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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1885, 1886, IN

118, 119, 120, 121, 122 U. S.

BOOK 30,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.

ASSOCIATE JUSTICES,

HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN,
HON. WILLIAM B. WOODS,*
HON. STANLEY MATTHEWS,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL,

HON. AUGUSTUS H. GARLAND.

SOLICITORS-GENERAL,

HON. JOHN GOODE.

to Aug. 10, 1886; after that

HON. GEORGE A. JENKS.

CLERK,

JAMES H. MCKENNEY, ESQ.

REPORTER,

J. C. BANCROFT DAVIS, ESQ.

MARSHAL,

JOHN G. NICOLAY, ESQ.

* Mr. Justice WOODS, by reason of illness, did not sit at the argument or take part in the decision of any case at October Term, 1886, and died Apr. 14, 1887.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERM OF 1886, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotment Apr. 3, 1882.)

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS, 1881, 1883.	COMMISSIONED.	SWORN IN.
ASSOCIATE JJ. HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H. MASS., RHODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)
SAMUEL BLATCHFORD, New York.	President ARTHUR.	SECOND. VERMONT, CONN., NEW YORK.	1882. (Mar. 22.)	1882. (April 3.)
JOSEPH P. BRADLEY, New Jersey.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Mar. 21.)	1870. (Mar. 23.)
CHIEF JUSTICE. MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)
ASSOCIATE JJ. WILLIAM B. WOODS, Georgia.	President HAYES.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1880. (Dec. 21.)	1881. (Jan. 5.) Died Apr. 14, 1887.
STANLEY MATTHEWS, Ohio.	President GARFIELD.	SIXTH. KY., TENN., OHIO, MICH.	1881. (May 12.)	1881. (May 17.)
JOHN M. HARLAN, Kentucky.	President HAYES.	SEVENTH. IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO. KAN., ARK.., NEB. COL.	1862. (July 16.)	1862. (Dec. 1.)
STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, OREGON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERMS, 1885, 1886.

Vol. 118.

U. S., Book 30.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1885.

[3] SAMUEL H. EMERSON (as Interpleader), *Plff. in Err.*,

v.

W. M. SENTER AND W. T. WILKINS, as SENTER & CO.

(See S. C. Reporter's ed. 3-10.)

Partnership—assignment for benefit of creditors by surviving partner—fraud of assignor.

A sole surviving partner of an insolvent firm, who is himself insolvent, can make a valid assignment of partnership assets for the benefit of the joint creditors, with preferences to some of them, there being no statute forbidding it; and such assignment, being valid, is not rendered void because of the fraudulent omission by the surviving partner, from the schedules, of certain partnership property for his own benefit, the assignee and the beneficiaries of the trust being ignorant of the fraud.

[No. 154.]

Submitted Mar. 9, 1886, Decided April 12, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas. *Reversed with directions.*

The case is stated by the court.

Mr. **U. M. Rose,** for plaintiff in error:

That a surviving partner has the power to make an assignment for the benefit of creditors has been settled by the case of *Hoyt* v. *Sprague*, 103 U. S. 613 (Bk. 26, L. ed. 585), where such an assignment was upheld and enforced. The power naturally results from the full control which the surviving partner has over the partnership assets.

The power to prefer one creditor to another is incident to the power to assign.

Brooks v. *Marbury*, 11 Wheat. 78 (24 U. S. bk. 6, L. ed. 423); *Clarke* v. *White*, 12 Pet. 200 (37 U. S. bk. 9, L. ed. 1055); *Tompkins* v. *Wheeler*, 16 Pet. 106 (41 U. S. bk. 10, L. ed. 903); *Ex parte Conway*, 4 Ark. 123; *Hempstead* v. *Johnson*, 18 Ark. 123; *Mandel* v. *Peay*, 20 Ark. 329.

There can be no reason why surviving partners should be made exceptions to this rule. They can prefer creditors at any time by payment; and if they can prefer by payment, they can prefer by an assignment, which is only a means of raising a fund for payment.

When a man is insolvent, and his creditors prevail on him to execute an assignment for their protection, and they and their assignee take the property in good faith, their claims ought not to be defeated because the assignor has acted fraudulently. Having acquired the entire interest in the property assigned, they ought to stand as well as though they had obtained a mortgage or deed of trust upon it. The mere fact that the assignor had concealed some of his property from the assignee is no reason why the part which he has turned over, and which has been received in good faith, should not be applied to the payment of debts.

Marbury v. *Brooks*, 7 Wheat. 556 (20 U. S. bk. 5, L. ed. 522); *Brooks* v. *Marbury*, *supra*; *Bancroft* v. *Blizzard*, 13 Ohio, 30; *Thomas* v. *Talmadge*, 16 Ohio St. 439; *Meyers* v. *Kinzie*, 26 Ill. 36; *Gates* v. *Labaume*, 19 Mo. 17; *Wise* v. *Mimer*, 23 Mo. 237; *State* v. *Keeler*, 49 Mo. 548; *Sipe* v. *Earman*, 26 Gratt. 563; *Wilson* v. *Davenport*, 7 Cold. 32; *Hollister* v. *Loud*, 2 Mich. 309; *Abercrombie* v. *Bradford*, 16 Ala. 560; *Governor* v. *Campbell*, 17 Ala. 566; *Cornish* v. *Dews*, 18 Ark. 172; *Hempstead* v. *Johnson*, 18 Ark. 124; *Mandel* v. *Peay*, 20 Ark. 329.

It having been settled by three adjudications of the Supreme Court of Arkansas that the creditors provided for in the assignment are not to be affected by the fraud of the assignor, it has become a construction of its Statute of Frauds, and a rule of property for its citizens, which will be enforced in the courts of the United States.

Brashear v. *West*, 7 Pet. 608 (32 U. S. bk. 8, L. ed. 801); *Lloyd* v. *Fulton*, 91 U. S. 479 (Bk. 23, L. ed. 363); *Sumner* v. *Hicks*, 2 Black, 532 (67 U. S. bk. 17, L. ed. 355); *Jaffray* v. *McGehee*, 107 U. S. 364 (Bk. 27, L. ed. 495).

Mr. **Thos. C. McRae,** for defendants in error:

We submit that a surviving partner has no power to make an assignment of the partnership assets in his hands, for the benefit of creditors, with preferences; and therefore the instrument under which appellant claims is bad.

Surviving partners are held strictly as trustees.

Wherever property is held by a person as a trustee for the benefit of creditors and others, he cannot assign the same with preferences.

Robins v. *Embry*, 1 Smedes & M. Ch. 207; *Richards* v. *N. Hampshire Ins. Co.* 43 N. H. 263.

The partner having control of the assets of a dissolved copartnership, under an agreement empowering him to wind up the business, has no authority to make an assignment for the

benefit of the creditors of the partnership with preferences, and such an assignment is illegal.

Marsh v. *Bennett*, 5 McLean, 117; *Bancroft* v. *Snodgrass*, 1 Colo. 430, 439.

It is claimed that the power to prefer is incident to the power to assign.

We deny the sequence. Limited partnerships may make general assignments, and yet may not make preferences.

Burrill, Assignments, 3d ed. §§ 90, 171; Ark. Digest, 1884, § 4842.

It is also said that inasmuch as surviving partners can prefer creditors at any time by payment, so can they by assignment.

But paying or securing a creditor is not equivalent to preferring him in an assignment.

Burrill, 2d ed. §§ 167, 168.

Wall v. *Lakin*, 13 Met. 167, and see pp. 171, 172; *U. S.* v. *Bank of U. S.* 8 Rob. (La.) 262, 404.

The fraud of the assignor is alone the criterion.

The assignee gives no consideration, ordinarily understood as valuable, by which his *status quo* is changed. The creditors ordinarily give no additional consideration.

The assignee takes the place of the assignor, and is in no better position.

Haggerty v. *Palmer*, 6 Johns. Ch. 437; *Root* v. *French*, 13 Wend. 570; *Mackie* v. *Cairns*, 5 Cow. 555; *Coddington* v. *Bay*, 20 Johns. 639; *Bay* v. *Coddington*, 5 Johns. Ch. 54; *Petrie* v. *Clark*, 11 Serg. & R. 377; *McCarty* v. *Springer*, 3 Pen. & W. 157; *Dickerson* v. *Tillinghast*, 4 Paige, 215; *Hunt* v. *Weiner*, 39 Ark. 70, 74, 75; *Adler* v. *Ecker*, 1 McCrary, 256; *Gere* v. *Murray*, 6 Minn. 307; *Knowles* v. *Lord*, 4 Whart. 500; *Lesher* v. *Getman*, 9 N. W. Rep. 585; *Pierson* v. *Manning*, 2 Mich. 450; *Flanagan* v. *Lampman*, 12 Mich. 58; *Farrington* v. *Sexton*, 43 Mich. 454; *Stickney* v. *Crane*, 35 Vt. 84; *Hargrove* v. *Millington*, 8 Kan. 480; *Ruble* v. *McDonald*, 18 Iowa, 493; *Lampson* v. *Arnold*, 19 Iowa, 479; *Stone* v. *Marshall*, 7 Jones (N. C.), 300; *Irwin* v. *Keen*, 3 Whart. 347; *Swan* v. *Crafts*, 124 Mass. 455; *Clements* v. *Berry*, 11 How. 398 (52 U. S. bk. 13, L. ed. 745); Burrill, Assignments, 391, 484; 2 Pom. Eq. Jur. pp. 209, 749; Bump, Fraud. Conv. 2d ed. p. 488.

Mr. Justice **Harlan** delivered the opinion of the court:

Butler and Moores constituted a mercantile firm doing business in the State of Arkansas under the name of A. Butler & Co. The former died on the 17th day of December, 1881, [4] and thereafter, February 23, 1882, Moores, as surviving partner, executed a deed of assignment to Emerson, the plaintiff in error. The deed recited the death of Butler, the insufficiency of assets to discharge the partnership debts, and the desire of Moores, as surviving partner, to provide for their payment, so far as in his power, "by an assignment of all the property belonging to him as such surviving partner." The grantor, for the purposes named, and in consideration of one dollar paid by the grantee, transferred and assigned to Emerson, his successors and assigns, "all the stock in trade, goods, wares and merchandise, debts, choses in action, property and effects of every description, belonging to the said firm of A. Butler & Co." or to the grantor, "as such surviving partner, mentioned, contained, or referred to in the schedule hereunto annexed." The conveyance was in trust that the assignee take possession of the property described, "sell the same as provided by law, and, with all reasonable dispatch," collect the debts and demands assigned and apply the proceeds: (1) to pay all the just and reasonable expenses, costs and charges of executing the assignment, and carrying into effect the trust thereby created; (2) to pay in full, if the residue of the proceeds is sufficient for that purpose, all the debts and liabilities then due or to become due from Moores, as surviving partner, with interest thereon, to certain preferred creditors, among whom were the defendants in error, Senter & Co.; (3) to apply the balance to all other debts and liabilities of A. Butler & Co., or of Moores, as surviving partner; (4) to repay the latter, as surviving partner, whatever may remain after meeting the costs and expenses of the trust, and the amounts due respectively to other creditors.

The deed invested the assignee with all the power and authority necessary to the full execution of the trust created by it. It was accepted by Emerson and by some of the preferred creditors therein mentioned.

The debts of the firm largely exceeded its assets, and Moores individually, as well as surviving partner, was insolvent when he made the assignment. In addition to the recitals in the deed of a desire to make an assignment of all the property in his hands as surviving partner [5] Moores represented to his creditors that he had done so. Nevertheless, for the purpose of hindering and cheating his creditors, he omitted from his schedule $500 worth of goods which belonged to him as surviving partner; and, with like intent, left out of the schedule and withheld from his assignee $1,000 in cash and other property which he held as surviving partner; appropriating to his own use the property so omitted from the schedule.

Neither the assignee nor the preferred creditors who accepted the deed had any knowledge of the alleged fraud of the grantor until after their acceptance of its provisions.

Upon an issue formed between Emerson, asserting the validity of the deed, and Senter & Co., who, as creditors of the firm, attached the assigned effects as the property of the surviving partner, the deed of assignment was held to be void and the claim of the assignee denied.

The court below proceeded upon the ground, in part, that a sole surviving partner of an insolvent firm, who is himself insolvent, cannot make a valid assignment of partnership assets for the benefit of the joint creditors, with preference to some of them. We are unable to concur in this view.

Some of the cases hold that one partner cannot, either during the continuance of the partnership, or after its dissolution by agreement, make such an assignment. It cannot, however, be doubted that, in the absence of a statute prohibiting it, such an assignment, whether during the continuance of the partnership or after its dissolution by agreement, would be valid where the partners all unite in executing it, or where one of them executes it by the direction or with the consent of the others. Partnership creditors have no specific lien upon the joint funds for their debts. 3 Kent, Com. 65; Story, Part. § 358. They have no such relations with the partnership as entitles them to

[8] interfere with the complete control of the joint property by the partners during the existence of the partnership, or with their right, after a dissolution, by agreement, of the partnership, to dispose of it for the payment of their joint debts, giving such preference as they deem proper.

When the partnership is dissolved by the death of one partner, the surviving partner is entitled to the possession and control of the joint property for the purpose of closing up its business. *Wickliffe* v. *Eve*, 17 How. 469 [58 U. S. bk. 15, L. ed. 163]; *Shanks* v. *Klein*, 104 U. S. 18 [Bk. 26, L. ed. 635]. To that end, and for the purpose of paying the joint debts, he may, according to the settled principles of the law of partnership, administer the affairs of the firm and, by sale or other reasonable disposition of its property, make provision for meeting its obligations. He could not otherwise properly discharge the duty which rests upon him, to wind up the business and pay over to the representative of the deceased partner what may be due to him after a final settlement of the joint debts. It is true that, in many cases —where, for instance, the surviving partner is not exercising due diligence in settling the partnership business, or is acting in bad faith—the personal representative of the deceased partner may invoke the interference of a court of equity, and compel such a disposition of the partnership effects as will be just and proper; this, because as between the partners, and therefore, as between the surviving partner and the personal representatives of the deceased partner, the joint assets constitute a fund to be appropriated primarily to the discharge of partnership liabilities, though not necessarily, and under all circumstances, upon terms of equality as to all the joint creditors. But while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon the joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned for the benefit of preferred creditors of the firm, the surviving [9] partner, there being no statute forbidding it, could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner.

It is, however, contended that the assignment in question was void because of the fraudulent omission from the schedule by Moores of certain property which constituted a part of the partnership assets, and was appropriated by him to his own use. But this fraud upon the part of Moores did not affect the rights of the assignee and of the beneficiaries of the trust who were ignorant of the fraud of the grantor. Such seems to be the established doctrine of the Supreme Court of Arkansas. In *Hempstead* v. *Johnson*, 18 Ark. 140, it was said that a deed of trust or other conveyance is not necessarily void "because its effect is to hinder and delay the creditors of the grantor in the collection of their claims. But such must be its object. It must be a fraudulent contrivance for that purpose; and the grantee, or person to be benefited by the conveyance, must be party privy to the fraudulent design." Referring to the facts which existed in that case, that the grantor was in failing circumstances when the deed of trust was made; that suits were pending against him, and that some of the beneficiaries were his near relatives, the court said: "But all these facts may and do exist in many cases, consistently with the hypothesis that the conveyance was made in good faith to secure preferred creditors, whose demands are just." In *Cornish* v. *Dews*, 18 Ark. 181, the court said: "As held in the case of *Hempstead* v. *Johnson*, *supra*, if the deed was valid when executed, no subsequent conduct on the part of the grantor, or the trustee, however fraudulent, could avoid the deed, and deprive the creditors, accepting it in good faith and not participating in the fraud, of their rights under it. And even if Cornish (the [10] grantor) had the purpose, when he made the deed, of hindering and delaying creditors not provided for by it, yet, if the preferred creditors were not parties or privies to his fraudulent purpose, but accepted the deed in good faith to secure the debts really due them, it would be valid as to them." See also *Mandel* v. *Peay*, 20 Ark. 329; *Hunt* v. *Weiner*, 39 Ark. 775. The rule announced by the Supreme Court of Arkansas is in harmony with the settled doctrines of this court, and accords with sound reason. *Marbury* v. *Brooks*, 7 Wheat. 556, 577 [20 U. S. bk. 5, L. ed. 522, 528]; *Brooks* v. *Marbury*, 11 Wheat. 78, 89 [24 U. S. bk. 6, L. ed. 423, 428]; *Tompkins* v. *Wheeler*, 16 Pet. 106, 118 [41 U. S. bk. 10, L. ed. 903, 908]. There was nothing upon the face of the deed to Emerson to indicate that it was made for any other purpose than, in good faith, to make provision for the payment of certain debts held against the grantor as surviving partner; first, debts due to the preferred creditors; and then, debts held by other creditors. If the intentional omission by the grantor of certain property from his schedule, and his appropriation of it to his own use, was such a fraud as would vitiate the deed where the assignee or the preferred creditors have previous notice of such omission, that result cannot happen when they were ignorant of the fraud at the time they accepted the benefit of the conveyance.

The judgment is reversed, with directions to enter judgment on the special finding of facts in favor of the plaintiff in error.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[46] HEIRS OF JOHN F. BENJAMIN, Deceased,
Appts.,
v.
CHARLES L. DUBOIS, Admr. of GUY H. SCHLEY, Formerly GUY H. ALLEN.

(See S. C. Reporter's ed. 46-48.)

Jurisdiction—final decree.

An affirmance by the Supreme Court of the District of Columbia, at a general term, of a decree of that court at a special term, deciding a question of domicil and thereby affirming the jurisdiction of the court, is not a final decree for the purpose of an appeal to this court.

[No. 225.]

Argued, on motion to dismiss, Apr. 14, 1886. Decided Apr. 15, 1886.

APPEAL from the Supreme Court of the District of Columbia. *Dismissed.*

The facts are stated in the opinion.

Mr. **S. S. Henkle**, for appellants.

Mr. **A. S. Worthington**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

When this case was called for argument a motion to dismiss was interposed, because the decree appealed from was not a final decree in the suit. The facts are these:

On the 8th of March, 1877, John F. Benjamin died in the District of Columbia, leaving a will by which he gave to his adopted daughter, Mrs. Guy H. Allen, the wife of James M. Allen, all his interest in the partnership of Bigelow and Benjamin, all debts owing to him by persons residing in the District of Columbia, and all real estate owned by him in the District of Columbia. He also gave to George C. B. Rowan $100, and to his wife all his property in Missouri, $12,000 in District of Columbia 6 per cent gold bonds, and other property. Joshua M. Ennis was named as executor, [47] so far as the property in Missouri was concerned, and George Truesdell was appointed to wind up business in the District of Columbia. Previous to the year 1874 Benjamin had resided in Missouri. During that year he went to Washington, in the District of Columbia, where he engaged in business with Otis Bigelow, and remained until his death. The will was first admitted to probate in Missouri, and letters testamentary granted to Ennis. A copy of the will and of the proof and probate thereof in Missouri were admitted to record in the Supreme Court of the District of Columbia, on the 5th of June, 1877, and letters testamentary granted to Truesdell of all the personal property in the District. Truesdell thereupon proceeded with the settlement of the estate in the District of Columbia, and on the 5th of January, 1880, Mrs. Allen and Rowan filed their petition in the Supreme Court of the District, setting forth that all debts had been paid, and praying that Truesdell be directed to pay to Rowan his legacy in full, and to Mrs. Allen so much of that to her as he might have in his possession. Notice of the filing of this petition was given to Truesdell, to Ennis the Missouri executor, and to the heirs of Benjamin. Truesdell and George H. Benjamin, one of the heirs, answered, and in the answer of Benjamin the defense was made that the legal domicil of John F. Benjamin at the time of his death was in Missouri, where the validity of the will was being litigated, and not in the District of Columbia, and that no distribution of the estate in the District should be ordered in this proceeding until the litigation in Missouri was ended. Upon the question of the actual domicil of the testator much testimony was taken, and on the 28th of February, 1880, the court, after full hearing, decided that his domicil "was the City of Washington, in the District of Columbia," and "that this court has original jurisdiction in the matter of his estate." An entry to this effect was made at special term, and George H. Benjamin thereupon took an appeal to the general term. Afterwards a final decree was entered, notwithstanding this appeal, approving the accounts of Truesdell, and directing him to pay over the funds in his hands as provided for in his account. This order George H. Benjamin moved to set aside, but his motion was denied, and afterwards the court at general term affirmed the decree of the 28th of February, 1880, and from that decree this appeal was taken. [48]

As was said in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [Bk. 27, L. ed. 73], "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals or writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree which had been rendered."

The effect of the appeal below from the special to the general term was to take to the general term for review only the finding of the special term upon the question of domicil. Consequently the appeal from the general term to this court brings up nothing more. The suit was for the money in the hands of Truesdell given to Rowan and to Mrs. Allen by the will, and the litigation between the parties is not ended until a decree to that effect is entered. The jurisdiction of the court to make the decree seems to have been thought to depend on the fact of the domicil of the testator in Washington at the time of his death. The finding that such was his domicil settled the disputed question of jurisdiction, but it did not decree the payment of any money, which was the only purpose of the suit. It opened the way to that end, but nothing more. If we should affirm the decree as it stood when the appeal from the special term to the general term was taken, there would be no order of the court to carry into execution. No relief had then been granted the petitioners. All the court had then decided was that it had jurisdiction and power to order the payment of the money which was prayed for.

It follows that we have no jurisdiction, and the motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[22] UNITED STATES RIFLE AND CARTRIDGE COMPANY AND E. REMINGTON & SONS, *Appts.*,

v.

WHITNEY ARMS COMPANY, ELI WHITNEY, Pres., ET AL.

(See S. C. Reporter's ed. 22-25.)

Patent law—rejection of application—abandonment.

1. There may be an abandonment of an invention to the public, as well after an application has been rejected or withdrawn as before an application is made. Such abandonment may be proved, either by express declarations of an intention to abandon, or by conduct inconsistent with any other conclusion.

2. Upon a renewed application for a patent, the decision of the commissioner in favor of the applicant, upon the question whether the invention has been abandoned, is not conclusive, but may be contested and reviewed in a suit brought for the infringement of the patent.

3. Where the first application for a patent had been rejected and withdrawn, a delay of eight years in renewing the application, because the applicant regarded the invention as of less value than others for which he took out patents, will be held an abandonment, when the subject matter of the invention has been incorporated into the substance of many other subsequent inventions.

[No. 157.]

Argued Mar. 10, 11, 1886. Decided Apr. 19, 1886.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

Affirmed.

The case is stated by the court.

Messrs. **J. E. Hindon Hyde** and **F. H. Betts**, for appellants.

Mr. **B. F. Thurston**, for appellees.

[23] *Mr. Justice* **Gray** delivered the opinion of the court:

This was a bill in equity for the infringement of letters patent granted May 7, 1872, to John W. Cochran for an improvement in breech-loading firearms, of which one of the plaintiffs was the owner, and the others were the exclusive licensees. The answer denied that Cochran was the original inventor, and alleged that his application, upon which the letters patent were issued, was made and filed in the Patent Office, on May 6, 1868; that for more than two years before that date the thing patented had been in public use and on sale with his consent and allowance; and that long prior to that date the invention had been abandoned by him to the public. A general replication was filed, and evidence taken, by which the material facts appeared to be as follows:

On January 10, 1859, Cochran filed an application for a patent for this invention, which on February 8, 1859, was rejected by the Commissioner of Patents, for want of novelty; and on February 20, 1860, was withdrawn by Cochran, and $20 refunded to him, at his request, agreeably to the Act of July 4, 1836, chap. 357, § 7. 5 Stat. at L. 120.

At various dates from November 19, 1861, to February 11, 1868, eighteen patents were granted to other persons for the same devices or their equivalents, and the defendants bought some of those patents, and afterwards manufactured firearms under them.

On May 6, 1868, Cochran filed a new application, which was rejected by the examiners, on the ground of abandonment. On June 9, 1869, Mr. Commissioner Fisher, on appeal, affirmed their decision. His opinion is published in the Decisions of the Commissioner of Patents for 1869, p. 30. On appeal to the Supreme Court of the District of Columbia, his decision was reversed. On July 7, 1870, he rejected the application. But on December 5, 1870, Cochran filed a formal renewal of his application, under the Act of July 8, 1870, chap. 230, § 35, and on May 7, 1872, the patent sued on was granted to him by Mr. Fisher's successor. [24]

During the time between the applications of 1859 and of 1868, Cochran applied for and obtained twenty-two other patents, nine of them for improvements in breech-loading firearms, some of which he sold for considerable sums. He was poor and in debt; but upon the whole evidence it is quite clear that his delay in renewing the application of 1859 was not owing to want of means, but to his regarding this patent as of less value than the others.

The circuit court was of opinion that the invention had been abandoned before May, 1868, and therefore entered a decree dismissing the bill. 14 Blatchf. 94; *S. C.* 2 Bann. & A. 493. From that decree this appeal is taken.

The renewal of Cochran's application on December 5, 1870, was under the provision of the Act of July 8, 1870, chap. 230, § 35, which allowed any inventor whose application for a patent had been rejected or withdrawn before the passage of that Act to renew it within six months after its passage; and provided that upon the hearing of such renewed application abandonment should be considered as a question of fact. 16 Stat. at L. 202.

The rules of law which must govern this case are clearly established by the judgment of this court in *Planing Machine Co.* v. *Keith*, 101 U. S. 479 [Bk. 25, L. ed. 989]. The decision of the Commissioner in favor of the applicant, upon the question whether the invention has been abandoned, is not conclusive, but may be contested and reviewed in a suit brought for the infringement of the patent. There may be an abandonment of an invention to the public, as well after an application has been rejected or withdrawn, as before any application is made. Such abandonment may be proved, either by express declarations of an intention to abandon, or by conduct inconsistent with any other conclusion. An inventor whose application for a patent has been rejected, and who, without substantial reason or excuse, omits for many years to take any step to reinstate or renew it, must be held to have acquiesced in its rejection, and to have abandoned any intention of further prosecuting his claim. [25]

In the case at bar, the first application was both rejected by the Commissioner and withdrawn by the applicant; and the question presented is well put in the opinion of Mr. Commissioner Fisher, above referred to: "Can an inventor withdraw his application, make no effort to renew it for eight years, during which time the subject matter of the invention has been incorporated into the substance of many other subsequent inventions, and then file a new application and obtain a patent which, to support the novelty of the invention, shall relate back to the first application?" We concur with

him and with the circuit court in deciding that an inventor cannot do this.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[25] WINFIELD SCOTT KEYES AND ALBERT ARENTS, *Plffs. in Err.*,

v.

JAMES B. GRANT AND JAMES GRANT.

(See S. C. Reporter's ed. 25-37.)

Patent law—whether invention is anticipated is question for jury.

Where the defense to an action at law for infringement of letters patent for an improvement in furnaces for smelting ores relied on a prior publication containing an alleged description of "plaintiffs' pretended invention" and the differences were obvious in the arrangement of the parts and the relation of the basin in one, and the forehearth in the other, to the interior of the furnace, and the mode of connecting the one with the other for the purpose of drawing the metal from the furnace, so that it was not a matter of mere judicial knowledge, that these differences were either not material in any degree to the result or, if material at all, were only such as would not require the exercise of the faculty of invention, but would be suggested by the skill of an experienced workman in the application of the well known arrangements of the furnace and there was evidence of experts upon both sides of the issue presented, it was error to withdraw the case from the jury.

[No. 208.]

Argued Apr. 2, 1886. Decided Apr. 19, 1886.

IN ERROR to the Circuit Court of the United States for the District of Colorado. *Reversed.*

The case is stated by the court.

Messrs. **George Harding, G. G. Symes** and *Francis T. Chambers*, for plaintiffs in error.

Messrs. **B. F. Thurston,** *E. T. Wells*, **Thomas Macon,** *B. T. McNeal*, and *Whit. M. Grant*, for defendants in error.

[26] *Mr. Justice* **Matthews** delivered the opinion of the court:

This was an action at law to recover damages for an alleged infringement of letters patent No. 121885, issued November 28, 1871, to the plaintiffs for an improvement in furnaces for smelting lead and other ores. There were several defenses set up by way of pleas, but the two chiefly relied on were that "the plaintiffs' pretended invention" had been described "in a certain printed publication entitled 'System der Mettallurgie,' von Dr. J. B. Karsten, published at Berlin, Prussia, in 1831-2, in 5 volumes, with an atlas of plates, I, at pages 315, 316, 317, 318, 319, 320, 321 and 322, of Volume III, and pages 150 to 166, both inclusive, and 166 to 180, both inclusive, of Volume V, and figures 479, 480, 481, 482, 483, 484, 473, 474, 475 on plate XXI, and figures 850 to 868, both inclusive, of plate XLI of the atlas accompanying said work;" and secondly, that, in view of the state of the art at the date of the alleged invention, the improvement was not patentable as not requiring the exercise of invention.

The issues came on for trial before a jury, and there was a verdict for the defendants and judgment thereon, to reverse which this writ of error is brought.

It appears from the bill of exceptions that the plaintiffs read in evidence the patent sued on, the substantial part of the specifications attached to which was as follows:

"The object of this invention is to provide a novel, simple, and improved method of tapping or withdrawing lead and other metals when in a molten state, from the bottom of a smelting furnace, so that the metal may be obtained therefrom in a clean state, and also that the formation of hard matters or incrustations on the sides and bottom of the furnace may be avoided. The nature of this invention consists [27] in the use or employment of a basin of suitable dimensions, located a short distance from one side of the furnace and at a suitable elevation above the bottom of the furnace; which said basin is connected with the furnace by means of a tube which extends from the bottom of the basin to the bottom of the furnace. As the molten metal fills the lower part of the furnace it rises to the same level in the tube until it reaches the basin, from whence it may be removed as clean metal.

"To enable others skilled in the art to make and use our invention we will proceed more particularly to describe the same.

"The figure represents a sectional elevation of a portion of a smelting furnace with our improvements.

"A represents the furnace which may be of ordinary or common construction. B is a basin of suitable dimensions, located at the top of an extension built on one side of the furnace and at a suitable elevation above the bottom of the furnace. The basin may be constructed of any material suitable for receiving and holding the molten metal. Extending from the bottom of the basin B, to the bottom of the furnace A, through the above mentioned extension, is a tube C, which connects the basin with the furnace, and which may be made of iron, clay or other material suitable for the purpose.

"The metal as it melts falls to the bottom of the furnace; as the surface of the molten metal rises within the furnace it rises to the same level in the tube C until it reaches the basin B, from which it may be removed with a ladle.

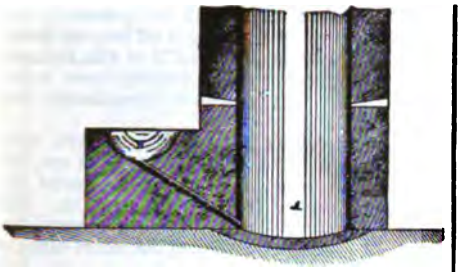
"The advantages of this invention are obvious, as by this means the metal is tapped or withdrawn from the furnace free from impurities; and it will also be seen that the difficulties arising from the formation of hard matter or incrustations on the bottom or sides of the furnace, occasioned by the usual method of drawing off a large quantity of molten metal at one time, are obviated.

"Having thus described our invention, what we claim as new, and desire to secure by letters patent of the United States, is:

"The method of tapping or withdrawing [28] molten lead or other metals from a smelting furnace by means of the basin B and tube or connection C, in combination with the furnace substantially as shown and described."

The drawing referred to is as follows:

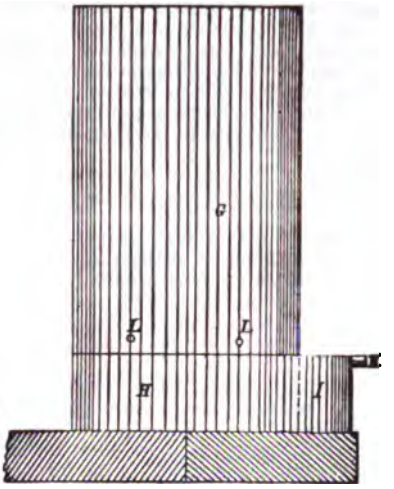
Albert Arents, one of the plaintiffs, testified to his own qualifications as an expert in the art of smelting, and also "that the obtaining of clean metal from the side of a furnace of ordinary construction automatically by the means described in the specifications in the patent was novel and useful, and a great improvement



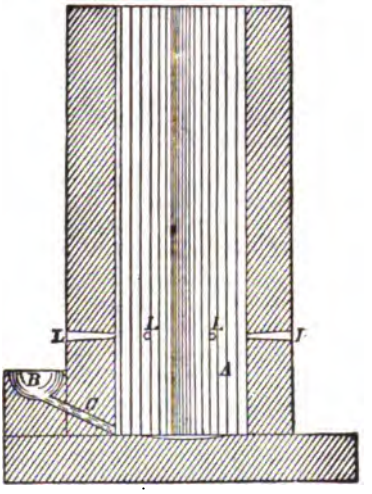
over the old method of withdrawing clean metal from smelting furnaces; that the specifications were sufficiently full, clear and precise to enable persons skilled in the art to which they appertained, to wit: the art of smelting, to construct a furnace which would produce the useful result claimed by the patent, to wit: the obtaining clean metal automatically from a smelting furnace when in operation of ordinary construction; that a furnace of ordinary construction, as it existed at the date of plaintiff's patent, as defined by the art of smelting, so far as is material to this case, consisted of an inner hearth with an open breast or sump, into which the molten masses of the furnace, when fused, collected and settled, according to their specific gravities; that the front of a smelting furnace was that part of the furnace where the slag ran and was handled by the smelter; that the back of the furnace was opposite to the [29] front, and that those parts of the furnace to the right and left were known and called the sides; that the slag ran off through a spout over the open breast of the furnace in front, and the clean metal was tapped periodically from a taphole at the bottom of and from the side of the furnace; that each part in the construction of the furnace had its particular functions, which were important as understood and known and taught in the art of smelting at that time, to wit: the front was the working door of the furnace, and was where the slag ran off and was handled; the back and sides where the tuyeres were situated, through which the blast was forced into the furnace, and the clean metal was periodically drawn or tapped from one side or other of the furnace."

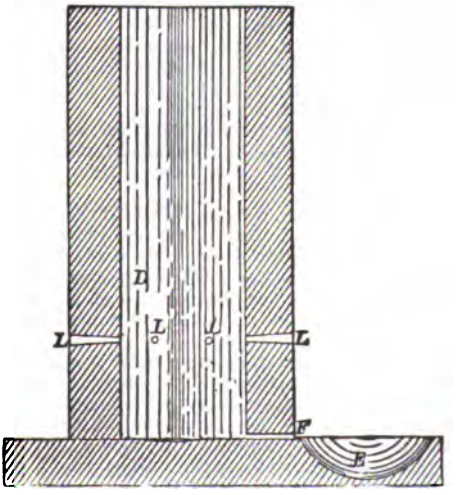
The plaintiff then introduced a model on the scale of one inch to the foot, in sections, showing what a furnace of ordinary construction was at the date of the patent, as known in the art of smelting, showing the improvement of the plaintiffs and the old mode of tapping, of which the following are drawings:

A—Section of furnace of ordinary construction in 1871, showing pl'ff's device.
B—Basin similar to that shown in pl'ff's patent.
C—Tube connecting bottom of basin with bottom of furnace.
D—Section of same furnace.
E—Basin to receive clean metal when furnace was tapped.
F—Tap hole through which clean metal was periodically tapped by the old method into basin E.
G—Section of same furnace.
H—Inner hearth.
I—Fore hearth or sump.
K—Slag spout or exit.
L—Tuyere holes.



[30]





The plaintiffs then corroborated this testimony of Arents, by that of numerous experts,

and gave evidence tending to prove infringement by the defendants, and rested their case.

The defendants put in evidence certain extracts from the text and illustrative drawings of smelting furnaces of the treatise upon Metallurgy by Dr. J. B. Karsten, published at Berlin in 1831-32, mentioned in the plea, translated as follows:

"(318) The forehearth is that part of the crucible projecting in front of the fire walls of the furnace.

"Crucible furnaces are those shaft furnaces in which the crucible is entirely on the inside. They are divided into eye-crucible furnaces and tap-crucible furnaces. The former have an eye in the front wall from which the slag flows continuously, the metal and matte being tapped off at intervals into basins.

"The tap-crucible furnaces are those in which the metal, matte and slag are all tapped off from time to time.

"Sump furnaces are those shaft furnaces in which the crucible is partly in the furnace and partly in front of the furnace. The slag runs off continuously over the fore hearth. The metal and matte are tapped off into receiving vessels or tap basins. Sometimes the sump furnaces are not provided with tap basins, and [31] the metal in them is dipped with ladles direct from the fore hearth.

"Spur or channel furnaces are shaft furnaces without a crucible. The molten contents flow through the eye directly from the furnace hearth into receiving vessels. These different furnaces can be more advantageously studied from the drawings than from written descriptions.

"(319) In some countries the crucible furnace is preferred; in others, the sump furnace. It is not advisable to use the channel furnace when clean metal is produced. With this furnace the metal is not protected from oxidation. It is used chiefly in smelting copper ores, with a view to producing copper matte.

"The drawings, figures 461 to 463, represent an eye-crucible furnace. The slag runs continuously through a hole in the front wall. The metal and matte are tapped off at intervals through a hole in the side of the crucible.

"The drawings, figures 464 to 466, represent an eye-crucible furnace, which differs from the former, in that the tap hole is in the front wall and at the bottom of the crucible.

"The drawings, figures 467 to 469, represent a tap-crucible furnace. The metal, matte and slag are tapped off from time to time into receiving basins.

"The drawings, figures 470 to 472, represent an eye-crucible similar to the one represented by drawings, figures 464 to 466; it is provided with two tap basins. The slag also passes through a basin, for the purpose of allowing the small particles of metal and matte mixed with it to settle.

"(320) The drawings, figures 473 to 475, represent a sump furnace with a covered eye, in which the brasque (a mixture of fire clay and coke dust) under the front wall divides the sump into two communicating vessels.

"The slag runs off continuously through the eye between the bottom of the front wall and the top of the brasque partition.

"This arrangement is used when it is desired to dip the clean metal with ladles from the fore hearth, instead of drawing it off into tap basins.

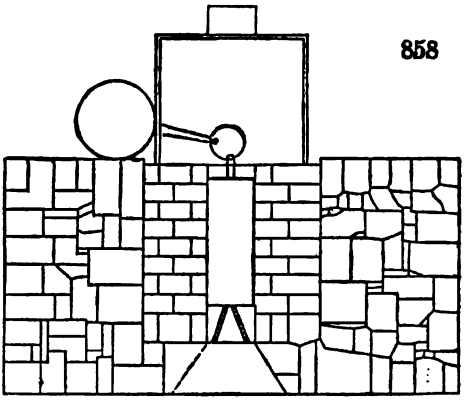
"The drawings, figures 476 to 478, represent [32 a sump furnace with an entirely open breast, in which the slag passes off immediately over the fore hearth.

"The drawings, figures 479 and 480, represent a sump furnace with a covered eye, and with a tap basin, into which the metal and matte are tapped from the fore hearth. This furnace might be regarded as a channel furnace, by simply considering the short canal, or eye, which connects the sump under the shaft with the fore hearth, as a channel. But, by means of this short canal or eye, the sump and the fore hearth stand in combination with each other as a pair of communicating tubes or vessels; consequently, it is a sump and not a channel furnace. The slag may pass through the covered eye into the fore hearth, or through an open eye above the fore hearth, the latter eye being used exclusively for the slag.

"In smelting operations, where little or no slag is produced, the upper eye is dispensed with entirely."

The following are figures 858-860 and their scale from Plate XLI of Karsten's Atlas:

858



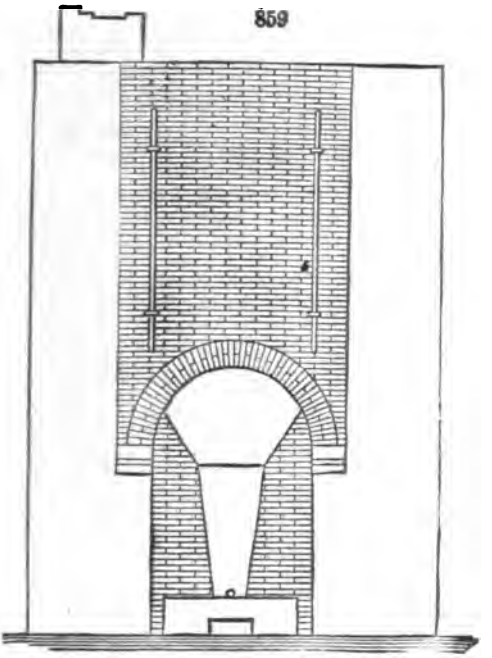
The defendants also introduced experts as witnesses, whose testimony tended to prove that, as stated by one of them:

"The furnaces thus figured by Karsten are planned for withdrawing the reduced metal continuously, and as fast as possible, from the oxidizing action of the blast and the intensely heated part of the slag. So the metal is made to flow constantly outward and upward through the open eye into the fore hearth, which is made as high as the inner crucible; and generally, the clean molten metal alone is passing through this bottom eye. When much slag is formed it is run off separately by another eye placed higher up; when very little slag is produced, it accumulates for a long time on the top of the molten metal in the inner crucible, and the clean metal in the fore bay may be partially removed many times without allowing any of the slag to escape through the eye."

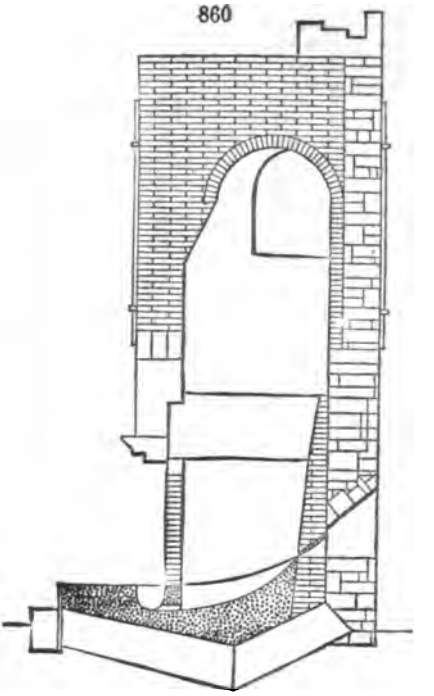
One of the defendants, James Grant, was called to prove that he had constructed an experimental furnace of small size, according to the description and drawing of figure 860 of Karsten's publication, and worked it successfully. A model was exhibited, the proportions

[33]

859



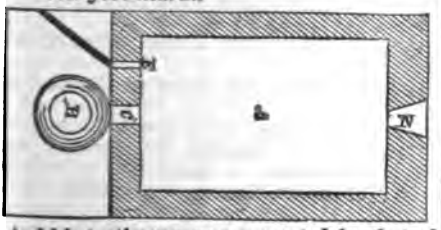
860

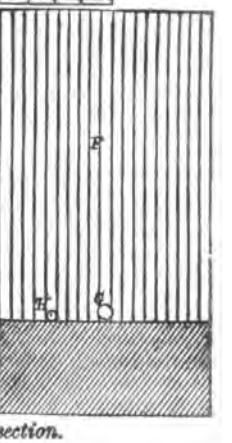


[34]

and features of which are shown in the following drawings:

A—Horizontal section.
B—Fore hearth.
C—Open eye.
E—Slag exit made by defendants, with spout over fore hearth.





F—Front section.
G—Open eye.
H—Slag exit made by defendants.

[35]

And his testimony was supported by that of others who had seen the furnace in operation.

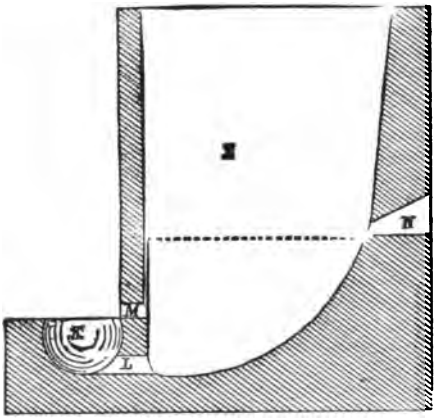
On the other hand the plaintiffs, in rebuttal, called expert witnesses, who testified that the plaintiffs' furnace, as described in the patent, differed materially from that described by Karsten and from the model of the one made by the defendant Grant, and who pointed out in their evidence the particulars in which that difference consisted, in the construction and arrangement of the furnace, in the principle of its operation and in the results produced.

All of the evidence on both sides having been given, the whole of which is set out in the bill of exceptions, the court, having refused to charge the jury as requested by the plaintiffs, instructed the jury to return a verdict for the defendants, which was done; and to this ruling exception was duly taken, and is now assigned for error.

[36]

The judgment entered on the verdict rendered in favor of the defendants, in pursuance of the direction of the court, can be maintained only on the ground, either that the legal identity of the furnace described by Karsten with that covered by the plaintiffs' patent was manifest as a matter of law, or that it was established as a matter of fact so conclusively by the evidence that a verdict the other way could not

I—Vertical section.
K—Fore hearth.
L—Hidden eye.
M—Open eye.
N—Tuyeres.



be supported, within the rule as stated in *Randall* v. *Baltimore & O. R. R. Co.*, 109 U. S. 478 [Bk. 27, L. ed. 1003].

Clearly it was not matter of law that the specification of the plaintiffs' patent, and the publication of Karsten, taken in connection with the drawings intended in illustration, described the same thing. The differences were obvious in the arrangement of the parts, and the relation of the basin in one, and the fore hearth in the other, to the interior of the furnace, and the mode of connecting the one with the other for the purpose of drawing the metal from the furnace. So that it certainly was not a matter of mere judicial knowledge that these differences were either not material in any degree to the result or, if material at all, were only such as would not require the exercise of the faculty of invention but would be suggested by the skill of an experienced workman employed to produce the best result in the application of the well known arrangements of the furnace. It was claimed, on behalf of the plaintiffs, that the furnace described in the patent and as used by them, embodied an idea not contained in or suggested by Karsten's publication. That idea consisted in the employment of a basin to receive the molten metal, located at a suitable elevation above the bottom of the furnace, and connected with the interior of the furnace by means of a tube, so that, instead of tapping a lead smelting furnace by withdrawing the molten metal through a tap hole near the bottom, it was proposed to allow the metal to flow upward into the receiving basin under the operation of the familiar natural law that liquids will seek the same level in communicating vessels. The object to be attained by this arrangement was that clean metal, unaccompanied with slag or other impure products resulting from the operation of smelting lead ores, [37] should, after settling to the bottom of the furnace, by reason of its greater specific gravity, ascend through the connecting tube, as the mass of molten metal accumulates and rises within the furnace, into the receiving basin, and be dipped thence with a ladle. It was insisted by the patentees that no such arrangement and combination were to be found in Karsten's publication or in the furnaces depicted in his figures, and that the improvement which they constituted was not the result of mere mechanical skill, but sprung from a genuine effort of invention. And this view was supported by the opinion of many experts skilled in the art.

In our opinion this was a question of fact properly to be left for determination to the jury, under suitable instructions from the court upon the rules of law, which should guide them to their verdict. And there was evidence upon both sides of the issue sufficient to require that it should be weighed and considered by the jury in the determination of the question; and this implies that, if it had been submitted to the jury and the verdict had been for the plaintiffs, it would not have been the duty of the court to have set it aside as not supported by sufficient evidence. The court erred, we think, in withdrawing the case from the jury as it did by directing a verdict for the defendants.

For this error the judgment is reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,
v. [81]
WILLIAM J. LANDRAM.

(See S. C. Reporter's ed. 81-86.)

Collectors of internal revenue—commissions—Act of 1879.

The right which collectors of internal revenue had, prior to the Act of March 1, 1879, to the one half of 1 per centum commissions on taxes collected on distilled spirits was not taken away by that Act.

[No. 1299.]

Submitted Apr. 5, 1886. Decided Apr. 19, 1886.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Messrs. **John Goode,** *Solicitor-Gen.*, and **Ed. M. Watson,** for appellant.

Mr. **Green B. Raum,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

By section 2 of the Act of March 1, 1879, entitled "An Act to Amend the Laws Relating to Internal Revenue" (chap. 125, 20 Stat. at L. 327), the twelfth section of the Act of February 8, 1875 (chap. 36, 18 Stat. at L. 307), was amended so as to read as follows:

"Each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be compensated for their services by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue. Allowances shall also be made in like manner for salary and office ex-

penses of collectors, all of which shall be in lieu of the salary and commissions heretofore provided by law; *Provided, however*, That the [82] salaries of collectors shall be fixed at $2,000 each per annum where the annual collections amount to $25,000 or less, and shall, by the Secretary, on the recommendation of the Commissioner, be graduated up to the maximum limit of $4,500; which latter sum shall be allowed in all cases where the collections amount to $1,000,000 or upward. * * * *Provided*, That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, it may seem just to make such allowances; but no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered. But the total net compensation of a collector shall not in any case exceed $4,500 a year; and no collector shall be entitled to any portion of the salary pertaining to the office, unless such collector shall have been confirmed by the Senate, except in cases of commissions to fill vacancies occurring during the recess of the Senate."

By section 5 of the same Act it was provided as follows: "That section 3314 of the Revised Statutes shall be amended by striking out all after said number and substituting the following: 'The books of tax-paid stamps issued to any collector shall be charged to his account at the full value of the tax on the number of gallons represented on the stamps and coupons contained in said books; and every collector shall make a monthly return to the Commissioner of Internal Revenue of all tax-paid stamps issued by him to be affixed to any cask or package containing distilled spirits on which the tax has been paid, and account for the amount of the tax collected; and when the said collector returns to the Commissioner of Internal Revenue any book of marginal stubs, which it shall be his duty to do as soon as all the stamps contained in the book when issued to him have been used, and accounts for the tax [83] on the number of gallons represented on the stamps and coupons that were contained in said book, there shall be allowed to the collector a commission of one half of 1 per centum on the amount of such tax in addition to any other commission by law allowed, provided that the total net compensation of collectors as fixed by this title shall not be thereby increased.'"

This so-called amendment was simply a re-enactment of section 3314 without any change whatever.

While these sections were in force, to wit: during the five fiscal years beginning with July 1, 1879, and ending with June 30, 1884, William J. Landram, the appellee, was the collector of internal revenue for the Eighth District of Kentucky. During that period he received a salary as follows: for the years ending respectively on June 30, 1880, and June 30, 1883, $3,000 for each year; for the years ending respectively June 30, 1881 and June 30, 1882, $2,875 for each year; and for the year ending June 30, 1884, $4,375. During each of the years above mentioned Landram collected a large amount of taxes on distilled spirits by the sale of tax-paid stamps, on which, limiting his total net compensation for each year to $4,500, the commissions for the whole five years to which he would have been entitled, on the assumption that section 3314 of the Revised Statutes still remained in force, would amount to $4,724.78. The accounting officers of the Treasury refused to allow him this sum or any part of it. He therefore brought this suit against the United States, in the court of claims, to recover it. Upon a finding of the foregoing facts the court of claims gave him judgment for said sum, and the United States appealed.

The policy of allowing a commission of one half of 1 per cent on taxes collected from distilled spirits by the sale of tax-paid stamps was begun by the Act of July 20, 1868 (chap. 185, 15 Stat. at L. 125), which required that the taxes on distilled spirits should be paid by affixing to the packages in which they were contained the prescribed stamps, and "allowed a commission of one half of 1 per centum on the amount of the tax on spirits distilled after the passage of" that "Act in addition to any other commission by law allowed, which" should "be equally divided between the collector receiving the tax and the assessor of the district [84] in which the distilled spirits were produced." This policy was continued by the Act of December 24, 1872 (chap. 13, 17 Stat. at L. 401), which, after abolishing by section 1 the office of assessor of internal revenue, provided by section 6 that the commission of one half of 1 per centum allowed by the Act of July 20, 1868, to the collector and assessor should be paid to the collector, provided that "the total net compensation of collectors" should not be thereby increased. The provisions of the Acts of 1868 and 1872 remained in force until June 22, 1874, when, having been embodied in section 3314 of the Revised Statutes, they were re-enacted. By the Act of March 1, 1879, section 3314, though still in force, was re-enacted *in totidem verbis*, and by the Act of May 28, 1880 (chap. 108, 21 Stat. at L. 145), entitled "An Act to Amend the Laws in Relation to Internal Revenue," the same section was repeated and re-enacted, word for word.

It is asserted by counsel for the appellee, and not disputed by counsel for appellant, that prior to the passage of the Act of March 1, 1879, *ubi supra*, the right of collectors of internal revenue to the one half of 1 per centum commissions on taxes collected on distilled spirits was never questioned. After June 22, 1874, the commissions were allowed and paid solely by virtue of the provisions of section 3314 of the Revised Statutes.

On the passage of the Act of March 1, 1879, the right of the collectors to commissions was for the first time disputed. It seems to us clear that this right was not taken away by that Act. When it was passed section 3314 of the Revised Statutes allowing the commissions was in force. It was a plain, unambiguous provision, whose meaning had not been doubted and which was not open to construction. Being in force, there was no reason for its re-enactment by the Act of March 1, 1879, except to express in a most unmistakable manner the purpose of Congress that it should continue in force, and should not be considered as in any way modified by that

Act. This purpose Congress reiterated by repeating and re-enacting the same section in the Act of May 28, 1880. By virtue of the provisions thus enacted and re-enacted the right of the appellee to the commissions would seem to be plain.

[85] The only ground upon which the appellants try to escape this conclusion is by an argument which amounts to this: that Congress, by section 2 of the Act of March 1, 1879, intended virtually to repeal by implication that part of section 3314 of the Revised Statutes relating to collector's commissions, which, by Section 5 of the same Act, it deliberately, and word for word, re-enacted. Conceding that this argument is entitled to any weight, it is to be noted that, if the provision referred to was repealed by the same Act which re-enacted it, it was as an independent enactment, and, without change or qualification, again restored to the statute book by the subsequent Act of May 28, 1880, *ubi supra*, where it has remained ever since, covering more than four fifths of the period for which the appellee claims the commissions sued for in this case.

But it is not necessary to resort to the Act of May 28, 1880, to sustain the right of the appellee to any part of his commissions. It is a settled rule of construction that "One part of a statute must be so construed by another that the whole may, if possible, stand; *Ut res magis valeat quam pereat;*" (1 Bl. Com. 89); or, as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another. *Brooks* v. *Mobile School Commissioners*, 81 Ala. 227. Applying this rule to the interpretation of sections 2 and 5 of the Act of March 1, 1879, so far as they relate to the compensation of collectors, their meaning appears to be: first, that salaries shall be allowed the collectors, graded according to the amount of their annual collections, the minimum salary being $2,000 and the maximum $4,500; second, that in addition to the salary a commission of one half of 1 per centum on the taxes on spirits collected by sales of tax-paid stamps shall be allowed collectors, provided that their total net compensation shall not be more than $4,500; and third, that the Secretary of the Treasury may make further allowances, provided the limitation of $4,500 as the total net compensation of the collector is not exceeded. Thus construed, both sections of the statute are given effect without violence to the language or spirit of either. No construction of the two sections would be so incongruous and unreasonable as to hold that [86] Congress deliberately re-enacted the provision of section 3314 allowing commissions to the collectors without meaning anything by it; for the case of the appellants cannot be sustained unless we virtually expunge from the statute book, after it had, *ex industria*, been put there by Congress, the provision allowing to the collectors commissions on taxes collected by the sale of tax-paid spirit stamps.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CAMBRIA IRON COMPANY, *Appt.*, [54]

v.

THOMAS Q. ASHBURN, Trustee of FIRST MORTGAGE BONDHOLDERS.

(See S. C. Reporter's ed. 54-58.)

Removal of causes—separable controversy—local prejudice.

The provision in the second subdivision of section 639, R. S., for the removal of a separable controversy and the provision in the third subdivision of the same section, for the removal of causes on the ground of local prejudice, have no relation to each other. To warrant a removal under the third subdivision it is not enough that there may be a separable controversy between parties having the necessary citizenship.

[No. 1296.]

Submitted Apr. 5, 1886. Decided Apr. 19, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio. *Affirmed.*

The case is stated by the court.

Messrs. **Wm. M. Ramsey, Lawrence Maxwell, Jr.,** and **Mortimer Matthews,** for appellant. [55]

Mr. **C. B. Matthews,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court remanding a cause which had been removed from a state court. The facts are these:

On the 14th of September, 1883, Stephen Feike brought suit in the Court of Common Pleas of Scioto County, Ohio, against the Cincinnati and Southeastern Railroad Company to collect a debt due to him from the railroad company and asking the appointment of a receiver. On the same day that the petition was filed the railroad company, then the only defendant, entered its appearance and waived both process and notice of an application for the appointment of a receiver. At the same time W. R. M'Gill, another creditor of the company, came in, and by leave of the court made himself a party defendant, and filed an answer and cross petition, in which he asked for himself the same relief that had been prayed by Feike. Immediately upon the filing of these pleadings a receiver was appointed with full power to take possession of and manage the railroad and other property of the company. On the 20th of September, R. M. Shoemaker, T. Q. Ashburn, M. Jamison, P. F. Swing, and L. W. Bishop, trustees under various mortgages of the railroad company, came in voluntarily and by leave of the court made themselves parties defendant. On the 5th of November, Shoemaker, one of the trustees, answered the petition. On the 21st of February, 1884, the Lomas Forge and Bridge Company was made a defendant and filed a cross petition, asking to be paid certain claims for supplies out of the earnings of the road.

On the 5th of June, 1884, the Cambria Iron Company, a Pennsylvania corporation, filed an [56] answer and cross petition, by leave of the court, to recover the price of a quantity of steel rails which had been delivered to the railroad com-

pany a short time before the appointment of the receiver and used in the construction of the railroad, or to have a return of the rails with a reasonable compensation for their use. A judgment for damages was also asked, because of a refusal to accept other rails which had been contracted for and a delivery tendered. On the 15th of June, Post & Co. were admitted defendants, and they filed an answer and cross petition asking payment of an amount due them for spikes, angle bars and bolts; and on the 19th of July, D. M. Richardson filed an answer and cross petition, in which he asked payment of an amount due him for the construction of part of the road. On the 6th of January, 1885, Shoemaker & Ashburn filed an answer and cross petition for a foreclosure of the mortgage executed to them as trustees, and on the 5th of February Richardson demurred to the answer and cross petition of the Cambria Iron Company. On the 5th of August the case was referred, on motion of Feike, Richardson and Ashburn, and with the consent of all the other parties, to a master to take testimony and report upon the questions and issues raised by the pleadings. This report was filed December 10, 1885, and on the 24th of the same month the Cambria Iron Company presented a petition for the removal of the suit to the Circuit Court of the United States for the Southern District of Ohio, on the ground of prejudice and local influence. This petition set forth that the Iron Company was a citizen of Pennsylvania and all the other parties to the suit citizens of Ohio. The suit was entered in the circuit court, and on the 8th of February, 1886, Ashburn, one of the parties, moved that it be remanded (1) because it was not removable, and (2) because the petition was not filed in time. This motion was granted February 10, and from an order to that effect the appeal was taken.

There is here but one suit, and that between Stephen Feike, the plaintiff, a citizen of Ohio, on one side, and the several defendants, one a citizen of Pennsylvania, and the others citizens of Ohio, on the other side. It is conceded that the petition was filed too late for a removal under the Act of 1875, and that the Iron Company is not entitled to a removal on its separate [97] petition under the third subdivision of section 639, Rev. Stat., unless because its cross petition presents a separate controversy in the suit in which that Company alone appears as plaintiff and all the other parties as defendant. It was decided at the present term, in *Jefferson* v. *Driver*, 117 U. S. 272 [Bk. 29, L. ed. 897], that the provision for a removal of a separable controversy in the second subdivision of section 639 did not apply to removals under the third subdivision; but it is now argued that this cannot be so, because the original Local Prejudice Act of March 2, 1867, 14 Stat. at L. 558, chap. 196, was enacted as an amendment of the Removal Act of July 27, 1866, 14 Stat. at L. 306, chap. 288, which had no other purpose than to authorize the removal of separable controversies. The law which governs this subject now is all found in section 639, and it was decided in *United States* v. *Bowen*, 100 U. S. 508 [Bk. 25, L. ed. 631], that "the Revised Statutes of the United States must be accepted as the law on the subjects which they embrace as it existed on the 1st of December, 1873. When their meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the revision."

There is nothing of doubtful meaning in this section. It is divided into three subdivisions, all relating to the removal of suits, b each providing for a separate class. The fi embraces the cases provided for in section of the Judiciary Act of 1789, 1 Stat. at L. chap. 20; the second is for cases in which there is a separable controversy, and the third for cases affected by prejudice or local influence. Each subdivision is complete in itself and in no way depends on any other. Each describes the particular class of suits to which it relates, and without reference to the others. The language of the third subdivision is: "When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter," if he files with his petition "an affidavit that he has reason to believe and does believe that, from prejudice and local influence, he will not be able to obtain justice in such state court." This is the language substantially of the Act of March 2, 1867, 14 Stat. at L. 559, as to which it was held in *Sewing Machine Cases*, 18 Wall. 553 [85 U. S. bk. 21, L. ed. 914]; *Vannevar* v. *Bryant*, 21 Wall. 41 [88 U. S. bk. 22, L. ed. 476]; and *Myers* v. *Swann*, 107 U. S. 547 [Bk. 27, L. ed. 583], that there could be no removal under that Act if all the parties on one side of the suit were not citizens of different States from those on the other. In the last case it was added: "It is not enough that there be a separable controversy between parties having the necessary citizenship, nor that the principal controversy is between citizens of different States. If there are necessary parties on one side of the suit, citizens of the same State with those on the other, the circuit court cannot take jurisdiction." [58]

We see no reason for departing from the decisions which have thus been made, and *the order remanding the suit is affirmed.*

True copy. Test:
James H. McKenny, Clerk Sup. Court. U. S.

ELIZABETH T. OAKLEY, *Plff. in Err.*, [43]

v.

EDWARD K. GOODNOW.

(See S. C. Reporter's ed. 43-45.)

Jurisdiction of Federal Courts over removal of causes—colorable transfer.

1. Where a right of removal under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, was claimed by the defendant and the decision was against the right, a federal question is presented giving the Supreme Court of the United States jurisdiction.

2. The Circuit Courts of the United States have, under the Act of 1875, the power to dismiss or remand the case if it appears that a colorable assignment has been made for the purpose of imposing on their jurisdiction; but no authority has as yet been given them to take jurisdiction of the case by removal from a state court when a colorable assignment has been made to prevent such removal. It may be a good defense to an action in a state

court to show that a colorable assignment has been made to deprive the United States court of jurisdiction, but relief to the defendant can only come in a state court.

[No. 1315.]

Submitted Apr. 13, 1886. Decided Apr. 19, 1886.

IN ERROR to the Supreme Court of the State of Iowa. Motion to dismiss, with which is united a motion to affirm. *Affirmed.*

The case is stated by the court.

Mr. **George Crane,** for defendant in error, in support of motions.

Mr. **C. H. Gatch,** for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought in a state court of Iowa by Edward K. Goodnow, a citizen of New York, against Elizabeth T. Oakley, another citizen of the same State, to recover an amount claimed to be due for taxes paid by the Iowa Homestead Company and the Dubuque and Sioux City Railroad Company, both Iowa corporations, on lands belonging to the defendant. Before the suit was begun the two corporations assigned their respective claims to Goodnow, under an agreement by which he was "to use or exercise reasonable care or diligence to enforce said claims, demands or rights of action, and, after deducting all costs and expenses in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning." A copy of this agreement was annexed to the petition as an exhibit.

On the 16th of December, 1880, which was in time, the defendant presented her petition for a removal of the suit to the Circuit Court of the United States for the District of Iowa, on the ground that Goodnow "is only a nominal [44] party to said suit, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Iowa Homestead Company and Dubuque and Sioux City Railroad Company, which were, at the commencement of this suit and still are, corporations created and existing under and by virtue of the laws of the State of Iowa, each having its principal place of business in said State of Iowa, which said railroad and homestead companies directed the commencement of said suit, employed counsel to prosecute the same, and are directing and controlling its prosecution."

The state court proceeded with the suit, notwithstanding the petition for removal, and gave judgment against the defendant. This judgment was affirmed by the Supreme Court of the State on an appeal, that court being of opinion that the suit had not been removed. To reverse that judgment this writ of error was brought, and Goodnow now moves to dismiss for want of jurisdiction, and with that he unites a motion to affirm.

The motion to dismiss must be denied, because a right of removal under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, was claimed by the defendant and the decision was against the right. This presents a federal question and gives us jurisdiction; but, as the decision was in accordance with our judgment in *Provident Savings L. Assur. Soc.* v. *Ford*, 114 U. S. 635 [Bk. 29, L. ed. 261], the motion to affirm is granted. In that case it was said p. 641 [263]: "We know of no instance where the want of consideration in a transfer, or a colorable transfer of a right of action from a person against whom the defendant would have a right of removal to a person against whom he would not have such a right, has been held a good ground for removing a cause from a state court to a Federal Court. Where an assignment of a cause of action is colorably made for the purpose of giving jurisdiction to the United States court, section 5 of the Act of Congress of March 3, 1875, * * * has now given to the circuit courts power to dismiss or remand the cause at any time when the fact is made to appear. And by analogy to this law, it may perhaps, be a good defense to an action in a state court, to show that a colorable assignment has been made to deprive the United States court [45 of jurisdiction; but, as before said, it would be a defense to the action, and not a ground of removing that cause into the Federal Court."

Our attention was called in the argument to the fact that in the present case it appears that the assignee is "only a nominal party to said suit," and that the assignor "directed the commencement of the suit, employed counsel to prosecute the same, and is directing and controlling its prosecution," while in the other it was only alleged that the assignment was "merely colorable," and that the plaintiff was "not the real party in interest;" but the opinion in the other case, p. 638 [263], shows that it was further alleged that the assignment "was made without any consideration, and merely for the purpose of prosecuting and collecting" the claim for the benefit of the assignor, "and to avoid the necessity of" the assignor's "giving security for costs as a nonresident of this State, and to embarrass, and, if possible, prevent the transfer of this action to the United States Courts, and that the controversy * * * is in reality and in substance between the defendant" and the assignor, "who are citizens of different States." The two cases are thus substantially alike, and this is clearly governed by that. While, therefore, the courts of the United States have under the Act of 1875 the power to dismiss or remand a case, if it appears that a colorable assignment has been made for the purpose of imposing on their jurisdiction, no authority has as yet been given them to take jurisdiction of a case by removal from a state court when a colorable assignment has been made to prevent such a removal.

Under the law as it now stands, resort can only be had to the state courts for protection against the consequences of such an encroachment on the rights of a defendant.

The motion to dismiss is denied, and that to affirm granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN DOBSON ET AL., *Appts.*,

v.

[10] JOHN DORNAN, FRANCIS MAYBIN, ET AL., Trading as DORNAN, MAYBIN & COMPANY.

(See S. C. Reporter's ed. 10-18.)

Patent on carpet design—description—infringement—damages.

1. A sufficient description and claim is contained in the following specification of letters patent for a design for a carpet. "The nature of my design is fully represented in the accompanying photographic illustration to which reference is made. I claim as my invention, the configuration of the design hereunto annexed, when applied to carpeting." The illustration contained a single figure or design. The claim covers the design as a whole and not any part of it as a part, and it is to be tested as a whole, as to novelty and infringement.

2. An infringement of letters patent for a design of a carpet could be committed only by making, using and selling carpets containing the patented design; and an interlocutory decree describing the profits and damages to be accounted for, as only those for infringement, is proper. The ruling in Dobson v. Hartford Carpet Co. Bk. 29, approved.

3. In a suit for the infringement of letters patent of a design for a carpet, the plaintiff must show what profits or damages are attributable to the use of the infringing design. Where the defendants' carpets were so inferior in quality that they sold them at a much less price than the plaintiffs got for their carpets, it is error to take the whole of the profit made by plaintiffs as the measure of damages, on the assumption that the whole of it was due solely to the design, and on the further assumption that the plaintiffs would have sold of their higher grade carpets a quantity equal to the cheaper lower grade carpets sold by the defendants.

4. Where in a suit for an infringement of letters patent for a design for a carpet, there was testimony of witnesses showing such infringement, with contradictory evidence also, and a piece of carpet containing the patented design and another piece alleged to infringe, were exhibited to the court, and such exhibits are not produced in the Supreme Court, no error can be predicated of the finding by the circuit court that their use was an infringement.

[No. 202.]

Argued Mar. 31, 1886. Decided Apr. 19, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed, etc.*

The case is stated by the court.

Messrs. **Hector T. Fenton** and **Richard P. White**, for appellants.

Mr. **L. C. Cleemann**, for appellees.

[12] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in equity brought in February, 1875, by the appellees, trading as Dornan, Maybin & Co., against the appellants, John Dobson and James Dobson in the Circuit Court of the United States for the Eastern District of Pennsylvania, for the infringement of letters patent No. 6822, for a design for a carpet, granted to Charles A. Righter, August 19, 1873, for 3½ years. The entire specification is as follows: "Be it known, that I, Chas. A. Righter, of the City of Philadelphia, County of Philadelphia, State of Pennsylvania, have invented and produced a new and original design for carpets, of which the following is a specification: the nature of my design is fully represented in the accompanying photographic illustration, to which reference is made. I claim as my invention—The configuration of the design hereunto annexed, when applied to carpeting." The photographic illustration is a six inch square, containing a single figure or design. The only defense set up in the answer is noninfringement. Issue being joined, proofs were taken, and the case was heard, and in April, 1876, a decree was made finding that the patent was valid and had been infringed, and awarding to the plaintiffs costs and an account of profits and damages before a master, and a perpetual injunction. The master made his report in April, 1882. He found that the defendants had made no profits, and stated thus the contending views of the parties, as to the proper rule of damages: "The complainants asked to have awarded to them, as damages and compensation for the injury inflicted upon them, whatever profit the defendants may have made, and also whatever loss they, the complainants, had incurred, which could be measured by the profits that would have accrued to them if they had made the exclusive sales of the carpet, deducting in such case the amount of profits, if any, made by the defendants. The defendants, however, contended that all that the complainants were entitled to was not what they, the defendants, had made or saved on the carpets, but only what they made or saved by reason of the use of the pattern, as [13] compared with what they could have made without it; and, therefore, unless they could sell the carpet bearing the design at a higher price than other carpets, whereby they made more or lost less, no profit resulted to them. They further contended that, unless it was shown by direct evidence that the complainants would have made the sales which the defendants did, had they not infringed, the fact could not be inferred." The master found that the profit of the plaintiffs consisted in the exclusive use of the invention, and in the monopoly of manufacturing for others to use; that they sold their carpets at from ten to fifteen cents a yard more than the defendants did, and made a profit, in 1874, of 18¾ per cent, and in 1875, of 10¾ per cent, their average price per yard being more than $1; that the defendants might have made an equal profit if they had asked the same prices, and the benefit, gain or advantage to them might be reasonably estimated as equivalent to the money profit they might have made; that it was to be presumed that the defendants' carpets displaced the plaintiffs' in the market; that it was proper to award to the plaintiffs an amount equal to the profits they could have made, in 1874 and 1875, on the carpets made and sold by the defendants, if the plaintiffs themselves had made and sold them; that the defendants made and sold, in 1874, 19,248½ yards, which would have yielded, at $1 a yard, $19,248.50, on which the profits of the plaintiffs, at 18¾ per cent, would have been $3,645.97; that the defendants made and sold, in 1875, 31,280½ yards, which would have yielded at $1 a yard, $31,280.50, on which the profits of the plaintiffs, at 10¾ per cent, would have been $3,362.65; and that, therefore, the plaintiffs had sustained $6,008.62 damages by the infringement of the patent.

The defendants excepted to the report, but the court confirmed it, and in October, 1882,

rendered a decree for the plaintiffs for $6,128.79, from which the defendants have appealed.

It is assigned for error that the patent is void on its face for want of a sufficient description and claim. It was issued under the Act of July 8, 1870, chap. 230, 16 Stat. at L. 198. Sections 71, 72 and 76 of that Act provided as follows: "Sec. 71. Any person who, by his own industry, genius, efforts and expense, has invented or produced any new and original de-
[14] sign for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton or other fabrics; any new and original impression, ornament, pattern, print or picture, to be printed, painted, cast or otherwise placed on or worked into any article of manufacture; or any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented, or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor." "Sec. 72. The commissioner may dispense with models or designs when the design can be sufficiently represented by drawings or photographs." "Sec. 76. All the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries, not inconsistent with the provisions of this Act, shall apply to patents for designs."

It is contended that section 26 of the Act of July 8, 1870, applies to the present case. That section provides that before any person shall receive a patent for his invention or discovery, he shall file in the Patent Office a written description of it, and "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery." It is urged that section 26 was not complied with in this case, and that the patent is void because it contains no description, and no proper claim.

But we are of opinion that the description and claim are sufficient. The purport of the description is, that what the photographic illustration represents as a whole is the invention. It is that which is claimed, when applied to carpeting. The design is a pattern to be worked into a carpet, and is within the statute. Claiming "the configuration of the design" is the same thing as claiming the design, or the figure, or the pattern. It is better represented by the photographic illustration than it could be by any description, and a description would probably not be intelligible without the illustration.

In *Dobson* v. *Bigelow Carpet Co.* 114 U. S. 439, 446 [Bk. 29, L. ed. 177], the claim of the design patent was "the design for a carpet, substan-
[15] tially as shown." Objection was taken to the form of the claim. But this court said it saw no good objection to the form, and that the claim referred to the description as well as the drawing, in using the word "shown." The drawing there was a photographic illustration of the body and border of the carpet, described in the specification as representing a face view. But the description was merely, that *a* was an irregular, shield like figure, surrounded by a border embellished by floral decoration; that *b b* were two irregular figures of the same design, but having a different ground color from *a*, and arranged at opposite sides diagonally of each shield; that *c c* were tassel-like ornaments, arranged beneath the several figures *a*; that *d* were bouquets, and there were other floral ornamentations; that the border contained an inner plain stripe *f*, and an outer zigzag stripe *g*, having inwardly projecting semi-circular ornaments *h*; that between the stripes *f* and *g* were representations of shields resembling the shield *a*, and floral decorations extending over the stripe *f*, as shown; and that the tassel-like ornaments *c* were also in the border. Unaided by the illustration, probably many different designs might have been drawn, to which the description would have applied; and the description furnished no aid whatever in identifying the design. So, in the present case, the design is sufficiently identified by the illustration, without the aid of any description. In the language of section 72, before cited, the design is sufficiently represented by the photograph.

Undoubtedly the claim in this case covers the design as a whole, and not any part of it as a part; and it is to be tested as a whole as to novelty and infringement. The answer admits that Righter was the original and first inventor of the design for which the patent was granted, and does not question the novelty of the invention.

Exception is taken to the form of the interlocutory decree, in that, while it awards a recovery for the profits and damages from the infringement of the design, it orders an account to be taken of the profits of the defendants from infringing upon the exclusive rights of the plaintiffs "by the manufacture, use and sale of carpeting bearing said patented design," and of [16
the additional damages suffered by the plaintiffs "by reason of said infringements." We do not think the decree is open to the objection made. It is not like the decree in *Littlefield* v. *Perry*, 21 Wall. 205, 228 [88 U. S. bk. 22, L. ed. 577]. It directs an account of the profits from the infringement. The infringement could be committed only by making, using and selling carpets containing the patented design; but the profits and damages to be accounted for are described as only those from the infringement.

It is also contended that the weight of the evidence on the question of infringement was with the defendants. The court below found otherwise. It appears by the record that a piece of carpet, Exhibit No. 2, was introduced in evidence as containing the patented design; and another piece of carpet, Exhibit No. 3, as being the defendants' carpet, alleged to infringe. Those exhibits have not been produced on the hearing in this court, although the brief for the appellants states that the circuit court evidently decided the question of infringement with little aid other than ocular inspection of the samples. This court has not the benefit of any such aid. We find, however, in the record, testimony of a witness to the effect that, from his experience as a seller of carpets, he thinks it would be almost impossible for anyone who had not seen the two carpets together to tell them apart; and of another witness, that, in his opinion, not one customer in

twenty-five would know the difference; and other testimony tending to the same result. While there is evidence contradictory of this, we cannot, in the absence of ocular inspection, take it upon ourselves to say that the circuit court erred in finding infringement.

The only remaining question is that of the amount of damages. The master and the circuit court proceeded on a view which had been adopted by that court in the three cases adjudged by it, the decrees in which were reversed by this court in *Dobson* v. *Hartford Carpet Co.* 114 U. S. 439 [Bk. 29, L. ed. 177]. The present case was decided by the circuit court before such reversal. We are of opinion that the decision cited covers all the questions involved in the case at bar, and requires that the final decree in it should be reversed. In the cases in 114 U. S., the patents being for designs for carpets, it was found that no profits had been made by the defendant, but the circuit [147] court allowed to the plaintiff, as damages, in respect to the yards of infringing carpet made and sold by the defendant, the sum per yard which was the profit of the plaintiff in making and selling carpets with the patented design, there being no evidence as to the value imparted to the carpet by the design. This court held that such award of damages was improper, and that only nominal damages should have been allowed. It is not necessary to recapitulate the views set forth in 114 U. S., which controlled that decision. The present case cannot be distinguished.

It is urged that the principle on which damages are to be computed in respect to a patent for a machine, or for an improvement in a machine, or for a process, is not applicable to a patent for a design, because, in a patent for a design, the result is patented, while in the other kind of patent the means are patented; that in the design patent there is no other way of effecting the result, while in the other there generally is; and that, therefore, in the design patent the entire profits or damages on the article containing the design are to be given, while in the other only those belonging to the particular improvement patented are to be allowed. But we think all that is here urged is covered by what was said in the cases in 114 U. S. The plaintiff must show what profits or damages are attributable to the use of the infringing design.

In the present case, the master found that the plaintiffs' profit on their carpets was a certain percentage, and assumed or presumed that the defendants' carpets, which were far inferior in quality as well as in market value, displaced those of the plaintiffs to the extent of the sales by the defendants, and held that the entire profit which the plaintiffs would have received, at such percentage, from the sale of an equal quantity of their own carpets of the same pattern, was the proper measure of their damages. The defendants' carpets were so inferior in quality that they sold them at a much less price than the plaintiffs got for their carpets, and even at those prices the defendants made [148] no profits. Under these circumstances there can be no presumption that the plaintiffs would have sold their better quality of carpets in place of the defendants' poorer quality, if the latter had not existed, or that the pattern would have induced the purchasers from the defendants to give to the plaintiffs the higher price. On the contrary, the presumption is at least equal that the cheaper price, and not the pattern, sold the defendants' carpets. There was no satisfactory testimony that those who bought the cheap carpets from the defendants would have bought the higher priced ones from the plaintiffs, or that the design added anything to the defendants' price, or promoted their sale of the particular carpet; and none to show what part of the defendants' price was to be attributed to the design.

It does not evade the force of the principle governing the case that, in arriving at the percentage of profit made by the plaintiffs on their sales, the cost was made up by computing all the items which entered into the production of their carpets. The objection is to taking the whole of that profit as the measure of damages, on the assumption that the whole of it was due solely to the design, and on the further assumption that the plaintiffs would have sold of their higher grade carpets a quantity equal to the cheaper lower grade carpets sold by the defendants.

The final decree of the Circuit Court is reversed, and the cases remanded to that court, with direction to disallow the award of damages, and to award six cents damages, and to allow to the defendants a recovery for their costs after interlocutory decree, and to the plaintiffs a recovery for their costs to and including interlocutory decree.

Field, *J.*, I concur in the reversal of the decree, but am of opinion that the patent was invalid, and that the bill should, therefore, be dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BOARD OF LIQUIDATION OF THE CITY OF NEW ORLEANS, *Plff. in Err.*, [136]

v.

UNITED STATES, *ex rel.* JUDAH HART.

(See S. C. "*New Orleans Board of Liquidation v. Hart*," Reporter's ed. 136-147.)

Indebtedness of New Orleans—Statutes and Constitution of the State—preferring creditors—contract between Board of Liquidation and judgment creditor—mandamus *to compel issue of bonds.*

1. Property of a municipal corporation undoubtedly may be appropriated, and special taxes pledged, to meet future debts created for public purposes; but the Legislature of Louisiana cannot, under the Code of that State, authorize a municipality to appropriate its entire property and revenues, except what might be required for the support of its government, to a class of existing demands over others equally entitled to payment.

2. Article 254 of the Constitution of 1879, providing for the liquidation of the indebtedness of the city and the application of its assets to the satisfaction thereof, also forbids such preference as to indebtedness in existence at the time of the adoption of that Constitution.

Holders of the floating debt of New Orleans, existing at the time of the passage of the Act of 1880, who have established its validity by judicial proceedings, cannot be excluded from sharing in the

proceeds of property and funds which are, by that Act, appropriated to purchase and retire her bonds, notwithstanding the provision excepting from its benefits the floating indebtedness.

3. The relator obtained in 1882 a judgment against the City of New Orleans founded on contracts made from 1871 to 1877. In 1884 he made a compromise with the city, by which it was, in part, provided that the balance of the judgment, not otherwise provided for, should be funded under the provisions of the Act of 1884. The petition alleged that the city made no objection to the performance of the contract but that the Board of Liquidation refused to issue the bonds. Held, on a review of the constitutional and legislative provisions, that the relator was entitled to a *mandamus* compelling the issue of the bonds.

[No. 1123.]

Submitted Jan 4, 1886. Decided Apr. 19, 1886

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed with instructions.*

[137] Statement by *Mr. Justice* **Field:**

This was a petition in the name of the United States, on the relation of Judah Hart, a citizen of New York, for a *mandamus* to the Board of Liquidation of the City of New Orleans—a corporation organized under the laws of the State and having charge of the financial affairs of the city—to prepare and issue to him bonds of the city for the amount of his demand. The facts as stated in the petition and found by the court, are briefly as follows: On the 3d of March, 1882, the relator recovered judgment in the Circuit Court of the United States against the city for $121,697.18, which drew interest from its date at the rate of 5 per cent per annum. This judgment was founded on contracts for municipal purposes made from 1871 to 1877, inclusive. To review it the city sued out a writ of error from this court, but, as it did not operate as a *supersedeas*, the relator caused a writ of *fieri facias* to be issued, and levied upon certain moneys due and to become due to the city by the Canal and Claiborne Street Railroad Company and by the Orleans Railroad Company, and also upon the interest of the city in the New Orleans Sugar Shed Company and in the Orleans Sugar Sheds. Proceedings were taken to contest these seizures, but judgment was rendered in his favor, to review which the city sued out a writ of error together with a *supersedeas.*

[138] While these cases were pending in this court, the relator and the city entered into a compromise, by which it was agreed, among other things, that she should dismiss the writs of error, and that he should renounce his seizure of the sugar sheds, apply the bonus due and to become due by the railway companies to the payment of his judgment, and fund the balance under the provisions of the Act known as No. 67 of the Legislature of the State of 1884.

Under the writ various sums were collected, which, on the 8th of July, 1885, had reduced the judgment to $76,194.62. The relator complied with the terms of the compromise on his part, and called upon the Board to prepare and deliver to him bonds, under the provisions of Act No. 67, of 1884, for the balance due on his judgment; but the Board refused to comply with the demand.

The petition alleged that the city made no objection to the performance of this duty by the Board, but that the Board refused on its own account. The relator, therefore, prayed for an alternative writ of *mandamus* commanding the Board to prepare and issue the bonds of the city, pursuant to Act 67 of 1884, to the amount and value of the balance due on his judgment, and deliver them to him, and that the Board be cited to answer his demand, and that upon the hearing the writ be made peremptory.

The Board appeared and answered the petition, setting up that all the property of the city not dedicated to public use, and also the surplus of what was known as the Premium Bond Tax, were pledged, under Act No. 58, of 1882, and by previous legislation, to the payment of other bonds of the city which were outstanding, and that the Act of 1884, in so far as it directs a diversion of that property and fund, impairs the contract with the holders of those bonds, and is, therefore, unconstitutional and void.

By consent of parties, the Sun Mutual Insurance Company, as the holder of such outstanding bonds, intervened and joined with the Board in asserting the unconstitutionality of Act 67 of 1884. The court granted a peremptory *mandamus* as prayed, and to review that judgment the case was brought here.

Mr. Henry C. Miller, for the Board of Liquidation.

Messrs. H. J. Leovy, G. J. Leovy, E. D. White and *J. P. Blair*, for the Sun Mutual Insurance Company.

Mr. E. H. Farrar, for Judah Hart.

Mr. Justice **Field** delivered the opinion of the court: [13

To understand clearly the position of the Board of Liquidation, and appreciate the ground of its refusal to issue the bonds, under Act No. 67 of 1884, pursuant to the terms of the compromise, it will be necessary to refer briefly to the Act of March 6, 1876, known as the Premium Bond Act, out of which the surplus of the premium bond tax arises, and to the Act of April 10, 1880, to liquidate the indebtedness of the city and create the Board of Liquidation, as well as to the Acts of 1882 and 1884.

The Premium Bond Act was an attempt to coerce creditors of the city to accept the plan proposed by her counsel for the payment of her indebtedness by withholding from them all other means of payment of their demands. The city was at the time almost in a bankrupt condition, and the sums required to meet the interest on her admitted indebtedness rendered taxation not only burdensome but oppressive. The plan was to exchange all recognized and valid bonds of the city and of Jefferson and Carrollton, which had become incorporated with her, for premium bonds to be issued under the Act. The latter were to be of the denomination of $20 each, to be dated September 1, 1875, and to bear interest at the rate of 5 per cent per annum from July 15, 1875, but not payable at any designated period. That, both as to principal and interest, was to be determined by a lottery. They were to be divided into series of one hundred each. A certain number of the series was to be drawn according to a prescribed schedule; and it would depend upon the number drawn whether a bond would be paid in one year or in fifty years.

The Act forbade the levy of a tax for the payment of the principal or interest of any

other bonds, repealed all laws requiring or authorizing the city to lay any such tax, and declared that it should be incompetent for any court to issue a *mandamus* to the officers of the city to levy and collect a tax for interest on other bonds. To meet the interest on the premium bonds and provide for other municipal wants, it further declared that a tax of only 1½ per cent per annum on the assessed value of property in the city should be levied, and that this limitation of her taxing power was a contract, not only with the holder of them, but [140] also with every resident and taxpayer, so as to authorize him to legally object to any higher rate of taxation. Under this plan premium bonds to the amount of $20,000,000 were prepared, of which a number equal to $13,263,300 was issued for other bonds. The remainder was not issued, because creditors refused to accept them. Holders of other bonds brought suits to compel the levy of a greater tax to pay them, pursuant to stipulations made, or implied at the time of their issue, that sufficient sums should be raised to meet the principal and interest on them. In those suits this court declared that the limitation upon the taxing power which the city possessed at the time the bonds were issued, and upon the faith of which they were taken, was invalid as impairing the obligation of her contract with the holders. *Wolff v. New Orleans*, 103 U. S. 358 [Bk. 26, L. ed. 395], and *Louisiana v. Pilsbury*, 105 U. S. 278 [Bk. 26, L. ed. 1095].

Subsequently the city purchased with the proceeds of certain railroad franchises premium bonds to the value of $3,567,360, and under the operation of the plan a large number was extinguished, so that when the petition of the relator was presented there remained outstanding of those bonds only $7,918,280. But, notwithstanding the reduction made at different times, the tax was levied annually for interest on the whole number prepared, thus creating an excess beyond the amount required.

The Constitution of Louisiana, adopted in 1879, ordained that the General Assembly, at its next session, should enact such legislation as might be proper to liquidate the indebtedness of the city, and to apply its assets to the satisfaction thereof. Article 254. Under this requirement, and in supposed compliance with it, the General Assembly, on the 10th of April, 1880, passed the Act known as No. 133 of that year, creating a Board of Liquidation, investing it with exclusive control of all matters relating to the bonded debt, directing it to prepare bonds to be issued for negotiation or exchange, and with them or their proceeds to retire and cancel the entire valid debt of the city, *except the floating debt, previously created*, and requiring the city authorities to transfer to it, as soon [141] as possible after its organization, all the property of the city, real and personal, not dedicated to public use. The Board was empowered to dispose of the property and deposit the proceeds with its fiscal agent to the credit of the "city debt fund."

Nothing in the Act was to be construed as affecting or in any manner impairing the Premium Bond Act, but the city authorities were to transfer to the Board all moneys collected on account of the tax levied in accordance with the provisions of that Act, and the Board was to apportion the proceeds and apply the same *pro rata*, and in the proportion which each form of bonded debt should bear to the entire amount of the city debt. Such portions as should not properly belong to the outstanding premium bonds were to be applied to pay interest on the bonds to be issued. The surplus from the collection of the debt and interest tax, or that arising from the sale of assets in the hands of the Board, after paying such interest, was to be used to purchase and retire valid bonds of the city.

This Act of 1880 did not cause the intended retirement and cancellation of the debt of the city. No bonds were issued under its provisions, and the General Assembly on the 30th of June, 1882, passed Act No. 58 of that year. It recited that litigation had hitherto resulted disastrously for the taxpayer; that the creditors of the city had indicated a desire to settle their claims equitably, and to postpone the payment of certain bonds in order to lighten the burden of taxation; and that the Constitution contemplated a definite termination of her embarrassment by special legislative enactments. It authorized her, through the Board, to extend for the period of forty years payment of all outstanding bonds other than premium bonds, at a rate of interest not exceeding 6 per cent, and to issue certificates drawing like interest for the unpaid coupons on outstanding bonds prior to the first of January, 1883, for which no judgment tax was levied, and to levy and collect a special tax to pay the interest on all bonds other than premium bonds and on the certificates for matured coupons.

The sixth section declared that all funds then, or that under existing laws might be, in the hands of the Board should be deposited with its fiscal agent and credited to the city debt fund, and that such fund should be applied [142] *exclusively* to the purchase of outstanding bonds or coupons and the certificates therefor, which were extended to be retired under the Act, except that the fund should first be used to pay the interest on the bonds and the certificates.

The seventh section provided that the surplus, if any, of the premium bond tax of each year, or on hand at the passage of the Act, after all the drawn series, interest and premiums thereon, exigible or due to the holders thereof had been provided for or fully paid, should also be deposited with the fiscal agent of the Board on account of the city debt fund and applied *exclusively* in payment of the interest on the outstanding bonds and certificates.

The tenth section declared that the Act in all its parts was to be deemed and to constitute a valid and binding contract between the State, the city, its residents, citizens and taxpayers, and the holders of the bonds extended, and that the judicial process of the State, authorized by law or in force at the creation of the bonded debt, might be resorted to, and should be recognized and applied for the enforcement of its provisions in favor of any party showing just cause of complaint for their violation. Under the Act the Board issued bonds exceeding $4,000,000, on which the interest has been paid, in part by the tax provided and in part out of the premium bond tax, there being a surplus of moneys collected by that tax beyond what was required for the interest on the premium bonds outstanding.

The Act of July 9, 1884, known as Act No. 67 of that year, amends several sections of Act No. 133 of 1880. It extends the authority of the Board, and gives it exclusive control and direction over all matters relating not only to the bonded debt, but also to the judgment debt of the city. Section 3 of the Act of 1880, as amended, provides for retiring and canceling the entire debt of the city then in the form of executory judgments, or which might thereafter become merged into them, except the floating debt or claims created for 1879, and subsequent years; and also for the preparation of bonds similar in their general character to those mentioned in the Act of 1880, to be exchanged [143] for the judgments or sold, and the proceeds applied to their payment. The fifth section, as amended, provides, with greater particularity than the original section, for transferring to the Board the property of the city not dedicated to public use, and its assets, realized and to be realized, except such assets and revenues as pertain to the administration of the city and are necessary for its support; and it authorizes and requires the Board to dispose of the same, other than stock held in corporations, on such terms and conditions as it may deem best for the interests of the city, and to apply the proceeds, first, to the payment of the interest on the bonds authorized by the Act, and, second, to their redemption and cancellation.

There is no doubt of the right of the relator under the Act of 1884 to the bonds promised in the compromise with the city. His judgment is of the class of debts which it is made the duty of the Board to retire and cancel by the exchange of the bonds provided, or by the sale of them and the application of their proceeds. The Board refuses to issue them solely on the ground that the Acts of 1882 and 1884 conflict as to the application of the property and funds of the city; the first Act applying them to the payment of the bonded debt and certificates for matured coupons specified therein, and the second to the payment of bonds issued in cancellation of executory judgments against the city.

As seen by the preceding statement, all the property and funds of the city, and the excess of the proceeds derived from the tax for the interest on premium bonds beyond what was needed, were, by the Act of 1880, pledged to pay her entire debt, except the floating debt previously created. This floating debt may have been as meritorious as the funded debt, and the duty to make provision for its payment equally binding. Why all the property and funds of the city should be appropriated to pay the latter debt, to the exclusion of the former, does not appear. The Constitution of 1879 contemplates that provision shall be made for the payment of the entire debt. It declares that the General Assembly, at its next session, "shall enact such legislation as may be proper to liquidate the indebtedness of the City of New Or- [144] leans, and to apply its assets to the satisfaction thereof;" and this means obviously the entire indebtedness in whatever form it exists, whether bonded or floating, and not merely a part of it. And the application of the assets of the city is to be in satisfaction of all the debts alike, and if not sufficient to extinguish them it is to be made in some ratable proportion. Such is, we think, the clear import of the constitutional mandate, and its purpose is in harmony with the settled law of the State, which has always recognized as sound and just the rule that the property of the debtor should, as far as practicable, be appropriated to the payment of all his debts. The Civil Code, in force since 1825, declares that "Whoever has bound himself personally is obliged to fulfill his engagement out of all his property, movable and immovable, present and future." Art. 3149. Although this provision does not in terms designate artificial persons, it embraces them within its scope. Whenever corporations, private or municipal, are permitted by the Legislature to contract debts, they are brought equally with natural persons under the dominion of this law and are alike bound by it. The Code also declares that "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference." Art. 3150. The Supreme Court of the State, in the case of the *Succession of Taylor*, 10 La. Ann, 510, in speaking of this last article, said: "We do not think this article of the Code a mere idle recognition of an equitable principle, not intended to give the creditor any positive right to the property of his debtor. On the contrary, we think the whole of our legislation recognizes such an interest of the creditor in the property of the debtor as to give to the creditor the right to watch over this common pledge, and prevent the debtor himself from fraudulently parting with it."

This language was used in a case where a widow with minor children, left in necessitous circumstances, and not possessing in their own right property to the amount of $1,000, undertook as administratrix to distribute that sum to herself and children, under a statute of the State, which allows a widow, in those circumstances, to receive from the succession of her deceased father or husband that sum, or suffi- [145] cient when added to their property to make that sum, and requires it to be paid in preference to all other debts, except those for the vendor's privilege, and the expenses in selling property. The court held that the statute did not protect the property of the succession from creditors whose claims existed prior to its passage. The principle here asserted would undoubtedly cover the case at bar, if the appropriation of the property and funds of the city to the payment of certain claims, to the exclusion of others equally valid, had been made by her voluntary act; but being made by direction of the statute, it may be questioned whether its validity, independently of the constitutional provision, could be successfully assailed. The rule declared, however just in itself, can hardly be regarded as anything more than indicating the spirit which should control legislation in providing for the application of the property of a debtor to the discharge of his debts; although *Mr. Justice* Bullard of the Supreme Court of the State, in *Atchafalaya R. R. & Banking Co.* v. *Bean*, 3 Rob. (La.) 414, thought "it clear that the Legislature cannot constitutionally, by any Act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor, or the relative rank of creditors *inter se;* and that two creditors who stood equal originally in the eyes

of the law, and had an equal right to be paid, neither having any special lien or privilege over the other, must forever remain equal, notwithstanding any Act of the Legislature apparently sanctioning a different doctrine."

Property undoubtedly may be appropriated and special taxes pledged to meet future debts created for public purposes; but legislation would conflict with the spirit as well as the express letter of the Code, if it authorized a municipal body to appropriate its entire property and revenues, except what might be required for the support of its government, to a class of existing demands over others equally entitled to payment. So far as the indebtedness of the city, existing at the adoption of the Constitution of 1879, is concerned, we think the clause mentioned prohibits any such preference and appropriation. We are therefore of opinion that holders of her floating debt existing at the passage of the Act of 1880, who have established its validity by judicial proceedings—and [146] such is the position of the relator with his claim—cannot, under the Constitution of 1879, be excluded from sharing in the proceeds of property and funds which by that Act are in terms appropriated to purchase and retire her bonds. The Code recognizes, as we have seen, the justice of an appropriation of the property of the debtor for the payment of all his debts ratably. In the spirit of this equitable principle, the Constitution of 1879 required that all the debts of the city existing at that time should be provided for, and any pledge of her entire property and revenues to the payment of one class of her debts to the exclusion of others is repugnant to that instrument.

The Act of 1882 did not change the position of the relator. It authorized the renewal and extension of outstanding bonds of the city other than premium bonds, and the issue of interest-bearing certificates for matured coupons; but the provision of the Act of 1880 for transferring all the property of the city not dedicated to public use to the Board, creating a fund to purchase and retire her bonds, continued in force. It changed the application of the fund to the payment of the renewed and extended bonds and certificates for matured coupons; but it made no provision for the floating debt created previously to the Act of 1880.

The Act of 1884 amends several sections of the Act of 1880, and as amended they are to be read from their passage as parts of that Act. They provide that the property and funds of the city shall be appropriated to pay, first, interest on bonds issued to retire and cancel the debts of the city in the form of executory judgments, or which might become merged into such judgments, except the floating debt created after 1878; and second, to redeem and cancel the bonds. It does not refer to the Act of 1882; and we infer that the Legislature intended, not to supersede all the provisions of that Act for the payment of other bonds of the city, but to place on the same footing with them bonds issued for executory judgments. We must, therefore, construe it as extending the appropriation made by the Act of 1882 to the [147] payment of bonds issued for such judgments, in addition to the payment of the bonds provided for by that Act, and not as merely limiting it to the payment of such judgments.

The objectionable feature in all the previous Acts is their attempt to do partial justice, by discriminating between creditors equally meritorious, and applying the property and funds of the city to the payment of some of them in preference to others. In our opinion this cannot be done. All creditors at the time the property and funds were appropriated were entitled, for the payment of their respective claims, when legally established, to share *ratably* in the proceeds of the property and funds. The relator, with his judgment against the city, has a right to stand, with reference to those proceeds, on an equal footing with her other creditors, notwithstanding that by the terms of the Act of 1882 he is excluded from all participation in them; and, to enable him to do so, he can demand the bonds of the city for the balance due him, pursuant to the compromise with the municipality. With the bonds he will not have any preference over other bondholders, but will be entitled to share ratably with them in the proceeds of the property appropriated for the payment of their bonds.

The judgment ordering a mandamus *is, therefore, affirmed, but with instructions to the court below to modify its directions as to the payment of the bonds issued, in accordance with this opinion.*

SUN MUTUAL INSURANCE COMPANY, *Plff. in Err.*, v. UNITED STATES, *ex rel.* JUDAH HART.

[No. 1101.]

The same judgment and for like reasons will be entered on the intervention of the Sun Mutual Insurance Company as in the case between the original parties.

Affirmed.

True copies. Test:
James H. McKenney, Clerk Sup. Court, U. S.

SOUTH BOSTON IRON COMPANY, [37]
Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 37-42.)

Navy Department— certain letters are not contracts in writing.

The acceptance by Chief of Bureau of Steam Engineering of the Navy Department by direction of the Secretary of the Navy in a letter of March 7, 1877, and on subsequent dates, of an offer to build new boilers for certain named ships, from drawings and specifications to be furnished by the Bureau, which specifications were promised in the letter, does not constitute such a contract as will bind the United States under sections 3744-3747 where, on the 16th of March, 1877, the Secretary of the Navy ordered a discontinuance of all work contracted for.

[No. 220.]

Argued and submitted Apr. 8, 1886. Decided Apr. 19, 1886.

APPEAL from Court of Claims. *Affirmed.* [38]

Suit by the appellant to recover $75,000 damages and $143,264.06 prospective profits claimed by reason of alleged breach of a con-

tract, claimed to be established in the following correspondence which was in evidence with the indorsements:

Boston, March 5th, 1877.

Wm. H. Shock,
Chief of Bureau of Steam Engineering,
Navy Department, Washington.

Sir: Having learned that new boilers are required for the U. S. steamers Narragansett and Tuscarora, now at Mare Island Navy Yard, California, I submit the following proposition for the consideration of the Bureau of St. Engineering, viz.: I will build such new boilers as may be required for the above named ships, complete in all respects, from drawings and specifications furnished by the Bureau, the material to be of the very best quality, and the workmanship to be first class in all respects; the boilers to be finished complete, ready for use, excepting erection on board the vessels, or in sections convenient for shipment, as the Bureau may determine; the price of the same to be, if erected complete, ready for use, thirty and seven eighths (30 ⅞) cents per pound; if in sections, thirty and three quarter (30 ¾) cents per pound; in either case to be delivered alongside of ship at New York or Boston, as may be determined by the Bureau. I agree to receive in part payment such old material as may be at the disposal of the Department at the highest market prices.

I will also build one small boiler, complete in all respects, ready for use, for the tug-boat Snowdrop, now at Norfolk, from designs and specifications furnished by the Bureau, and deliver at navy yard, Norfolk; material and workmanship to be of the best quality; price to be thirty and seven eighths (30 ⅞) cents per pound.

[39]

Very respectfully, your ob'd't serv't,
William P. Hunt,
President South Boston Iron Co.

(Endorsement.)

Bureau of Steam Engineering,
Navy Department, March 7th, 1877.

Received at the Navy Department, March 7, 1877.

Accepted by verbal directions of the Secretary of the Navy, in obedience to his order of this date.

W. H. Shock.
Ch'f of Bu. St'm. Eng.

Navy Department,
Bureau of Steam Engineering,
Washington, March 7th, 1877.

Sir: By direction of the Hon. Secretary of the Navy, your offer of the 5th inst. for boilers for The Narragansett and Tuscarora is accepted, upon the terms and conditions named in said letter, the same to be delivered alongside vessel in New York Harbor for shipment to Mare Island Navy Yard; also your offer for boilers for the tug Snowdrop, to be delivered in the Norfolk Navy Yard.

The specifications and drawings will be furnished as soon as prepared.

Respectfully,
Wm. H. Shock.
Hunt, Wm. P. Chief of Bureau.
President South Boston Iron Co.,
Boston, Mass.

Boston, March 8, 1877.

Sir: Having learned that new boilers are required for the iron-clad monitor Dictator, I submit the following proposition for the consideration of the Bureau of Steam Engineering, viz.: I will build such new boiler as may be required for the above named vessel, complete in all respects from drawings and specifications furnished by the Bureau; the materials to be of the very best quality and the workmanship to be first class in all respects the boiler to be furnished complete, ready for use and erection on board the vessel; the price of the same to be thirty and seven eighths (30 ⅞) cents per pound, to be delivered alongside ship at New York.

[40]

Very respectfully your obedient servant,
Wm. P. Hunt,
President South Boston Iron Company.

Wm. H. Shock,
Chief of Bureau of Engineering,
Navy Department, Washington.

(1st Endorsement.)

Received at the Navy Department, March 8, 1877.

Bureau will accept.

G. M. R. Sec't'y.

(2d Endorsement.)

Navy Department,
Bureau of Steam Engineering,
March. 10, 1877.

Accepted by direction of the Hon. Secretary of the Navy, in obedience to his order of this date.

W. H. Shock,
Chief of Bureau.

Navy Department,
Bureau of Steam Engineering,
Washington, March 10th, 1877.

Sir: By direction of the Hon. Secretary of the Navy, your offer of the 3d inst. for boilers for the U. S. iron-clad Dictator is accepted, upon the terms named in said letter, the same to be delivered alongside ship or navy yard wharf (as may be required) in New York.

The specifications and drawings will be furnished as soon as possible.

Respectfully,
Wm. H. Shock,
Wm. P. Hunt, Chief of Bureau.
Boston, Mass.

March 13, 1877, Hon. R. W. Thompson became Secretary of the Navy, whereupon and before commencement of suit the following correspondence was had, viz.:

Navy Department, Washington,
March 16, 1877.

Gentlemen:

You are hereby notified to discontinue all work by you contracted for with this Department or any Bureau thereof since March 1, 1877, until you shall be otherwise directed by the Secretary of the Navy.

[41]

Respectfully yours,
R. W. Thompson,
Secretary of the Navy.

South Boston Iron Co.,
South Boston, Mass.

Riggs House, Washington, D. C.,
Hon. R. W. Thompson, March 24th, 1880.
Secretary of the Navy.

Sir: You are hereby notified that the South Boston Iron Company claims damages, interest and expenses of the United States in the sum

of two hundred thousand ($200,000) dollars, by reason of the suspension by you of a certain contract made by your immediate predecessor in office (Mr. Robeson) on or about the 7th of March, 1877, which contract was for boilers to be furnished by said Company to the Navy Department of said United States, as specified in said contract, and that a suit for the recovery of the same will be commenced immediately.

Very respectfully,
Timothy Davis,
Agent and Attorney in Fact for the South Boston Iron Company.

Riggs House, Washington, D. C.,
March 30th, 1880.

Hon. Secretary of the Navy,

Sir: I had the honor on the 24th inst. to communicate to you the claim and intentions of the South Boston Iron Company under the contracts made by your predecessor with said Company for boilers on or about the 7th and 10th of March, 1877.

I have received no acknowledgment of the receipt of said communication by you, and I have now respectfully to inquire if said communication reached you, and if you have any views to express as to said Company's claim for damages, before the commencement of a suit, as indicated in my said letter of the 24th instant.

Very Respectfully, Your Ob't Servant,
Timothy Davis,
Agent South Boston Iron Company.

Navy Department,
Washington, March 30th, 1880.

Sir: Your letter of the 24th inst. and your [42] letter of this date have been received.

Very Respectfully,
R. W. Thompson,
Secretary of the Navy.

Timothy Davis, Esq.,
Ag't South Boston Iron Co.,
Washington.

Claimant's petition was dismissed, the court of claims holding that such correspondence did not constitute a compliance with the provision of the statute then in force requiring all contracts made with the Secretary of the Navy "to be reduced to writing and signed by the contracting parties, with their names at the end thereof" and was therefore void. Claimant thereupon appealed to this court.

Mr. **John C. Fay**, for appellant.

Mr. John Goode, Solicitor-Gen., for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In *Clark* v. *U. S.*, 95 U. S. 539 [Bk. 24, L. ed. 518] it was decided that, to bind the United States, contracts by the Navy Department must be in writing, and signed by the contracting parties. Such, in the opinion of the court, was the effect of the Act of June 2, 1862, 12 Stat. at L. 411, chap. 93, now in force as §§ 3744–3747 and 512–515 of the Revised Statutes. An effort has been made in this case to show a contract in writing, but we agree entirely with the court of claims that the papers relied on for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound. Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[231]

QUIN BOHANAN, *Plff. in Err.*,
v.
STATE OF NEBRASKA.

(See S. C. Reporter's ed. 231-233.)

Jurisdiction.

The Supreme Court of a State having denied a claim of immunity specially set up under Article V of Amendments to the Federal Constitution, this court has jurisdiction to review that decision.

On motion merely to dismiss, the merits of the question on which jurisdiction depends cannot be considered.

[No. 1261.]

Submitted Apr. 12, 1886. Decided Apr. 19, 1886.

IN ERROR to the Supreme Court of the State of Nebraska.

On motion to dismiss.

The plaintiff in error was indicted in a state court of Nebraska, charged with murder in the first degree. Upon trial he was convicted of murder in the second degree. The Supreme Court of Nebraska awarded him a new trial. When his case was remanded to the lower court he was again placed on trial on the same indictment. To this indictment plaintiff in error filed a plea of *autrefois acquit*, as to the charge of murder in the first degree, setting forth the facts of his previous conviction, on said indictment, of murder in the second degree. This plea was adjudged bad by the trial court, for the reason that the former judgment had been set aside at the instance of the plaintiff in error. The question was again presented to the trial court, by way of a request for an instruction to the jury to the effect that, by reason of the previous acquittal, they could not convict the accused of murder in the first degree, which instruction was refused; whereupon the jury convicted this plaintiff in error of murder in the first degree, and the court sentenced him to be hanged. This cause was again taken to the Supreme Court of Nebraska, and these rulings, with other matters, assigned as errors, but the judgment of the lower court was by the supreme court affirmed; whereupon the present writ of error was sued out.

One of the assignments of error in the petition in error before the Supreme Court of the State of Nebraska was as follows:

The said court erred in putting the said defendant twice in jeopardy for the same offense in violation of and in disregard of Article V. of the Amendments to the Constitution of the United States, which provides: "Nor shall any [233] person be subject for the same offense to be twice put in jeopardy of life and limb."

Messrs. Wm. Leese, Atty-Gen. of Nebraska, J. B. Strode, J. C. Watson and *W. R. Kelley*, for defendant in error, in support of motion.

Messrs. Chas. O. Whedon, Chas. E. Magoon and *O. P. Mason*, for plaintiff in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. Bohanan set up specially an immunity from a second trial for the same offense, by reason of Article V. of the Amendments of the Constitution of the United States. This was denied him by the judgment of the supreme court of the State, and we have jurisdiction to review that decision. Upon a motion to dismiss we cannot consider the merits of the question on which our jurisdiction depends, and no motion has been made to affirm.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[58]

GEORGE CASHMAN, *Appt.*,
v.
AMADOR AND SACRAMENTO CANAL COMPANY ET AL.

(See S. C. Reporter's ed. 58-61.)

Jurisdiction of circuit court—dismissal for collusion.

An order of the circuit court dismissing a bill in chancery, on the ground of collusion, affirmed; a written contract having been entered into between the nominal complainant, an alien, and a citizen of the same State with the defendant, which showed in express terms that the action was collusive within the meaning of section 5 of the Act of Congress, March 3, 1875.

[No. 1233.]

Submitted Apr. 5, 1886. Decided Apr. 19, 1886.

APPEAL from the Circuit Court of the United States for the District of California.

Affirmed.

The case is stated by the court.

Mr. A. L. Rhodes, for appellant.

Mr. J. H. McKune, for appellees:

Cited *Williams* v. *Nottawa*, 104 U. S. 209 (Bk. 26, L. ed. 719); *Howes* v. *Oakland*, 104 U. S. 450 (Bk. 26, L. ed. 827); *Detroit* v. *Dean*, 106 U. S. 537 (Bk. 27, L. ed. 300); *Hayden* v. *Manning*, 106 U. S. 586 (Bk. 27, L. ed. 306); *Bernards* v. *Stebbins*, 109 U. S. 341 (Bk. 27, L. ed. 956); *Farmington* v. *Pillsbury*, 114 U. S. 138 (Bk. 29, L. ed. 114).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court dismissing a suit, on the ground that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of that court. The facts are these:

[59]

Cashman, the plaintiff, was an alien, and he owned a tract of 700 acres of land in Sacramento County, California, situated on the Cosumnes River, which it is claimed was injured by the mining *débris* thrown on it in the working of certain mines by hydraulic process. On the 9th of September, 1885, a bill in chancery was filed in the Circuit Court of the United States, in the name of Cashman, against the Amador and Sacramento Canal Company, a California corporation and certain other defendants, all citizens of California, to restrain them from operating their mines so as to allow the *débris* to be deposited on his premises. Subpenas were issued and served on some or all of the defendants, returnable on the second of November. On the return day a motion was made by some of the defendants, and among others the Amador and Sacramento Canal Company, to dismiss the suit for want of jurisdiction, and because it was commenced and prosecuted in violation of the provisions of section 5 of the Act of March 3, 1875. At the hearing of this motion it appeared, by the admission of both parties, that the County of Sacramento and Cashman had, on or before the 6th of October, 1885, entered into a contract in writing of which the following is a copy:

"Whereas, the County of Sacramento desires to restrain the miners working by hydraulic process on the Cosumnes River and using the bed thereof as a place for the deposits and wastage of the tailings and *débris* from their mines; and whereas, it is desired to bring such suit in the Circuit Court of the United States for the District of California and in the Ninth Circuit; and whereas, George Cashman has brought, or is about to bring, such suit in said circuit court against the miners working on the Cosumnes River by hydraulic process; and whereas, the County of Sacramento is directly interested in the said suit and in the subject matter of litigation, and the same is brought for its benefit, the county being unable to sue in such court; and whereas, the County of Sacramento, by a resolution duly passed by its board of supervisors on the 22d day of September, 1885, has agreed to pay the costs and expenses of such suit, and to keep the said George Cashman safe and harmless from all counsel fees, costs and charges to be paid or incurred therein:

[60]

"Now, therefore, this contract and indenture, made in pursuance of said resolution between the County of Sacramento, the party of the first part, and George Cashman aforesaid, party of the second part, witnesseth: That the party of the first part, the said County of Sacramento, does hereby stipulate, covenant and agree to supply the said George Cashman with the services of competent attorneys, to wit: A. L. Rhodes, S. C. Denson and Robert T. Devlin, to institute, conduct, and manage such suit; and does further covenant and agree to pay all the charges, costs and expenses thereof or connected therewith, and to hold and keep him, the said George Cashman, safe and harmless from any costs, counsel fees, charges or expenses to be paid or incurred in the institution, conduct and prosecution of the said suit.

"The said George Cashman, the party of the second part does hereby stipulate, covenant, and agree not to compromise, dismiss or settle the said suit without the consent of the County of Sacramento, and to allow the said county and the attorneys aforesaid in its behalf to manage and conduct the said suit, to the same extent and in the same manner as if such suit had been commenced by and was prosecuted in the name of the said County of Sacramento.

"In witness whereof the parties hereto—the party of the first by the chairman of its board of supervisors, he being by a resolution of said board passed September 22, 1885, duly thereunto authorized—have hereunto set their hands and seals this 26th day of September, 1885.

"This contract being executed in duplicate, each party retaining one.

[Seal of the Board of Supervisors of the County of Sacramento.]

"County of Sacramento,
"By L. H. Fassett,
Chairman Board of Supervisors.
"Geo. Cashman. [SEAL.]"

[61] Upon this showing, there being nothing against it, the court granted the motion. To reverse an order to that effect this appeal was taken.

It is very apparent from the face of the agreement, on which the right to the dismissal depends, that the suit was originally brought by the County of Sacramento for its own benefit, and that the name of Cashman was used with his consent, because the county could not sue in its own name in the Circuit Court of the United States. The recital shows in express terms that the suit was brought for the benefit of the county because it desired to restrain the miners from depositing the *débris* from their mines in the bed of the river, and it could not sue therefor in its own name in the courts of the United States. For this reason the county provided the attorneys who were to "institute, conduct and manage such suit," and it agreed "to pay all the charges, costs and expenses thereof or connected therewith, and to hold and keep * * * Cashman safe and harmless from any costs, counsel fees, charges or expenses to be paid or incurred in the institution, conduct and prosecution of the suit." And Cashman, on his part, agreed "not to compromise, dismiss or settle the * * * suit without the consent of the county, * * * and to allow the * * * county and the attorneys * * * in its behalf to manage and conduct the * * * suit to the same extent and in the same manner as if such suit had been commenced and prosecuted in the name of the county." From the very beginning the suit was and is in reality the suit of the county, with a party plaintiff "collusively made," "for the purpose of creating a case cognizable" by the Circuit Court of the United States under the Act of March 3, 1875. While, therefore, the "dispute or controversy" "involved" is nominally between Cashman, an alien, and the defendants, citizens of California, it is "really and substantially between one of the counties of California and citizens of that State, and thus not "properly within the jurisdiction" of the circuit court.

The order dismissing the suit is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[68] COUNTY COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, AND WILLIAM HAGAR ET AL., the Judges Thereof, *Plffs. in Err.*,

v.

UNITED STATES, *ex rel.* JOHN T. HILL.

(See S. C. "*Cape Girardeau County Court v. Hill*" Reporter's ed. 68-72.)

Municipal bonds—mandamus—*municipal taxation—power of Legislature—repeal of statute.*

1. Where bonds were issued by a municipal corporation under a statute requiring a levy or special tax on real estate for their payment and the Act is subsequently so amended as to require personal property to be included within the levy, a holder of the bonds overdue is entitled by proper proceedings to a writ of mandate directing the levy of the tax on both species of property.

2. The Act passed March 10, 1871, by the Legislature of Missouri amending the Act of March 23, 1868, entitled "An Act to Facilitate the Construction of Railroads in the State of Missouri" was not repealed until the passage of the Act of March 24, 1885. The omission of the Act of March 10, 1871, from the Revised Statutes did not operate as a repeal.

[No. 215.]

Argued Apr. 7, 1886. Decided Apr. 19, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

The case is stated by the court.

Mr. **R. B. Oliver,** for plaintiffs in error:

The contract between the taxpayers of Cape Girardeau Township and the relator herein was to the effect that their real estate alone in said township should be charged with the payment of said bonds, and that the personal property therein situate should not be charged for the payment of any part of the same. With this contract in their face a majority of those voting on the proposition voted for the issuance of said bonds. Such was the construction placed upon this Act by the Supreme Court of Missouri at about the time the bonds in this suit were issued.

Missouri, ex rel. N. M. Cent. R. R. Co. v. *Linn Co. Ct.* 44 Mo. 511.

The principle is identical with that rule of law authorizing a city to assess benefits to the owners of lots fronting on streets, and with the creation of draining districts to relieve swamps, marshes and other low lands of their stagnant water.

The assessment is usually made with reference to the benefit to property; and it is difficult to frame or to conceive of any other rule of apportionment that would operate so justly and equally in all like cases.

Uhrig v. *St. Louis*, 44 Mo. 458; *Egyptian Levee Co.* v. *Hardin*, 27 Mo. 495; Cooley, Const. Lim. pp. * 506, 7, 10, 11, and cases cited. Sedgw. Stat. & Const. Lim. 512-3, 554, 557.

The State, through its Legislature of 1868, authorized the taxpayers of Cape Girardeau Township to enter into a contract with the holders of its bonds, upon the express condition that if said township would assist in building a railroad, a benefit to the public, the State would guaranty that their real estate alone should be taxed and that their personal property should not be so taxed.

Cooley, Const. Lim. * 278, and cases cited; *Sloan* v. *Pacific R. R.* 61 Mo. 24.

That the Legislature of a State can surrender its sovereign power to tax certain property, rights, or franchises is not an open question.

Dartmouth Coll. v. *Woodward*, 4 Wheat. 518 (17 U. S. bk. 4, L. ed. 629).

In *Murray* v. *Charleston*, 96 U. S. 432 (Bk. 24, L. ed. 470), this court in substance said: a Legislative Act which assumes to repeal any tax law in force when relator's bonds were issued, and under which he was entitled to enforce payment, is, as to him, unconstitutional and void.

Here the municipality does not seek to

avoid what it has expressly promised, but in attempting by *mandamus* to compel the County Court to levy a tax on the personal property of the township, the creditor endeavors to make property liable to pay a debt the municipality expressly promised should not be so made liable.

The Act of 1871, if construed to make the personal property of Cape Girardeau Township liable for a debt voted with reference to the realty of the township alone, is in effect the establishment of a pecuniary demand against the personal property of the citizens of that municipal township without their consent, a consent expressly required by the State Constitution.

See *Hampshire* v. *Franklin*, 16 Mass. 76–84, cited in Cooley, Taxation, p. 484.

The power to force taxation upon the people for objects not within the ordinary scope of local government is also denied in Maine, Wisconsin, Michigan, Kansas and Illinois.

Cooley, Tax. p. 484.

Messrs. **J. B. Henderson** and *James M. Lewis*, for defendant in error:

The power of the Legislature to pass the amendatory Act of March 10, 1871, subjecting personal property to the payment of a pre-existing debt is fully settled by the adjudications of the Supreme Court of Missouri.

Hannibal, etc. R. R. Co. v. *State Bd. Equalization*, 64 Mo. 294; *St. Louis* v. *Clemens*, 52 Mo. 133; *Glasgow* v. *Rowse*, 43 Mo. 479; *St. Louis* v. *Mfrs. Bank*, 49 Mo. 574; *St. Joseph* v. *Hannibal & St. J. R. R. Co.* 39 Mo. 476; *State* v. *Dulle*, 48 Mo. 282; *Northern Mo. R. R. Co.* v. *Maguire*, 49 Mo. 490; *State* v. *St. Louis Co. Ct.* 34 Mo. 546.

The rulings of the Missouri Court are sustained on principle by the decisions of this court.

McCulloch v. *Md.* 4 Wheat. 428 (17 U. S. bk. 4, L. ed. 606); *Pittsburg, Ft. W. & C. R. R. Co.* v. *Pa.* 15 Wall. 326 *note* (82 U. S. bk. 21, L. ed. 189); *Bank* v. *New York*, 2 Black, 631 (67 U. S. bk. 17, L. ed. 451); *Veazie Bank* v. *Fenno*, 8 Wall. 533 (75 U. S. bk. 19, L. ed. 482). See also, *Trustees of Cass v. Dillon*, 16 Ohio St. 88; *Taylor* v. *Thompson*, 42 Ill. 9; *Briscoe* v. *Allison*, 43 Ill. 291; *Ahl* v. *Gleim*, 52 Pa. 432; *Dunnovan* v. *Green*, 57 Ill. 63; *John* v. *Cincinnati, R. & Ft. W. R. R. Co.* 35 Ind. 539; *Commonwealth* v. *Commr.* 40 Pa. 348.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a proceeding by *mandamus* commenced in the Circuit Court of the United States for the Eastern District of Missouri. The information is based upon a judgment obtained by the relator in that court April 7, 1881, for the sum of $6,659.80, the amount of certain past due coupons of bonds issued by the County of Cape Girardeau, in that State, for the payment of a subscription made by the township of the same name to the capital stock of the Cape Girardeau and State Line Railroad Company. The authority for making the subscription and issuing the bonds was a popular vote at a township election held on the 18th of April, 1869, under a statute of March 23, 1868, entitled "An Act to Facilitate the Construction of Railroads in the State of Missouri." Laws Mo. 1868, p. 92. The first section of that Act prescribes the condition upon which such elections could be ordered by the county court, and requires coupon bonds to be issued, in payment of any subscription voted, "if it shall appear, from the returns of such election, that not less than two thirds of the qualified voters of such township voting at such election are in favor of such subscription." By the second section it is made the duty of the county court, from time to time, in order to pay any subscription so voted, or [69 the interest and principal of any bond issued on account of such subscription, to "levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the *real estate* lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

By an Act passed March 10, 1871, the second section of the last mentioned statute was so amended as to require this special tax to be "levied on all the real estate *and personal property, including all statements of merchants doing business* within the said city, town, township or county, lying and being within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes; *Provided, however*, that no county, city, town or township shall ever in the aggregate subscribe a sum exceeding 10 per cent of the last annual assessment within said county, city or township." Laws Mo. 1871, p. 55.

It is averred in the information that a demand was made upon the County Court and the judges thereof to pay the said judgment, interest and costs, or that they levy and cause to be collected upon the real estate and personal property in the township subject to taxation, including merchants' licenses, a tax according to law for the purpose of paying the said judgment, interest and costs; that such demand was refused; and that the county has no property out of which the judgment, interest and costs can be made.

The return of the alternative writ of *mandamus* admits the right of the relator to a levy of a tax upon the real estate in the township; but to so much of the information as seeks to compel a levy upon personal property and merchants' licenses, the county makes the following defense: That the Act of March 10, 1871, was repealed by the General Assembly of Missouri in 1879, before the relator obtained his judgment; and that the County Court has not had since such repeal, and has not now, any authority to levy taxes upon personal property or merchants' licenses in the Township of Cape Girardeau for the purpose of paying relator's judgment.

Upon the final hearing of the cause, it was [70 ordered that the County Court, within thirty days after being served with a copy of the order, shall cause to be paid whatever amount of money may be in the treasury of the county to the credit of the township, applicable to the payment of the judgment herein; "said amount being whatever sum has not been heretofore paid on judgments and writs thereunder, *pro rata*, rendered upon coupons for which taxes have been collected for the coupons due of the same year, from which said judgments and writs, if any other than the relators in this case,

unless of equal date therewith, are to be excluded in said *pro rata* computation."

It was further ordered and adjudged that, in default of the payment of the full amount of the principal, interest, and costs, the County Court "cause to be levied and collected, in the same manner as county taxes are levied and collected, a special tax to be assessed and levied on all the real estate and personal property lying and being within the Township of Cape Girardeau, in the said County of Cape Girardeau; and including all statements of merchants doing business within said township, for the purpose of paying the judgment of relator, or so much thereof as may remain unpaid at the time of making said levy, together with interest and costs;" that the levy so ordered and directed be made at the time of making the annual levy of taxes for state and county purposes in the year 1883; that the said special tax be extended on the regular tax book for said year, in a separate column on said book; and that it "cause the collection of said tax by suit, distraint, or otherwise, as by law required, and when collected to pay the same to the relator or his attorney of record."

From that judgment the present writ of error [71] has been prosecuted.

The plaintiffs in error concede, as they must have done, that the coupons upon which the relator obtained judgment are, in view of the decisions of this court, obligations which may be enforced by suit against the county. If any question could have been made as to their validity, it is concluded by the judgment which is the foundation of the present proceeding. The only question now before us is, whether the relator is entitled to have a tax levied upon any property other than real estate lying within the township. In behalf of the plaintiffs in error it is contended that, as the Act of 1868 only required a tax to be levied on real estate, it was beyond the power of the Legislature by subsequent enactment, after the bonds were issued, to subject any property other than real estate to taxation for the purpose of meeting this liability of the township. Such legislation, it is claimed, is in violation of the prohibition, found in both the National and State Constitutions, of laws impairing the obligations of contracts. This position cannot be maintained. There was not, within the meaning of such prohibition, any contract between the State and the township in respect either of the subscription which the latter voted, or of the bonds issued in its behalf. The township being a part of the civil government of the State established for public purposes, the powers conferred upon it were at all times subject to legislative control or modification—at least to such as was not inconsistent with the contract rights of third parties. But for the provision in the State Constitution making the assent of the voters of the township, given at an election held for that purpose, a condition precedent to the right of making a subscription, in its behalf, in aid of the construction of railroads, the Legislature could have imposed the tax without submitting the question to popular vote. The provision in the Act of 1868 subjecting real estate to the tax therein authorized was nothing more than an expression of the legislative will, and did not prevent the enlargement, in the discretion of the Legislature, of the subjects of taxation. The township having legally incurred an obligation to pay the bonds in question, it was competent for the Legislature, at any time, to make provision for its being met by taxation upon any kind of property within the township that was subject to taxation for public purposes. [72]

The only remaining point to be considered is whether the Act of 1871 was in force when this proceeding was commenced. We are of opinion that it was. It certainly had not then been expressly repealed. But it is argued that the Legislature refused to incorporate it in the Revision of 1879, and by such refusal indicated a purpose to repeal it. One answer to this argument is that it does not appear that the Legislature so refused. Its express direction, at the regular session of 1879, was that the Revised Statutes, which it then ordered to be prepared, should contain all laws of a general nature in force at the commencement of that session and "not expressly repealed, nor repugnant to the provisions" of any Act passed at that session, "and continued in force by their own provisions." Rev. Stat. Mo. 1879, § 3154. It was further declared that "All Acts or parts of Acts of a general nature, in force at the commencement of the present session of the General Assembly, and not repealed, shall be and the same are hereby continued in full force and effect, unless the same be repugnant to the Acts passed or revised at the present session." § 3161. It is not claimed that the Act of 1871 was repugnant to any Act passed at the session of 1879, when the revision was set on foot; and as it had not then been "expressly repealed," it results that it was continued in full force. And this seems to have been the view of the Legislature at a subsequent session; for, by an Act passed March 24, 1885, after the judgment below, the Act of March 10, 1871, was expressly repealed. We perceive no ground for holding that the Act of 1871 was repealed prior to the passage of the Act of 1885.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HORACE S. JOHNSTON, *Plff. in Err.*, [19]

v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 19-22.)

Municipal corporation—construction of sewers—liability of corporation to private parties—judicial and ministerial acts.

1. The acts of municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted, are simply ministerial duties, for the negligence of which the municipality may be sued by a person whose property is thereby injured.

2. In an action against a municipality by an owner of a house and land for damages thereto from an overflow from a sewer alleged to have been knowingly constructed and continued upon an unreasonable and defective plan and of inadequate capacity

for its purpose, and wrongfully permitted to become choked up, evidence was inadmissible of what, in the case of a freshet, or of a great fall of rain, would be the consequence of the difference in level between the sewer in question and another sewer connecting with it, offered with a view of showing that the plan on which the sewer had been constructed had not been judiciously selected. The evidence was incompetent as showing the plan of drainage to be injudicious and insufficient, and immaterial upon the question of negligence in the construction or repair of the sewer, or that it created a nuisance.

[No. 188.]

Argued Mar. 23, 24, 1886. Decided Apr. 19, 1886.

IN ERROR to the Supreme Court of the District of Columbia. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action against the District of Columbia by a citizen and taxpayer in Washington, to recover damages caused to his house and land fronting on Missouri Avenue, in the summer of 1877, by the overflow of foul water from a sewer in that avenue, which the declaration alleged that the defendant knowingly constructed and continued upon an unreasonable and defective plan, and of inadequate capacity for its purpose, and wrongfully permitted to become choked up. The defendant denied its liability.

The plaintiff's bill of exceptions stated that he testified that at the time alleged his house and land were overflowed and injured by foul water from this sewer; that he noticed that the water in the avenue was very deep; and that he never saw or knew of any flooding or overflow of the avenue or of his property until the sewer was constructed. The rest of the bill of exceptions was as follows:

"And to sustain further the issues joined, the plaintiff put upon the stand, as his witness, Benjamin Severson, a citizen of Washington, and an engineer by profession, who testified to the Tiber sewer being two feet lower at its base than the Missouri Avenue sewer where they meet each other; and being asked by the counsel for the plaintiff what, in his opinion, the consequence would be in case of a freshet or great fall of rain, the question was objected to by the counsel of the defendant, unless the counsel for the plaintiff stated his object in asking such question; and thereupon it appeared that it was asked with the view of showing by that witness that the plan on which the sewer had been constructed by the authorities of the [20] District had not been judiciously selected; and thereupon the testimony was objected to, and the court after argument, sustained the objection, to which ruling the plaintiff's counsel excepted."

The jury returned a verdict for the defendant, the exceptions were overruled by the court in general term, and the plaintiff sued out this writ of error.

Mr. **Frank T. Browning**, for plaintiff in error:

Whether the defendant should lay a sewer or not in front of plaintiff's premises, may be held to be a matter of discretion, and in determining that question, its officers may be said to be acting judicially; but having determined to lay one, their acts as to the plan thereof, and its construction in accordance therewith, are ministerial.

Barton v. *Syracuse*, 36 N. Y. 54; *Evansville* v. *Decker*, 84 Ind. 325; *City of Dixon* v. *Baker*, 65 Ill. 518; *Weiss* v. *City of Madison*, 75 Ind. 241; *Ashley* v. *Port Huron*, 35 Mich. 296; Cooley, Torts, 580; *Cummins* v. *City of Seymour*, 79 Ind. 491.

The skill and care which is incumbent relates as well to the capacity of the sewer as to the mechanism in its construction; as well to its plan as to its execution.

Indianapolis v. *Huffer*, 30 Ind. 235; *Logansport* v. *Wright*, 25 Ind. 512; *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463. See especially *Weiss* v. *City of Madison*, 75 Ind. 241; *Weightman* v. *Washington*, 1 Black, 39 (66 U. S. bk. 17, L. ed. 52).

Messrs. A. G. Riddle and **H. B. Davis**, for defendant in error:

Cited, *Mills* v. *Brooklyn*, 32 N. Y. 489; *Child* v. *Boston*, 4 Allen. 41; *Wilson* v. *New York*, 1 Denio, 599; *Carr* v. *Northern Liberties*, 35 Pa. St. 324, approved by Sharswood, *J.*, in *Grant* v. *Erie*, 69 Pa. 423; *Detroit* v. *Beekman*, 34 Mich. 125; *Van Pelt* v. *Davenport*, 42 Iowa, 308; Dill. Mun. Corp. 3d ed. §§ 949, 966, 980, 997, 1041, 1043, 1044, 1046–1051; *Roll* v. *Indianapolis*, 52 Ind. 547; *Rosell* v. *City of Anderson*, 91 Ind. 591; *Fair* v. *Phila.* 88 Pa. 309; *Foster* v. *St. Louis*, 71 Mo. 157; *Hines* v. *Lockport*, 50 N.Y. 238; *Urquhart* v. *Odgensburgh*, 91 N. Y. 67; *S. C.* 97 N. Y. 288; *Lansing* v. *Toolan*, 37 Mich. 152; *Ashley* v. *Port Huron*, 35 Mich. 296. See Dill. Mun. Corp. § 1047, note 1, p. 1074; *Emory* v. *Lowell*, 104 Mass. 13, pp. 15, 16; *Merrifield* v. *Worcester*, 110 Mass. 216, 221; *Hill* v. *Boston*, 122 Mass. 344, 358, 375.

Mr. Justice **Gray**, after stating the case as above reported, delivered the opinion of the court:

The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi [21] judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured.

The principal decisions upon the subject are collected in the briefs of counsel, and generally, if not uniformly, support these propositions. The leading authorities are the judgments of the Supreme Judicial Court of Massachusetts, delivered by *Mr. Justice* Hoar, in *Child* v. *Boston*, 4 Allen, 41, 51–53, and of the Court of Appeals of New York, delivered by *Chief Justice* Denio, in *Mills* v. *Brooklyn*, 32 N.Y. 489, 495–500.

In *Barnes* v. *District of Columbia*, 91 U. S. 540, 556 [Bk. 23, L. ed. 440, 445], it was said

that in *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463, "The city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held to be an act of negligence." But this was clearly a mistake; for in the *Rochester Case* the fact was distinctly found that the insufficiency of the culvert to carry off the water was owing, not merely to the smallness of its size, but to "the want of skill in its construction;" 3 N. Y. 465; and the case was distinguished on that ground in *Mills* v. *Brooklyn*, 32 N. Y. 499. The question in judgment in *Barnes* v. *District of Columbia*, as well as in *Weightman* v. *Washington*, 1 Black, 39 [66 U. S. bk. 17, L. ed. 52], was of municipal liability, not for an injury to property by a sewer, but for a personal injury to a traveler by a want of repair in the highway, a question not now before us. In *Barton* v. *Syracuse*, 36 N. [52] Y. 54, also cited for the plaintiff, the ground of action was not the plan of constructing the sewer, but the neglect to keep it in repair.

In the present case, the only evidence offered by the plaintiff, which was excluded by the court, was evidence of what, in the case of a freshet or of a great fall of rain, would be the consequence of the difference in level between the sewer in question and another sewer connecting with it; and this evidence, as the plaintiff's counsel avowed, was offered "with the view of showing that the plan on which the sewer had been constructed by the authorities of the District had not been judiciously selected."

The evidence excluded was clearly inadmissible for the only purpose for which it was offered. As showing that the plan of drainage was injudicious and insufficient, it was incompetent. As bearing upon the question whether there was any negligence in the actual construction or repair of the sewer, or the question whether the sewer was so constructed as to create a nuisance upon the plaintiff's property, it was immaterial. The instructions given to the jury are not reported and must be presumed to have been accurate and sufficient.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[49] MEXICAN NATIONAL CONSTRUCTION COMPANY, *Plff. in Errr.*,

v.

GUILLAME REUSENS.

(See S. C. Reporter's ed. 49-54.)

Practice—security on supersedeas.

A motion to require plaintiff in error to furnish additional security, not because plaintiff's condition has changed since the security was taken, but because another surety ought to have been required before the attachment was discharged, will not be granted, as this was one of the facts existing at the time the security was accepted, and not open to consideration on review.

[No. 980.]

Submitted Apr. 12, 1886. Decided Apr. 23, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. Motion for additional security on the *supersedeas*. *Denied.*

This action was commenced in the Supreme Court of the State of New York, in February, 1884, by the defendant in error against the plaintiff in error, to recover a sum of money.

On or about the 6th day of February, 1884, the defendant in error obtained a warrant of attachment against the property of the plaintiff in error; and the sum of $80,000, then on de- [50] posit in the American Exchange National Bank to the credit of the plaintiff in error, was levied on by the sheriff to secure said claim, interest and costs.

On or about the 20th day of February, 1884, the plaintiff in error served an undertaking, for the purpose of discharging said attachment, pursuant to sections 687 and 688 of the Code of Civil Procedure of the State of New York.

The undertaking given by the plaintiff in error in this case was not an undertaking with two sureties as provided in section 688 of the New York Code, but was one executed by the Fidelity and Casualty Company of New York, pursuant to the Act of the Legislature of the State of New York, passed June 13, 1881, being chapter 486 of the Laws of 1881, entitled "An Act to Facilitate the Giving of Bonds Required by Law."

It was allowed by one of the justices of the Supreme Court of the State of New York, against the protest and objection of the plaintiff in error on or about the 23d day of February, 1884.

The Fidelity and Casualty Company of New York, that gave this undertaking, did so under a special rule of the Supreme Court of the State of New York, adopted by said court after the passage of the above Act of 1881.

Thereafter a general demurrer to the complaint of the plaintiff in error was interposed by the defendant in error; and when the issues of law raised thereby, were upon the day calender of said supreme court for trial, the case was removed into the Circuit Court of the United States for the Southern District of New York upon the petition of the plaintiff in error.

On or about the first day of December, 1884, an argument was had upon the demurrer before the circuit judge, and he rendered a decision in favor of the defendant in error upon said demurrer, but granted leave to the plaintiff in error to answer the said complaint. *Reusens* v. *Mexican N. Const. Co.* 22 Fed. Rep. 522.

Thereafter the plaintiff in error answered the complaint, and on or about June 3, 1885, the action was tried, and a verdict was rendered in favor of the defendant in error for the sum of $27,708.05, and on or about August 12, 1885, judgment was entered against the plaintiff in error for the sum of $28,062.86.

Subsequently a writ of error was allowed, and a citation was issued to the defendant in error, returnable on the second Monday of October, 1885.

The bond which was given by the plaintiff in error and approved at the time the writ of error was allowed, is a bond with two sureties in the sum of $5,000.

Mr. **Michael H. Cardozo**, for defendant in error in support of motion.

Messrs. **Joseph H. Choate** and **T. F. H. Meyer**, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied on the authority of *Jerome* v. *M'Carter*, 21 Wall. 17 [88 U. S. bk. 22, L. ed. 515]. Neither the circumstances of the case, nor of the parties, nor of the sureties on the bond have changed since the security was taken. All these things are now as they were then.

We do not understand the case of *Nichols* v. *MacLean*, 98 N. Y. 458, to decide that the guaranty by the Fidelity and Casualty Company of New York, of the undertaking of the Mexican National Construction Company for a discharge of the attachment, is void because signed by one surety and not by two, but only that it need not have been accepted by the judge as [54] sufficient security. It was accepted, however, and the attachment was discharged. It stands, therefore, as security for the payment of the judgment, and the judge, when he took the *supersedeas* bond, acted with reference to a judgment which was "otherwise secured" within the meaning of Rule 29, and could be governed accordingly. The present motion is not made because the condition of the Fidelity Company has changed since the security was taken, but because another surety ought to have been required before the attachment was discharged. This was one of the facts existing at the time the security was accepted, and, therefore, under the rule in *Jerome* v. *M'Carter*, not open to consideration here for the purposes of a review of the action of the judge who fixed the amount.

Denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[73]

CHARLES C. CADMAN, *Appt.*,
v.
WILLIAM PETER.

(See S. C. Reporter's ed. 73-80.)

Conveyance absolute in terms—sufficiency of parol evidence to show that it was intended as security for a debt.

1. If a conveyance is made in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or in a collateral paper, parol evidence to show that it was intended to secure a debt and to operate only as a mortgage must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail.

2. The evidence in the present case examined, and held insufficient to entitle the complainant to relief under the rule.

[No. 224.]

Argued Apr. 13, 14, 1886. Decided Apr. 26, 1886.

APPEAL from the Circuit Court of the United States for the Western District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **C. I. Walker**, for appellant:

Parol testimony is admissible to prove that a deed absolute on its face was intended as a mortgage.

Wadsworth v. *Loranger*, Harr. Ch. 113; *Emerson* v. *Atwater*, 7 Mich. 12; *Tilden* v. *Streeter*, 45 Mich. 533; *Hurst* v. *Barber*, 50 Mich. 612; *Ferris* v. *Wilcox*, 51 Mich. 166; *Russell* v. *Southard*, 12 How. 139 (53 U. S. bk. 13, L. ed. 927); *Babcock* v. *Wyman*, 19 How. 289 (60 U.S. bk. 15, L. ed. 644); *Villa (Alexander)* v. *Rodriguez*, 12 Wall. 323 (79 U. S. bk. 20, L. ed. 406); *Peugh* v. *Davis*, 96 U. S. 332 (Bk. 24, L. ed. 775); 1 Jones, Mort. § 285.

The burden of proof is upon the party seeking to show a deed absolute to be a mortgage, and the testimony must be clear.

Howland v. *Blake*, 97 U.S. 624 (Bk. 24, L. ed. 1027); *Tilden* v. *Streeter*, 45 Mich. 533; 1 Jones, Mort. § 335.

If the evidence shows that in fact the deed was given as security for a pre-existing debt, or for advances made or to be made, or for both, it is to be treated as a mortgage, irrespective of its form.

Whether it was given as security, to use the language of *Judge* Swayne, "is the very hinge of the controversy."

Russell v. *Southard*, *Villa (Alexander)* v. *Rodriguez* and *Peugh* v. *Davis*, *supra;* 2 Jones, Mort. § 1039.

In determining the question whether a deed is to be construed as a mortgage, the adequacy of the consideration is an important element.

Russell v. *Southard*, 12 How. 148 (53 U.S. bk. 13, L. ed. 931), and cases cited; *Peugh* v. *Davis*, *supra*.

So also are the confidential relations between grantor and grantee.

Babcock v. *Wyman*, 19 How. 296 (60 U. S. bk. 15, L. ed. 647).

So also are the necessities of the borrower.

Russell v. *Southard*, 12 How. 158 (53 U. S. bk. 13, L. ed. 935).

A promise to repay is not essential to constitute a deed a mortgage.

Russell v. *Southard*, *supra*, and cases above cited.

The fact that the grantee is to have the entire management of the property does not prevent the deed becoming a mortgage.

Babcock v. *Wyman*, *supra;* *Emerson* v. *Atwater*, 7 Mich. 12.

The cases cited by the district judge to sustain the decree are cases where it was held that the deed was not intended as a security, and they are therefore not applicable.

Baker v. *Thrasher*, 4 Denio, 493; *McCauley* v. *Porter*, 71 N. Y. 177.

If the deed was intended as a security, the right to redeem attaches thereto, even if the grantor at the time agrees to release this right of redemption.

1 Jones, Mort. § 251; 2 Jones, Mort. § 1039.

Messrs. **Harrison Geer** and **Ashley Pond**, for appellee:

A deed absolute in form will not be decreed to be a mortgage, unless the testimony is entirely plain and convincing beyond reasonable controversy.

The complainant must show that the effect *prima facie* due to the deed is not the effect equitably due to it; and unless the proof is entirely clear and convincing, the writing will be held to express correctly the intention of the parties.

Howland v. *Blake*, 97 U. S. 626 (Bk. 24, L. ed. 1027); *Case* v. *Peters*, 20 Mich. 303; *Tilden* v. *Streeter*, 45 Mich. 540.

All parol testimony to establish a trust or to make a conveyance absolute upon its face a mortgage should be clear, and even then should be received with great caution.

Corbitt v. *Smith*, 7 Iowa, 60; *Kent* v. *Lasley*, 24 Wis. 654; *Smith* v. *Crocker*, 71 Ill. 185; *Hyatt* v. *Cochran*, 37 Iowa, 309; *Gardner* v. *Weston*, 18 Iowa, 533; *Noel* v. *Noel*, 1 Iowa, 423.

Under the Statutes of Michigan, and the decisions of its supreme court, trusts in lands cannot be created by parol.

Howell, Ann. Stat. §§ 5569, 5573, 6179; *Newton* v. *Sly*, 15 Mich. 395; *Jackson* v. *Cleveland*, 15 Mich. 94; *Palmer* v. *Sterling*, 41 Mich. 218: *Sanderson* v. *Graves*, 13 Eng. Rep. 364; L. R. 10 C. P. 234.

The allegations of the bill would not, if true, make this deed an equitable mortgage.

In the case of *Baker* v. *Thrasher*, 4 Denio, 493, an agreement similar to the one under consideration, although in writing, was held not to constitute a mortgage.

See also *McCauley* v. *Porter*, 71 N. Y. 173; 41 Cal. 28; 9 Pacific Rep. 547; *Freer* v. *Lake*, 3 West. Rep. 924; 107 Ill. 276.

There is no claim made by Cadman that Peter was guilty of any fraud in obtaining this deed. He claims that the fraud consists in his refusal to execute the trust and that this trust may be established by parol; but this would be a clear violation of the statute.

Rasdall v. *Rasdall*, 9 Wis. 379; *Lathrop* v. *Hoyt*, 7 Barb. 59.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 25th of October, 1875, by a warranty deed, dated and acknowledged on that day, Charles C. Cadman and his wife, of Detroit, Michigan, conveyed to William Peter, of Toledo, Ohio, in fee, land in Newaygo County, Michigan, amounting to $8\frac{1}{16}$ sections, or 5,400 acres, the consideration named in the deed being $20,000. On the same day, by a mortgage dated and acknowledged on that day, Peter mortgaged the same land to Cadman, to secure the payment to Cadman of $10,000 in four months, and $10,000 in six months, from that date, with interest at 8 per cent, according to four promissory notes of $5,000 each, of that date, executed by Peter to Cadman. The deed and the mortgage were both of them recorded in October, 1875.

On the first of April, 1881, Cadman filed a bill in equity against Peter, in the Circuit Court of the United States for the Western District of Michigan, and an amended bill on the 23d of April, 1881. The latter contains the following allegations: About the year 1874 or 1875, Cadman became indebted to Peter in $10,000, for money borrowed, Peter making his two notes, for $5,000 each, with interest at 7 per cent per annum, payable to Cadman, to be by him indorsed, and used to obtain money for Cadman's benefit, which was done. The notes were renewed from time to time, Cadman paying up the accrued interest at each renewal, until October 25, 1875. On that day, Cadman owned the 5,400 acres of land above mentioned, covered [74] with pine timber and valued at upwards of $40,000, and was anxious to procure money, and applied to Peter to furnish him with $20,000 more, and the negotiations with Peter culminated in the following agreement: Peter agreed to loan to Cadman $20,000 more, by making two notes of $10,000 each. Cadman was to execute to Peter a deed of the land, as security for the entire $30,000. Peter was to hold the land until such time as it might be sold at a profit or for a greater sum than could be then realized, and, when such time should come, was to sell the land in the most advantageous manner possible, and out of the proceeds was to pay himself the $30,000, and interest thereon at the rate of 7 per cent per annum, and the taxes which he should have paid on the land, and should divide the surplus, if any, paying over to Cadman one half, and retaining the other half to recompense himself for his labor; trouble and expense in selling the land. Cadman received and used the notes for $20,000, and the transaction was intended to operate as a security from Cadman to Peter for the repayment of the $30,000 and interest, and was so considered by both of the parties. At the time of the agreement and conveyance, the financial affairs of the country were greatly depressed, and land valuable chiefly for its standing pine timber was not in great demand, and both parties knew that an adequate price therefor could not then be obtained, but also knew that within a short time such land would greatly appreciate in value, and that, by continuing to hold the land until it should rise in value, they would be able to dispose of it at a price much beyond $30,000. Cadman had estimates of the timber standing on the land, and alleges that there was upwards of 40,000,000 feet at the time, worth not less than $60,000, and now worth, if none had been cut, from $80,000 to $120,000. During two years last past the property has become valuable, and it could, at any time during the past 18 months, have been readily sold for a sum sufficient to pay all of Cadman's indebtedness to Peter, and all moneys Peter may have expended for taxes. Cadman, on the ——— day of ———, 1878, applied, by letter, from San Francisco, California, to Peter, for an accounting of his doings in the matter, and received a reply that the land had not yet been sold, [75] and consequently no account could be rendered. On the 4th of February, 1881, he again applied to Peter to settle the matter in some way, and Peter then ignored and repudiated the entire transaction, and stated to Cadman that he knew of no unsettled transaction between them, except an indebtedness of $10,000 from Cadman to Peter. Cadman thereafter offered to pay Peter $30,000 and interest, and any sums paid by Peter for taxes or other proper expenses, and requested Peter to release the security, and deed the land back to Cadman. Cadman offers to pay any sum that may be found due from him to Peter. The bill waives an answer on oath. It prays for an accounting as to what is due from Cadman to Peter; and for a decree that the deed was an equitable mortgage, intended by the parties as a security for money loaned and expenses to be incurred about the land, and that Cadman be permitted to redeem the land on paying to Peter the money which shall be found equitably due to him; and that then Peter may be directed to convey the land to Cadman. There is also a prayer for general relief.

The answer contains the following averments Peter made the two notes for $5,000 each, to

the order of Cadman, to enable him to obtain money for his individual benefit, but at an earlier date than that stated in the bill. The land conveyed was not, at the time, valued at $40,000. There were no negotiations between Cadman and Peter which culminated in the agreement set forth in the bill, and Peter never made any such agreement. The deed was not received as security for money. At the time Peter received it the affairs of the country were greatly depressed, and the land was valuable chiefly for the pine timber standing on it and was not in great demand, and an adequate price for it was difficult to be obtained, and this fact was known to both parties, and it was expected by both of them that it would appreciate in value, but that was a matter which should not affect Cadman, as he was in no way to have any interest in the land after the sale and the deed to Peter were made. The property has become valuable since Peter purchased it from Cadman, but he does not hold it to secure any indebtedness from [76] Cadman to him. Cadman did not, at any time in 1878, apply to Peter by letter for an accounting of his doings in the matter, and did not receive a reply that the land had not been sold and consequently no account could be rendered. On the 25th of October, 1875, Peter purchased the land from Cadman for $20,000, the price agreed on between them and which was a fair price therefor at the time, and the sum has long since been paid. After the purchase Cadman never claimed to have any interest in the land until a short time before the bill was filed.

The answer also contains a demurrer to the bill, as not stating a cause of action warranting the relief prayed.

Issue being joined, proofs were taken, and, on a hearing, the bill was dismissed, in June, 1882. The decision (12 Fed. Rep. 368) announced these propositions: The agreement set forth in the bill is inconsistent with a right to redeem, it being stated as an agreement under which Peter was to hold the land until he should sell it, and then share in any profit from the sale. Under that agreement, even if it was valid, the deed cannot be turned into a mortgage, although the execution of the agreement, if valid, might be compelled, when the land could be sold at a considerable profit. If the agreement is obnoxious to the statute which declares that no trust concerning or in any man- [78] ner relating to land shall be created by parol, it cannot be enforced specifically nor employed to turn the deed into a mortgage. The agreement, if valid, would make Cadman a beneficiary under the deed, and create a trust in Peter concerning or relating to land, and, not being in writing and properly signed, is void under the Statute of Frauds.

But the grounds of the conclusion reached were stated thus: under the evidence Cadman is not entitled to relief, conceding the bill to state a good case.

1. The conveyance was absolute on its face, for an expressed consideration of $20,000. To overcome the effect of the deed, and turn it into a mortgage, the evidence must be clear and convincing, beyond reasonable controversy.

2. Peter gave back to Cadman a mortgage, of the same date as the deed, to secure the payment of the notes for $20,000 given for the purchase price. The mortgage was accepted and speaks for both parties, as a contemporaneous writing expressing their intention, and adding to the effect of the deed, as evidence that there was an absolute sale.

3. On January 21, 1876, Cadman wrote to Peter that he had drawn on the latter, at one day's sight, for $5,000, to take up at a bank a note of $5,000 made by Peter, due that day, which Cadman was unable to get extended by renewal. That note and another like it, due that day, were continuations of the $10,000 accommodation notes mentioned in the bill, which were in fact made in 1872. This $10,000 of paper is alleged by Cadman to have been secured by the deed. Peter had sent to Cadman two new notes to retire the two then coming due, and Cadman says, in his letter, that he had lodged one of the new notes as collateral to the draft. The draft, a copy of which is in the record, directs the amount to be charged to Cadman's account. Peter, on January 22, 1876, replied to Cadman thus: "I accepted your draft this morning. What do you think of making a draft on me at one day for $5,000? I do not have the money to pay this draft. This shows for itself how my notes are peddled in Detroit. I have told you before that my credit will suffer from such transactions. You say you did this to save my good name. This is a most cruel assertion to me under the circumstances, as I derive no benefit from it. Let me know at once if I must raise the money to pay this draft. I have $5,000 to pay to your bank the same day. I want you to send me something to show that [79] the two notes and this draft are for your benefit, and for you to pay it in case I should be taken away, which we are all liable to be. My estate should have something to show—in fact, I myself should have it." Peter would not have written thus, if the $10,000 of notes were for him to pay, and if, three months before, Cadman had given him security for the amount; nor would he have asked Cadman to give what he had no right to ask from him. To the above letter Cadman replied, on January 24, 1876: "I am sorely mortified and grieved that this should be the case, but I am entirely powerless to act. I think I can get the money on the other note in time to recall your acceptance. * * * I shall try and get the money, but if I do not, you can draw on me at three days' sight, and I will get the money in meantime on the note. I hardly know what to do. I will do anything in my power. I will send you my notes or anything I have." Cadman would not have acquiesced in Peter's demand for something to show that Cadman was to pay the paper, and that it was all for his benefit, unless Cadman so understood the fact. On January 30, 1876, Cadman having come to the end, wrote to Peter thus: "I return your note, $5,000, herein. I cannot use it, except to discredit you still more. I have resigned; am a ruined man. * * * I owe so much money outside that I cannot stand the pressure. * * * My family have gone into the country to board, and I am ruined and penniless. I console myself, in your case, that the great bargain you made in the Newaygo lands will, in some great measure, compensate you for the loss you must incur, for I cannot take care of the acceptance due early in February." This was an acceptance by Cadman of a draft on him by Peter, drawn January 28, for

$5,000, at three days' sight, to pay the $5,000 draft of Cadman at one day's sight which Peter had accepted January 22. Peter having paid that draft, and there still being one $5,000 note out against him, he would lose $10,000 by Cadman, having the land to represent the $20,000 of notes given for it, which had not matured. This last letter cannot be reconciled with Cad-
[80] man's version of the transaction as to the deed. At such a crisis in his affairs, with the transaction so recent, if he had a beneficial interest in the Newaygo lands, they being, as he now says, then worth $60,000, as against $30,000 of notes from Peter, he would not have dwelt on the great bargain Peter had made, as a matter of congratulation to Peter and consolation to himself, but would rather have taken consolation from the fact that he still had an interest in this valuable property. If the property, ample as Cadman now says it was, even at its value at that time, to secure to Peter the $30,000, was in fact merely a security to Peter for the $30,000, the idea of talking to Peter of loss was absurd. But if Peter owned the lands, had bought them at a bargain, and was likely to make by selling them a profit greater than $10,000, then the loss of the $10,000 by Cadman was properly called a loss to be compensated for out of a profit in selling the Newaygo lands for more than Peter had paid for them.

These are the considerations which induced the circuit court to dismiss the bill. They seem to us of controlling weight. It is not necessary to enlarge on them. The rule in cases of this kind is well settled. If the conveyance is in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or in a collateral paper, parol evidence to show that it was intended to secure a debt, and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. *Howland* v. *Blake*, 97 U. S. 624 [Bk. 24, L. ed. 1027]; *Coyle* v. *Davis*, 116 U. S. 108 [Bk. 29, L. ed. 583]; *Case* v. *Peters*, 20 Mich. 298, 303; *Tilden* v. *Streeter*, 45 Mich. 533, 539, 540.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[120] UNITED STATES, *Plff. in Err.*,

v.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY.

(See S. C. Reporter's ed. 120-126.)

United States as trustee—when not barred by Statute of Limitations.

1. The Federal Government, asserting rights vested in it as a sovereign, is not bound by any statute of limitations unless Congress has clearly manifested its intention that it should be so bound.

2. The right of the United States to sue on bonds and coupons, purchased before the Statute of Limitations had commenced to run against the right of any holder to sue thereon, with money received from the sale of lands ceded to the Chickasaw Nation of Indians, is not barred by the Statute of Limitations of the State of Tennessee.

[No. 231.]

Argued Apr. 15, 1886. Decided Apr. 26, 1886.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee. *Reversed.*

Statement by *Mr. Justice* Gray:

This action was brought July 6, 1880, in the Circuit Court of the United States for the Middle District of Tennessee, upon coupons owned and held by the United States, for interest payable at different dates from July 1, 1861, to January 1, 1866, on bonds made and delivered by the defendant to the State of Tennessee on July 1, 1851, and July 1, 1852, and payable to bearer in thirty years after date.

The defendant filed two pleas: First. That the United States held the coupons, not in its own right as the Government of the United States, but as trustee for certain beneficiaries, namely, the Chickasaw Indians, a nation of people, and that the cause of action accrued to the United States more than six years before this suit was brought. Second. That the United States was the holder of the coupons, not in its own right, but as such trustee, from January 10, 1866, until January 20, 1878, at which last date it ceased to hold them as trustee, and became the owner thereof in its own right; and that the cause of action accrued more than six years before that date.

To each of these pleas the United States filed a demurrer, which was overruled by the court, and issue was joined on the pleas.

By the Treaty of October 20, 1832, between the United States and the Chickasaw Nation of Indians, which provided for the removal of the Chickasaws to the west of the Mississippi, they ceded to the United States all their lands east of the Mississippi; and the United States agreed [121] that those lands should be surveyed and sold, like other public lands, and the proceeds, deducting expenses, paid over to the Chickasaw Nation. The eleventh article of that Treaty contains the following provisions:

"The Chickasaw Nation have determined to create a perpetual fund, for the use of the Nation forever, out of the proceeds of the country now ceded away. And for that purpose they propose to invest a large proportion of the money arising from the sale of the land in some safe and valuable stocks, which will bring them in an annual interest or dividend, to be used for all national purposes, leaving the principal untouched, intending to use the interest alone. It is therefore proposed by the Chickasaws, and agreed to, that the sum to be laid out in stocks as above mentioned shall be left with the Government of the United States, until it can be laid out under the direction of the President of the United States, by and with the advice and consent of the Senate, in such safe and valuable stock as he may approve of, for the use and benefit of the Chickasaw Nation. The sum thus to be invested shall be equal to at least three fourths of the whole net proceeds of the sales of the lands; and as much more as the Nation may determine, if there shall be a surplus after supplying all the national wants." "At the expiration of fifty years from this date, if the Chickasaw Nation shall have improved in education and civilization, and become so enlightened as to be capable of managing so large a sum of money to advantage, and with safety, for the benefit of the Nation, and the President

of the United States with the Senate, shall be satisfied thereof, at that time, and shall give their consent thereto, the Chickasaw Nation may then withdraw the whole or any part of the fund now set apart to be laid out in stocks or at interest, and dispose of the same in any manner that they may think proper at that time, for the use and benefit of the whole Nation; but no part of said fund shall ever be used for any other purpose than the benefit of the whole Chickasaw Nation." 7 Stat. at L. 381, 382, 385.

[122] In the Treaty between the United States and the Chickasaw Indians of May 24, 1834, article 11, "It is stipulated that the Government of the United States, within six months after any public sale takes place, shall advise them of the receipts and expenditures, and of balances in their favor; and also, at regular intervals of six months after the first report is made, will afford them information of the proceeds of all entries and sales. The funds thence resulting, after the necessary expenses of surveying and selling and other advances which may be made are repaid to the United States, shall from time to time be invested in some secure stocks, redeemable within a period of not more than twenty years; and the United States will cause the interest arising therefrom annually to be paid to the Chickasaws." 7 Stat. at L. 454.

By the Treaty of June 22, 1852, article 2, "it is agreed that the remnant of the lands so ceded and yet unsold shall be disposed of as soon as practicable, under the direction of the President of the United States, in such manner and in such quantities as, in his judgment, shall be least expensive to the Chickasaws and most conducive to their benefit." The fifth article of this Treaty is as follows:

"The Chickasaws are desirous that the whole amount of their national fund shall remain with the United States, in trust for the benefit of their people, and that the same shall on no account be diminished. It is therefore agreed that the United States shall continue to hold said fund, in trust as aforesaid, and shall constantly keep the same invested in safe and profitable stocks, the interest upon which shall be annually paid to the Chickasaw Nation; Provided, that so much of said fund as the Chickasaws may require for the purpose of enabling them to effect the permanent settlement of their tribe, as contemplated by the Treaty of 1834, shall be subject to the control of their General Council." 10 Stat. at L. 974, 975.

At the trial the following facts were proved and admitted: The bonds with the coupons annexed, mentioned in the declaration, were purchased in 1852 by the United States, acting as trustee for the Chickasaw Indians, under and [123] pursuant to the Treaties aforesaid, with the trust fund therein mentioned, and were thenceforth held by the United States for the purposes of that trust until on or after July 20, 1878, when the United States, by virtue of the Act of July 20, 1878, chap. 359, 20 Stat. at L. 233, accounted with the Chickasaw Indians for the coupons sued on and interest thereon, and the United States has since claimed title to the same in its own right. The bonds and coupons were at first in the care and custody of the Secretary of the Treasury under authority of law, and afterwards of the Secretary of the Interior under the Act of July 27, 1868, chap. 248, 15 Stat. at L. 222, until after June 10, 1876, when, pursuant to the Act of June 10, 1876, chap. 122, 19 Stat. at L. 58, they were turned over to the Treasurer of the United States, and have ever since been in his custody. The coupons sued on were clipped from these bonds, and have never been paid. The bonds, as well as the coupons payable at later dates, were paid by the defendant as they became payable.

Upon these facts, the circuit court instructed the jury that the plaintiff's right of action was barred by the Statute of Limitations of Tennessee (Code of 1858, § 2775), the jury returned a verdict for the defendant, and the plaintiff excepted to the instruction and sued out this writ of error.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff in error.

Mr. **Edward H. East,** for defendant in error:

If the United States should buy or otherwise become the owner or holder of commercial or negotiable paper already barred by the Statute of Limitations, as between the original parties, its title being derivative, it would get no better right of action than the assignor could give; and it would take the paper subject to all legal defenses existing at the time of the transfer.

U. S. v. *Buford*, 3 Pet. 30 (28 U. S. bk. 7, L. ed. 591); *Lambert* v. *Taylor*, 10 Eng. Com. Law 293, also reported in 4 Barn. & C. 138; Wood, Lim. 90; Ang. Lim. p. 33, § 40.

It is admitted that the United States' right of action cannot be barred by any statute of limitations passed by any State, though it be named therein.

U. S. v. *Thompson*, 98 U. S. 486 (Bk. 25, L. ed. 194).

In all cases in which the United States brings an action in its own name, and solely in its own interest, the maxim *nullum tempus* applies. In all cases in which it brings an action in its own name, nominally as trustee, and it is not the real and sole owner or beneficiary, then the statute does not apply.

Wood, Lim. 91, 92; *Miller* v *State*, 38 Ala. 600; Ang. Lim. pp. 28, 33, § 41; *Moody* v. *Fleming*, 4 Ga. 115.

The maxim *nullum tempus* does not apply in a case in which the overeign or State has some pecuniary interest, and not the entire interest.

U. S. v. *McKenzie*, 2 Brock. 393; *Bank of Tenn.* v. *Dibrell*, 3 Sneed, 380.

In the case presented the only question of any difficulty is whether the relation of the United States to this fund prevented the running of the statutes. That the Government held these bonds and coupons as trustee, for the benefit of the Chickasaw Indians, there can be no doubt. While the United States made the Treaty with the Indians in its sovereign capacity, yet as trustee, collecting and investing the bonds, it was not acting as sovereign, but performing a duty which any citizen may perform. It would be a difficult matter to confound the position of political sovereign with that of a trustee of a fund. The latter nowhere belongs to the duties of a sovereign. A government may accept the position of a trustee, as it may that of a common carrier or a banker; yet whenever it does so, it disrobes itself of its sovereignty, and of the maxims which attach thereto.

It cannot be said that the Indians were the grantees of the Government in any such manner as to bring the case within the principles announced in England, extending the maxim to the grantees of the Crown, as in *Doe* v. *Roberts*, 13 M. & W. 520, and *Lee* v. *Norris*, Cro. Eliz. 331.

The Government did not own the land which constituted the consideration for the trust; it belonged to the Indians. It did not grant the bonds, but bought them as trustee with the surplus funds of the Indians arising from the sale of the lands, and which remained after deducting expenses; and its relation to the fund was that of a pure and simple trustee, and no other.

In all the cases in which the State was the grantor of an equity and held the legal title, and in which it was held that the statute did not run, it was because the State held the relation of grantor or vendor to a vendee, and had promised to convey upon conditions.

[125] *Mr. Justice* **Gray**, after stating the case as above reported, delivered the opinion of the court:

It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound. *Lindsey* v. *Miller*, 6 Pet. 666 [31 U. S. bk. 8, L. ed. 538]; *United States* v. *Knight*, 14 Pet. 301, 315 [39 U. S. bk. 10, L. ed. 465]; *Gibson* v. *Chouteau*, 13 Wall. 92 [80 U. S. bk. 20, L. ed. 534]; *United States* v. *Thompson*, 98 U. S. 486 [Bk. 25, L. ed. 194]; *Fink* v. *O'Neil*, 106 U. S. 272, 281 [Bk. 27, L. ed. 196].

The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States. When the United States, through its lawfully authorized agents, becomes the owner of negotiable paper, it is obliged to give the same notice to charge an indorser as would be required of a private holder. *United States* v. *Barker*, 4 Wash. C. C. 464, and 12 Wheat. 559 [25 U. S. bk. 6, L. ed. 728]; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 392, 393 [41 U. S. bk. 10, L. ed. 774]; *Cooke* v. *United States*, 91 U. S. 389, 396, 398 [Bk. 23, L. ed. 267]. It takes such paper subject to all the equities existing against the person from whom it purchases at the time when it acquires its title; and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the Statute of Limitations. *United States* v. *Buford*, 3 Pet. 12, 30 [28 U. S. bk. 7, L. ed. 585]; *King* v. *Morrall*, 6 Price, 24.

[126] But if the bar of the statute is not complete when the United States becomes the owner and holder of the paper, it appears to us, notwithstanding the dictum of Cowen, *J.*, in *United States* v. *White*, 2 Hill (N. Y.) 59, 61, impossible to hold that the statute could afterwards run against the United States. *Lambert* v. *Taylor*, 4 B. & C. 138; *S. C.* 6 D. & R. 188.

In the present case, the United States bought the coupons sued on, and the bonds to which they were annexed, long before any of them became payable, or the Statute of Limitations had begun to run against the right of any holder to sue thereon. The money with which they were bought was money received by the United States from the sale of lands ceded to it by the Chickasaw Nation of Indians. Those lands, the money received from their sale, and the securities in which that money was invested, were held by the United States, in trust, to be applied for the benefit of those Indians, in performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, the performance of a quasi international obligation; and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United States, like all other property of the Government, for the ordinary public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158 [Bk. 29, L. ed. 845].

The necessary conclusion is that the Statute of Limitations of Tennessee never ran against the right of action of the United States upon these coupons, either while the United States held them in trust for the Indians, or since it has held them for other public uses; and that the decision of the circuit court was erroneous.

This case does not present the question, what effect the Statute of Limitations may have in an action on a contract in which the United States has nothing but the formal title, and the whole interest belongs to others. See *Maryland* v. *Baldwin*, 112 U. S. 490 [Bk. 28, L. ed. 822]; *Miller* v. *State*, 38 Ala. 600.

Judgment reversed and case remanded, with directions to set aside the verdict, and for further proceedings in conformity with law and with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PENNSYLVANIA RAILROAD COMPANY, PENNSYLVANIA COMPANY, PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY CO., CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO., LAKE SHORE & MICHIGAN SOUTHERN RAILROAD CO., *Appts.*, [290]

v.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY, *Appt.*,

v.

INDIANAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 290-321.)

Citizenship of corporations—lease of railroad for ninety-nine years—breach of covenants—equity jurisdiction—power of railroad corporation to lease—to make guaranty contract—construction of charters—Statutes of Illinois—of Indiana—effect of execution of void contract.

*1. In the case of an existing railroad corporation organized under the laws of one State, which is authorized by the laws of another State to extend its road into the latter, it does not become a citizen of the latter State by exercising this authority, unless the statute giving this permission must necessarily be construed as creating a new corporation of the State which grants this permission.

2. Where a lease of a railroad for ninety-nine years contained covenants for the payment of monthly installments of rent, to keep the road in repair, and to keep accounts of all matters connected with its business, as affecting the amount of rent to be paid, which covenants were guarantied by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for specific performance of the obligations of the lease. In such a case a suit at law on each installment of rent as it falls due is not an adequate remedy.

3. Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to run and operate such road, property and franchises of the first corporation. Such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter. Thomas v. Railroad Co. Bk. 25, reaffirmed.

4. The Act of the Illinois Legislature of February 12, 1855, is a sufficient authority on the part of the St. Louis, Alton and Terre Haute Company to make the lease sued on in this case.

5. But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract is void as to it; and if the other Companies had no power to guaranty its performance, it is void as to them, and cannot give a right of action against them.

6. An examination of the Statutes of Indiana and of the decisions of its courts fails to show, in the one or the other, any authority for an Indiana railroad company to make such a contract as that between the principal contracting Companies in this case.

8. Nor is any authority found in the charters of any of these guarantying Companies, or of the laws of the States under which they are organized, to guaranty the performance of such a contract as this, with the parties to it and the road which it relates to being outside the limits of these States, and having no direct connection with their roads.

8. The doctrine that acts may be done and property change hands under void contracts which have been fully executed, with which courts will not interfere, is sound; but any relief in such cases must be based on the invalidity of the contract, and not in aid of its enforcement. While the plaintiff in this case might recover in an appropriate action the rental value of the use of its road against the lessee Company, the other defendants who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract.

[Nos. 112, 209.]

Argued Jan. 14, 15, 1886. Decided Apr. 26, 1886.

CROSS appeals from the Circuit Court of the United States for the District of Indiana. *Affirmed as to Indianapolis, St. L. etc. Co. Reversed as to all other defendants.*

The case is stated by the court.

Messrs. **John M. Butler** and **J. E. McDonald**, for the St. Louis, Alton & Terre Haute R. R. Co.

Messrs. **Stevenson Burke, Ashley Pond** and **John T. Dye**, for the Pennsylvania Railroad Company *et al.*

By *Mr. Butler:*

The operating contract of September 11, 1867, is a legal, valid and binding contract.

R. S. Ind. 1881. §§ 3951 3973, 3999, 4000, 4018, 4025, 4089, 3988, and 3967 to 3970 inclusive; 3 Ind. Stat. 420, 421; *Pittsburgh, C. & St. L. R. Co.* v. *Columbus, C. & I. Cent. R. Co.* 8 Biss. 456; *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, B. & M. R. R. Co.* 50 Ind. 85; *Pittsburgh, C. & St. L. R. Co.* v. *Kain* 35 Ind. 291; *Huey* v. *Indianapolis & V. R. R. Co.* 45 Ind. 320; *Aurora & C. R. R. Co.* v. *Lawrenceburg*, 56 Ind. 87; *Indianapolis & St. L. R. R. Co.* v. *Vance*, 96 U. S. 450 (Bk. 24, L. ed. 752, 825); *Archer* v. *Terre Haute & I. R. R. Co.* 102 Ill. 502.

The guaranty contract of September 11, 1867, is a legal, valid and binding contract.

Ohio & Miss. R. R. Co. v. *McCarthy*, 96 U. S. 266 (Bk. 24, L. ed. 693); *Odgensburg & L. C. R. R. Co.* v. *Pratt*, 22 Wall. 123 (89 U. S. bk. 22, L. ed. 827); *Green Bay & M. R. R. Co.* v. *Union S. Co.* 107 U. S. 100 (Bk. 27, L. ed. 413); *Hitchcock* v. *Galveston*, 96 U. S. 351 (Bk. 24, L. ed. 659); Green, Brice's Ultra Vires, 2d ed. p. 90, note "a," and authorities there cited; *Atty-Gen.* v. *Great Eastern R. Co.* L. R. 5 App. Cas. 473; *South Yorkshire R. Co.* v. *Great N. R. Co.* 9 Exch. 55; *Great N. R. Co.* v. *South Yorkshire R. Co.* 9 Exch. 642; Wood, R. Law, Vol. 1, pp. 545, 541, 474, §§ 190, 188, 170 and notes; *Smead* v. *Indianapolis P. & C. R. R. Co.* 11 Ind. 111, 112; *State Bd. of Agriculture* v. *Citizens' St. R. Co.* 47 Ind. 407; *Low* v. *Central P. R. R. Co.* 52 Cal. 60; *Stewart* v. *Erie & Western Trans. Co.* 17 Minn. 372, 373; *Zabriskie* v. *Cleveland, C. C. & I. R. R. Co.* 23 How. 381 (64 U. S. bk. 16, L. ed. 488); *Chicago, R. I. & Pac. R. R. Co.* v. *Howard*, 7 Wall. 412, 413 (74 U. S. bk. 19, L. ed. 117); *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R. Co.* 50 Ind. 115; *Flagg* v. *Manhattan R. Co.* 4 Am. & Eng. R. R. Cas. 158; *S. C.* 20 Blatchf. 142; *Hoyt* v. *Thompson's Exr.* 19 N. Y. 216; *Van Hostrup* v. *Madison City*, 1 Wall. 291 (68 U. S. bk. 17, L. ed. 538).

Both the guaranty contract and the operating contract having been performed by the St. Louis, Alton and Terre Haute Railroad Company; and these companies, parties to these appeals, having for over ten years received the benefits and advantages of these contracts, in procuring for them a continuous line to St. Louis, and the increased business such continuous line brought them, they cannot now be permitted to attempt to evade liability by pleading that the contracts were *ultra vires*. Equity estops them from setting up that defense against either of these contracts.

San Antonio v. *Mahaffey*, 96 U. S. 315 (Bk. 24, L. ed. 816); *Ohio & Miss. R. Co.* v. *McCarthy*, 96 U. S. 267 (Bk. 24, L. ed. 695); *Hitchcock* v. *Galveston*, 96 U. S. 351 (Bk. 24, L. ed. 659); *Nat. Bank* v. *Graham*, 100 U. S. 699 (Bk. 25, L. ed. 750); *Daniels* v. *Tearney*, 102 U. S. 420 (Bk. 26, L. ed. 187); *Gold Min. Co.* v. *Nat. Bank*, 96 U. S. 640 (Bk. 24, L. ed. 648); *Union Nat. Bank of St. L.* v. *Matthews*, 98 U. S. 621 (Bk. 25, L. ed. 188); *Township of Pine Grove* v. *Talcott*, 19 Wall. 678 (86 U. S. bk. 22, L. ed. 227); *Oil Creek & A. R. R. Co.* v. *Penn. Trans. Co.* 83 Pa. St. 166; *Woodruff* v. *Erie R. Co.* 93 N. Y. 609; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Parish* v. *Wheeler*, 22 N. Y. 494; *Behler, Admrx.* v. *German Mut. F. Ins. Co.* 68 Ind. 355; *Bicknell, Admrx.* v. *Widner School Township*, 47 Ind. 505; *Pancoast* v. *Travelers Ins. Co.* 79 Ind. 178; *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R. Co.* 50 Ind. 121, *Bradley* v. *Bal-*

*Head notes by *Mr. Justice* MILLER.

lard, 55 Ill. 413; *Chicago Build. Soc.* v. *Crowell*, 65 Ill. 459; *Darst* v. *Gale*, 83 Ill. 136; *Hamilton & R. Hyd. Co.* v. *Cincinnati, H. & D. R. R. Co.* 29 Ohio St. 341; *Hays* v. *Galoin Gas L. Co.* 29 Ohio St., 340; *Newburgh Petr. Co.* v. *Weare*, 27 Ohio St. 343; *Grant* v. *White*, 42 Mo. 285; Green, Brice's Ultra Vires, 2d ed. note a, pp. 729-749; Wood, R. Law, pp. 491-517, §§ 171, 172, 173 and notes.

Equity looks to the intent rather than to the form, and treats that as done which in good conscience ought to be done.

Pom. Eq. Jur. Vol. 1, p. 378; *Craig* v. *Leslie*, 3 Wheat. 578 (16 U. S. bk. 4, L. ed. 463.)

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Lake Shore and Michigan Southern Railroad Company jointly, as one party, and the Pittsburgh, Fort Wayne and Chicago Railway Company, and its lessee, the Pennsylvania Railroad Company, as the other party, are in equity each bound, severally, for the one half instead of the one third of any and all damages arising from default of the Indianapolis and St. Louis Railroad Company in the performance of the conditions and stipulations of the operating contract of September 11, 1867.

Brooklyn L. Ins. Co. v. *Dutcher*, 95 U. S. 278 (Bk. 24, L. ed. 410); *Philadelphia, W. & B. R. R. Co.* v. *Trimble*, 10 Wall. 382 (77 U. S. bk. 19, L. ed. 948); *Chicago* v. *Sheldon*, 9 Wall. 54 (76 U. S. bk. 19, L. ed. 594); *Zabriskie* v. *Cleveland, C. & C. R. R. Co.* 23 How. 397 (64 U. S. bk. 16, L. ed. 488); *Reissner* v. *Oxley*, 80 Ind. 584; *Willouts* v. *Northwestern M. L. Ins. Co.* 81 Ind. 311; *Ætna L. Ins. Co.* v. *Nezsen*, 84 Ind. 350; *Johnson* v. *Gibson*, 78 Ind. 284; *Aimen* v. *Hardin*, 60 Ind. 122; *Great N. R. Co.* v. *Lancashire & Y. R. Co.* 1 Sm. & G. 81.

By *Mr. Burke:*

The question of the ultimate liability of the guarantors depends upon the corporate power and capacity of an Indiana railroad company by its president and secretary to enter into a contract with a view of promoting its business, by which for a century to come the guarantors undertake that a railroad connecting with one of the guarantors will pay $450,000 per annum, and maintain, equip and operate for that period a railroad running across the State of Illinois, from the east line of the State to East St. Louis on the west line.

We maintain that this contract is in excess of the corporate powers of the several corporations and each of them, parties thereto, and that their officers in entering into such a contract clearly exceeded their authority, and that the lessor company at the time the contract was entered into well knew that the officers of the guarantor companies, in entering into the contract, exceeded their powers, and that the contract was clearly *ultra vires*. This view is sustained by the following considerations:

There is no Statute of Indiana or of any other State authorizing the guarantors or either of them to enter into such a contract.

The Statutes of Indiana under which the guarantors were incorporated, define specifically the powers of railroad companies, and the powers conferred are to construct their roads between the points named in their charters, and maintain and operate them and receive the revenues. To these granted powers may be added such incidental powers as are necessary to the proper and beneficial use and enjoyment of the powers expressly granted; and it has been repeatedly decided by the courts of Indiana and by this court that such corporations possess no other powers.

It is a general rule that corporations without statutory authority cannot enter into contracts as guarantors or sureties for the debt, default or miscarriage of another.

Davis v. *Old Colony R. R. Co.* 131 Mass. 258; *Pearce* v. *Madison & I. R. R. Co.* 21 How. 441 (62 U. S. bk. 16, L. ed. 184); *Madison, W & M. Plank Road Co.* v. *Watertown & P. Plank Road Co.* 7 Wis. 59; *Central Bank* v. *Empire Stone D. Co.* 26 Barb. 23, also 30 Barb. 421; *Bank of Genesee* v. *Patchin Bank*, 3 N. Y. 309; *Ætna Bank* v. *Charter Oak L. Ins. Co.* 50 Conn. 167; *Lafayette, etc. Bank* v. *St. Louis S. Co.* 2 Mo. App. 299.

The amount involved in the guaranty, $45,000,000, and probably as much more for equipping, maintaining and operating the railroad the length of the time, ninety-nine years, the fact that lessor's road was remote from the lines of the guarantors and nearly all, if not all, located in another State, all suggest that such a contract should be entered into only when expressly authorized by statute and by the observance of such formalities, including the approval of stockholders, as the statute requires.

Nothing can be clearer than that the entering into such a contract is not an implied power of a railroad company. It involves the pledge of money and means of the company for purposes not contemplated by its charter, and for a time and to an amount so great as to involve the solvency of the guarantors, and possibly, if not probably, deprive them of the means to maintain and operate their own roads and discharge their duties to the public as common carriers.

It is a rule of universal application where a corporation has undertaken to do that which under no circumstances it has the corporate power to do that the corporation is not bound, and that it may interpose such want of powers as a defense.

Green Bay & M.R.R Co. v. *Union S. Co.* 107 U. S. 100 (Bk. 27, L. ed. 413); *Bank of Augusta* v. *Earle*, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274); *Miners Ditch Co.* v. *Zellerbach*, 37 Cal. 543; *Beach* v. *Fulton Bank*, 3 Wend. 573; *Rock River Bank* v. *Sherwood*, 10 Wis. 230; *Minor* v. *N. Y. & N. H. R. R. Co.* 53 N. Y. 363.

The contract of guaranty is clearly beyond the corporate powers of the guarantors. The power to make such a guaranty is nowhere expressly granted, nor is it implied from any of the granted powers. The only excuse for making such a guaranty was an anticipated increase of business; but as we have seen this will not justify the officers of the company itself in assuming obligations not authorized by its charter. Contracts beyond the corporate powers of a corporation are uniformly held invalid.

Vandall v. *South San F. Dock Co.* 40 Cal. 83; *Bellmyer* v. *Marshalltown*, 44 Iowa, 564; *Weckler* v. *First Nat. Bank*, 42 Md. 581; *St. Louis* v. *Weber*, 44 Mo. 547; *Matthews* v. *Skinner*, 62 Mo. 329; *Brooklyn Gravel R. Co.* v. *Slaughter*, 33 Ind. 185; *East Anglian R. Co.* v. *Eastern*

Co. R. Co. 11 C. B. 775, and 78 Eng. C. L. 775; *Monument Nat. Bank* v. *Globe Works*, 101 Mass. 57; *Chamber* v. *Faltner*, 65 Ala. 454; 50 Ind. 85.

So long as the principle laid down by this court in *Green Bay, etc. R. R. Co.* v. *Union, etc. Co. supra*, is recognized that "The charter of a corporation read in connection with the general laws applicable to it is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation;" the contract in question must be held void. To hold otherwise would conflict with the rule as stated by *Chief Justice* Taney, in *Bank of Augusta* v. *Earle, supra*, "that a corporation can make no contracts and do no acts except such as are authorized by its charter."

To hold the contract binding would conflict with the rule stated in *Thomas* v. *West J. R. R. Co.* 101 U. S. 71 [Bk. 25, L. ed. 950], that corporations possess such powers as are expressly granted, and such incidental powers as are necessary to carry into effect and properly enjoy those which are expressly granted, and that they do not possess any other powers. The power to make a contract that another railroad will, during a century to come pay $45,000,000 of rent, and maintain and operate a railroad during that time cannot be said to be one of the powers incident to the power to construct and operate a railroad under the Statutes of Indiana.

There is nothing in the point that the lessee has enjoyed the use of the railroad, and that, therefore, the guarantors must pay without regard to their power to make the contract.

The answer to this claim is obvious:

1. The occupation of the lessee is referable to the lease, and

2. In all cases where the performance or execution of the contract changes the rights of the parties and creates an obligation upon an executed contract where none existed on an executory contract, the performance or execution must be of the contract itself, to which the party to be charged is a party, and the performance must have been accepted by that party in pursuance of the contract.

In the nature of the case there could not be and has not been any performance by any party of the contract of guaranty. The guarantors are not parties to the lease. They are parties to the contract of guaranty only, and the only thing to be performed by any party to that contract is to pay any damages resulting from the default of the I. & St. L. Railroad Company to pay the rent and maintain and operate the railroad according to the terms of the lease.

The contract of guaranty stands to-day as it did when made. It was then and is now an executory contract to stand as surety or guarantor of another's obligations.

In all cases where performance changes the case the recovery is upon the performance itself, and is in the nature of an action for money or property received.

The guarantors here have received nothing.

By *Mr. Dye:*

The question is whether railroad corporations, under the laws of Ohio and Indiana, have the power to subject their capital, which they hold under their charters for the purpose of maintaining and operating their own roads, and for the benefit of their stockholders and the public, to the liabilities of another corporation incurred in the maintenance and operation of another railroad in another State.

The charter of a corporation, in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond these powers will not sustain an action against the corporation.

Green Bay & M. R. R. Co. v. *Union S. Co.* 107 U. S. 101 (Bk. 27, L. ed. 413); *Pearce* v. *Madison & I. R. R. Co.* 21 How. 441 (63 U. S. bk. 16, L. ed. 184); *Thomas* v. *West Jersey R. R. Co.* 101 U.S. 71 (Bk. 25, L. ed. 950); *Atty-Gen.* v. *Great Eastern R. Co.* L. R. 5 App. Cas. 473; *Davis* v. *Old Colony R. R. Co.* 131 Mass. 258; *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R. Co.* 50 Ind. 112.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where all Acts of incorporation are deemed public Acts; and every corporation organized under general laws is required to file in the office of the secretary of the Commonwealth a certificate showing the purposes for which the corporation is constituted.

Davis v. *Old Colony R. R. Co. supra; Whittenton Mills* v. *Upton*, 10 Gray, 582; *Richardson* v. *Sibley*, 11 Allen, 65; *Pearce* v. *Madison & I. R. R. Co. supra; East Anglian R. Co.* v. *Eastern Counties R.* 11 C. B. 775; *Ashbury R. Carriage and Iron Co.* v. *Richie*, L. R. 7 H. L. 653; *Thomas* v. *West Jersey R. R. Co.* and *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R. Co. supra; Smead* v. *Indianapolis, P. & C. R. R. Co.* 11 Ind. 104.

"It is not within the scope of the authority of a corporation to lend either its funds or its credit to another railroad corporation, as such an act can in no sense be said to come within the contemplation of the Legislature, or to come within the scope of the powers granted to build and operate its own road."

1 Wood, Railway Law, p. 521, § 176 and cases cited; *Stevens* v. *Rutland & B. R. R.* 29 Vt. 545; *Danbury & N. R. R. Co.* v. *Wilson*, 22 Conn. 435; *Davis* v. *Old Colony R. R.*, *Thomas* v. *West Jersey R. R. Co.* and *Pearce* v. *Madison & I. R. R. Co. supra; Colman* v. *Eastern Counties R.* 10 Beav. 1; *Bagshaw* v. *Eastern Union R.* 7 Hare, 114; *East Anglian R.* v. *Eastern Counties R.* 11 C. B. 775; *McGregor* v. *Dover and Deal R.* 18 Q. B. 618; *South Yorkshire R.* v. *Great N. R.* 9 Exch. 55; *Scottish N. E. R.* v. *Stewart*, 3 MacQ. 382; *Eastern Counties R.* v. *Hawks*, 5 H. L. 331; *Smead* v. *Indianapolis P. & C. R. R. Co.* 11 Ind. 104; *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R. Co.* 50 Ind. 112.

"The contract of guaranty in this case was not authorized by the laws of Ohio."

Marietta & C. R. R. Co. v. *Elliott*, 10 Ohio St. 61; *Atkinson* v. *Marietta & C. R. R. Co.* 15 Ohio St. 23; *Ohio & M. R. R. Co.* v. *Indianapolis & C. R. Co.* 5 Am. L. Reg. 733, 741; *Strauss* v. *Eagle Ins. Co.* 5 Ohio St. 59.

The contract of guaranty in this case was not authorized by the laws of Indiana.

See Act of Feb. 23, 1853, 1. G. & H. 526; R. S. 1881, par. 3973; *Pearce* v. *Madison & I. R. R. Co. supra; Smead* v. *Indianapolis P. & C.*

R. R. 11 Ind. 104; *Board of Comrs. of Tippecanoe Co.* v. *Lafayette, M. & B. R. R.* 50 Ind. 112.

Equity has no jurisdiction to enforce a contract of guaranty, where there is neither fraud nor mistake, and there is a full and complete remedy at law.

"Where a corporation has received nothing in money or property, it cannot be held liable upon an agreement to share in or to guaranty the profits of an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it."

Davis v. *Old Colony R. R. Co.* 131 Mass. 275; see, also, *East Anglian R.* v. *Eastern Counties R.* 11 C. B. 775; *McGregor* v. *Dover and Deal R.* 18 Q. B. 618; *Ashbury R. Carriage and Iron Co.* v. *Riche*, L. R. 7, H. L. 668; *Downing* v. *Mt Washington Road Co.* 40 N. H. 230; *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Me. 43.

The contract, as claimed by appellee, is not only void for want of authority, but is illegal because it is against public policy.

Peoria & R. I. R. Co. v. *Coal Valley Min. Co.* 68 Ill. 489; *Thomas* v. *West Jersey R. R. Co.* 101 U. S. 71 (Bk. 25, L. ed. 950).

By the Act of Illinois of March 11, 1869, the property described in the lease of 1867 became that of the Corporation created by that Act as a Railroad Corporation of Illinois, having a separate existence distinct from the Indiana Corporation, and clothed with different powers, and owning different property.

Indianapolis & St. L. R. R. Co. v. *Vance*, 96 U. S. 460 (Bk. 24, L. ed. 752, 825).

[294] *Mr. Justice* **Miller** delivered the opinion of the court:

These are cross appeals from a decree of the Circuit Court for the District of Indiana.

The suit was brought in that court by a bill in chancery, filed by the St. Louis, Alton and Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the State of Illinois, and a citizen of that State, against the Indianapolis and St. Louis Company, a corporation similarly organized under the laws of the State of Indiana, and a citizen of that State, and against the other corporations mentioned in the bill as citizens of Indiana, or of other States than the State of Illinois.

[295] A final decree was rendered in favor of plaintiff for the sum of $664,874$\frac{70}{100}$, with costs, and an injunction against several of the defendants, from which both complainant and defendants in the court below have appealed.

1. The first question arising on the record is that of the jurisdiction of the Circuit Court of the Indiana District as founded on the citizenship of the parties.

This question was raised at an early stage of the controversy by a distinct plea to the jurisdiction, and was overruled by the court. Afterwards, and before the decree, the defendant corporations who had filed this plea withdrew it, and desired to have the case decided on the merits.

As it is not competent to any parties to confer jurisdiction on the circuit court by a waiver of objections to it, the question is one which lies at the threshold of any further proceeding, and must be decided.

The objection arises out of the admitted fact that the Indianapolis and St. Louis Railroad Company is a corporation organized under a Statute of Indiana and is a necessary party to the suit, and the assumption that the St. Louis, Alton and Terre Haute R. R. Co. is organized under laws of both Illinois and Indiana, and is, therefore, a citizen of the latter State, as is its principal opponent in the controversy.

The complainant company owns a road extending from the Mississippi River, opposite St. Louis, to Terre Haute, Indiana, of which only a very few miles—ten or twelve—are within the State of Indiana. The controversy grows out of a lease of this road by the complainant Company to the Indianapolis and St. Louis Company. As the complainant Company was chartered originally by the State of Illinois, and is undoubtedly a citizen of that State, and in that character would have the right to sue the other Companies in the Circuit Court for Indiana, do the other facts in the case defeat this right by making it also a citizen of Indiana?

It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of [296] Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may by the permission of the State of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an Act of the Legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers (to enable it to use and control that part of the road within the State of Indiana) as have been conferred on it by the State which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another State to exercise its functions in the State where it is so received. The latter class of laws is common in authorizing insurance companies, banking companies and others to do business in other States than those which have chartered them. To make such a company a corporation of another State the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the Legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this and does not make it a citizen of the State conferring such powers.

In a case where the corporation already exists, even if adopted by the law of another State and invested with full corporate powers, it does not thereby become such new corporation of another State until it does some act which signi-

fies its acceptance of this legislation and its purpose to be governed by it.

We think what has occurred between the State of Indiana and this Illinois corporation falls short of this.

The origin of this corporation was a special Act of the Illinois Legislature of January 28, 1851, chartering the Terre Haute and Alton [297] Railroad Company to construct a road from the state line near Terre Haute to Alton; and by an Act of the Indiana Legislature, passed a few days later, this Illinois corporation was permitted to extend its road through Indiana to Terre Haute. Some changes took place in the name and power of this company by statutes of Illinois, but none which affected its powers derived from the Indiana Statute of February 11, 1851.

But the property of the corporation was sold out under foreclosure of a mortgage to Robert Bayard, Samuel J. Tilden, Russell Sage, and others, who, under an Act of the Illinois Legislature, reorganized the purchasers into the corporation called the St. Louis, Alton and Terre Haute Railroad Company, which is the present Company, and which, by the Illinois Statute, succeeded to all the franchises of the original Terre Haute, Alton and St. Louis Company. As these included all the powers necessary to operate the few miles of the road in Indiana under the Act of February 11, 1851, it was unnecessary to seek an Act of incorporation from that State. It appears, however, that Bayard, Tilden and their associates, did file in the office of the Secretary of State of Indiana a certificate of the organization of the new Company, with the names of the first directors of it who were to serve until 1868; and it is argued that this made the St. Louis, Alton and Terre Haute Company a corporation of the State of Indiana. A critical examination of this certificate renders it very doubtful whether that was its purpose, but rather indicates that it was intended to secure and perpetuate the rights granted to the Terre Haute and Alton Company by the Act of February 11, 1851. At all events, no evidence exists of the agreement of the new Illinois Company to accept of or act under this attempt at organization under Indiana laws. They never held an election for directors of the Indiana corporation, if one existed, and they never in any other manner recognized the existence of an Indiana corporation of the same name.

Without going into the question whether the plaintiff in this case, if it were clearly a corporation of both States, could maintain this suit in the circuit court under the decisions in this [298] court, we are satisfied that, with reference to its right to sue as a citizen of Illinois, it is not, also, a corporation and citizen of Indiana under the facts found in this record.

As regards the asserted existence of the Indianapolis and St. Louis Company, under the law of Illinois, by which it is asserted to be a citizen of the same State with plaintiff, the objection is the same as that which was overruled in *Chicago & N. W. R. R. Co.* v. *Whitton*, 13 Wall. 270 [80 U. S. bk. 20, L. ed. 571], and in *Muller* v. *Dows*, 94 U. S. 444 [Bk. 24, L. ed. 207].

2. The next objection to the decree is that the bill does not present a case for equitable relief, and should have been dismissed for want of jurisdiction in chancery.

To understand the force of this proposition clearly, it is necessary to make a statement of the case as made by the bill.

It seems that in May, 1867, the St. Louis, Alton and Terre Haute Railroad Company, plaintiff in the bill, had nearly completed and was operating, from Terre Haute to St. Louis by way of Alton, a road about one hundred and eighty-nine miles long. From Terre Haute to Indianapolis (about seventy miles) a corporation had been organized under the laws of Indiana to build a road, and probably had built the whole or a part of it. Indianapolis was then a railroad center of importance, from which roads ran to Chicago and other lake towns, and to Louisville, Cincinnati and other towns on the Ohio River, and to all the principal cities of the Atlantic Coast.

At St. Louis the Terre Haute and Alton road connected with the railroad system west of the Mississippi River.

Several of these railroad companies whose traffic was east of Indianapolis, and all of whom had connection, direct or indirect, with that city, were desirous of reaching St. Louis with their business, and made proposal to the complainant Company for the purpose of accomplishing this result. The companies who executed the agreements to secure this purpose, all of whom were made defendants to the bill, were the Indianapolis, Cincinnati and Lafayette Railroad Company, the Pittsburgh, Fort Wayne and Chicago Railway Company, the Pennsylvania Company, the Bellefontaine Company, the Cleveland, Columbus and Cincinnati Company, and the Cleveland, Painesville and Ashtabula Company.

Their proposition was that the Indianapolis [29 and Terre Haute Company should lease, for a period of ninety-nine years, the part of complainant's road between St. Louis and Terre Haute, and thus with its own road make a continuous line between Indianapolis and St. Louis, and the other companies agreed to guaranty the payment of the rent and performance of the other obligations of the Terre Haute and Indianapolis Company. And it was also agreed that if this company refused to execute this operating contract, the defendants might procure some other company to build the seventy miles of road from Indianapolis to Terre Haute, and execute the agreement in place of the Terre Haute and Indianapolis Company, and in like manner they would guaranty the performance of its obligations in the lease.

What occurred was that the Terre Haute and Indianapolis Company refused to execute the contract of lease, and another corporation was organized, under the influence and control of these guarantying companies, to build the seventy miles of road between Indianapolis and Terre Haute, and the line of road between Indianapolis and St. Louis was thus made complete. This company was called the Indianapolis and St. Louis R. R. Co., and it executed the contract of lease with the complainant company September 11, 1867. At the same time, the guarantying companies, except the Pennsylvania Company, executed a new guaranty as a substitute for the former. The averments of the bill, however, bring in the Pennsylvania

Company as defendant, by alleging that, in its lease of the Pittsburgh, Fort Wayne and Chicago road, it bound itself to perform the obligation of this latter company as one of the guarantors, and that, by signing the original contract of guaranty for the Terre Haute and Indianapolis Company, it bound itself to the same guaranty for any road substituted in its place, and, by the further averment, that the Indianapolis and St. Louis Company, which did enter into the contract of lease, was in reality but the creature of the companies who signed the original contract of guaranty, the Pennsylvania Company included.

[300] This contract of lease between the complainant Company and the Indianapolis and St. Louis Company lies at the foundation of all claim for relief in this suit. It is a carefully drawn instrument of nineteen articles. It leases out complainant's road from St. Louis to Terre Haute, and a short connecting line of four miles to Alton, for the period of ninety-nine years, and it provides for the absolute control of this road by the Indianapolis and St. Louis Company, called party of the first part, during this period; for its being kept in repair by that Company; for the payment of a rent by that Company to the party of the second part, the St. Louis, Alton and Terre Haute Company, which should be regulated by the gross income derived from the use of the road, but in no event to be less than $450,000 per annum.

Some of these articles of agreement and parts of others important to the issues before us are as follows:

"Art. I. The said party of the first part shall, will and may manage, operate and carry on the business of a certain railroad belonging to the party of the second part, and known as the principal or main line of the St. Louis, Alton and Terre Haute Railroad, extending from Terre Haute, in the State of Indiana, to East St. Louis or Illinoistown, in the said State of Illinois, and also a certain branch thereof belonging to the party of the second part, and extending from a point on the said main line to Alton, in the said State of Illinois, for and during the period of ninety-nine years, from the first day of June, in the present year of our Lord one thousand eight hundred and sixty-seven, upon and subject to the terms and conditions of this indenture, and all and singular the provisions herein contained.

"Art. II. The said party of the first part shall and will, within a reasonable time hereafter, finish and put in good order and condition, any and all unfinished portions of said main line of railroad, or of said Alton branch thereof, and any and all parts or portions of either said main line or said branch which may be in inferior condition or out of repair; and thereafter, at [301] all times during the said period of ninety-nine years, the said party of the first part, its successors and assigns, shall and will keep the said main line of railroad, and the said Alton branch thereof, in the order and condition of first class western railroads, making from time to time all needful repairs, replacements, improvements of and additions to the same, at the proper cost and expense of the said party of the first part, without deduction or abatement, from the moneys hereinafter provided to be paid to the party of the second part; and the said party of the first part shall and will expend, for improvements and equipments upon the said line of railroad, in addition to the ordinary expenses of operation, repair and replacement, a sum not less in the aggregate than $500,000 before the thirty-first day of December, in the year one thousand eight hundred and sixty-eight.

"Art. III. The said party of the first part shall, and may, for and during the term aforesaid, use and apply to and for the business of said main line and branch railroads any and all depots, stations, station-houses, car-houses, freight-houses, wood-houses and other buildings, and all machine-shops and other shops, and all depot grounds and other lands adjacent to the said main line and branch railroad, or either of them, or used or acquired for use in connection therewith, including certain depot grounds at East St. Louis aforesaid." * * *

Article V authorizes the lessee Company to fix all rates of fare for freight and passengers, with a provision for the protection of other companies not material here.

"Art. VI. The said party of the first part, keeping and performing all and singular the terms, provisions and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect and receive any and all fares, charges, freights, tolls, rents, revenues, issues and profits of the said main line of railroad extending from [302] Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

"Art. VII. The party of the first part shall, in each and every year of the term of ninety-nine years, pay or cause to be paid to the party of the second part, in the manner and at the times hereinafter provided, 80 per cent of the gross earnings of the said railroad from Terre Haute to East St. Louis, and the branch thereof to Alton, until such gross earnings for such year shall amount to the aggregate sum of $2,000,000, and 25 per cent of any excess over $2,000,000, until the whole earnings for such year shall amount to $3,000,000, and 20 per cent of any excess over $3,000,000 of gross earnings for such year and such percentage of the gross earnings for each such year shall be paid over without any deduction, abatement, or diminution for any cause whatever; every demand or claim accruing or to accrue to the party of the first part being hereby declared to be chargeable on that portion of the gross earnings which the said party is, by the next succeeding article hereof, empowered to retain as therein provided; but it is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least $450,000, which is hereby agreed upon as a minimum for each and every year, and it is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

"Art. XV. The said party of the first part shall and will, during the whole period of ninety-nine years aforesaid, keep just, full and true accounts of any and all business which shall or may be done upon the said main line of railroad, and the said Alton branch thereof, or upon either or any part of either thereof, and of all moneys earned or received from or on ac-

count of such business, and shall render to the [303] party of the second part, monthly during such period, a detailed approximate statement of such business, showing the receipts and disbursements on account thereof, and shall also, annually, to wit: on or before the first day of March in each year, account to and with the party of the second part for any and all moneys earned or received as aforesaid for and during the year terminating with the 31st day of December preceding the time of such accounting, and the president of the party of the second part, or an agent duly authorized by the board of directors, shall at all reasonable hours and times during the term aforesaid, have the right to examine and inspect, and there shall be produced and exhibited to them, any and all books of account wherein shall be entered, or which shall purport to contain, any entry or statement relating to the business done on said main line and branch railroads, or on any part of either thereof during the term aforesaid, and any and all vouchers relating to such business, and shall also have the right to take transcripts from and copies of such entries or statements and of such vouchers."

The following is the contract of guaranty, signed by the other railroad companies on the same day that the foregoing lease was signed by the two principal companies, the reference to the operating contract of the 17th May, 1867, being to the one prepared for the Indianapolis and Terre Haute Company which it refused to execute. The recitals are omitted, and only the language descriptive of the contract of guaranty is given:

"Now, therefore, this indenture witnesseth, That for and in consideration of the premises, and of the sum of one dollar to each of them duly paid, the receipt whereof is hereby acknowledged, the said parties of the first, second and third parts to these presents, for themselves, their successors and assigns, have covenanted, promised and agreed, and by these presents do covenant, promise, agree and guaranty to and with the said party of the fourth part, its successors and assigns, that the said Indianapolis and St. Louis Railroad Company shall and will at all times hereafter keep, observe and perform all and singular the covenants, conditions and provisions of the said operating contract, bearing date on the 17th [304] day of May, in the year of our Lord, 1867, and of the said instrument bearing even date herewith, by which the said Indianapolis and St. Louis Railroad Company has assumed, adopted or become liable to carry out the said operating contract according to the true intent and meaning thereof; *Provided, nevertheless,* That all the obligations of the parties of the first, second and third parts hereto, created or intended to be created hereby, shall be several and not joint, and as to each of them for the equal third part of any and all damages which may arise from any default of the said Indianapolis and St. Louis Railroad Company, its successors or assigns in the premises, or for any breach of this agreement by the said parties of the first, second or third parts thereto."

The bill charges, as violations of the contract of lease, that the Indianapolis and St. Louis Company has for some time past failed to pay the rent as fixed at the minimum of $450,000 per annum; that it is insolvent, and is in many other respects in default in regard to its obligations under the operating contract; that it has not kept the road adequately furnished with equipments, but has allowed it to run down and depreciate, and has resorted to the use of leased cars and equipments, instead of purchasing and owning the same, and the road is not in the order and condition of a first class western road, as required by said contract, and that the money which should go to pay complainant is used to pay for the leased cars; that the rails have become worn and the track out of repair. It is also alleged that the lessee's road is covered by a large mortgage, to secure bonds held chiefly, if not altogether, by the guarantying companies, and, in fact, by means of their ownership of the stock and bonds of that company, they are drawing from it the money which should go to pay complainant's rent and to purchase rolling stock and repair the road. It is then alleged that suits for the installments of rent as they fall due, and judgments at law against all the defendants, would be no adequate remedy That to do this or resume possession and control of complainant's road for nonperformance, would not be sufficient for that purpose. That complainant has a contract with the defendants more valuable than would be the resumption of the possession of the road in its depreciated condition, [30 both in respect to the road and equipments and the traffic over it, so largely diminished by construction of the road of the Indianapolis and St. Louis Company to the Mississippi River at St. Louis by that company, and by the other defendants, on a line nearly parallel to complainant's road, and not far from it.

The prayer for relief is that the Indianapolis and St. Louis Company be required specifically to perform its obligations in all the respects mentioned, and that, in default thereof, the guarantying defendants be required to do so, and that the latter companies be required to perform, by paying such of the installments of minimum rent as the lessee company fails to do as they fall due; that the companies be enjoined from receiving from the Indianapolis and St. Louis Company interest on its bonds held by them while it is in arrears for rent, and also enjoined from selling these bonds· and that a receiver be appointed to take such a per cent of the gross earnings of the company as may be necessary to pay the rent due complainant.

We have been thus minute in showing the breaches of the contract alleged in the bill, the condition of the parties as to ability to perform, and the relief sought, because it is said that an action at law for the unpaid rent, as often as the installments become due, is an adequate remedy, and is all that the defendants are liable for. But we cannot concur in this view of the matter.

If the contracts are valid contracts, and the complainant has the rights which are guaranteed to it under them, such relief is very inadequate. To sue for every monthly installment of rent, even if the principal and the guarantors can be sued jointly, is almost equivalent to a denial of justice. If the contract is to continue and the road to be run by the lessee company, which is insolvent, a monthly resort to a suit at law against the guarantors is destruct-

ive of the substantial right of the plaintiff under the contract. Having a valuable contract in regard to the operation of the road for a great many years to come, plaintiff cannot be compelled to forfeit it and resume possession and sue for all its damages in one action, because this would best serve the purposes of the solvent guarantors.

[306] The Indianapolis and St. Louis Company agreed to keep the road, its rolling stock and its equipment in good condition, equal to a first class western railroad. The plaintiff has a right to have this done specifically, and is not bound to bring action after action for damages at every stage of this depreciation. These suits would be vexatious, unsatisfactory, expensive, and the relief would be inadequate.

A clause in the contract requires the lessee to keep regular accounts of all the matters essential to complainant's rights. The examination of these accounts by a master is eminently appropriate, rather than by a jury. The relief granted by the decree, of enjoining the guarantying companies from collecting the interest on the bonds of the Indianapolis and St. Louis Company while it is insolvent and in arrears, can only be given in a court of equity.

In short, the numerous questions, the complex issues raised in the case can only be satisfactorily tried in a court of equity, and that court alone can give full, adequate and complete remedy for the grievances of plaintiffs growing out of the violation of this contract, and adjust the extent and nature of that relief among the parties to it.

We are of opinion, therefore, that if the complainant is entitled to any relief on the facts of the case, it is in a court of equity as distinguished from a court of law.

3. It is objected that the contract of lease between the two primary parties to that contract, the lessor and the lessee company, was one which they had no power to make, and that, still less, had the other defendant companies authority to guaranty its performance by the latter.

In the consideration of this question no reference will be had to any want of regularity in the proceedings attending the execution of these agreements, nor to the absence of any such authority as the boards of directors could have given to the officers of the companies who signed the contracts. It is here a question pure and simple as to how far the authority to execute these contracts is sustained by the corporate powers which the law has vested in these companies.

[307] A case very much like the present one, as it relates to this point, was before us some six years ago, and the opinion in it establishes for this court the main principles on which the inquiry must proceed.

In that case a railroad company in New Jersey had leased its road, franchises and property for a period of twenty years, yielding as in this case complete control of it all to the lessees and receiving as rent one half the gross sum collected by the lessees from the operation of the road. The agreement contained a condition that the railroad company might at any time terminate the contract and take possession of its property. But in that event they should pay to the lessees the value of the lease for the remaining period of the twenty years to which the lease extended. The company exercised this option, took possession of its road, and the suit was brought to recover on this covenant. *Thomas* v. *West Jersey R. R. Co.* 101 U. S. 71 [Bk. 25, L. ed. 950].

The decision turned upon the power of the company under its corporate authority to make the lease. The plaintiffs in error, who were the lessees, insisted that a corporation may, as at common law, do any act which is not either expressly or impliedly prohibited by its charter, although, where the act is unauthorized, a shareholder may enjoin its execution, and the State may, by proper process, forfeit the charter. To this the court responded:

"We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the power of corporations organized under legislative statutes is such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

The reports of decisions in the English courts were very fully examined, as will be seen by reference to cases cited in counsels' briefs, and many of them specially referred to in the opinion; also several cases in this court and in the state courts of this country.

It is not expedient here to go again over the ground there considered, as we are of opinion now, as we were then, that the great preponderance of judicial decisions supports the proposition above stated. [308]

It has been distinctly recognized, and repeated in this court in the case of the *Green Bay & M. R. R. Co.* v. *Union Steamboat Co.* 107 U. S. 98 [Bk. 27, L. ed. 413].

It is cited with approval in the Supreme Court of Massachusetts in the case of *Davis* v. *Old Colony R. R. Co.* 131 Mass. 258.

This latter opinion is a very full and able review of all the important decisions on that subject, and sustains very clearly the main propositions.

In this court the principle is completely covered by the decision of the case of *Pearce* v. *Madison & I. R. R. Co. etc.* 21 How. 441 [62 U. S. bk. 16, L. ed, 184], decided in 1858. In that case the defendant companies, whose road at one end of it terminated on the Ohio River, had purchased a steamboat to be used on that river in connection with their freight and passenger traffic, and had given notes for the purchase money. In a suit on these notes this court ruled that they were void for want of any authority in the companies to buy the boat, or to engage in the carrying trade on the river.

The opinion delivered by *Mr. Justice* Campbell cites several of the English cases relied on in *Thomas* v. *R. R. Co.* and in *Davis* v. *Old Colony R. R. Co.*, above referred to, and concludes with the observation that "the opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." This doctrine had been previously asserted with great force in the case of *York & Maryland*

Line R. R. Co. v. *Winans*, 17 How. 30 [58 U. S. bk. 15, L. ed. 27].

These are all cases in which railroad companies were parties, and their powers, as regulated by their charters, were the matters mainly considered. There are many other cases of the highest authority where railroad corporations are held to the doctrine laid down in *Thomas* v. *R. R. Co.; Eastern Counties Railway* v. *Hawke*, 5 H. L. Cas. 331, 371-381; *Ashbury* [309] *Railway Carriage and I. Co.* v. *Riche*, L. R. 7 H. L. 653; *McGregor* v. *Dover & Deal R.* 18 Q. B. 618; *East Anglian Railway* v. *Eastern Counties R.* 11 Q. B. 775.

We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.

We must, therefore, proceed to inquire if any such powers have been given to the Railroad Companies engaged in this transaction.

There is found in the record a copy of an Act of the Illinois Legislature, approved February 12, 1855, of which the following is the first section:

"Sec. 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly*, That all railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof, and also to contract for and hold in fee simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this Act."

Though it might be said that this Act only authorizes Illinois railroad companies to become lessees, we think it must be conceded that this enactment authorized the St. Louis, Alton and Terre Haute Railroad Company, which we have already said was exclusively an Illinois corporation, to enter into the lease or operating contract found in the record.

[310] But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract of lease is void as to it, and if the other companies had no power to guaranty its performance, it is void as to them; and the capacity of the complainant to make this contract does not make it valid as against those which had not such capacity, and cannot give a right of action on it against them. In the case of *Thomas* v. *Railroad Company* [*supra*], the lessees were natural persons with no disability to contract, but they were held to have no remedy on their contract, because it was not binding on the other party for want of a similar power to make the contract.

An Act of the Legislature of Indiana of December 18, 1865, is relied on as by implication conferring this power. Section 8 is as follows:

"Sec. 8. In case any railroad or part thereof shall have been or shall hereafter be leased, conveyed, or mortgaged to any other railroad company and shall be in the possession of such other company, under such lease, conveyance, or mortgage, the road, or part thereof, so leased, conveyed, or mortgaged, shall, during the continuance of such possession, be assessed, for taxation, as the property of the company having such possession in the same manner as if it were a part of the road of such lessee, grantee, or mortgagee, under its own charter; and such lessee, grantee, or mortgagee, shall, during the continuance of such possession, have all the rights and be subject to all the duties and liabilities in relation to the road, or parts thereof, so held, which are created by this Act, and both its property and the road, or parts thereof, so held, with its fixtures and the property used in operating the same, shall be liable for the payment of such taxes, in the same manner as railroad property is, in other cases, made liable for taxes properly assessed against the same." 3 Ind. Stat. 420, 421.

It will be seen at once that this is a statute for the collection of revenue, and that to make sure of the payment of taxes due on railroad property the Legislature has undertaken to provide that in cases where the possession has passed out of the corporation which owns it or has the title, it shall be paid by the persons having that possession. Hence, in enumerating this latter class it speaks of property leased then [3 or thereafter, or conveyed or mortgaged, and makes the holder liable during the continuance of such possession for the taxes.

This precise question, only more strongly presented, in favor of the affirmance of the lease by the Act of the New Jersey Legislature, was decided in *Thomas* v. *West Jersey R. R. Co.* 101 U. S. 85 [Bk. 25, L. ed. 950]. The statute in that case having direct relation to the company which had made the invalid lease, passed after the lease was made and in operation, declared it should "be unlawful for the directors, lessees or agents of said railroad to charge more than three cents per mile for carrying passengers," and the proviso said "that nothing contained in this Act shall deprive the railroad company or its lessees of the benefit of the provisions of another Act," relative to fares on other railroads in the State.

This court said that, though "it might be fairly inferred that the Legislature knew that the road was operated under the lease in that case, it was not important for the purpose of that Act to decide whether this was done under a lawful contract or not." "The Legislature was determined that whoever did run the road, and exercise the franchises conferred on the company, and under whatever claims of right this was done, should be bound by the rates of fare established by that Act. * * * It is not by such an incidental use of the word lessees, in an effort to make sure that all who collected fares should be bound by the law, that a contract un-

authorized by the charter and forbidden by public policy is to be made valid and ratified by the State."

So here the mention of lessees as possible holders of the possession of railroad property neither implies that they are lawfully so, or that such an absolute transfer of road, appurtenances, franchises, powers and their control as the one found in this case, is authorized by law, nor, though it may be in operation, does it give sanction to or create such a law.

The following section of the Act of February 28, 1853, of the Indiana Legislature is relied on as authorizing this contract:

"Sec. 3. Any railroad company heretofore organized or which may hereafter be organized [312] under the general or special laws of this State, and which may have constructed or commenced the construction of its road, so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, shall have the power to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, *or for the use of its said road*, as to the board of directors may seem proper." R. S. Ind. 1881, § 3973.

We cannot see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk.

In the case of the *Board of Commissioners of Tippecanoe County* v. *Lafayette, M. & B. R. R. Co.* 50 Ind. 110, this same statute was relied on as supporting the authority to make the lease then under consideration. But the Supreme Court of Indiana said: "That Act is to authorize railroad companies to consolidate their stock with the stock of other railroad companies in this and in an adjoining State, and to connect their roads with the roads of said companies, * * * the title nowhere mentions a lease or a sale. Indeed, the words to connect their roads with the roads of other companies, would seem to exclude such a conclusion. To connect one road with another does not fairly mean to lease or to sell it."

This was said in a case where the whole question turned on the power of one railroad company to make, and the other to receive, a lease of the road.

It is cited in the brief of counsel for complainant as sustaining the doctrine that in Indiana the right of railroad companies to lease their roads to other companies is recognized by the judiciary of that State. We think it proves the opposite. The lease in that case was held void as being *ultra vires*. All the arguments of the court are based on the proposition that [313] the corporation can do no valid act unauthorized by statute, and can make no contract in contravention of public policy. And while it says: "We do not decide that railroad companies cannot become lessors or lessees of other railroad companies, for the purpose of running their lines in conjunction, facilitating commerce, travel and transportation, or for any legitimate purpose for which railroad companies are organized, and there is much in the legislation of the State favoring this view and many decisions sustaining the advancing enterprise of the country," it adds: "But all such contracts must come within the powers of the corporation, must not exceed the powers of the agency that makes them, must not violate the rights of stockholders or contravene public policy." We look in vain in this latest decision of the State for any assertion of the proposition that, by the laws of that State or by the decisions of its courts, there exists any law by which one railroad company can, by lease or by any other contract, make an absolute surrender of its road and its franchises to another. And yet that was the question under discussion, and because the lease in that case contained a clause of perpetual renewal, and in effect amounted to a sale, the court held it *ultra vires*. What practical difference is there between this and a lease with the same powers for ninety-nine years?

If that decision does no more, it at least leaves this court free to follow its own views of the powers conferred by the Indiana law in regard to this subject on its railroad corporations.

Lastly, it is said that in *Indianapolis & St. L. R. R. Co.* v. *Vance*, 96 U. S. 450 [Bk. 24, L. ed. 752], this court decided that this same contract was binding on the Indianapolis and St. Louis Company.

That was done on the ground that the latter company was made a corporation of the State of Illinois by the Act of that State of March 11, 1869, and was using that part of the present plaintiff's road lying within the State of Illinois, under that contract. In reference to its liability to pay the taxes on that part of the plaintiff's road, it was held to be an Illinois corporation, and bound under the Illinois Statute by the contract of lease now under consideration.

But we have just shown that the Indianapolis and St. Louis Company was an Indiana corporation when this contract of lease was made, which was two years before it became an Illinois corporation by the Act of 1869. The present suit is against it as an Indiana corporation, [314] otherwise it could not be maintained. The validity of the contract depends on its power as an Indiana corporation to make it at the time it was made. It had none then, and no Act of the Indiana Legislature has ratified it since. That suit was founded on an Illinois contract between Illinois corporations to collect Illinois revenue, and was in no sense governed by Indiana law, but by the law of Illinois.

As regards this lease in a suit against the Indiana corporation, organized under its laws by the name of the Indianapolis and St. Louis Railroad Company, in the Circuit Court of the United States for that District, we must hold it to be void for want of power in the defendant company to make it.

We have been thus careful in our examination into the power of the lessor and lessee companies in the contract of lease, because if the lease itself is void the contract of the other companies must be equally so. A contract to perform for the Indianapolis and St. Louis Railroad Company obligations which it was forbidden to assume, and which it had no authority to assume, must itself be void. There is no power shown in any of these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and

they cannot, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. If these guarantying companies had executed the original contract of lease it would have been void for want of authority from the Legislature of Indiana, or of any other State by whose laws they are incorporated or endowed with corporate power. No such power is shown in them to lease roads beyond their own States.

Indeed, while there may be a just claim of authority for some kind of running arrangement between two connecting roads under the Indiana Statutes, there is no connection between the plaintiff's road and any road of a guarantying company. The connection even by traffic is remote. These companies might as well have assumed the power to loan them money, or to indorse their notes, or any other [315] commercial transaction, as to guaranty the performance of a void contract by one company to another.

It may not be amiss to cite one or two cases in which this power to guaranty the contract of one corporation by another is more directly in point. Among these are *Coleman* v. *Eastern Counties R. Co.* 10 Beav. 1; *Madison & W. Plank Road Co.* v. *Watertown & P. Plank Road Co.* 7 Wis. 59.

In the first of these cases, under the powers contained in the Acts of Parliament, the Eastern Counties Railway Company and the Eastern Union Railway Company had formed a railroad from London to Manningtree, a place about ten miles from the Port of Harwich. The directors of these companies conceived that it would add to the traffic and profits of the railway if a steam packet company could be formed communicating between Harwich and the northern ports of Europe, and they accordingly took proceedings for the establishment of such a company. It was intended that the railway companies should guaranty to the shareholders in the steam packet company a dividend of 5 per cent per annum upon their paid up capital until the dissolution of that company, and that then the whole paid up capital should be paid by the railway companies to the shareholders of the packet company in exchange for a transfer of its assets.

On a bill by a shareholder of the railway company to enjoin, it was held by the Master of the Rolls, *Lord* Langdale, that no such contract was within the power of the railway companies, and further proceedings in the matter were enjoined.

Among other things, that learned Judge said that "If there is one thing more desirable than another, after providing for the safety of all persons traveling on railroads, it is this: that the property of the railway companies shall be itself safe; that a railway investment shall not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best thigs that could happen would be that the investment should be of such a safe [316] nature that prudent persons might without improper hazard invest their moneys in it. Quite sure I am that nothing of that kind can be approached if railway companies should be at liberty to pledge their funds in support of speculations not authorized by their legal powers, and which might very possibly, to say the least, lead to extraordinary losses on the part of the railway company." This became a leading case in England where its doctrines have been steadily followed. It is cited with approval in *Pearce* v. *Madison & I. R. R. Co.* 21 How. 441 [62 U. S. bk. 15, L. ed. 184.]

In the case of *Madison & W. Plank Road Co.* v. *Watertown & P. Plank Road Co.* 7 Wis. 59, the former company, in order to aid the latter company to build a plank road, which was a continuation of the road of the former, agreed to guaranty a loan made to the Watertown Company. After the road was built the Madison Company refused to pay on the default of the Watertown Company. The Supreme Court held that the Madison Company had no corporate power to guaranty the payment of the debt of the other company; and, when pressed with the argument that, by the building of the road, the Madison Company had received the benefit which had induced it to guaranty the debt, the court said it was a contract *ultra vires* and could not be enforced.

We are of opinion that the guaranty of the obligations of the lease on the part of the Indianapolis and St. Louis Company by the other defendants is void.

4. It is argued, in support of the decree that, though the contract of lease may be void, so that no action could originally have been sustained upon it, there has been for ten years such performance of it, in the use, possession and control of plaintiff's road and its franchises, by the defendants, that they cannot now be permitted to repudiate or abandon it. That it now presents one of a class of cases which hold that where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such a contract.

Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands. We know of no well considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so. As was said in *Thomas* v. *Railroad Co.* (a case so often in point here), "Having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a lawful duty, a duty

which it owed to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts."

Whatever may be said in regard to the Indianapolis and St. Louis Company, there is wanting in the case of the guarantying companies one of the strongest reasons usually urged in support of the estoppel, as it is sometimes called, namely: that the recalcitrant party has received the money or the property of the other. For, so far from these guaranty companies having received of the plaintiff any money or property, they are the parties who have been paying money and the plaintiff receiving it for rent of its road. They are not, [319] therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have heretofore done so. On the contrary, as we have already said, the duties of these directors to their stockholders is to cease to perform a contract to which they were never bound.

We do not decide the question whether the Indianapolis and St. Louis R. R. Co. cannot be compelled to pay the plaintiff for the use of its road, though the contract be void. Whether it would be so liable on a *quantum meruit* admits of doubt. It is unnecessary to decide this, because that company has submitted to the decree of the circuit court in favor of plaintiff for that rent, by failing to give bond and perfect its appeal from that decree.

That part of the decree must stand, as no appeal from it has been prosecuted.

The decree against the other defendants, appellants here, is for the reasons given reversed, and the case remanded to the Circuit Court, with directions to dismiss the bill as to them.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley**, dissenting:

I dissent from the judgment of the court in this case, and will very briefly state my reasons for dissenting.

The St. Louis, Alton and Terre Haute R. R. Company, the lessor, had full authority to make the lease of its road and works which is brought in question in the cause. The Indianapolis and St. Louis Railway Company, the lessee, assumed to have power to take the lease, and had such power in Illinois by the effect of the laws of that State, and was supported in its assumption of power by the implications of several Statutes of Indiana. If these implications were not sufficiently strong to amount to a grant of power, still, they were sufficient to show that the Legislature of Indiana understood the power as existing and acquiesced in it. The other railroad companies, parties to the suit, who guarantied the performance of the lease and its covenants on the part of the lessor, had the power to do so by the laws of Illinois, and [320] the engagement of guaranty on their part was a contract entered into by them in furtherance of their through business to and from St. Louis and the States west of the Mississippi. The whole arrangement, in fact, was devised by them for the purpose of facilitating and increasing their business as integral parts of great trunk lines; which in the absence of interstate regulations of commerce made by Congress, are of the greatest utility in the business of the country.

To hold that the railroad companies of the country thus situated cannot, without acting *ultra vires*, make business arrangements beyond the limits of their own tracks in a country situated and divided up into States as ours is, it seems to me, is to take a very contracted view of the powers and duties of these public institutions. According to the doctrine of the court, a New York or Pennsylvania company could not even have a ticket or freight agent in St. Louis for the purpose of soliciting freight and passengers to be carried on the trunk line of which it forms a part. It could not hire an office for such an agent, or, if it did, it could not be held responsible for the rent. This is carrying the doctrine of *ultra vires* to what seems to me, an absurd extent. It is following out the English notions on that subject, which always seemed to me inapplicable to our situation and circumstances, however well suited to that compact and homogeneous country—homogeneous in government and jurisdiction. All the principal railroads in England extend across the entire country from London, in different directions, to the sea. In this country, as Congress declines to charter through lines across the States, the State Governments themselves charter local roads, limited by the boundary lines of the State. In order to give the country through facilities at all, these state roads are obliged to unite their lines, and make what is called a trunk line. The necessities of the country require it. Yet, according to the logic of the decision in this case, this is all *ultra vires*.

Look at it. One of our great trunk lines, extending from West to East, is composed, say, of five connected railroads, forming together a continuous line, working together under a contract which regulates their mutual rights and obligations in the management of the business [320] and the distribution of its joint receipts. All this is *ultra vires* and void! One of the links of the chain is a ferry which, in consideration of extra accommodations afforded for the business of the line, is guarantied a certain sum per annum. The guaranty is *ultra vires* and void!

Is this law? It may be English law; but is it American law? I cannot believe it. We must not shut our eyes to the fact that new circumstances and conditions, of themselves, require and produce a modification of old rules, or the application of new ones.

This narrow doctrine has already been discarded by the courts, and by this court. It has become settled law that a railroad company at one end of a trunk line may enter into contracts for the transportation of passengers and goods to any part of the line, hundreds of miles beyond its own track; and will be held liable for the fulfillment of such contracts. And yet, according to the doctrine of the opinion in this case, this is *ultra vires*.

But this is not all. The contract has been performed on the part of the lessor company,

and the lessee and its guarantors have enjoyed the benefit of it. With what face can they now refuse to pay what they agreed to pay? With what face can they plead incapacity to contract? This is not a suit to compel the specific performance of the contract in future; but to compel the payment of the money earned by past performance of the contract. It seems to me that the Companies concerned are estopped to deny their liability to make this payment. It is the Companies themselves who make the plea, not their stockholders.

In several national bank cases, where the banks have loaned money on mortgages of land, contrary to the express prohibition of the Act of Congress, and *ultra vires*, we have enforced the contract, leaving it to the government to call the banks to account for acting outside of their chartered powers.

Why should not the same rule be applied to railroads, if it is thought they have exceeded their powers; especially when no stockholder complains of the company's action, and the object of the suit is, to compel them to pay for a [321] benefit actually received?

In every aspect in which the case can be viewed, it seems to me that the decree of the circuit court was not only just and right, but in accordance with sound principles of American law, and ought to be affirmed.

I am authorized to say that *Mr. Justice* **Harlan** agrees with me in opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[62] JUAN S. HART, Admr., of the Estate of SIMEON HART, Deceased,

v.

UNITED STATES.

(See S. C. Reporter's ed. 62-67.)

Section 7, Act of Congress, June 25, 1868—effect of pardon.

A pardon granted by the President, prior to the passage of section 3480, Revised Statutes, to one who promoted the late rebellion, "for all offenses committed by him arising from participation, direct or implied, in the rebellion," did not authorize the payment of a claim to such person, which originated prior to April 13, 1861, and was forbidden by such section to be paid; and where such claim was referred by the Secretary of War to the Court of Claims, that court properly decided that it had no jurisdiction further than to find the facts.

[No. 198.]

Argued Mar. 25, 1886. Decided Apr. 26, 1886

APPEAL from the Court of Claims. *Affirmed.* The case is stated by the court.

Mr. **John J. Weed,** for appellant.

Mr. **John Goode,** *Solicitor-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

Section 7 of the Act of Congress, approved June 25, 1868, chap. 71 (15 Stat. at L. 76), enacted as follows: "It shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds $3,000; or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case; or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to [6 cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; * * * *Provided, however,* That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject matter and character, the said Court of Claims might, under existing laws, take jurisdiction on such voluntary action of the claimant. And all the cases mentioned in this section which shall be transmitted by the head of any executive department, * * * shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court:" These provisions are now embodied in sections 1063, 1064 and 1065 of the Revised Statutes.

Under them the Secretary of War, on the 14th of October, 1878, transmitted to the Court of Claims the claim of Henry B. Hart, as the assignee of Simeon Hart. Thereupon, on the 9th of January, 1874, Simeon Hart, for the use of Henry B. Hart, filed in that court a petition, claiming to recover from the United States $50,891.52. In July, 1874, the United States filed a plea setting up a counterclaim of $9,000 against Simeon Hart, and in August, 1874, a plea setting up a bar by a six years' limitation after the first accruing of the claim. In December, 1874, Simeon Hart having died, the suit was revived in the name of A. B. Hyde, as his administrator. In January, 1877, the claimant demurred to the plea of the Statute of Limitations; and the demurrer was sustained. 12 Ct. of Claims, 319. On the 9th of May, 1877, [6 the claimant filed an amended petition, to which, three days afterwards, the United States filed a traverse, and a plea setting up a bar by a six years' limitation. In October, 1878, the claimant replied to the plea of counterclaim, that the $9,000 had been paid by Simeon Hart. In November, 1879, the United States, by leave of court, filed a special demurrer to the petition and the amended petition, but it was overruled. In June, 1880, James P. Hague, as administrator of Simeon Hart, and successor of Hyde, was substituted in place of Hyde, as claimant. At the same time the claimant filed

an amended petition, praying that any assignment of the claim to Henry B. Hart be treated as void; and withdrawing items four and five of the claim contained in the original petition.

The case was then heard on the evidence, and on the 7th of June, 1880, the court filed its findings of fact and conclusion of law, and an opinion (15 Ct. of Claims, 414) whereby the petition was dismissed, and a judgment to that effect was entered on that day. In January, 1881, a motion for a new trial was granted, and the case was reheard, on additional evidence, and, on the 16th of May, 1881, the court filed its findings of fact and conclusion of law, and an opinion (16 Ct. of Claims, 459) whereby the petition was dismissed, and a judgment to that effect was entered on that day, from which the claimant appealed. Since the appeal Juan S. Hart, as administrator in place of Hague, has been substituted as appellant.

The findings of fact, on the second hearing, which are quite voluminous, are set forth at length in the report in 16 Ct. of Claims. Those which are material, in the view we take of the case, are as follows: on the 3d of March, 1861, Simeon Hart was residing at El Paso, Texas, and was in active sympathy with those who were inciting to rebellion. In April, 1861, he joined the insurgents, and then and afterwards furnished them with supplies, money, and means of transportation to carry on their invasion and campaign into New Mexico. On the 3d of November, 1865, the President granted to him a full pardon and amnesty for all offenses committed by him arising from participation, direct or implied, in the rebellion. Hart claimed [65] certain sums as due to him for flour, corn and forage delivered to the United States before April 13, 1861, and certain sums for flour, corn and forage delivered after that date. There is nothing due from the United States to the claimant for flour delivered after April 13, 1861; and the United States paid to Hart, or his assignees, for flour alleged to have been delivered after April 13, 1861, but never delivered, more than the amounts claimed as due for corn and forage, those payments being made partly in cash and partly by retaining and charging against him the $9,000 so set up as a counterclaim.

The Court of Claims applied to those demands of the claimant which accrued before April 13, 1861, the provisions of Joint Resolution No. 46, approved March 2, 1867 (14 Stat. at L. 571), now embodied in section 3480 of the Revised Statutes, and which was as follows: "Until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the 13th day of April, A. D. 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; or in favor of any person who, during said rebellion, was not known to be opposed thereto, and distinctly in favor of its suppression; and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim, or demand, until this resolution is modified or repealed: *Provided*, That this resolution shall not be construed to prohibit the payment of claims founded upon contracts made by any of the departments, where such claims were assigned or contracted to be assigned prior to April first, 1861, to creditors of said contractors, loyal citizens of loyal States, in payment of debts incurred prior to March first, 1861."

It was urged before the Court of Claims that the pardon and amnesty granted by the President to Hart, on the third of November, 1865, "for all offenses committed by him arising from participation, direct or implied, in the rebellion," operated to set aside the provisions of the Joint [66] Resolution as to him and his claims. The court held otherwise. Its view was that Hart was guilty of numerous acts for which he could, on conviction, have been punished in his person and his property, and that the pardon freed him from liability for those offenses; that his disability to receive from the United States a debt due to him was not a consequence attached to or arising out of any such offense; that it grew out of the fact stated in the Joint Resolution that he had been a public enemy; that every disability which a state of war imposed upon him was removed by the cessation of the war; that it needed no pardon to effect that result; that, as the pardon conferred on him no new right, so the Joint Resolution did not take from him anything which the pardon had conferred; that it did not, like the legislation considered in *United States* v. *Klein*, 13 Wall. 128 [80 U. S. bk. 20, L. ed. 519], attempt to prescribe to the judiciary the effect to be given to a pardon, in regard to a matter to which the pardon extended, but merely forbade certain debts to be paid until Congress should otherwise order; that a creditor of the United States can only be paid in accordance with the provision of the Constitution (art. 1, sec. 9, subd. 7) which declares that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law;" that by this Joint Resolution Congress had declared, by law, that this claimant should draw no money from the Treasury, and that no general appropriation should extend to his claim; that, therefore, no executive department could consider the claim; that the Act of 1868 did not extend to claims covered by the Joint Resolution; and that, as the claim in question could not be paid, the Court of Claims had no jurisdiction to proceed to judgment in regard to it, on the reference made. The views of the court were set forth at greater length in the opinion, and its conclusion was, that as to all items which accrued prior to April 13, 1861, it was its duty to decline to take jurisdiction further than to find the facts.

As to the items for flour and corn and forage furnished after April 13, 1861, the court held, on the facts it found, that there was nothing due to the claimant for flour delivered after that date; and that the United States had paid Hart, or his assignees, for flour alleged to have been delivered after that date, but never deliv- [67] ered, more than the amounts now claimed to be due for corn and forage.

We are of opinion that the judgment of the Court of Claims was right. In approving, as we do, the reasons above recited as assigned by that court, for the view it took on the question of the pardon, we do not depart, in the least, from what was held, on the subject of pardons, in the cases of *Ex parte Garland*, 4 Wall. 333 [71 U. S. bk. 18, L. ed. 366]; *Armstrong's*

Foundry, 6 Wall. 766 [78 U. S. bk. 18, L. ed. 882]; *United States* v. *Padelford*, 9 Wall. 531 [76 U. S. bk. 19, L. ed. 788]; *United States* v. *Klein*, 13 Wall. 128 [80 U. S. bk. 20, L. ed. 519]; and *Carlisle* v. *United States*, 16 Wall. 147, 151 [88 U. S. bk. 21, L. ed. 426]. If the Joint Resolution had said nothing on the subject of a pardon, no pardon could have had the effect to authorize the payment, out of a general appropriation, of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it merely because the Joint Resolution says that it shall not have such effect. It was entirely within the competency of Congress to declare that the claims mentioned in the Joint Resolution should not be paid till the further order of Congress. It is now within its competency to declare that they may be paid, in like manner as, by the Act of March 3, 1877, chap. 105 (19 Stat. at L. 362), it provided that section 3480 of the Revised Statutes, which is the Joint Resolution in question, should not apply to payments to be made out of a general appropriation made by that Act to pay mail contractors for mail service performed in certain States in 1859, 1860 and 1861, and before they "respectively engaged in war against the United States."

As to the claims which accrued after April 13, 1861, we see no reason to question the correctness of the judgment.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[196] IRON SILVER MINING COMPANY, *Plff. in Err.*,

v.

ELGIN MINING AND SMELTING COMPANY ET AL.

(See S. C. Reporter's ed. 196-209.)

Mining law—Act of 1872—right of patentee of surface lode to follow vein laterally—parallelism of end lines.

Under the Act of Congress of 1872 (R. S. § 2320 *et seq.*) parallelism of the end lines of a surface location is essential to the existence of any right in the locator or patentee of a surface lode mining claim to follow the vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion.

[No. 200.]

Argued Mar. 26, 29, 1886. Decided Apr. 26, 1886.

IN ERROR to the Circuit Court of the United States for the District of Colorado. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This is an action to recover possession of certain mining ground in Lake County, Colorado. The plaintiffs in the court below, the defendants in error here, assert title to the premises under a patent of the United States for what is known as the "Gilt Edge Claim," of which they are a part. In the original complaint they asserted title by conveyance from the original [19 locators. A patent to them having been subsequently granted, they filed an amended complaint setting up its issue, and that it conveys to them a fee simple title.

The complaint avers that the defendant, the Iron Silver Mining Company, on the 25th of June, 1882, by means of drifts, inclines and tunnels entered without right upon a portion of the Gilt Edge Claim, which it has since wrongfully withheld from the plaintiffs to their damage of $50,000; and that it has excavated, carried away, and converted to its own use, since such entry, gold, silver and lead ores belonging to them, of the value of $50,000. They therefore pray judgment for the premises and damages for their wrongful detention, and for the ores taken.

The defendant in its answer denies the several allegations of the complaint, and sets up as an affirmative defense that, under a patent of the United States, bearing date May 24, 1877, it is the owner in fee and entitled to the possession of a surface lode mining claim also situated in Lake County, Colorado, called the "Stone Claim," containing nine acres and $\frac{18}{100}$ of an acre of land, more or less, and of a vein, lode or ledge therein, extending the length of the claim from north to south 1,500 feet throughout its entire depth, although it enters adjoining lands; that the vein, lode or ledge contains iron, lead and silver in large quantities; that the top, apex and outcrop of it are found in the surface claim throughout its entire extent; that its true strike is north and south, with a dip to the east at an angle of fifteen degrees below the plane of the horizon; that the vein, lode or ledge on its dip, within vertical planes drawn downward, with its end lines continued in their own direction, that is, in the direction of the dip, passes through and beyond the east vertical side line of the surface claim and location into and under the Gilt Edge Surface Claim. And the defendant admits that underneath the surface of the Gilt Edge Claim it has followed and mined upon the Stone vein, lode or ledge; and avers that, by reason of the facts above set forth, it had the right so to do, and denies that it has otherwise interfered with the Gilt Edge Claim or any part of it.

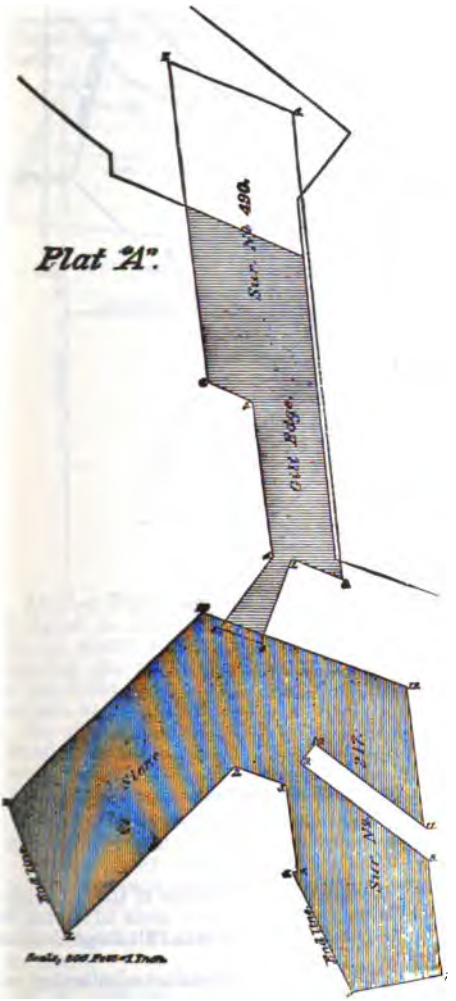
The plaintiffs in their reply deny the material allegations of the answer. By stipulation the [11 case was tried by the court without the intervention of a jury. On the trial the plaintiffs produced in evidence a patent of the United States to them for the Gilt Edge Claim, in the usual form of patents for lode mining claims, and the defendant admitted that they were invested with the title to the property which the patent conveyed; that it had entered underneath the surface of that claim at a point east of the Stone Surface Claim; and was engaged in mining and in carrying away lead and silver ores when the action was commenced.

It was agreed that plat "A" (given below) correctly represents the shape and relative positions of the Gilt Edge Mining Claim and of the Stone Mining Claim, and that the lines on the figures of the Stone Claim, from No. 5 to 6 and from 1 to 14, are the two end lines of the surface claim, so called by the locator thereof, and in

the plat accompanying the application for the patent.

It was also agreed that plat "B" (given below) is a correct copy of the plat of the Gilt Edge Claim contained in the patent thereof, which also shows its relative position to the Stone Claim, the latter being marked Sur. No. 217.

[199]



And thereupon the plaintiffs rested. The defendant then introduced in evidence a patent for the Stone Claim, bearing date May 24, 1877, issued to one Alvinus B. Wood; and it was admitted that, by divers mesne conveyances, the defendant holds title in fee to the premises described in it.

The patent gives a full and minute description by metes and bounds of the surface claim, containing nine acres and $\frac{18}{100}$ of an acre of land, more or less, and embracing 1,500 linear feet of the Stone lode along the course thereof. Its granting clause is as follows:

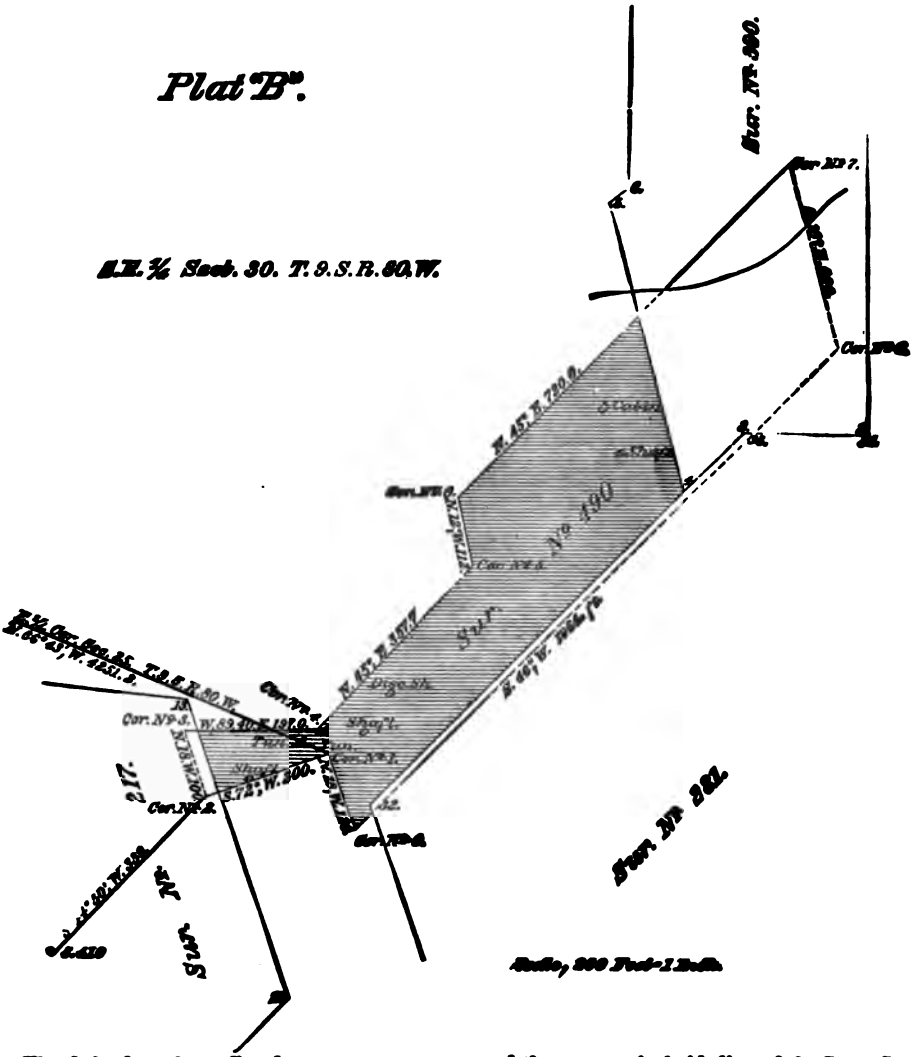
"Now, know ye, that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Alvinus B. Wood, and to his heirs and assigns, the said mining premises hereinbefore described as lot No. 217, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1500) linear feet of the said Stone vein, lode, ledge or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining; and also of all other veins, lodes, ledges or deposits, throughout their entire depth, the tops or apexes of which lie [201] inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits, in their downward course, may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; *Provided*, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward *through the end lines of said survey at the surface*, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits; *And provided further*, That nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another: To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Alvinus B. Wood, and to his heirs and assigns forever; subject, nevertheless, to the following conditions and stipulations:

"First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 217, with fifteen hundred (1500) linear feet of the Stone vein, lode, ledge or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

"Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

"Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and [202] decisions of courts.

"Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development."



The defendant then offered to prove:

(1) That the Stone vein, lode or ledge mentioned in patent is a vein, lode or ledge of rock in place bearing iron, lead and silver in large quantities, and is valuable on account thereof.

(2) That the top, apex and outcrop of the vein, lode or ledge exist, and are found in the Stone Surface Claim through its entire extent from north to south between walls of rock in place, a limestone foot wall, and a porphyry hanging wall.

(3) That the true strike of the vein, lode or ledge is north and south, and has a dip to the east at an angle of 15° below the plane of the horizon.

(4) That the vein, lode or ledge, on its dip within vertical planes drawn downward through the end lines of the vein, lode, or ledge, so existing and found within the Stone Surface Mining Claim, and continued in their own direction, viz.: in the direction of the dip of the vein, lode or ledge, passes through, out of, and beyond the east vertical side line of the Stone Surface Claim and location into lands adjoining, to wit: into and under the said Gilt Edge Surface Claim.

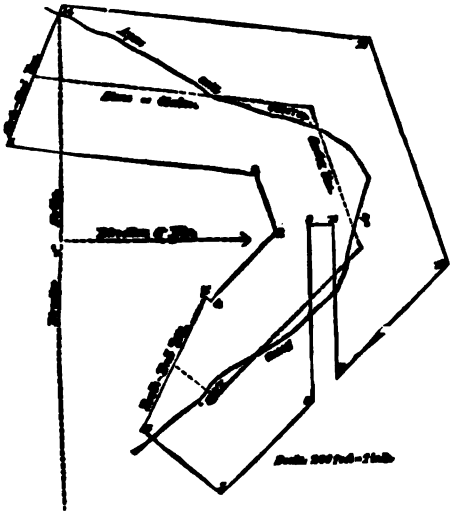
(5) That while the defendant admits that underneath the surface of the Gilt Edge Surface Claim it has followed and mined in and upon the Stone vein, lode or ledge, by reason of the facts and premises above set forth, it had a right so to do, and that it has not otherwise in any way interfered with said Gilt Edge Claim, or any part thereof.

To which plaintiffs objected, on the ground that the proffered proof would not be a defense to the action nor tend to establish a defense thereto; and that by reason of the surface form or shape of the Stone Claim its owners had no right under the laws of the United States or otherwise to follow the lode alleged to exist therein in its downward course beyond the lines of the claim and into plaintiffs' claim; and that no part of the Gilt Edge Claim or the mineral or lode within it was within vertical

planes drawn downward through the end lines of the Stone Claim and continued indefinitely in their own idrection.

The court sustained the objection and excluded the evidence offered, to which ruling the defendant excepted.

The following diagram, showing the shape of the Stone Claim, its exterior lines, its center line, and the line of the apex of the vein, as alleged by the defendant, was also put in evidence:



[204] Another diagram of the Stone Claim was introduced in evidence, but as it was similar to the one above, with the exception of the lines showing the course of the apex, the direction of the strike and the dip of the vein, it is not important to exhibit it in this statement.

No other evidence was offered. The court found the issues for the plaintiffs, and judgment was entered in their favor, to review which the case was brought here.

Messrs. **Walter H. Smith** and **G. G. Symes**, for plaintiff in error.

Messrs. **T. M. Patterson**, *C. S. Thomas*, *M. B. Carpenter* and *Amos Steck*, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The question presented for our decision is one of great interest to miners on the public lands, and with respect to it much difference of opinion exists. This difference has arisen from a consideration, on the one hand, of what would properly be called the true end lines of a claim upon a lode of a specified length and width, after it has been opened by explorations, and its general course and direction are seen; and a consideration, on the other hand, of the statute requiring the location of a claim to be distinctly marked on the ground, so that its boundaries may be readily traced. Such location often precedes any extended explorations, and is therefore made without accurate knowledge of the course and direction of the vein. When a vein has been discovered, the rules of miners and the legislative regulations of mining States and Territories generally allow some specified time for explorations before the location is definitely marked. But miners discovering a lode are sometimes in such haste to locate their claim, and mark its extent and boundaries on the surface, that they omit to make sufficient explorations to guide them aright in measuring the ground and fixing its end lines. Hence efforts are not infrequently made to change those lines when the true course and direction of the vein are ascertained by subsequent de- [205] velopments.

The framers of the Statute of 1872 evidently proceeded upon the theory that a claim on a lode, following its outcroppings on the surface for the distance allowed, with a definite extension on each side of the middle of the vein, would generally take the form of a parallelogram. It provided that the length of a claim, subsequently located, whether by one or more persons, should not exceed fifteen hundred feet; that its extension on each side of the middle of the vein at the surface should not exceed three hundred feet; and that its end lines should be parallel to each other. R. S. § 2320. A section of the lode within vertical planes drawn downward through the lines marked on the surface was designed as the grant to the original locator; but as the vein in its downward course might deviate from a perpendicular and pass out of the side lines, the right was conferred to follow it outside of them, but within planes through the end lines drawn vertically downward, and continued in their own direction. The language of that statute, as carried into the Revised Statutes, is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so con- [206] tinued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." R. S. § 2322.

This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The locators have the exclusive right of possession and enjoyment of "all the surface included within the lines of their locations," and the location, by another section must be

distinctly marked on the ground so that its boundaries can be readily traced. R. S. § 2324. They have also the exclusive right of possession and enjoyment "of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations." The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface.

The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado the statute allows for this purpose sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and [207] thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. *Erhardt* v. *Boaro*, 113 U. S. 527, 533 [Bk. 28, L. ed. 1113]. Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty.

If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby, though subsequent explorations may show that he erred in his location.

The provision of the statute, that the locator is entitled throughout their entire depth to all the veins, lodes or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical.

It is also a fact of importance, that the Land Department has, since the Act of 1872, followed the end lines as marked on the surface, and has limited the extra lateral right of patentees by vertical planes drawn down through such end lines; as in the patent to Wood in this case. Any decision that the department erred in that respect, and that the rights of the patentees [208] were different, would disturb titles derived from such patents, and lead to great confusion and litigation. If it is expedient to change the rule, legislative action should be invoked, as it would operate only in the future, and not judicial decision which would affect past cases as well.

This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the *Flagstaff Case, Mining Co.* v. *Tarbet*, 98 U. S. 463 [Bk. 25, L. ed. 253]. There the court said that "The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings;" and that "it is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined," and that the end lines of the claim, properly so called, "are those which are crosswise of the general course of the vein on the surface." The court suggested that the law might be imperfect in this respect, and that perhaps the true course of the vein should correspond with its strike or the line of a level run through it; but it added that this "can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed."

Under the Act of 1866, parallelism in the end lines of a surface location was not required; but where a location has been made since the Act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion.

The exterior lines of the Stone Claim form a curved figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine sided figure, and, apparently for no other reason than their parallelism, called them end lines. [20

We are, therefore, of opinion that the objection that, by reason of the surface form of the Stone Claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of that claim can be regarded as such lines of the location, no part of the Gilt Edge Claim falls within vertical planes drawn down through those lines

continued in their own direction. In either view of the location of the Stone Claim, the rejected proof would have established no defense. The premises in controversy are admitted to be under the surface lines of the Gilt Edge Claim eastward from the defendant's claim, and the plaintiffs were therefore entitled to recover them.

Judgment affirmed.

Mr. Justice **Gray** did not hear the argument nor take any part in the decision of this case.

Mr. Chief Justice **Waite** dissenting:

I cannot agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface.

Mr. Justice **Bradley** concurs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[109] SOUTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 109-113.)

Removal of causes—controversy arising under the Constitution and laws of the United States.

In an action by a State to recover money claimed to be due as taxes, where the right to recover was made, by the pleadings, to depend: (1) on the power of the State to tax the franchises of the corporation derived from the Acts of Congress, which were especially referred to, as well as the property used in connection therewith; and (2) on the effect of article 14 of the Amendments of the Constitution on the validity of the statutes under which the taxes sued for were levied, the defendant had the right to remove the cause to the federal court, under the Act of March 3, 1875, on the ground that the action "is a suit at law, of a civil nature and arising under the Constitution and laws of the United States."

[No. 841.]

Submitted Dec. 11, 1886. Decided Apr. 26, 1886.

IN ERROR to the Supreme Court of the State of California. *Reversed.*

The case is stated by the court.

Messrs. George H. Smith and *S. W. Sanderson*, for plaintiff in error.

Mr. R. M. Widney, for defendants in error.

[110] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a suit brought by the State of California, in one of its own courts, against the Southern Pacific Railroad Company to recover $31,470.58 claimed to be due for taxes. The Railroad Company answered the complaint, setting up, among others, the following defenses:

1. That under and by virtue of the Acts of Congress of July 27, 1866, 14 Stat. at L. 292, chap. 278; March 3, 1871, 16 Stat. at L. 573, chap. 122, and May 2, 1872, 17 Stat. at L. 59, chap. 132, the defendant "became, and ever since has been, a federal corporation, and has held its franchises and exercised all its corporate powers under the Government of the United States;" or "if, by virtue of the several Acts of Congress * * * referred to, it did not become a federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several Acts of Congress as the trustee for the government, and for the governmental uses and purposes specified in said Acts;" "that the Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant;" that the "value of all the franchises held and corporate powers exercised by defendant under said Acts of Congress" were included in the valuation of the property of the Company upon which the taxes sued for were assessed, and that by reason of the premises the taxes are illegal and void.

2. That the property of the Company, for which the taxes sued for were levied, was and is incumbered by a mortgage securing an indebtedness of the Railroad Company, exceeding $3,000 a mile, and that it was valued for taxation without deduction on account of such incumbrance, because such was the requirement of the statute with respect to railroad Corporations owning railroads within the State, and [111] operated in more than one county; and this corporation was and is of that class.

3. That the statute under which the taxes were levied is repugnant to article XIV of the Amendments of the Constitution of the United States, inasmuch as it deprives railroad corporations of the State operated in more than one county of the equal protection of the laws: (1) by providing that the property of such corporations shall be valued for taxation to them without deduction on account of mortgage incumbrances, while the mortgaged property of other corporations and of natural persons is taxed to its owner only on its value after the value of the mortgage has been deducted; and (2) by failing to provide a tribunal for the correction of errors in the valuation of the property of such railroad corporations for taxation, when such a tribunal is provided for all other corporations and for natural persons.

4. That the statute is still further repugnant to the same Amendment, because it deprives such corporations of their property without due process of law, there being no provision for notice to them of a time, place or tribunal for a hearing in defense of their rights in the valuation of their property for taxation.

Upon the filing of this answer, the Railroad Company presented its petition, accompanied by the necessary security, for the removal of the suit to the Circuit Court of the United States for the District of California, under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, on the ground that the action "is a suit at law of a civil nature and arising under the Constitution and laws of the United States." This petition was filed in time. The state court proceeded with the suit, notwithstanding the petition, and gave judgment against the Railroad

Company for the full amount of the tax and the statutory penalty. From this judgment the Corporation appealed to the supreme court, where the only question presented for decision was "Whether the Federal Constitution and the Act of Congress authorized a removal of an action from a state to a federal court, brought by a State to recover taxes levied under its laws [112] on the property of a being created by its power, in one of its own courts." This question was decided against the Corporation, and the judgment of the court below affirmed. To this judgment of affirmance the present writ of error was brought, on the allowance of the Chief Justice of the Supreme Court of the State.

In *New Orleans, M. & T. R. R. Co.* v. *Mississippi*, 102 U. S. 141 [Bk. 26, L. ed. 98], it was decided that a suit brought by a State in one of its own courts against a corporation of its own creation can be removed to the Circuit Court of the United States, under the Act of March 3, 1875, if it is a suit arising under the Constitution or laws of the United States, although it may involve questions other than those which depend on the Constitution and laws. The case of *Ames* v. *Kansas*, 111 U. S. 449 [Bk. 28, L. ed. 482], is to the same effect; and in *Starin* v. *New York*, 115 U. S. 257 [Bk. 29, L. ed. 388], it was stated, as the effect of all the authorities on the subject, that if, from the questions involved in a suit, "it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

Applying these rules, which must now be considered as settled, to the present case, it is apparent that the court below erred in deciding that the suit was not removable; for it distinctly appears that the right of the State to recover was made by the pleadings to depend: (1) on the power of the State to tax the franchises of the Corporation derived from the Acts of Congress which were specially referred to, as well as the property used in connection therewith; and (2) on the effect of art., XIV of the Amendments of the Constitution on the validity of the statutes under which the taxes sued for were levied. The first depended on the construction of the Acts of Congress, and the second on the construction of the constitutional Amendment. If decided in one way the State might recover, if in another it would be defeated, at least in part. The right of removal does not depend upon the validity of the claim set up under the Constitution or laws. It is enough if the claim involves [113] a real and substantial dispute or controversy in the suit. In this case there can be no doubt about that. The Circuit Court of the United States for the District of California has already decided more than once, in other cases involving precisely the same questions, that the statute on which the recovery depends was unconstitutional and void, and some of these cases are now pending here on writs of error. Already much time has been devoted in this court to their argument under special assignments.

The judgment of the supreme court is reversed and the cause remanded, with directions that it be sent back to the Superior Court of Los Angeles County for removal to the Circuit Court of the United States, in accordance with the prayer of the petition filed for that purpose.

Judgment reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PATTIE A. CLAY ET AL., *Appts.*, [97
v.
LUCY C. FREEMAN ET AL.

(See S. C. Reporter's ed. 97-109.)

Statute of Limitations—partnership accounts—indebtedness of firm to surviving partner—statute does not run against surviving partner in possession of firm assets—lien of surviving partner on assets.

1. Where real estate was in fact partnership assets, and the interest of heirs and the right to dower therein were subject to the lien of partnership debts, but dower was actually assigned nearly three years before the filing of a bill to enforce the lien, the court refused to disturb the assignment.

2. Where real estate held as partnership assets is sold under a decree and purchased by a firm creditor who thereupon cancels his indebtedness, and such sale is subsequently held void, its incidents and consequences are also void.

3. A surviving partner in possession of partnership property, real or personal, has a right to hold it until the debts of the firm are paid, including any existing indebtedness to him; nor will his neglect to wind up the concern relieve the partnership assets in his hands from the lien of the partnership debts, nor permit the Statute of Limitations to run in favor of the heirs of the deceased partner so as to enable them to obtain an interest in the property without payment of the indebtedness.

[No. 677.]

Submitted Jan. 11, 1886. Decided Apr. 26, 1886.

APPEAL from the District Court of the United States for the Northern District of Mississippi. *Reversed.*

The case is stated by the court.

Mr. William L. Nugent, for appellants.

Messrs. Frank Johnston and *J. E. McKeighan*, for appellees.

Mr. Justice **Bradley** delivered the opinion [98 of the court:

This case was commenced by bill in equity filed in the court below in July, 1882, by Pattie A. Clay and Brutus J. Clay, her husband, citizens of the State of Kentucky, against Lucy C. Freeman and C. L. Freeman, her husband, and David I. Field, citizens of the State of Missouri. As the bill was dismissed on demurrer, and the appeal is from the decree of dismissal, it is necessary to state its principal allegations. The facts alleged are substantially as follows:

In 1855 Christopher I. Field (of whom the complainant, Pattie A. Clay, is only child and heir at law) and his brother, David I. Field (of whom the defendant, Lucy C. Freeman, is the widow, and the defendant, David I. Field, is only child and heir at law), jointly purchased a plantation in Bolivar County, Mississippi, called the Content Place, for the purpose of carrying it on in partnership, under an agreement by which said David was to possess, manage and control the partnership property for the firm, and the partners were to be equally inter-

ested in the property and business. They were also equally to bear losses and expenses, and to share equally the profits realized; but Christopher, being a man of large wealth, did not have the same necessity for calling upon the firm profits as David did. The style of the partnership, as advertised by the partners, was David I. Field & Co., or D. I. Field & Co. The plantation and its equipment of slaves and implements cost from $60,000 to $70,000, the lands alone costing about $54,000. Of this capital Christopher advanced $15,541.26 more than David, which advance was made in the years 1856, 1857, 1858 and 1859, and four partnership notes were executed by David and delivered to Christopher as evidence of these advances, which notes were as follows, namely:

1. "$7, 385$\frac{81}{100}$. On or before the first day of January, 1858, the concern of David I. Field & Co. will be owing C. I. Field the sum of seven thousand three hundred and eighty-five $\frac{81}{100}$ [100] dollars for money advanced the concern for payment for the Leach land and cash advanced for the purchase of negroes in K'y in the summer of 1856, and to bear six per cent interest from maturity, or when due. This 23d Dec'r., 1856. "D. I. Field & Co. [seal.]"

2. "The concern of David I. Field & Co. is owing to C. I. Field the sum of five thousand six hundred and sixty-six and two thirds dollars (it being that amount advanced by him of payment to Kirk, balance on concern note due him 1st day of January last); he is to be paid six per cent for said amount from date until paid. This 20th March, 1857.

"David I. Field & Co."

[On this note is indorsed a credit as follows: "$243.50. Rec'd on the within note the sum of two hundred and forty-three $\frac{50}{100}$ dollars on settlement of articles purchased at D. I. Field's sale of personal property by C. I. Field and D. I. Field & Co., this 1st day January, 1861.

"C. I. Field."]

3. "Due C. I. Field, or order, the sum of eleven hundred dollars ($1,100), it being money this day advanced by paying to Wm. Kirk, through his draft on Hewitt, Norton & Co., of New Orleans, this fifth day of June, 1858.

"D. I. Field & Co. [seal.]"

4. "Bolivar, *June 13th*, 1859.

"Due C. I. Field, or order, one thousand three hundred and eighty-nine dollars $\frac{22}{100}$, for value rec'd, on settlement to this date (to this date). "D. I. Field & Co."

David I. Field (whom for the sake of brevity we will call D. I. Field) conducted the plantation, and lived on it until his death, which took place on the 11th of September, 1859; and from that time until the commencement of the [100] late war, it was conducted by his administrator, one E. H. Field. His widow, Lucy, the now defendant, soon after his death removed to Lexington, Kentucky, with her infant son, David I. Field, Junior, one of the defendants in this suit; and after her marriage with her present husband, C. S. Freeman, she removed to Missouri to reside with him, and neither she nor her son has ever lived in Mississippi since. At the time of his death, D. I. Field owed individually (including his half of the firm debt due to his brother, C. I. Field) $11,000 or $12,000, all of which debts, and all the firm debts except the debt due to C. I. Field, were paid. On the 12th of December, 1859, C. I. Field probated and registered his claim against the estate of D. I. Field, and to the proof thereof annexed the following memorandum, to wit:

"David I. Field & Co. is a firm consisting of the estate of David I. Field and C. I. Field, partners in the Kirk Plantation, known as the Content Place. All the within notes are joint notes of the firm to C I. Field; consequently one half of the within claim is chargeable to the estate of D. I. Field. This the 10th Dec'r. 1859. (signed) C. I. Field."

Nothing was realized from the plantation during the years 1859, 1860, and 1861, more than sufficient to keep it up. In 1859 there was a bad overflow of the river; in 1860 there was barely sufficient for expenses, and the crop of 1861 was destroyed by the confederate soldiers under military orders.

Christopher I. Field then took the slaves (about thirty in number) to Texas to prevent their being dispersed and, after the war was ended, brought them back and endeavored to work the plantation again; but as few of the slaves, after obtaining their freedom, were willing to remain on it, very little could be done, and the place was worked at a loss. Christopher I. Field died on the 18th of July, 1867, leaving his daughter Pattie, the complainant, his sole heir at law, who came of full age on the 22d of November, 1869. A few months before his death he was appointed administrator *de bonis non* of his brother David, but nothing came to his hands as such administrator, and he filed no account. After his death, Brutus J. Clay, Senior (father of Brutus, one of the complainants), was appointed administrator, both of the estate of Christopher and of his brother David, and assumed the management of the plantation; but by reason of dilapidation, [101] growth of brush, and overflows of the river, realized nothing beyond taxes and expenses as long as he had the charge.

On the 2d of November, 1868, Brutus J. Clay, Senior, as administrator of David I. Field, presented a petition to the probate court of Bolivar County, Mississippi, representing the estate of said David to be insolvent, and praying for an order to sell his property, real and personal, for the payment of his debts. Schedules were annexed to the petition, showing that there was no personal property, that the only real estate was the said David's half interest in the plantation of Content, and that his debts consisted of one half of the notes given to Christopher as before mentioned. The petition stated that David's widow, Lucy, and his only child and heir, David, Jr., and his guardian, one Scott, resided in Lexington, Kentucky, and prayed an order of publication citing all parties interested to appear, etc. Upon this petition and the proceedings had in pursuance thereof, a decree was made by the probate court in March, 1869, declaring that the estate was insolvent, and authorizing and directing the administrator to sell the lands described in the petition. In pursuance of this decree and advertisement, duly published, D. I. Field's one half interest in the plantation was sold at public auction on the 20th day of December, 1869, and struck off to the complainant, then Pattie A. Field, by her attorney, for the sum of $6,000. The complainant gave her re-

ceipt for the amount of purchase money, less the costs, which was credited on the notes by the administrator, and she received a deed for the property purchased, and went into possession, and has remained in possession, by herself and her husband or her tenants, ever since that time, except as to the dower of the defendant, Lucy C. Freeman, hereafter mentioned. The sale was made in good faith and in the belief that it was valid. On the first day of December, 1869, shortly before the sale took place, a new Constitution of Mississippi went into operation, which abolished the probate court and established a chancery court for each county, having, amongst other things, the former jurisdiction of the probate court; and, by a law [102] passed the 4th of May, 1870, it was enacted that all causes and proceedings remaining undisposed of in the court of probate of each county should be transferred to the chancery court. The proceedings in this case were not formally transferred, but are actually on file in the clerk's office of the chancery court for Bolivar County aforesaid.

The bill then states the results of the working of the plantation from 1870 to the time of the filing of the bill, showing that no profits were realized, but that the complainant incurred a loss of from $2,500 to $3,000, in consequence of the dilapidations consequent upon the war, severe overflowing of the river, and other causes for which the complainant was not responsible. Vouchers are exhibited with the bill for taxes, expenses, and repairs by her paid and incurred.

In 1873 Lucy C. Freeman (then Lucy C. Field) filed a petition in the chancery court of Bolivar County for her dower in one undivided half of the Content Plantation; and in 1875 a decree for allotment of dower was made, which decree was affirmed by the supreme court of the State in 1876, so far as said Lucy's legal right to dower was concerned. The complainant and Brutus J. Clay, Senior, by way of defense to the suit, set up the partnership, the indebtedness to Christopher I. Field, the fact that the plantation was partnership property, and liable for the partnership debts before any dower could be had therein, and also set up the sale of David I. Field's interest by order of the orphans' court. But this defense was overruled as not a good defense at law. The supreme court in affirming the decree, however, declared that the right of C. I. Field's estate arising out of the partnership and the partnership debts was not affected by the proceedings in dower, and that the defendants, or tenants, in that suit were left free to litigate the same with the said Lucy. Her dower was thereupon set off to her in November, 1879, and complainants hoped she would be therewith content, and did not further resist her taking possession of her dower. But in September, 1880, she filed a bill for damages in dower, which is now pending in the Circuit Court of the United States for the Northern District of Mississippi.

[103] On the 27th of November, 1880, David I. Field, Junior, who had then come of age, commenced an action of ejectment in the said circuit court for an undivided half of said plantation, as heir of his father, David I. Field, Senior, and demands $20,000 for mesne profits. The complainant filed a plea, and the suit was still pending at the time of filing the bill in this case.

The bill states that shortly after the sale made on the 20th of December, 1869, Brutus J. Clay, Senior, made his final settlement as administrator of the estates of David I. Field and Christopher I. Field, in the chancery court of Bolivar County aforesaid, and was discharged; and that there has since been no administrator of either of said estates. E. H. Field also settled his accounts as administrator of David I. Field's estate and was discharged. All of the personal property of the partnership of David I. Field & Co. was lost or destroyed without any negligence of Christopher I. Field, surviving partner, as the result of the war, at the end of which the only property of the partnership left was the Content Plantation; that no part of the partnership notes given to Christopher as aforesaid has ever been paid. The complainant insists that this debt is a charge on the property prior to any claim of the widow, Lucy, or of the heir, David I. Field, Junior. D. I. Field's estate is insolvent, the one half of said lands being now insufficient to pay said notes and the interest thereon. C. I. Field, at the time of his death, owed nothing, or if anything, all his debts are paid off and discharged. All the partnership debts, except the said debt due to the estate of C. I. Field, have been paid off and discharged. The complainant, Pattie A. Clay, now holds said debt as his sole heir at law and distributee.

The prayer is that an account of the partnership may be taken, and that the assets may be marshaled, and the said debt paid out of the assets of the partnership, including said plantation—the complainants proffering an account of all moneys received therefrom, and claiming credit for all taxes, expenses and repairs. The prayer then proceeds as follows: "Or if this honorable court should adjudge and determine that the said proceedings in the probate court of said county of Bolivar constitute an election [1 binding upon her, and that they estop her from proceeding otherwise than as against the undivided half interest of said David I. Field, deceased, in said plantation for the half of said partnership debts due to her ancestor, your orators in that event pray that after the amount due her as such heir at law and distributee upon such accounting shall be ascertained and fixed; the said undivided half interest of said David I. Field in said plantation shall be sold under the proper decree of this court, thus carrying into execution the decree of said probate court of Bolivar County, rendered in the matter of the administration of the estate of said David I. Field, deceased; but if this honorable court should adjudge and determine that your orators are not entitled to either of the special reliefs hereinbefore prayed, they then pray that this honorable court may decree that your orators have a lien upon the said undivided half interest of said David I. Field, deceased, in said plantation for the said sum of $6,000, and the interest thereon from the 20th day of December, 1869, lessened by any balance that may be found due by her upon such accounting to be had in the cause as may be adjudged to be fair and equitable; and if it be determined that your oratrix has lost her right to proceed against

said plantation, as assets of said partnership for the payment of said partnership debts to her said ancestor, they pray that an accounting may be had between them and the said Lucy C. Freeman, in connection with her claim as propounded in and by her bill of complaint, upon such principles and in such manner as this honorable court shall adjudge to be fair and equitable; or, if mistaken in the relief sought, then for such other, further and general relief and decree as to equity belongs and your orators can require. In the meantime your orators, hereby confessing they are without valid title to the undivided half interest of said David I. Field in said plantation, but claiming and insisting that in no event can they be held to account to said defendants in two separate proceedings concerning the rents of said plantation, and that the whole controversy between them and said defendants, their agents and attorneys, be enjoined, inhibited, and restrained from further prosecuting their [105] said suits in this honorable court against your orators; and on final hearing, that said injunction be perpetuated."

This bill was dismissed by the court below as upon demurrer. Other proceedings were had; but, in view of the course which was finally taken in the cause, it is not necessary to notice them. The ground on which the bill was dismissed was lapse of time. The sale of David I. Field's interest by order of the probate court in 1869 was held to be void. This was also so held in the action of ejectment brought by David I. Field, Junior, the reason assigned being that the probate court had no jurisdiction of accounts between partners, and that the administrator gave no bond as required by law. On writ of error from this court in that case the judgment of the circuit court was affirmed. See *Clay & Wife* v. *Field*, 115 U. S. 260 [Bk. 29, L. ed. 375]. But that action affected only the legal title; and the question still remains, unless precluded by lapse of time, whether, in equity, the lands, being partnership property, are not liable to the debts of the partnership prior to any claim of the widow and heir of D. I. Field.

As before said, the court below placed its decree upon the lapse of time, holding that as the partnership was dissolved by the death of David I. Field, Sr., in September, 1859, a suit for an account of the partnership transactions could not be brought in 1882, after a lapse of 23 years; or, deducting 5 years for the continuance of the war, after a lapse of 18 years.

If this were simply a bill to enforce the settlement of an account, this reasoning would be very apposite. But it is not. It is a bill to prevent a dispossession of property until the equitable charges against that property are adjusted and settled. Of course the adjustment and settlement of those charges involves an account of the partnership transactions. But that account was no less claimable, at any time, by the estate of D. I. Field than it was by that of C. I. Field. The primary object of the present bill, though it involves a taking of the account, is to prevent the complainants from being dispossessed of the property until their claim against [106] it has been discharged.

If a pledgee holds property as security for a debt, the Statute of Limitations does not affect his right to hold the pledge until the debt is paid; it does not authorize the debtor to claim the pledge without paying the debt. The creditor is in possession. If the statute runs against anyone (so far as relates to the pledge), it runs against the pledgeor. The creditor, by operation of the statute, may lose his right of action for a personal judgment against the debtor; but he has a right to hold on to the pledge until the debt is paid. It is the debtor's concern to see that he does not lose his right to redeem the pledge.

So, a mortgagee in possession, if satisfied with the mortgage security, need have no anxiety about the Statute of Limitations. That is the concern of the mortgagor. Unless he redeems in proper time, he will lose his equity of redemption.

The same rule applies in the case of partnership property in the possession of the surviving partner; he has a right to hold it until the debts of the firm are paid, and if the firm is indebted to him, he has a right to hold it until he is paid. It is true, it is his duty to dispose of the partnership property, and settle the partnership debts. But that is a duty to which he may, at any time, be compelled by the representatives of the deceased partner and although his neglect or delay in winding up the concern may expose him to the animadversion of the court, and to the vigorous exercise of its power to compel him to do his duty, it will not relieve the partnership assets in his hands from the lien of the partnership debts. Being in possession of those assets, he is not affected by the Statute of Limitations. If the statute runs against anybody, it runs against the representatives of the deceased partner in relation to their right to call him to account. The proposition that the partnership property can be taken out of the surviving partner's hands and distributed amongst the several partners and their representatives, without a settlement and payment of the partnership debts, including any balance due the surviving partner himself, is a proposition that equity will not for a moment entertain.

The other side, it is true, have prevailed at law; but they cannot prevail in equity. It would be strange indeed, if the principal capi- [107] talist of the firm, who advanced much the largest amount of money in the concern, should be brought in debt to his copartner. The thing is unreasonable on its face; and it cannot stand the test of a juridical examination.

The reason why the matter lay so long without any movement being made on either side (except that of Lucy C. Freeman for her dower) is probably this: On the side of C. I. Field and his representatives it was supposed that the decree of the probate court, declaring the insolvency of D. I. Field and ordering a sale of his property to pay his debts, and the sale made in pursuance thereof, ended all further inquiry or controversy. On the side of D. I. Field's family, it is probable that the same idea prevailed; or, if not, that the land was not supposed equal in value to the lien upon it. The infancy of D. I. Field, Jr., would hardly have deterred his mother and guardian from prosecuting his interest if they had thought it worth prosecuting.

The idea that David, Junior, could get the land without paying the debt on account of lapse of time is probably of recent growth.

But whatever the reasons for inaction may have been, C. I. Field and his representatives and heir at law have always, since the war, remained in possession; and the heir cannot, in equity, be ousted of that possession without a settlement of the accounts. It is very doubtful, indeed, whether without this possession even a technical plea of the Statute of Limitations, or lapse of time analogous thereto, could be sustained. After the death of D. I. Field, his administrator, E. H. Field, and C. I. Field, by mutual consent, continued the partnership until the breaking out of the war. Of course, neither party could have claimed that the statute was running during that period, under those circumstances. It did not run during the war. It did not commence to run, therefore, until April, 1866. C. I. Field died fifteen months afterwards, in July, 1867, and for several of those months he had been administrator of his brother's estate, no one being such for the remainder of the time. Of course he could not sue himself. Then Brutus J. Clay, Sr., was appointed administrator of both estates, and, so far as appears, continued such (except as discharged from active trust on settlement of his accounts) down to the period of his death, which occurred, as stated in the bill, in October, 1878, since which time there has been no personal representative of either estate. We do not see, therefore, how the Statute of Limitations, or lapse of time, can be set up against the complainant, Pattie A. Clay, the heir at law of C. I. Field.

[108]

That she is a proper party to bring this suit we think is very clear. She is the only person in the world interested in C. I. Field's real or personal estate. In the realty she is legally interested as heir at law; in the personalty she is the only beneficiary. If new letters of administration were to be taken out it would be for her benefit. There are no creditors; there are no debts due the estate except the one debt due from the partnership. The plantation is partnership property, standing in the joint names of the partners, but liable for the partnership debts. C. I. Field and his administrator held it in possession subject to the lien of those debts. She, as their successor and the only person beneficially interested, still holds that possession. We think it would be highly inequitable to deprive her of that possession at the suit of the heir of D. I. Field, the debtor, without payment of the debt under the lien of which she holds it, or, at least, without bringing the debt into account against the property itself and any rents and profits which she and her predecessors in interest may have realized therefrom. Her position is really one of defense. She has possession, and an attempt is made, under a technically legal title, to deprive her of that possession; whilst that legal title is a merely formal one; since, as before said, the lands are partnership property, and assets, in equity, subject to the partnership debts; and her possession as sole successor in interest to her father cannot be disturbed without doing equity to her, by allowing her to bring the notes, with interest (now belonging to her) into account against those assets. The sale made by order of the probate court having been adjudged void, its incidents and consequences are void—such as the receipt given for the balance of the $6,000 purchase money, and the indorsement thereof on the notes. The latter will stand for their full amount, with interest, less the indorsement of $243.50 made by C. I. Field.

It results from these views that the lien for partnership debts takes precedence, not only of the interest of David I. Field, Jr., as heir at law of D. I. Field, but of Lucy C. Freeman's right of dower. As, however, dower was actually assigned to her nearly three years before the filing of the present bill, such assignment should not now be disturbed; but no further exaction for detention of dower should be enforced. We think, therefore, that upon the allegations of the bill, the complainants are entitled to relief, and that the demurrers should have been overruled.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to overrule the demurrers, and to proceed in the cause according to law and the principles announced in this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:
In the MATTER OF WASH. F. LOTHROP.

(See S. C. Reporter's ed. 118-119.)

Territory of Arizona—authority of Legislature to establish courts.

The County Court in the County of Cochise, established by section 4 of the Act of March 12, 1885, of the Legislature of Arizona, is an inferior court within the meaning of section 1908 R. S. and was therefore legally created.

[No. 6. Orig.]

Argued and submitted April 12, 1886. Decided April 26, 1886.

PETITION for a writ of *habeas corpus. Denied.*

The case is stated by the court.

Mr. A. X. Parker, for petitioner.

Mr. **Thomas Mitchell**, in opposition.

Messrs. A. T. Britton and *A. B. Browne*, filed a brief in support of the validity of the Territorial Act "in behalf of the legal profession and the public at large" in the Territory.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The petitioner is detained in the territorial prison of Arizona upon a warrant of commitment issued by the County Court of Cochise County, under a sentence of imprisonment on a conviction of the crime of grand larceny; and the only question presented by his petition is whether the Territorial Legislature of Arizona had authority to create and establish that court. There is no question of the jurisdiction of the court to try the petitioner for the offense of which he was convicted, if the court itself was rightfully created.

The provisions of the Revised Statutes on which the question depends are these:

"Sec. 1846. The legislative power in each Ter-

ritory shall be vested in the Governor and a legislative Assembly. The legislative Assembly shall consist of a council and house of representatives."

"Sec. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

"Sec. 1864. The supreme court of every Territory shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum. * * * They shall hold a term annually at the seat of government of the Territory for which they are respectively appointed.

"Sec. 1865. Every Territory shall be divided into three judicial districts; and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned."

"Sec. 1868. The supreme court and the district courts, respectively, in every Territory, shall possess chancery as well as common-law jurisdiction."

"Sec. 1869. Writs of error, bills of exceptions, and appeals shall be allowed, in all cases, from [115] the final decisions of the district courts to the supreme court of the Territories, respectively, under such regulations as may be prescribed by law."

"Sec. 1907. The judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana and Wyoming, shall be vested in a supreme court, district courts, probate courts and in justices of the peace."

"Sec. 1908. The judicial power of Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe."

"Sec. 1866. The jurisdiction, both appellate and original, of the courts provided for in sections 1907 and 1908 shall be limited by law."

Such was the organic law of Arizona, as shown by the Revised Statutes, on the 12th of March, 1885, when the Act was passed by the Legislative Assembly of the Territory and approved by the Governor, "to create and establish a County Court in the County of Cochise." Section 4 of this Act is as follows:

"Sec. 4. Said county court shall be a court of record, having a seal with the coat of arms of the Territory and 'County Court, Cochise County, Arizona,' sunk or engraved thereon; and said county court shall have original, general, criminal and civil jurisdiction, except as hereafter limited, and shall have equal, concurrent, common-law, equitable and statutory jurisdiction with the district courts in all cases. The County Court of said Cochise County shall have original, concurrent jurisdiction with the district courts in all cases of equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to $100 or more; and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of all actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and all matters incidental thereto or connected therewith; and of all such special cases and proceedings as are not otherwise provided for. And said court shall have the power of naturalization, and to issue papers therefor. Said county courts shall have appellate jurisdiction in all cases arising in justices and other inferior courts in [116] said Cochise County, in the same manner and to the same extent as is now allowed by law on appeals from such courts to the district courts. The said County Court of Cochise County shall be always open, legal holidays and nonjudicial days excepted, and its process shall extend to all parts of the Territory; *Provided*, That all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated. Said county court and the judge thereof shall have power to issue writs of *mandamus*, *certiorari*, injunction, prohibition, *quo warranto* and *habeas corpus* on petition, by or on behalf of any person in actual custody in said Cochise County. Injunctions, writs of prohibition and *habeas corpus* may be issued and served on legal holidays and nonjudicial days, and all Acts and parts of Acts granting and conferring jurisdiction to and upon the district courts and describing their civil and criminal procedure shall be and is here made applicable to the County Court of Cochise County. Appeals shall be taken from the county court to the supreme court of this Territory in the same manner and in the same cases as are now allowed by law in appeals from the district and probate courts to the supreme court."

The judge of the court was to be elected by the qualified electors of the county, and to hold his office for four years. He was to reside at the county seat, and could not be absent from the county more than thirty days in each calendar year.

The precise question for determination is whether such a court with such a jurisdiction is an "inferior court" within the meaning of section 1908. It has "equal, concurrent, common-law, equitable and statutory jurisdiction with the district courts in all cases," and "original, concurrent jurisdiction with the district [117] courts * * * in all criminal cases amounting to felony, and cases of misdemeanor, not otherwise provided for." It is, therefore, a court of substantially equal dignity and importance with the district court, so far as Cochise County is concerned; but it is "inferior" to the supreme court, because that court has power to review its judgments and decrees on appeal. As every Territory is by the Revised Statutes to be divided into districts, and a district court is to be held in each district, section 1908 must be so construed as not to exclude district courts in Arizona Territory. Still, as district courts are neither named nor specifically referred to in the section, it does not necessarily follow that the "inferior courts" provided for must be courts inferior to them. For some reason Congress saw fit in establishing the Territorial Government of Arizona to depart from its usual habit of specifying the courts in which the judicial power should be vested, and to pro-

vide that it should be vested there "in a supreme court to consist of three judges, and such inferior courts as the legislative council may prescribe." Chap. 56, § 2, 12 Stat. at L. 665. In all the other Territories then existing it had been vested "in a supreme court, district courts, probate courts, and in justices of the peace." This practice began with the Act establishing the Territorial Government at Wisconsin, April 20, 1836, 5 Stat. at L. 10, chap. 54, § 9, and it was followed in all the territorial organic Acts passed afterwards, except in those for Arizona and Alaska. In Arizona the provision as to the vesting of judicial power was more like that in the organic Act of Florida, March 30, 1822, 3 Stat. at L. 654, chap. 13, § 6, where it was placed "in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the Territory may from time to time establish." This, it was held in *American Ins. Co.* v. *Canter*, 1 Pet. 511 [26 U. S. bk. 7, L. ed. 240], gave the legislative council authority to establish courts of concurrent jurisdiction with the superior courts, except in respect to capital offenses, as to which, by the organic Act, the jurisdiction of the superior courts had been made exclusive. The language of *Chief Justice* Marshall is, p. 544 [256]: "This general grant is common to the superior and inferior courts and their jurisdiction is concurrent, except so far as it may be made exclusive in either, by other provisions of the statute. The jurisdiction of the superior [118] courts is declared to be exclusive over capital offenses; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts." This is, as it seems to us, equally applicable to the present case. The legislative power of the Territory extends to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." This includes the establishment of "inferior courts;" that is to say, courts inferior to the supreme court. District courts have been established by Congress, but Congress has not defined their jurisdiction, further than to provide generally that they shall have chancery as well as common-law jurisdiction. According to section 1866 the jurisdiction of all the courts is to be such as shall be limited by law. There is no restraint on the legislative power of this Territory as to the grant of jurisdiction to the inferior courts, except by implication, that it shall be such as properly belongs to a court inferior to the supreme court. In *Ferris* [*Perris*] v. *Higley*, 20 Wall. 388 [87 U. S. bk. 22, L. ed. 384], it was held in respect to a Territory where the judicial power was vested in a supreme court, district courts, probate courts, and justices of the peace, that the probate courts could not be vested by the territorial Legislature with the powers of courts of general jurisdiction, both civil and criminal, because that would be inconsistent with the nature and purpose of a probate court as authorized by that Act, and inconsistent with the clause which conferred on the supreme court and district courts general jurisdiction in chancery as well as at law. But here there is nothing of the kind. All that is required, according to the doctrine of *American Ins. Co.* v. *Canter*, is that the court shall be inferior to the supreme court. Its jurisdiction may be made concurrent with that of every other court which is alike inferior to the supreme court. Section 1869 provides for appeals and writs of error from the district courts to the supreme court, but this is not at all inconsistent with authority in the Legislature of Arizona to allow like appeals and writs of error from any other inferior court it may establish. District courts are now established in all the Territories, but it is, to say the least, doubtful whether that was done by Congress in Arizona prior to the adoption of the Revised Statutes. As has already been seen, the original organic Act contained no such provision in express terms, and it is not necessary now to decide [11 what effect the extension to that Territory of the legislative enactments, etc., of New Mexico may have had on this subject. At the first session of the Territorial Legislature of Arizona in 1864 such courts were established and their jurisdiction defined. Howell, Code, chap. 45, pt. 8. At the same time the Territory was divided into three judicial districts, the judges of the supreme court assigned for district court purposes, and the times and places for holding such courts fixed. From that time until now district courts have actually existed in the Territory, and it is not now important to inquire by what particular authority. The Territorial Legislature had power before the adoption of the Revised Statutes to create courts of concurrent jurisdiction with the district courts, and this power was not taken away by the revision.

Something was said in argument about the use of the word "prescribe" in the organic Act of Arizona, and "establish" in that of Florida, but we attach no importance to this. The words are often used to express the same thing, and Webster classes them as synonyms. We are, therefore, of opinion that the Act establishing the county court is valid and that the writ should be denied. Congress has power under section 1856 of the Revised Statutes to disapprove the Act and thus render it inoperative thereafter, and it is to be presumed this will be done if in its practical operation the court shall be found to be no longer desirable. There may be now no good reason for keeping up the distinction between the power of the Territory of Arizona over its courts and that of the other Territories; but this is a subject for congressional legislation and not for judicial restraint.

The rule is discharged and the writ of habeas corpus *denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [86

v.

O. S. WILSON.

(See S. C. Reporter's ed. 86-90.)

Bill in equity to clear title—when does not lie—legal remedy.

1. The remedy of a person having the legal title to real estate, but kept out of possession by a person holding adversely, is at law to recover the pos-

session. Bills *quia timet*, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment which is plain, adequate and complete.

2. Where the local statute gives the remedy by bill in equity to remove a cloud upon a legal title, without requiring the complainant to obtain prior possession, that remedy may be administered in appropriate cases by the courts of the United States, but section 5043 of the Tennessee Code, enlarging the equity jurisdiction of courts of that State, does not efface the distinction between legal and equitable rights and remedies; and if it did, it could not confer upon the courts of the United States jurisdiction in equity to try cases at common law.

3. The United States alleged in its bill that a distiller became indebted in a certain sum for taxes and penalties which were assessed on the July list for 1867; that on failure to pay the same proper steps were taken and, on March 25, 1876, the interest of the distiller in certain real estate was sold to the United States; that, there having been no redemption, the land was, on September 29, 1877, conveyed to the United States; that on January 14, 1876, the distiller, for the purpose of defrauding the United States, conveyed the property to the defendant in error. *Held*, under the principles above stated, that the remedy of the United States, if any, was by ejectment.

[No. 226.]

Argued April 15, 1886. Decided April 26, 1886.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee. *Affirmed.*

The case is stated by the court.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellant.

No one appeared for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the United States, June 6, 1878, to which were made defendants the widow, personal representatives and heirs at law of E. L. Allen, deceased, and C. S. Wilson, the appellee, and John T. Gill.

The material allegations of the bill are, that in the year 1867 there was a firm of distillers in Lincoln County, Tennessee, under the name of Alexander & Co., of which E. L. Allen, since deceased, was a member; that the said [87] firm became indebted to the United States in the sum of $3,057.16 for taxes and penalties, which were duly assessed on the July list for 1867; that failing to pay the same, as required by law, the proper collector of internal revenue, on January 21, 1876, issued a distress warrant for the collection of the same which, there not being a sufficiency of goods and chattels of the firm or either of the partners, was, on January 22, 1876, levied on all the right, title, claim and interest of the said E. L. Allen, in and to certain real estate in said County of Lincoln, particularly described in the bill; that, pursuant to law, all proper notices having been previously given, the said premises were offered for sale at the court-house door, in the Town of Fayetteville, on March 25, 1876, when said lots and parcels of land were offered separately at the minimum price placed on each; and no person offering to take them or either of them at said price, the same were purchased by the United States in accordance with the statutes in such cases made and provided; that no one appearing to redeem said lands within the time provided by law, on September 29, 1877, the collector of internal revenue, then in office in said district, conveyed to the United States, by deed, under and by virtue of said assessment, distress warrant, levy, and sale, all the interest in said lands of the said Allen, of which, at the time said taxes became due and were payable, it is averred the said Allen was owner in fee, holding the legal title thereto; that, notwithstanding said taxes were a lien on said lands from the time the same became due and payable, the said Allen and the said Wilson conspired and confederated to hinder, delay and defraud the United States in the collection of said taxes, and, in pursuance of said conspiracy and confederacy, on January 14, 1876, the said Allen made a pretended sale and conveyance of said tracts of land by deed to the said Wilson; that the said deed purported on its face to be an absolute conveyance in fee, and was duly registered and recorded as such; but the same was not so in fact, there being a secret agreement between the parties thereto by which it was converted into an assignment with benefits reserved to said Allen, and was made for the purpose of hindering, delaying and defrauding the United States in the collection of said taxes; the said Allen being at the time insolvent, and the property conveyed being all his property [88] subject to execution, and the conveyance to Wilson being, therefore, an assignment of all his effects by an insolvent debtor of the United States, within the meaning of section 3466 of the Revised Statutes of the United States; that since this assignment and since the sale to the United States, the defendant Gill claims to have acquired an interest under Wilson in the said real estate.

The prayer of the bill is that the conveyance by Allen to Wilson be declared fraudulent and void; that the paramount lien of the United States in said land for the said taxes be adjudged and declared; that the priority of the United States be maintained and decreed, and the pretended conveyance of Allen to Wilson be removed as a cloud upon their title, and account for rents and profits, and a writ of possession to put the complainants in possession, and for general relief.

The defendants answered, denying the legality of the tax and its assessment, and the regularity of the steps taken for its enforcement, and the validity of the sale and conveyance to the United States, and denying all the allegations of fraud and trust in reference to the conveyance from Allen to Wilson, insisting that the same was an absolute conveyance, made in good faith and for a valuable consideration. The case was put at issue by a replication and heard upon the pleadings and proof. The circuit court, finding the preponderance of evidence against the allegation of a demand of payment of the tax, penalty and interest, as required by section 3185 of the Revised Statutes, and that the title set up by the United States had failed, dismissed the bill. From this decree the United States has appealed.

Without examining the ground on which the circuit court proceeded, we are of opinion that the bill was rightly dismissed. The case as made by it is not one of equitable cognizance. It is not a creditor's bill. The United States does not set forth a debt due and a lien on the land of the debtor which it seeks to subject to the payment of the debt by a sale and to marshal the liens thereon. The debt originally due by

[89] virtue of the assessment of the tax has been merged in the tax sale and the purchase in pursuance thereof. The United States claims and, if the allegations of the bill can be supported by proof, owns the legal title to the lands described, a title paramount to that under which the appellee claims; for the deed to the United States conveys, if it is effective, the title which Allen had when the tax was assessed in July, 1867, and operates by relation from that time. Having the legal title, then, but being kept out of possession by defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless its aid is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate and complete. This is the familiar doctrine of this court. *Hipp* v. *Babin*, 19 How. 271 [60 U. S. bk. 15, L. ed. 633]; *Ellis* v. *Davis*, 109 U. S. 485 [Bk. 27, L. ed. 1006]; *Killian* v. *Ebbinghaus*, 110 U. S. 568 [Bk. 28, L. ed. 246]; *Fussell* v. *Gregg*, 113 U. S. 550, 555 [Bk. 28, L. ed. 993, 995].

The case of *Ward* v. *Chamberlain*, 2 Black, 430, 444 [67 U. S. Bk. 17, L. ed. 319, 326], was one of a creditor's bill, where the complainant, having a lien on the real estate of the defendant, by virtue of a decree in admiralty, for the payment of money, was held, as in other cases of creditors by judgment or decree, to be entitled to the aid of a court of equity to remove a cloud upon the title which obstructed or prevented the enforcement at law of his lien. The jurisdiction is invoked in such cases because it is necessary to give to the complainant the benefit of his remedy at law, which, without it, is not plain, adequate and complete.

Where the local statute gives the remedy by a bill in equity to remove a cloud upon the legal title, without requiring the complainant to obtain prior possession, that remedy, it is admitted, may be administered in appropriate cases by the courts of the United States. *Holland* v. *Challen*, 110 U. S. 16 [Bk. 28, L. ed. 52]; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405 [Bk. 28, L. ed. 733]; *Chapman* v. *Brewer*, 114 U. S. 158 [Bk. 29, L. ed. 83].

[90] But there is no statute of Tennessee which gives an equitable remedy in such cases. It is true, indeed, that section 5043 of the Code of Tennessee provides that the chancery court "shall have and exercise concurrent jurisdiction with the circuit court, of all civil actions triable at law, except for injuries to person, property, or character, involving unliquidated damages;" and it has been decided by the Supreme Court of that State that this gives the chancery court jurisdiction over an action of ejectment. *Frazier* v. *Browning*, 11 Lea, 253. But this does not efface the distinction between legal and equitable rights and remedies, and if it did, it could not confer upon the courts of the United States jurisdiction in equity to try cases at common law. *Thompson* v. *Railroad Companies*, 6 Wall. 134 [73 U. S. bk. 18, L. ed 765]; *Bacey* v. *Gallagher*, 20 Wall. 670 [87 U. S. bk. 22, L. ed. 452].

The decree of the Circuit Court is accordingly affirmed, without prejudice to the right of the appellant to bring an action at law.

CATHARINE CONLEY, *Appt.*, [12

v.

RACHEL D. NAILOR ET AL.

(See S. C. Reporter's ed. 127-136.)

Bill to set aside deeds—incapacity of grantor—consideration, criminal intercourse—fraud or undue influence of grantee—equity practice.

1. Unless a plaintiff in equity waives the answer under oath, the answer must be sworn to and is evidence.

2. Extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance may be sufficient ground for setting it aside when made upon a nominal or grossly inadequate consideration. Each case however must stand on its own facts, and a review of the evidence in the present case shows that the deeds in question cannot be set aside under this principle.

3. A conveyance to a woman with whom the grantor was living in adulterous intercourse, for the benefit of the illegitimate children of the grantor and grantee, is upon a valid consideration; and the subsequent death of the children does not invalidate the conveyance, although it contained a provision that, upon that contingency, the fee should vest in the grantee.

4. In order that a deed may be set aside on the ground of undue influence, the influence must be such that the grantor has no free will but stands *in vinculis*.

[No. 228.]

Argued Apr. 12, 13, 1886. Decided Apr. 26, 1886.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. **Walter D. Davidge** and *Irving Williamson*, for appellant.

Messrs. **William A. Cook** and **C. C. Cole**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

This was an appeal from a decree of the Supreme Court of the District of Columbia, by which certain deeds executed by one Allison [12 Nailor, to Catharine Conley, the defendant and appellant, were declared null and void. The deeds were four in number, and under them the defendant claimed title to certain real estate, some of which was situate in the City of Washington, and the rest in Montgomery County, in the State of Maryland. The bill was filed by the widow and three of the four heirs of Nailor. The interest of the widow in the lands was as doweress, and her rights were conceded by the answer. Allison Nailor, Jr., the remaining heir, was made a defendant, and answered that he had received his share of his father's estate by advancement, and disclaimed any interest in the property in controversy. The litigation was, therefore, virtually between Washington T. Nailor, son, and Lizzie Trimble and Frances Clarke, married daughters

NOTE.—*Validity of deed; insanity, drunkenness, duress, fraud, etc.* See Harding v. Handy, 24 U. S. bk. 6, p. 429, note.

of Allison Nailor, whose husbands, Matthew Trimble and James W Clarke, were joined as plaintiffs.

The pleadings and evidence showed the following facts: In the latter part of the year 1869 Allison Nailor, who was then about fifty-eight or fifty-nine years of age, was the owner of real estate in the City of Washington and in Montgomery County, Maryland, worth about $150,000, and was possessed of considerable personal estate. He had resided in the City of Washington for about fifty years. He had for many years been engaged in buying and selling real estate, in keeping a livery stable, and in farming. He was shrewd and active in business, and had the capacity for making money and accumulating property. Much of the real estate which he owned in the City of Washington he let to be used for houses of ill fame and for sale by retail of spirituous liquors. For many years prior to 1869, and at least as early as the year 1854, he had led a dissolute and intemperate life. In 1869 he made the acquaintance of the defendant, who was then about twenty-one years of age. There is no averment or proof that prior to that time she was not a virtuous woman. In November or December of that year Nailor left his family and took up his residence with the defendant, and lived with her in concubinage until his death.

The deeds referred to in the bill were the following: the first was a trust deed, dated and [129] executed November 27, 1872, more than six years before the death of Nailor, and recorded May 27, 1873, which conveyed to the defendant, Catharine Conley, a lot on South Fourteenth Street, in the City of Washington, to hold in trust for the sole and separate use of Willie Earnest Nailor, who is described in the deed as the infant son of the grantor and the grantee. By the terms of the trust the grantee was to receive the rents and profits of the lot and apply the same to the education and support of the beneficiary. When the latter became twenty-one years of age the trust was to cease, and the title in fee simple was to vest in him. But the deed provided that, should "said Willie Earnest die before he arrives at the age of twenty-one years," "or without having disposed of the said piece or parcel of ground," then the title in fee simple should vest absolutely in the defendant.

The three other deeds were all dated and executed March 29, and recorded early in April, 1878. One of these three deeds conveyed to the defendant certain other real estate in the City of Washington in trust for the sole and separate use of Mary Edna Nailor, who is described as the infant daughter of the grantor and grantee, upon trusts and uses similar to those contained in the first deed, and with a similar remainder to the defendant. The second of the three deeds conveyed to the defendant about one hundred and thirty acres of land in Montgomery County, Maryland, in trust for the benefit of the said Willie Earnest Nailor, upon trusts and uses similar to those contained in the deed of November 27, 1872, and with a similar remainder to the defendant. The last deed conveyed to the defendant, in fee simple, for her own use, about one hundred acres of land in Montgomery County, Maryland. The property conveyed by these four deeds was worth about $25,000. Willie Earnest Nailor died August 6, 1878, being nearly six years of age, and Mary Edna Nailor died August 8, 1878, being nearly two years of age. Catharine Conley, therefore, claimed title in fee simple to all the property conveyed by the four deeds above mentioned. Allison Nailor died January 6, 1879.

The bill alleged three grounds for setting the deeds aside. The first was that the grantor was "demented and insane," and mentally incapa- [130] ble of making the deeds; the second, that the only consideration for said deeds, "and each of them, was the illegal and criminal intercourse between said Allison Nailor, Sr., and the said Catharine Conley, and that such consideration was illegal, alike contrary to public policy and common decency;" and the third, that the deeds had been procured by fraud and the undue influence of the defendant over the grantor. The bill neither required nor waived an answer under oath, but the defendant answered under oath, traversing all the averments of the bill upon which the prayer for relief was based. We shall notice the grounds upon which the cancellation of the deeds is demanded, in the order in which we have stated them.

There is a large mass of evidence in the record introduced to prove that from a long course of dissolute and intemperate habits Nailor had become insane and incapable of transacting business. On the other hand there is, in our judgment, a great preponderance of evidence to show that when he executed the deeds, though in feeble health, he was of sound mind and capable of intelligently executing and making the conveyances. It would serve no useful purpose to discuss the evidence in detail. But there are some striking facts which should be stated. Of the forty-three witnesses for the plaintiffs who testify in regard to the mental capacity of Nailor, thirty-three give their opinion from having seen him when drunk. Of these thirty-three, eighteen swear that they never saw him sober, three that they never saw him sober but once, and twelve that they seldom saw him when not intoxicated. Six other of the forty-three witnesses speak of him as incompetent to transact business when he had been drinking. Only four witnesses testify that he was incapable of doing business when sober. Three of these are plaintiffs in this case, namely: W. T. Nailor, Matthew Trimble, and James W. Clarke. W. T. Nailor testifies generally that for the last eight or ten years of his life, Allison Nailor, his father, was incapable of transacting business, and that neither on November 27, 1872, when the first deed was executed, nor on March 29, 1878, when the other three were executed, was he mentally competent to make a valid conveyance. But the same witness testifies that during the last year of his father's life he [131] took from him a thirty years' lease for certain stables in the City of Washington, at a rent of $50 per month and the taxes on the property. Matthew Trimble and James W. Clarke both swear generally; the first that for the last three years, and the other that for the last six or seven years of his life, Allison Nailor was not competent to transact such business as the disposition and conveyance of valuable property Fairly construed the testimony of these three plaintiffs may be considered to mean that, whether inebriated or not, Nailor was mentally incompetent during the latter years of his life

to attend to business of moment. After Nailor left his family and went to live with the defendant, it does not appear that these witnesses had any better opportunities for observing his mental condition than many others. There is but one witness, not a plaintiff in the case, who testifies that during the time covered by the transactions set out in the bill, Nailor, if sober, was not mentally capable of making the conveyances which the bill seeks to set aside.

The question to be decided is not whether Nailor had the mental capacity to make the conveyances when he was intoxicated, but whether he was competent when sober, and whether he was sober when he executed them. On these questions the evidence does not leave us in doubt. There is abundant testimony to show that during the last six or seven years of his life, Nailor, though habitually intemperate, was often sober and free from the influence of intoxicating liquors. This fact is shown by the testimony of fourteen witnesses who swear that they had interviews with him, many of them frequently, during the time above mentioned, and found him entirely sober. Every one of these fourteen witnesses testifies to the sanity and capacity of Nailor for the transaction of business. These witnesses, a number of whom had dealings with him, assert his mental capacity in the strongest terms. Other witnesses, who did not state distinctly whether they had met him when not under the influence of drink, spoke of the soundness of his mind in the same way. Three witnesses testify that they had known Nailor, one for thirty, and the other two for forty years, and had seen and talked with [132] him while sober during the last year of his life, and they concurred in the opinion that he was at that time of sound and capable mind.

The proof of Nailor's mental capacity extended to a period after the execution of the last three deeds. The physician who was attending his two children during their last illness, and who had frequent occasion to observe him when not at all under the influence of drink, testified to the soundness of his mind.

The apparent discrepancy between the witnesses for the plaintiffs and the witnesses for the defendant on the question of Nailor's mental condition is, therefore, in a large degree reconciled by the fact that the former give their opinions of Nailor's capacity when drunk and the latter when sober. In view of all the testimony on this branch of the case, it appears that Nailor, for many years before his death, had been dissolute and intemperate, and that during the last seven or eight years of his life his health had gradually failed. Much of the time he was more or less inebriated, but he was frequently entirely sober. When drunk he was, like most other men, incompetent to transact business. When sober he was, down to his last illness, entirely capable of doing the acts which are assailed in this case. He was competent to make deeds, to understand their effect, and to know whether or not their execution would accomplish his wishes. In all conditions, he was perverse, willful, obstinate, and defiant of public opinion.

The next inquiry relates to Nailor's mental condition and capacity on the two occasions when he executed the deeds whose validity is questioned by the bill. The averment of the bill was that the deeds were made when he was intoxicated and mentally incapable. The charge that Nailor was intoxicated when the deeds were executed is without support in the evidence. So far, therefore, as it concerns the deed executed on November 27, 1872, the case must fail for want of proof; for if Nailor was then competent to make a deed when sober, the plaintiffs to succeed in overthrowing that conveyance must show that when he executed it he was not sober, and this they have not attempted to do. In respect to the three deeds of March 29, 1878, the proof of sobriety and mental capacity of Nailor when he executed them is positive and satisfactory. The deeds were signed and acknowledged by Nailor before Nicholas Callan, a notary public of Washington City. Callan testifies that he had known Nailor for more than forty years; that he had during that time done much conveyancing for him; that he had taken his acknowledgment to more than a hundred deeds; that Nailor came to his office alone, on March 29, 1878, for the purpose of signing and acknowledging the last three deeds in question; that he conversed with him; that his mental condition was good on that day; and that he was sober. The deeds were all prepared beforehand, and were brought by Nailor, who acknowledged them in the presence of the witness.

This evidence is unimpeached and uncontradicted, and is conclusive. Upon the whole record, therefore, in our judgment, it plainly appears that Nailor was not intoxicated, and was mentally competent, when he executed the deeds which are the subject of this litigation.

The cases of *Harding* v. *Handy*, 11 Wheat. 103 [24 U. S. bk. 6, L. ed. 429] and *Allore* v. *Jewell*, 94 U. S. 506 [Bk. 24, L. ed. 260], are cited by the plaintiffs' counsel as authorities in law against this conclusion These cases establish the proposition that extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance, may be sufficient ground for setting it aside when made upon a nominal or grossly inadequate consideration. Conceding the correctness of this legal proposition, it can have no application to the present case, unless the facts are substantially the same. A cursory reading of the cases will show such a palpable difference in the facts as to make it clear that they cannot be taken as controlling authority in this. Cases like the present must each stand upon its own facts; and when the testimony shows that the grantor was sober and capable and well knew what he was doing when he executed the deed, no other case materially differing in its facts can furnish a reason for setting aside the deed thus executed.

The next ground alleged in the bill for annulling the deeds was that the only consideration for their execution was the illegal and criminal intercourse between Nailor and the defendant. There is no averment that the deeds were given in consideration of future criminal intercourse. The criminal intercourse averred must, therefore, be construed to mean past intercourse. Without pausing to consider whether or not past criminal intercourse is a sufficient consideration to support a deed, it is enough, upon this branch of the case, to say that the averment is without support by any testimony

in the record. On the contrary, the deeds recite a valuable consideration, and the averment of the bill is flatly denied by the answer of the defendant made under oath. The answer, though not called for under oath, is evidence in behalf of the defendant. For, if a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill. See amendment to 41st Equity Rule. If he fails to do this the answer must be given under oath, and is evidence. This branch, therefore, of the plaintiffs' case breaks down, because all the testimony in the record upon the question of consideration is against the averment of the bill.

But it should be noted here that three of the four deeds assailed by the bill were made by Nailor mainly for the benefit of the two children whose father he declared himself to be. The interest of the defendant in the property conveyed was remote and contingent. If the deeds were valid when executed, the subsequent death of the children could not avoid them. It is not now open to question that a deed made by a father for the benefit of his illegitimate child is upon good consideration, which will support the conveyance. *Gay* v. *Parpart*, 106 U. S. 679 [Bk. 27, L. ed. 256]; *Bunn* v. *Winthrop*, 1 Johns. Ch. 329; *Hook* v. *Pratt*, 78 N. Y. 371; *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432; *Jennings* v. *Brown*, 9 Mees. & W. 496.

The next and last ground alleged for annulling the deeds is that Nailor was induced to make them by the fraud and undue influence of the defendant. The ground upon which courts of equity grant relief in such cases is that one party, by improper means and practices, has gained an unconscionable advantage over another. The undue influence for which a will or deed will be annulled must be such that the party making it has no free will, but stands [135] *in vinculis*. "It must amount to force or coercion, destroying free agency." *Stule* v. *Schaeffle*, 16 Jur. 909. See also *Williams* v. *Goude*, 1 Hagg. Eccl. 577; *Armstrong* v. *Huddleston*, 1 Moore, P. C. 478. In *Eckert* v. *Flowry*, 43 Pa. St. 46, it was said by Strong, *J.*: "Now, that is undue influence which amounts to constraint, which substitutes the will of another for that of the testator. It may be either through threats or fraud; but however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made." The rule upon this subject was thus stated in *Davis* v. *Calvert*, 5 Gill & J. 302: "A testator shall enjoy full liberty and freedom in the making of his will and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist and will render the instrument not his free and unconstrained act, is sufficient to invalidate it."

Tested by these rules, the charge that the deeds in question were procured by the fraud and undue influence of the defendant is without support. On this branch of the case the plaintiffs have taken pains to prove that the defendant treated Nailor with great kindness and with unremitting attention to his wants and comforts, but they have shown nothing else. There is an absence of proof that the defendant used either threats, stratagem, importunity, or persuasion to induce Nailor to execute the deeds. In fact there is no evidence that the defendant even requested him to make them. On the other hand, the proof is abundant that the making of a provision for the children whom the defendant had borne him had long been his cherished purpose. As early as 1872, soon after the birth of his son Willie, he executed the first deed. In December, 1877, he executed a will for the sole purpose of providing for the two children then living, borne him by the defendant, and for the defendant. Afterwards, conceiving that a provision by will was not as secure as one by deed, he executed the deeds in question, in which he made precisely the same disposition of the property that he had previously made by the will. The proof shows that he took great pleasure in what he had done or [136] what he proposed to do for these children. It was a matter of which he often boasted to his friends and acquaintances. In short, the evidence that the making of the deeds was his own act, and not the act of another, is clear and is uncontradicted. Conceding, therefore, as it is contended by plaintiffs' counsel, that when a will or deed is made while the parties are living in illegal sexual relations, it is open to suspicion of fraud and undue influence, the plaintiffs have failed by any testimony whatever to show that the deeds in question were procured by either. On the contrary, it is shown that the making of the deeds was the result of Nailor's free volition.

As none of the grounds alleged for annulling the deeds have been maintained, *the decree of the Supreme Court of the District of Columbia must be reversed, and the cause remanded, with directions to dismiss the bill; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

SPRAIGUE, SOULLEE AND COMPANY, [90]
Owners of the Steamer SAXON, *Plfs. in Err.*,
v.
JOSEPH J. THOMPSON.

(See S. C. Reporter's ed. 90-96.)

Pilotage fees—pilotage laws of Georgia—Revised Statutes of the United States.

1. A coastwise sea-going steam vessel, not sailing under register, having a pilot licensed by the United States inspector of steamboats in her employ, under pay from the commencement of the voyage, to be taken on board when necessary, is under the control and direction of such pilot as required by section 4401, R. S., and is exempt by section 4444, R. S., from any pilot charges levied by any state or municipal government, and may lawfully refuse the services of any other pilot.

2. Where, by rejecting as in conflict with the Constitution and laws of the United States certain exceptions in a statute, it is made to enact what confessedly the Legislature never meant, the entire Statute must be held as annulled. Section 1512 of the Code of Georgia requiring vessels bearing toward any port of that State, except coasters of such State, and between its ports and South Caro-

NOTE.—*Constitutional law; regulation of commerce; how far power is exclusive in Congress.* See Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, 158, note.

lina or Florida, to accept the pilot first offering his services, is abrogated by section 4237, R. S., U. S.

[No. 212.]

Argued April 15, 1886. Decided April 26, 1886.

IN ERROR to the Supreme Court of the State of Georgia.

The case is stated by the court.

Mr. **H. B. Tompkins,** for plaintiffs in error.

No counsel appeared for defendant in error.

[91] *Mr. Justice* **Matthews** delivered the opinion of the court:

This was an action at law, begun by the defendant in error, in a magistrate's court in Chatham County, Georgia, against the plaintiffs in error, to recover $98.16, claimed to be due under the pilotage laws of Georgia, for inward pilotage on account of the steamer Saxon, of which the defendants were owners, the vessel having been spoken by the pilot while she was bearing toward the Port of Savannah, and his services offered outside of Tybee Bar, and refused, the vessel having arrived in port piloted by another Savannah pilot, who spoke her and entered on the discharge of his duties as pilot on the same day, but subsequently to the tender by the plaintiff below of his services.

There was a judgment in favor of the plaint-
[92] iff below in the magistrate's court for the amount claimed, which was reversed on appeal by the Superior Court of Chatham County, which judgment was in its turn reversed by the Supreme Court of Georgia, which ordered judgment to be entered for the plaintiff below. To reverse this judgment this writ of error is brought.

The case was submitted and decided upon an agreed statement of facts, as follows:

"It is agreed between the parties to the above entitled cause that the same shall be tried on appeal in the Superior Court of Chatham County on the following state of facts before the court, without a jury: that the steamship Saxon is a licensed coastwise steam vessel engaged in the trade between Philadelphia and Savannah, and belongs to Spraigue, Soullee & Co.; that on the 9th day of August, 1881, she was engaged in a voyage from Philadelphia, Pennsylvania, to Savannah, Georgia, and that S. W. Snow was her master; that said master was duly licensed, under title 52 of the Revised Statutes of the United States, as master of a steam vessel, and as a pilot also, but that his certificate as pilot did not include Tybee Bar and Savannah River, but that his certificate was for the Atlantic coast, and that his certificate as master and pilot was issued last November.

"That said steamship 'Saxon' was spoken by plaintiff off Cape Roman on the 9th day of August, 1881, and his services were tendered to said master of said steamship 'Saxon' as a pilot for Savannah River and Tybee Bar, and that at the time his said services were offered there was no pilot for Tybee Bar or Savannah River on board said steamship, and that said plaintiff was the first pilot who spoke said vessel on her said trip to Savannah. It was further admitted by counsel at the hearing that Philadelphia was the home port of said steamer 'Saxon,' and that the captains and masters of the Ocean Steamship Company steamers, whose home port is Savannah, have each a license from the United States authorities at Savannah to pilot their vessels up and down the Savannah River over and from the bar to the city; that said pilot was duly commissioned by the commissioners of pilotage for the Savannah River and Tybee Bar, and was also duly commissioned by the United States inspectors to conduct steam vessels over Tybee Bar and up Savannah River and within that limit; that Thompson went out to meet the 'Saxon,' being advised of her departure from Philadelphia, and his services were refused; that the defendant had procured the services of Walter W. Smith, a pilot who was duly licensed for the Savannah River and Tybee Bar by the commissioners of pilotage, and who was also duly licensed by the United States to conduct steam vessels over Tybee Bar and up Savannah River, and had notified the captain of said steamship 'Saxon' to stop at the Martin's Industry Lightship and take said Walter W. Smith on board to pilot said steamship over Tybee Bar and up Savannah River; that said Walter W. Smith was employed as the regular pilot of steamer 'Saxon' and was under pay from the time said vessel left Philadelphia; that said pilot was taken on board said steamship on 10th day of August off the Martin's Industry Lightship, and he piloted the said vessel to the City of Savannah and has continued in the employ of said vessel from that time until the present time as pilot. That Cape Roman is on the South Carolina coast, north of Charleston, and that Martin's Industry Lightship is north of Tybee Bar and off the South Carolina coast. That Walter W. Smith was in Savannah when The Saxon left Philadelphia, and was not piloting The Saxon when she was spoken by the plaintiff, but met her afterwards and was taken. That said steamship Saxon drew seventeen feet six inches of water, and that according to rates of pilotage for Tybee Bar and River of Savannah $98.17 was a proper charge for piloting a vessel of such draft up to Savannah City."

The claim of the defendant in error for pilotage, arising upon the foregoing case, is based on section 1512 of the Code of Georgia, which is as follows:

"Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this State, except coasters in this State, and between the ports of this State and those of South Carolina, and between the ports of this State and those of Florida, and who refuses to receive a pilot on board, shall be liable, [94
on his arrival in such port in this State, to pay the first pilot who may have offered his services outside the bar, and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel."

And the claim is undoubtedly well founded, if this provision of the state law is enforceable consistently with the Constitution of the United States, and the Acts of Congress on the same subject passed in pursuance thereof.

It is therefore contended by the plaintiffs in error that this provision of the Georgia Code is invalid, on the ground that it is inconsistent with the laws of the United States regulating the same subject.

Section 4235, R. S., enacts that, "Until fur

ther provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose;" but it is also enacted by section 4237, R. S., that,

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by section 4237, R. S. It excepts from its operation "coasters in this State," and "between the ports of this State and those of South Carolina," and "between the ports of this State and those of Florida."

It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application [95] of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes.

We are also of opinion that the claim for pilotage in the present case is defeated by other provisions of the Revised Statutes. Section 4401 provides that "all coastwise sea-going vessels and vessels navigating the great lakes shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam and navigating as aforesaid, shall be subject to all rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this title; and every coastwise, sea-going, steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

And section 4444 is as follows:

"No state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this title; nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this title shall be construed to annul or affect any regulation estab- [96] lished by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise, steam vessels, to take a pilot duly licensed or authorized by the laws of any such State, or of a State situate upon the waters of such State."

According to the agreed case The Saxon was a coastwise, sea-going, steam vessel, was not sailing under register, and at the time when the defendant in error tendered his services, and subsequently when she passed up the river into Savannah, was under the control and direction of a pilot licensed by the United States inspectors of steamboats. She was therefore, at the time, piloted as provided by that title of the statute, so that she was lawfully exempt from any pilot charges levied by any state or municipal government. The section expressly excepts coastwise, steam vessels from the regulations established by the laws of any State requiring vessels entering or leaving a port in any such State, to take a pilot duly licensed or authorized by the laws of any such State, or of a State situate upon the waters of such State. The owners of The Saxon were, therefore, at liberty to employ any pilot, licensed under the authority of the United States, for the particular service in which he was engaged, without regard to the provisions of the Georgia Code requiring it to accept the services of the pilot first tendered or, in case of refusal, to pay pilotage therefor. The engagement of the services of the pilot actually taken, by previous contract, was equivalent to keeping him on board for that purpose during the whole voyage, as he was, in fact, under pay from its commencement; and had he been actually on board at the time the defendant in error tendered himself as pilot, we think the right of the vessel to reject the offer could not have been reasonably questioned.

For these reasons the judgment of the Supreme Court of Georgia is reversed and the cause is remanded, with instructions to take further proceedings therein according to law and in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

[394] COUNTY OF SANTA CLARA, *Plff. in Err.*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY.

PEOPLE OF THE STATE OF CALIFORNIA, *Plff. in Err.*,

v.

CENTRAL PACIFIC RAILROAD COMPANY.

PEOPLE OF THE STATE OF CALIFORNIA, *Plff. in Err.*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 394-417.)

Validity of state taxation of railroad corporations—constitutional provisions—fences not a part of roadbed or roadway—separability of assessment of different kinds of property.

1. Where judgment was sought for an entire tax arising upon an assessment of different kinds of property as a unit, such assessment including property not legally assessable and the part of the tax assessed against the latter property not being separable from the other part, the assessment was invalid and would not support an action for the recovery of the entire tax.
2. The fences along the line of a railway are not a part of the roadbed or roadway of such railroad, within the meaning of the constitution and laws of California authorizing the state board of equalization of that State to assess the property of certain classes of the railway corporations having roads in that State.
3. A corporation is not in default in not tendering such sum as may be legally due for taxes, when the different classes of property assessed are not distinct and separable.
4. The provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the law, applies to corporations.

[Nos. 464, 621, 622.]

Argued Jan. 26, 27, 28, 29, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the District of California. *Affirmed.*

The case is stated by the court.

Announcement by *Mr. Chief Justice* **Waite:**

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does.

Messrs. **D. M. Delmas, A. L. Rhodes** and **E. C. Marshall** for plaintiffs in error.

Messrs. **S. W. Sanderson, George F. Edmunds** and **Wm. M. Evarts,** for defendants in error.

[397] *Mr. Justice* **Harlan** delivered the opinion of the court:

These several actions were brought—the first one in the Superior Court of Santa Clara County, California, the others in the Superior Court of Fresno County, in the same State—for the recovery of certain county and state taxes, claimed to be due from the Southern Pacific Railroad Company and the Central Pacific Railroad Company, under assessments made by the state board of equalization upon their respective franchises, roadways, roadbeds, rails, and rolling stock. In the action by Santa Clara County the amount claimed is $13,366.53 for the fiscal year of 1882. For that sum, with 5 per cent penalty, interest at the rate of 2 per cent per month from December 27, 1882, cost of advertising, and 10 per cent for attorney's fees, judgment is asked against the Southern [3
Pacific Railroad Company. In the other action against the same Company the amount claimed is $5,029.27 for the fiscal year of 1881, with 5 per cent added for nonpayment of taxes and costs of collection. In the action against the Central Pacific Railroad Company judgment is asked for $25,950.50 for the fiscal year of 1881, with like penalty and costs of collection.

The answer in each case puts in issue all the material allegations of the complaint, and sets up various special defenses, to which reference will be made further on.

With its answer the defendant, in each case, filed a petition, with a proper bond, for the removal of the action into the Circuit Court of the United States for the district, as one arising under the Constitution and laws of the United States. The right of removal was recognized by the state court, and the action proceeded in the circuit court. Each case, the parties having filed a written stipulation waiving a jury, was tried by the court. There was a special finding of facts upon which judgment was entered in each case for the defendant. The general question to be determined is whether the judgment can be sustained upon all or either of the grounds upon which the defendants rely.

The case as made by the pleadings and the special finding of facts is as follows:

By an Act of Congress, approved July 27, 1866, the Atlantic and Pacific Railroad Company was created, with power to construct and maintain, by certain designated routes, a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific. For the purpose—which is avowed by Congress—of facilitating the construction of the line, and thereby securing the safe and speedy transportation of mails, troops, munitions of war, and public stores, a right of way over the public domain was given to the company, and a liberal grant of the public lands was made to it. The railroad so to be constructed and every part of it was declared to be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and to such regulations as Congress might impose for restricting the charges for [39
government transportation. By the 18th section of the Act, the Southern Pacific Railroad Company—a corporation previously organized under a general statute of California, passed May 20, 1861, Stat. Cal. 1861, p. 607—was authorized to connect with the Atlantic and Pacific Railroad at such point, near the boundary line of that State, as the former company deemed most

suitable for a railroad to San Francisco, with "uniform gauge and rate of freight or fare with said road;" and in consideration thereof, and "to aid in its construction" the Act declared that it should have similar grants of land, "subject to all the conditions and limitations" provided in said Act of Congress, "and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad." 14 Stat. at L. p. 292, §§ 1, 2, 3, 11, 18.

In November, 1866, the Atlantic and Pacific Railroad Company and the Southern Pacific Railroad Company filed in the office of the Secretary of the Interior their respective acceptances of the Act.

By an Act of the Legislature of California, passed April 4, 1870, to aid in giving effect to the Act of Congress relating to the Southern Pacific Railroad Company, it was declared that,

"To enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said Act of Congress, and all other Acts of Congress now in force, or which may hereafter be enacted, the State of California hereby consents to said Act; and the said company, its successors and assigns, are hereby authorized to change the line of its railroad so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association; and the right, power, and privilege is hereby granted to, conferred upon, and vested in them to construct, maintain, and operate by steam or other power the said railroad and telegraph line mentioned in said Acts of Congress, hereby confirming to, and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in said company by the said Acts of Congress, and any Act of Congress which may be hereafter enacted."

Subsequently, by the Act of March 3, 1871, Congress incorporated the Texas Pacific Railroad Company, with power to construct and maintain a continuous railroad and telegraph line from Marshall in the State of Texas, to a point at or near El Paso, thence through New Mexico and Arizona to San Diego, pursuing as near as might be the thirty-second parallel of latitude. To aid in its construction, Congress gave it also, the right of way over the public domain, and made to it a liberal grant of public lands. The 19th section provided:

"That the Texas Pacific Railroad Company shall be, and it is hereby declared to be, a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay or prevent the said company from performing its obligations to the United States in that regard; *Provided*, That said road shall be subject to the use of the United States for postal, military, and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service; and the Government shall at all times have the preference in the use of the same for the purpose aforesaid."

The twenty-third section of that Act has special reference to the Southern Pacific Railroad Company, and is as follows:

"Sec. 23. That, for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehacapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to said Southern Pacific Railroad Company of California by the Act of July twenty-seven, eighteen hundred and sixty-six; *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other company." [401]

Under the authority of this legislation, federal and state, the Southern Pacific Railroad Company constructed a line of railroad from San Francisco, connecting with the Texas and Pacific Railroad (formerly the Texas Pacific Railroad) at Sierra Banca, in Texas; and with other railroads it is operated as one continuous line (except for that part of the route occupied by the Central Pacific Railroad) from Marshall, Texas, to San Francisco. It is stated in the record that the Southern Pacific Railroad Company of California, since the commencement of this action, has completed its road to the Colorado River, at or near The Needles, to connect with the Atlantic and Pacific Railroad; and that with the latter road it constitutes a continuous line from Springfield, Missouri, to the Pacific, except as to the connection, for a relatively short distance, over the road of the Central Pacific Railroad Company.

On the 17th of December, 1877, the said Southern Pacific Railroad Company and other railroad corporations, then existing under the laws of California, were legally consolidated, and a new corporation thereby formed, under the name of the Southern Pacific Railroad Company, the present defendant in error, 59.30 miles of whose road is in Santa Clara County and 17.98 miles in Fresno County.

On the first of April, 1875, this Company was indebted to divers persons in large sums of money advanced to construct and equip its road. To secure that indebtedness, it executed on that day a mortgage for $32,520,000 on its road, franchises, rolling stock and appurtenances, and on a large number of tracts of land, in different counties of California, aggregating over eleven million acres. These lands were granted to the Company by Congress under the above mentioned Acts, and are used for agricultural, grazing and other purposes not connected with the business of the railroad. Of those patented, 3,138 acres are in Santa Clara County, and 18,789 acres in Fresno County. When these proceedings were instituted no part of its above mortgage debt had been paid, except the accruing interest and $1,632,000 of the principal, leaving outstanding against it $30,898,000. [402]

In the year 1852 California, by legislative enactment, granted a right of way through that State to the United States for the purpose of

constructing a railroad from the Atlantic to the Pacific Ocean, declaring that the interests of California, as well as the whole Union, "require the immediate action of the Government of the United States, for the construction of a national thoroughfare, connecting the navigable waters of the Atlantic and Pacific Oceans, for the purpose of the national safety, in the event of war, and to promote the highest commercial interests of the Republic." Stat. Cal. 1852, p. 150. By an Act passed July 1, 1862, Congress incorporated the Union Pacific Railroad Company, with power to construct and maintain a continuous railroad and telegraph line to the western boundary of what was then Nevada Territory, "there to meet and connect with the line of the Central Pacific Railroad Company of California." 12 Stat. at L. 489, §§ 1, 8. The declared object of extending government aid to these enterprises was to effect the construction of a railroad and telegraph line from the Missouri River to the Pacific, which, for all purposes of communication, travel and transportation, so far as the public and the General Government are concerned, should be operated "as one connected, continuous line." *Id.* §§ 6, 9, 10, 12, 17, 18.

In 1864 the State of California passed an Act to aid in carrying out the provisions of this Act of Congress, the first section of which declared that,

"To enable said Company more fully and completely to comply with and perform the provisions and conditions of said Act of Congress, the said Company, their successors and assigns, are hereby authorized and empowered, and the right, power and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain and operate the said railroad and telegraph line, not only in the State of California, but also in the said Territories lying east of and between said State and the Missouri River, with such branches and extensions of said railroad and telegraph line, or either of them, as said Company may deem necessary or proper, and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over, and along any [403] streets, roads, highways, rivers, streams, water and water courses; but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; and also the right to condemn and appropriate to the use of said Company such private property, rights, privileges and franchises as may be proper, necessary or convenient for the purposes of said railroad and telegraph; the compensation therefor to be ascertained and paid under and by special proceedings, as prescribed in the Act providing for the incorporation of railroad companies, approved May 20, 1861, and the Act supplementary and amendatory thereof; said Company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of said Company shall have priority of transportation and transmission over said line of railroad and telegraph, hereby confirming to and vesting in said Company all the rights, privileges, franchises, power and authority Conferred upon, granted to, and vested in said Company by said Act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this Act, or the rights and privileges herein granted."

In 1870, the Central Pacific Railroad Company of California and the Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company, the defendant in one of these actions, 61.06 miles of whose road is in Fresno County. The Company complied with the several Acts of Congress, and there is in operation a continuous line of railway from the Missouri River to the Pacific Ocean, the Central Pacific Railroad Company owning and operating the portion thereof between Ogden, in the Territory of Utah, and San Francisco.

When the present action was instituted against this Company the United States had and now have a lien, created by the Acts of Congress of 1862 and 1864, for $30,000,000, with a large amount of interest, upon its road, rolling stock, fixtures, and franchises; and there were also outstanding bonds for a like amount issued by the Company prior to January 1, 1875, and secured by a mortgage upon the same property.

Such were the relations which these two Companies held to the United States and to the [4 State when the assessments in question were made for purposes of taxation.

It is necessary now to refer to those provisions of the Constitution and laws of the State which, it is claimed, sustain these assessments.

The Constitution of California, adopted in 1879, exempts from taxation growing crops, property used exclusively for public schools, and such as may belong to the United States, or to that State, or to any of her county or municipal corporations, and declares that the Legislature "may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to *bona fide* residents" of the State. It is provided in the first section of Article XIII that, with these exceptions,

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership."

The fourth section of the same article provides:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property

affected thereby shall become a part of the debt so secured, if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof; *Provided*, That if any such security or indebtedness [406] shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year."

The ninth section makes provision for the election of a state board of equalization, "whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purpose of taxation." The boards of supervisors of the several counties constitute boards of equalization for their respective counties, and they equalize the valuation of the taxable property therein for purposes of taxation—assessments, whether by the state or county boards, to "conform to the true value in money of the property" contained in the assessment roll. *Id.* § 9.

The tenth section declares:

"All property, *except as hereinafter in this section provided*, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The *franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county* in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The assessments in question, it is contended, were made in conformity with these constitutional provisions, and with what is known as section 3664 of the Political Code of California. That section made it the duty of the state board of equalization, on or before the first Monday in May in each year to "assess the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county"—to which class belonged the defendants. It required every corporation of that class, by certain officers, or by such officer as the state board should designate, to furnish the board with a sworn statement showing, among other things, in detail, for the year ending March first, the whole number of miles of railway owned, operated, or leased by it in the State, the value thereof [408] per mile, and all of its property of every kind, located in the State; the number and value of its engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating and repairing its railway in the State, and on railways which are parts of lines extending beyond the limits of the State. It is also directed that "the said property shall be assessed at its actual value;" that the "assessment shall be made upon the entire railway within the State, and shall include the right of way, road bed, track, bridges, culverts, and rolling stock;" and that "the depots, station grounds, shops, buildings, and gravel beds shall be assessed by the assessors of the county where situated, as other property." It further declares:

"On or before the fifteenth day of May, in each year, said board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails and rolling stock of such railway within this State. Said statement shall be entered on the assessment roll of the county. At the first meeting of the board of supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the state board of equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district."

These Companies, within due time, filed with the state board the detailed statement required by that section.

At the trials below, no record of assessment against the respective defendants, as made by the state board, was given in evidence, and there was introduced no written evidence of [407] the assessment except an official communication from the state board to each of the assessors of Santa Clara and Fresno Counties, called, in the special findings, the assessment roll for the particular county. The roll for Fresno County, in 1881, relating to the Southern Pacific Railroad Company, is as follows:*

There were similar rolls in reference to the Central Pacific Railroad in the same county, for [408] the same year, and the Southern Pacific in Santa Clara County for 1882. For each of those years the board of supervisors of the respective counties made an apportionment of the taxes among the legal subdivisions of such counties.

It is stated in the findings that the delinquent lists for those years, so far as they related to the taxes in question, were duly made up in form corresponding with the original assessment roll; that in pursuance of section 3788 of the Political Code of California, the board of supervisors of the respective counties duly passed an order, entered on the minutes, dispensing with the duplicate assessment roll for that year; that the controller of the State transmitted a letter to the tax collector of the county, in pursuance of the provisions of section 3899 of that Code, directing him to offer the property for sale but once, and if there were no *bona fide* purchasers, to withdraw it from sale; that the tax collector, in obedience to the provisions of that section, transmitted to the controller, with his indorsement thereon of the action had in the premises, a certified copy of the entry upon the delinquent

*See next page.

Original—Assessment Book of the Property of Fresno County for the year 1881. Assessed to all known owners or claimants, and when unknown to unknown owners or claimants.

Taxpayer's Name.	DESCRIPTION OF PROPERTY. Real estate other than city and town lots. Subdivision of sections or metes and bounds. City and town lots. Improvements. Personal property.	Value of the franchise, roadway, roadbed, rails, and rolling stock of railroads as apportioned to the county by the State Board of Equalization.	Total value of all property after deductions. (Changes by the county boards of equalization to be noted in red ink.)	Total value after equalization by the State Board of Equalization.	Total tax.	Remarks.
Southern Pacific Railroad Company	Office of The State Board of Equalization, Sacramento, *May* 14, 1881. To W. H. McKenzie, *Assessor of Fresno County.* SIR: The State Board of Equalization on the 2d day of May, 1881, assessed for the year 1881, the Southern Pacific Railroad Company for its franchise, roadway, roadbed, rails, and rolling stock, in the State of California, in the aggregate sum of $11,739,915. The entire line of main track of said railroad of said company in the said State is 711.51 miles. The length of the main track of said railway in Fresno County is 17.93 miles. The description of the whole of the main track of the railway of the said Southern Pacific Railroad Company, and the right of way for the same, in the County of Fresno, is as follows: Beginning at the Town of Huron and running easterly in the direction of Goshen, in Tulare County, to the east line of Fresno County. The assessed value per mile of said railway, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway of the said company within this State is $16,500. The apportionment of the assessment of the said franchise, roadway, roadbeds, rails, and rolling stock, by this board, for and to Fresno County, is $295,-845. Warren Dutton, *Chairman,* M. M. Drew, D. M. Kenfield, T. D. Heiskell, *State Board of Equalization.* E. W. Maurin, *Clerk.*	$ 295,845	$ 602,869	$ 602,869	$ cts. 10,246.78	

(Duly certified by the auditor.)

list relating to the tax in question in these several actions; that such indorsement shows that the tax collector had offered the property for sale and had withdrawn it because there was no purchaser for the same; and that the controller, in pursuance of the provisions of the same section, transmitted to the tax collector of the county a letter directing him to bring suit.

In each case there were also the following findings:

"The state board of equalization, in assessing said value of said property to and against defendant, assessed the full cash value of said railroad, roadway, roadbed, rails, rolling stock and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid, to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of the said mortgage; and in making said assessment the said state board of equalization did not consider or treat said mortgage as an interest in said [409] property, but assessed the whole value thereof to the defendant, in the same manner as if there had been no mortgage thereon."

"The state board of equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at $300 per mile."

The special grounds of defense by each of the defendants were: 1. That its road is a part of a continuous postal and military route, constructed and maintained under the authority of the United States, by means in part obtained from the General Government; that the Company having, with the consent of the State, become subject to the requirements, conditions, and provisions of the Acts of Congress, it thereby ceased to be merely a state corporation, and became one of the agencies or instrumentalities employed by the General Government to execute its constitutional powers; and that the franchise to operate a postal and military route, for the transportation of troops, munitions of war, public stores, and the mails, being derived from the United States, cannot, without their consent, be subjected to state taxation. 2. That the provisions of the Constitution and laws

of California, in respect to the assessment for taxation of the property of railway corporations operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one county, and of other corporations, and of natural persons, for the value of the mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the laws. 3. That what is known as section 3664 of the Political Code of California, under the authority of which in part the assessment was made, was not constitutionally enacted by the Legislature, and had not the force of law. 4. That no valid assessment appears in fact to have been made by the state board. 5. That [410] no interest is recoverable in this action until after judgment. 6. That the assessment upon which the action is based is void, because it included property which the state board of equalization had no jurisdiction, under any circumstances, to assess, and that, as such illegal part was so blended with the balance that it cannot be separated, the entire assessment must be treated as a nullity.

The record contains elaborate opinions stating the grounds upon which judgments were ordered for the defendants. *Mr. Justice* Field overruled the first of the special defenses above named, but sustained the second. The circuit judge, in addition, held that section 3664 of the Political Code had not been passed in the mode required by the State Constitution, and, consequently, was no part of the law of California. These opinions are reported as *The Santa Clara Railroad Tax Case*, in 9 Sawyer, 165, 210.

The propositions embodied in the conclusions reached in the circuit court were discussed with marked ability by counsel who appeared in this court for the respective parties. Their importance cannot well be overestimated; for they not only involve a construction of the recent amendments to the National Constitution in their application to the constitution and the legislation of a State, but upon their determination, if it were necessary to consider them, would depend the system of taxation devised by that State for raising revenue, from certain corporations, for the support of her government. These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise. Whether the present cases require a decision of them depends upon the soundness of another proposition, upon which the court below, in view of its conclusions upon other issues, did not deem it necessary to pass. We allude to the claim of the defendant, in each case, that the entire assessment is a nullity, upon the ground that the state board of equalization included therein property which it was without jurisdiction to assess for taxation.

The argument in behalf of the defendant is: That the state board knowingly and designedly included in its assessment of "the franchise, [411] roadway, roadbed, rails, and rolling stock" of each Company, the value of the fences erected upon the line between its roadway and the land of coterminous proprietors; that the fences did not constitute a part of such roadway, and therefore could only be assessed for taxation by the proper officer of the several counties in which they were situated; and that an entire assessment which includes property not assessable by the state board against the party assessed is void and, therefore, insufficient to support an action, at least, when—and such is claimed to be the case here—it does not appear, with reasonable certainty, from the face of the assessment or otherwise, what part of the aggregate valuation represents the property so illegally included therein.

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.

That the state board purposely included in its assessment and valuation the fences erected on the line between the railroads and the lands of adjacent proprietors, at the rate of $300 per mile, is undoubtedly true; for, it is so stated in the special finding of facts, and that finding must be taken here to be indisputable. It is equally true that that tribunal has no general power of assessment, but only jurisdiction to assess "the franchise, roadway, roadbed, rails, and rolling stock" of railroad corporations operating roads in more than one county, and that all other property of such corporation, subject to taxation, is assessable only "in the county, city, city and county, town, township, or district, in which it is situated, in the manner prescribed by law." Such is the declaration of the State Constitution. *People* v. *Sacramento County*, 59 Cal. 324, art. XIII, § 10. It must also be conceded that "fences" erected on the line between these railroads and the lands of adjoining proprietors were improperly included by the state board in its assessments, unless they constituted a part of the "roadway." Some light is thrown upon this question by that clause of section 3664 of the Political Code of California—which, in the view we take of these cases, may be regarded as having been legally [412] enacted—providing that "the depots, station grounds, shops, buildings, and gravel beds" shall be assessed in the county where situated as other property. From this it seems that there is much of the property daily used in the business of a railroad operated in more than one county that is not assessable by the state board, but only by the proper authorities of the municipality where it is situated. So that, even if it appeared that the fences assessed by the state board were the property of the railroad Companies, and not of the adjoining proprietors, they could not be included in an assessment by that board unless they were part of the roadway itself; for, as shown, the jurisdiction of that board is restricted to the assessment of the "franchise, roadway, roadbed, rails and rolling stock." We come back, then, to the vital inquiry whether the fences could be assessed under the head of roadway? We are of opinion that they cannot be regarded as part of the roadway for purposes of taxation.

The Constitution of California provides that "land and improvements thereon shall be separately assessed" (art. XIII. § 2); and, although

that instrument does not define what are improvements upon land, the Political Code of the State expressly declares that the term "improvements" includes "all buildings, structures, fixtures, *fences*, and improvements erected upon or affixed to the land." § 3617. It would seem from these provisions that fences erected upon the roadway, even if owned by the railroad company, must be separately assessed, as "improvements," in the mode required in the case of depots, station grounds, shops, and buildings owned by the company, namely: by local officers in the county where they are situated. The same considerations of public interest or convenience upon which rest existing regulations for the assessments of depots, station grounds, shops and buildings of a railroad company operated in more than one county, would apply equally to the assessment and valuation for taxation of fences erected upon the line of railway of the same company.

In *San Francisco and North Pacific Railroad Co.* v. *State Board of Equalization*, 60 Cal. 12, [413] 34, which was an application, on *certiorari*, to annul certain orders of the state board assessing the property of a railroad corporation, one of the questions was as to the meaning of the words "roadbed" and "roadway." The court there said: "The roadbed is the foundation on which the superstructure of a railroad rests. (Webster.) The roadway is the right of way, which has been held to be the property liable to taxation. *Appeal of N. B. & M. R. R. Co.*, 32 Cal. 499. The rails in place constitute the superstructure resting upon the roadbed." This definition was approved in *San Francisco* v. *Central Pacific R. R. Co.*, 63 Cal., 467, 469. In the latter case the question was whether certain steamers owned by the railroad company, upon which were laid railroad tracks, and with which its passenger and freight cars were transported from the eastern shore of the Bay of San Francisco to its western shore, where the railway again commenced, were to be assessed by the City and County of San Francisco, or by the state board of equalization. The contention of the company was that they constituted a part of its roadbed or roadway, and must therefore be assessed by the state board. But the supreme court of the State held otherwise. After observing that all the property of the company, other than its franchise, roadway, roadbed, rails, and rolling stock, was required by the Constitution to be assessed by the local assessors, the court said: "They are certainly not the franchise of the defendant Corporation. They may constitute an element to be taken into computation to arrive at the value of the franchise of the corporation, but they are not such franchise. It is equally as clear that they are not rails or rolling stock. * * * Are they, then, embraced within the words roadway or roadbed, in the ordinary and popular acceptation of such words as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The *roadbed* referred to in section 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think it correct. The *roadway* has a more extended signification as applied to railroads. In addition to the part denominated roadbed, the roadway includes whatever [41 space of ground the company is allowed by law in which to construct its roadbed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the Act 'to provide for the incorporation of railroad companies,' etc., approved May 20, 1861. Stat. 1861, p. 607; *S. F. & N. P. R. R. Co.* v *State Board*, 60 Cal. 12."

The argument in support of the proposition that these steamers—constituting, as they did, a necessary link in the line of the Company's railway, and upon which rails were actually laid for the running of cars—were a part either of the road bed or roadway of the railroad is much more cogent than the argument that the fences erected upon the line between a roadway and the lands of adjoining proprietors are a part of the roadway itself. It seems to the court that the fences in question are not, within the meaning of the local law, a part of the roadway for purposes of taxation, but are "improvements" assessable by the local authorities of the proper county, and therefore, were improperly included by the state board in its valuation of the property of the defendants.

The next inquiry that naturally arises is whether the different kinds of property assessed by the state board are distinct and separable upon the face of the assessment, so that the Company, being thereby informed of the amount of taxes levied upon each, could be held to have been in default in not tendering such sum, if any, as was legally due? Upon the transcript before us, this question must be answered in the negative. No record of assessment, as made by the state board, was introduced at the trial, and, presumably, no such record existed. Nor is there any documentary evidence of such assessment, except the official communication of the state board to the local assessors, called in the findings the assessment roll of the County. That roll shows only the aggregate valuation of the Company's franchise, roadway, roadbed, rails, and rolling stock in the State; the length of the Company's main track in the State; its length in the county; the assessed value per mile of the railway as fixed by the *pro rata* distribution per mile of the assessed value of its whole franchise, roadway, roadbed, rails and rolling stock, in the State; and the apportionment of the property so assessed to the County.

It appears, as already stated, from the evidence, that the fences were included in the [41 valuation of the defendants' property; but under what head, whether of franchise, roadway, or roadbed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the railroad was operated. If the presumption is that the state board included in its valuation only such property as it had jurisdiction under the State Constitution to assess, namely: such as could be rightfully classified under the heads of franchise, roadway, roadbed, rails or rolling stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in

question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enable the court to render judgment for, such amount, if any, as was justly due. But no such evidence was introduced. The finding that the fences were valued at $300 per mile is too vague and indefinite as a basis for estimating the aggregate valuation of the fences included in the assessment, or the amount thereof apportioned to the respective counties. Were the fences the property of adjacent proprietors? Were they assessed at that rate for every mile of the railroad within the State? Were they erected on the line of the railroad in every county through which it was operated, or only in some of them? Wherever erected, were they assessed for each side of the railway, or only for one side? These questions, so important in determining the extent to which the assessment included a valuation of the fences erected upon the line between the railroad and coterminous proprietors, find no solution in the record presented to this court.

If it be suggested that, under the circumstances, the court might have assumed that the [416] state board included the fences in their assessment, at the rate of $300 per mile for every mile of the railroad within the State, counting one or both sides of the roadway, and, having thus eliminated from the assessment the aggregate so found, given judgment for such sum, if any, as, upon that basis, would have been due upon the valuation of the franchise, roadbed, roadway, rails and rolling stock of the defendant, the answer is that the plaintiff did not offer to take such a judgment; and the court could not have rendered one of that character without concluding the plaintiff hereafter, and upon a proper assessment, from claiming against the defendant taxes for the years in question, upon such of its property as constituted its franchise, roadway, roadbed, rails and rolling stock. The case as presented to the court below was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the state board, and the part of the tax assessed against the latter property not being separable from the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied. Cooley, Tax. 295-6, and authorities there cited; *Libby* v. *Burnham*, 15 Mass. 147; *State* v. *Randolph, etc.* v. *City of Plainfield*, 38 N. J. L. 93; *Gamble* v. *Wilty*, 35 Miss. 35; *Stone* v. *Bean*, 15 Gray, 45; *Mosher* v. *Robie*, 2 Fairfield (Me.) 137; *Johnson* v. *Colburn*, 36 Vt. 695; *Wells* v. *Burbank*, 17 N. H. 412.

It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the state board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

It follows that there is no occasion to determine under what circumstances the plaintiffs would be entitled to judgment against a delinquent taxpayer for penalties, interest, or attorney's fees; for if the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties, interest, or attorney's fees, could result from a refusal or failure to pay such taxes. [417]

Judgment affirmed.

PEOPLE OF THE STATE OF CALIFORNIA, *Plff. in Errr.*, v. NORTHERN RAILWAY COMPANY.

[No. 620.]

Decided May 10, 1886.

In error to the Circuit Court of the United States for the District of California.

Mr. Justice **Harlan** delivered the opinion of the court:

The facts in this case are substantially those which appear in *County of Santa Clara, etc.* v. *Railroad Companies*, just decided. For the reasons given in the opinion in that case, and upon the ground therein stated, the judgment is *Affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF SAN BERNARDINO, *Plff. in Errr.*, [417]

v.

SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 417-425.)

Validity of state taxation of railroad corporations—constitutional provisions—fences not a part of roadbed or roadway—separability of assessments of different kinds of property—claim for penalties and collection fees in action for taxes.

1. Where in an action for taxes, the plaintiff is not entitled to judgment for the taxes originally in question, it follows that it cannot have judgment for penalties, interest or attorney's fees.
2. County of Santa Clara v. Southern Pacific Railroad Company, *ante*, followed.

[No. 619.]

Argued Jan. 26, 27, 28, 29, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the District of California. *Affirmed.*

The case is stated by the court.

This cause was argued with the preceding case by the same counsel.

Mr. Justice **Harlan** delivered the opinion of the court: [418]

This action was brought in the Superior Court of San Bernardino, California, for the recovery of certain taxes, county and state, al-

leged to be due from the Southern Pacific Railroad Company for the fiscal year of 1880-1881. The amount claimed for county taxes is $8,785.90; that claimed for state taxes is $4,608.99. For each sum judgment is asked, with 5 per cent penalty, interest on the taxes and penalty at the rate of 2 per cent per month from December 26, 1880, and costs of advertising.

The complaint alleges that the taxes were duly assessed and levied upon "forty-eight $\frac{88}{100}$ miles of the roadway, road bed, and rails of said defendant, assessed at $10,800 per mile;" upon its rolling stock, "assessed at $1,933.15 per mile;" and upon its franchise, assessed at $2,000 per mile. It also alleges that the whole of the defendant's property, so far as its franchise, roadway, rails, roadbed, and rolling stock in California are concerned, was assessed for the period named at $10,483,518, the length of the defendant's road in the State being seven hundred and eleven $\frac{88}{100}$ miles.

An answer was filed similar to those in the cases of *The County of Santa Clara, etc.* v. *Railroad Companies* [ante, 118] just decided. This case was removed to the Circuit Court of the United States upon the same grounds as those presented in the other cases.

The facts specially found by that court are, in all material respects, like those found in the former cases. The copy of the assessment roll for San Bernardino County, introduced at the trial below, is not, so far as it bears upon this case, materially different from that for Fresno and Santa Clara Counties, set forth in the report of the other cases.

For the reasons given in the opinions delivered in the circuit court in the former cases, [419] reported as *Santa Clara Railroad Tax Cases*, 9 Sawyer, 165, 210, judgment was given for the defendant.

But the bill of exceptions further states:

"That, after said judgment was ordered, the defendant, being minded to pay, notwithstanding the fact that the tax had been declared invalid, the full amount of said tax due, without penalty, interest, or counsel fees, and to leave the question of its liability for said penalty, interest, and counsel fees to be finally determined by the Supreme Court of the United States in cases already pending there, or in this case if appealed, or taken there upon a writ of error, agreed, for the purposes aforesaid, that the judgment in its favor might be set aside and judgment in favor of the plaintiff be entered for the full amount of said tax, less penalties, interest, and counsel fees; which was done.

"And be it further remembered, that, before said judgment for the defendant was set aside, and in open court, it was stipulated and agreed by and between the attorneys for the plaintiff and defendant, that if said judgment was set aside and judgment for the plaintiff entered as aforesaid, the said defendant should not be deemed to have admitted thereby the validity of the taxes claimed or any part thereof, nor should said judgment be treated, upon an appeal or proceedings under writ of error, as a consent judgment; defendant then and there expressly waiving that point, if point it was.

"And be it further remembered, that the object and purpose of the proceeding then had was to enable the defendant to pay into the state and county treasuries on account the sum for which the judgment was rendered, without prejudice to the right of the plaintiff in the case to proceed for penalties, interest, and attorney's fees claimed, and in order that the litigation might be brought to a speedy conclusion.

"The plaintiff tenders this its bill of exceptions, which, being agreed to by the respective attorneys for the parties, is allowed, signed, sealed, and made a part of the record of the court."

The record also shows that in forty suits, heard with this one, brought in the name of different counties, and of the State against the Southern Pacific Railroad Company, the Central Pacific Railroad Company, and the Northern Railway Company, to recover like taxes, alleged to be due to counties and to the State, judgments were ordered for the respective defendants; that thereafter a stipulation, signed by the attorney of the several defendants in those cases and by the Attorney-General of the State, was filed, in which it is recited that the defendants, "notwithstanding the fact that the taxes therein sued for have been declared invalid, being minded to pay portions of the sum claimed," agree that judgments in favor of the plaintiffs might be entered for certain sums, being, as we suppose, the amount of the taxes sued for in the respective actions, less the penalties, interest and counsel fees therein claimed.

On the 8th of December, 1885, the following stipulation was filed in the court below, and a printed copy thereof filed in this case here:

"In the Circuit Court of the United States, Ninth Circuit, District of California.

"*The County of San Bernardino*, Plaintiff, *vs.* "*The Southern Pacific Railroad Company*, Defendant.	No. 2757.

"It is hereby stipulated between the parties to the above entitled action that for the fiscal year 1880-'81 the principal of the tax claimed to be due by plaintiff from defendant for state and county purposes amounted to $13,394.88; that before judgment was entered herein in this court—from which judgment a writ of error has been taken—there had been paid on account of such taxes to the plaintiff herein, through its county officers, the sum of $4,932.40, leaving a balance due of $8,462.48, for which said sum judgment was taken.

"That for the fiscal year 1881-'82, the principal of the tax claimed to be due by plaintiff, the County of San Bernardino, from defendant for state and county purposes was $16,847.87; that before judgment was entered in the action brought to recover such taxes, the defendant therein, the Southern Pacific Railroad Company, paid to the plaintiff, through its county officers, on account of such taxes, the sum of $6,518.20, and judgment was taken in said action for the balance, $9,829.67.

"That for the fiscal year 1882 the total [42 amount claimed by said County from defendant, the Southern Pacific Railroad Company, for state and county purposes, was $9,631.45; that no payment had been made on account of said taxes, and judgment was therefore taken for the full amount.

"That in the three actions brought to recover taxes claimed to be due to the County of San Bernardino from the defendant herein, the total

amount claimed as principal of state and county taxes, when the aforesaid judgments were entered, was $27,928.60, which amount was, upon the rendition of said judgments, paid in full to the Attorney-General, attorney for plaintiff, and by him subsequently paid into the county treasury of San Bernardino County, as directed by law, for the use and benefit of the State and of the County, and that said payment, together with the sums which had, prior thereto, been paid by said defendant, the Southern Pacific Railroad Company, on account of said taxes, constituted payment in full of the principal of all state and county taxes claimed to be due for the three years aforesaid.

"(Signed) E. C. Marshall,
Atty-Gen. Cal. and Atty. for Pltf.
P. D. Wigginton,
Atty. for Deft."

As it appears that the taxes, for the recovery of which this suit was brought, have, through the action of the Attorney-General of California, been received by the plaintiff for the use and benefit of itself and the State, the only question which remains to be determined is as to the defendant's liability for the statutory penalty, interest and attorney's fees. There is no substantial difference, upon the facts, between this case and that of the *County of Santa Clara* v. *Railroad Companies*, just determined; for, in this case, as in the others, the assessment—upon which the taxes sued for depend for their validity—improperly included fences, erected upon the line between the railroad and the lands of adjacent proprietors, at the rate of $300 per mile. For the reasons given in the opinion in the other cases—which are equally applicable here—that assessment must be held to be insuf- [422] ficient as a basis for judgment against the Company. As upon this ground judgment might have been rendered for the defendant, it is unnecessary to consider other questions, determined by the court below and discussed by counsel who appeared in this court.

The plaintiff, then, not being entitled to judgment for the taxes originally in question, and the parties having stipulated that the judgment entered for the plaintiff, with the consent of the defendant, should not be treated as an admission by the latter of the validity of the taxes claimed, it follows that the plaintiff cannot have judgment in its favor for penalty, interest, and attorney's fees. Apart from every other view, the defendant could not be adjudged liable for penalty, interest, or attorney's fees for not paying taxes arising out of an invalid assessment, and which, under the law, were not collectible by suit.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** concurring:

I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the circuit court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from consideration when it is owned by them, and considered when it is [423] owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional Amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions. *Barbier* v. *Connolly*, 113 U. S. 27, 31 [Bk. 28, L. ed. 923, 925].

Much as I regret that the question could not now be decided, I recognize fully the wisdom of the rule that the constitutionality of state legislation will not be considered by the court unless by the case presented its consideration is imperatively required. Although the objection, that in the assessment of the roadway there was included property not appertaining to it was raised in the answer and taken on the trial, the point was not discussed by counsel, as the constitutional questions were deemed of far greater importance. The attention of the court was specially directed to them, and thus the minor point was left undetermined.

After judgment had been entered in favor of the defendant on the ground that the assessment upon which the taxes claimed were levied was illegal, it entered into an agreement with the Attorney-General of the State to allow the judgment to be set aside and a judgment to be entered in favor of the plaintiff for the face of the taxes claimed, and to leave the question of its liability for the penalty, interest, and counsel fees to be finally determined by the supreme court. It is stated in the record that the object and purpose of the proceeding was "to enable the defendant to pay into the state and county treasuries, *on account*, the sum for which the judgment was rendered, without prejudice to [424] the right of the plaintiff in the case to proceed for penalties, interest, and attorney's fees claimed, and in order that the litigation might be brought to a speedy conclusion." It is also suggested that the same amount of taxes, if not recoverable when levied upon the property,

might under the Constitution be recovered in another action when levied upon the mortgage; and in that event that the Company could claim a credit from the mortgagees for the payment. The motives of the Company in this matter, however, do not affect the question of its liability for the penalty, interest, and attorney's fees. It was agreed between the respective attorneys that, in consenting to the judgment for the face of the taxes, the defendant should not thereby be deemed to admit their validity, desiring, as it would seem, to contest, on the ground of their alleged invalidity, the claim for the penalties, interest, and attorney's fees. Judgment was accordingly entered for the plaintiff for the face of the taxes claimed and the amount has been paid.

The arrangement was a wise and judicious one on the part of the Attorney-General, as it at once enabled the state and county treasuries to have the amount of the taxes levied, and to proceed for the penalties, interest, and attorney's fees. To have refused such an advantageous arrangement might have subjected him to just animadversion. Every right which the State could under any circumstance have had was fully guarded by the agreement. No conceivable benefit could have arisen to the State by his refusing to accede to it, and, as it has turned out from the decisions in the other cases, great inconvenience and loss would have followed.

The record shows that after the circuit court had announced its decision in favor of the defendant and different railway companies in forty other cases, brought to recover alleged delinquent taxes, they agreed to allow judgments to be entered against them for portions of the sums claimed. It was admitted by counsel on the argument that these judgments, amounting to several hundred thousand dollars, were for the face of the taxes; and that any claim in the cases for penalties, interest, and attorney's fees, was by stipulation to abide the [425] determination of the supreme court in the present case.

According to the decision of the court in the *Santa Clara Case*, the assessment upon which the taxes were levied was illegal, as it embraced items not assessable by the board of equalization. Of course no penalties for not paying an illegal tax, and no attorney's fees charged for the attempt to collect them, could be recovered; and for a like reason the interest of 2 per cent a month claimed could not be demanded. Besides, the statute allows no such interest on delinquent taxes where property is possessed by the delinquent, upon which a levy could be made for them. The collector must, on the third Monday of March of each year, make an affidavit that the taxes not marked "paid" on the delinquent list have not been paid, and that he has been unable to discover any property belonging to, or in the possession of the persons liable to pay the same, from which to collect them. It is only on such delinquent taxes that the 2 per cent a month interest is collectible. Since this case has been pending in this court a decision to that effect has been made by the Supreme Court of the State. *People* v. *North Pacific Coast R. R. Co.* 9 West Coast Rep. 574.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GARRETT B. HUNT ET AL., *Appts.*, [21

v.

DAVID D. OLIVER.

(See S. C. Reporter's ed. 211-223.)

Bill in equity—evidence held insufficient to support averments.

1. Where a debtor, for the purpose of delaying his creditors until he can make a favorable sale, conveys his real estate to one of three persons to whom he has executed a mortgage, but who has transferred his interest in the mortgage to his comortgagees, and the debtor then enters into a verbal contract authorizing his grantee to convey the property to junior mortgage creditors upon certain conditions, and after such subsequent conveyance has been executed under a written contract entered into by his grantee, and the persons to whom such grantee conveys purporting to embrace the verbal agreement, and after he has examined the written contract and executed deeds based upon it without expressing dissent therewith to the grantees who have accepted the deed under its provisions and have expended large sums upon the property, he cannot, after a delay of four years, be permitted in a court of equity to assert that the written contract and conveyance was not in accordance with the verbal agreement, and demand an accounting and reconveyance of the property to himself; nor can he demand a cancellation of the original mortgage without proof that the other two mortgagees were interested in his dealings with their co-mortgagee.

2. Where it is shown beyond question that neither of the defendants ever agreed to become partners in a firm, of which it is alleged they were members, that they never held themselves out as partners or contributed anything to the capital of the firm, or derived any profit whatever from its business, the facts that the defendants held a mortgage upon the firm property and that one of them indorsed the paper of the firm, his son-in-law being a member thereof, do not tend to prove that they were partners.

[No. 214.]

Argued April 5, 6, 7, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. *Reversed.*

The case is stated by the court.

Messrs. **Henry M. Duffield** and **George F. Edmunds**, for appellants.

Messrs. **Charles F. Burton** and **Alfred Russell**, for appellee.

Mr. Justice **Woods** delivered the opinion of [21 the court:

The bill was filed by David D. Oliver, the appellee, against Henry S. Cunningham, Garrett B. Hunt, Jacob Eschleman, Philip M. Ranney, Calvin Haines, George J. Robinson, and Henry M. Robinson. The following facts are shown by the pleadings and evidence: in the summer of 1868, Oliver, the plaintiff, was the owner of about 12,500 acres of pine lands, and held a contract for the purchase of 6,500 acres more from one David Preston. These lands were in the State of Michigan, mainly in Alpena and Alcona Counties. Six thousand acres of these lands Oliver had purchased in 1866 from the defendants Hunt, Eschleman, and Cunningham, for $35,000. He paid nothing on the purchase money, but secured its payment by a mortgage on the lands purchased and other lands owned by him. In 1867 he put up a steam saw-mill and made other improvements on the mortgaged lands, and carried on the business of manufacturing pine

lumber cut from the lands, first with one George W. Hawkins as a partner, and afterwards with the defendant George J. Robinson, to whom he conveyed an undivided one fourth in all his lands. In the summer of 1868 the plaintiff was in arrears for interest past due on the mortgage above mentioned, and on a mortgage for $16,000 to the defendants Haines and Ranney, and also on one to E. & G. R. Haines, for $10,000, covering part of the lands included in the Hunt, Eschleman and Cunningham mortgage. His property was also incumbered by other mortgages, to the amount of $13,000; he owed on the Preston contract for the purchase of lands, $12,000; he owed an unsecured indebtedness of $6,000; and the firm of Oliver & Robinson was indebted in the sum of $25,000, making in all $117,000, without including interest. He had not the ready means to meet his pressing demands. He was, therefore, financially embarrassed, and was, moreover, involved in difficulty with his partner, George J. Robinson, whom he accused of trying to dispossess and defraud him. Thereupon, on June 9, 1868, he wrote to Hunt and Cunningham for help, stating his situation, and asking them to take from him a quitclaim deed of all his property, and to purchase the Haines and Ranney mortgage, the E. & G. R. Haines mortgage, and other indebtedness outstanding against him; to take possession of and manage his property, and, when they had paid all his debts and the property was clear, to reconvey the same to him by quitclaim deed; and for all their trouble and services he offered to pay a reasonable compensation. They did not accede to Oliver's proposition, and matters remained *in statu quo* until September. In the meantime, Oliver went to Buffalo, and there saw Hunt, Eschleman and Cunningham, and urged them to help him out of his troubles with his partner and his creditors. But they did not yield to his importunities. Of these three persons Cunningham alone had had any experience in commercial affairs. Hunt and Eschleman were farmers living in Erie County, New York, and Hunt was Cunningham's father-in-law.

Oliver had given his creditors Haines and Ranney an option to buy his property, but they had declined to purchase. Finally, on September 2, 1868, Cunningham, being urgently entreated by Oliver, left Buffalo and went to Ossineke, in Michigan, Oliver's place of residence, and had an interview with him. Before leaving, [213] he assigned his interest in the Hunt, Eschleman and Cunningham mortgage to Hunt and Eschleman, and, as it appears, without consideration paid at the time.

Cunningham, while at Ossineke, accepted, at Oliver's own solicitation, quitclaim deeds from him of all the latter's real estate and bills of sale of all his personal property, including his interest in the firm of Oliver & Robinson. The conveyances were upon their face without condition or trust. Cunningham refused before the deeds were made to give Oliver any writing showing the terms on which he accepted them. Oliver, in his testimony in this case, states that at the time the conveyances were made he understood that "the object of the transfer was a trust; that he," Cunningham, "was to use the property to pay off the debts, and when the debts were paid to deed it back." In the bill he alleges that "said transfers were made for the purpose of enabling the mortgagees to sell said property in such a way as to pay their own debt, and to pay the other debts of complainant and leave him a surplus." Cunningham testifies that the purpose of Oliver in making the transfer to him was to enable him to hold the title for Oliver, so that the property should not be seized in suits then pending or about to be brought against Oliver, and to enable Oliver to make a sale thereof.

No consideration for the transfers passed at the time of their execution. The deeds were dated September 3, 1868; but were not in fact executed until September 8, following. Oliver endeavored during the thirty days that followed the date of the deeds to make a sale of his property, but failed. About the first of October, 1868, he was in Buffalo, and, with Cunningham, entered upon a treaty with the defendants, Calvin Haines and Philip M. Ranney, who were partners under the name of C. Haines & Co., and with the defendant, George J. Robinson, for the sale of the property to them. A contract was agreed on, and, as the appellants insist, was as agreed on reduced to writing, and dated and executed on October 3, 1868. It was signed by Cunningham, C. Haines & Co., and George J. Robinson, and, for the sake of brevity, is called in the record the Buffalo agreement. It provided, among other things, that on the expiration of thirty days [214] Cunningham, party of the first part, should convey to C. Haines & Co. and Robinson, party of the second part, all the real estate situated in townships 28 and 29 north, range 8 east, in the Counties of Alpena and Alcona, Michigan, which was conveyed to him by Oliver and wife by deed, bearing date on or about the fifth day of September, 1868, and also all the personal property conveyed to him by Oliver by bill of sale executed on the same day, the sale and conveyance to be subject to the following claims:

1. The Cunningham, Hunt and Eschleman mortgage upon a part of said real estate, on which mortagage there was unpaid $30,000 and interest.

2. A mortgage to C. Haines & Co. for about $19,000.

3. A mortgage to J. B. Wayne for about $12,000, on a portion of said real estate.

4. A claim of James H. Hill for about $3,000.

5. The copartnership indebtedness of the firm of Oliver & Robinson.

The party of the second part agreed to take the property subject to the above claims, and to assume and pay, at the time of the conveyance by Cunningham, one half of a debt for about $10,500 due to E. & G. R. Haines secured by a mortgage executed by Oliver on his lands. The party of the second part further agreed that they would, at the time of the conveyance by Cunningham, release and discharge all mortgages given by George W Hawkins to Calvin Haines or E. & G. R. Haines, and covering lands in the Counties of Erie and Niagara, in the State of New York, or either of said counties, and would protect and save Hawkins harmless therefrom, and from the debt thereby secured.

The contract further provided that the party of the second part in lieu of paying the one-

half part of the mortgage held by E. & G. R. Haines, and of discharging the Hawkins mortgage, should have the option to assign to Garrett B. Hunt, the mortgage of C. Haines & Co. against the said real estate of George W. Hawkins, and the debt secured thereby, and in addition to pay or secure the payment to Hunt of the sum of $4,000 within one year from the third day of November, 1868.

The contract also provided that Cunningham should assign a certain agreement made between Oliver and David Preston for the purchase of about 6,500 acres of land in Alpena and Alcona Counties, Michigan, subject to the aforesaid claims, and subject to the contract price of said last mentioned lands, and the party of the second part agreed that, upon such assignment, they would pay to Preston the contract price, and convey to such persons as Oliver should direct, free of charge, all of said 6,500 acres which lay outside of townships 28 and 29 north, range 8 east.

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The delay of thirty days provided by the contract was to give Oliver the chance of selling the property within that time if he could. He was not able to sell. On November 13, 1868, Cunningham conveyed to George J. Robinson, Calvin Haines, and Philip M. Ranney, in pursuance of the Buffalo agreement, the lands and personal property therein mentioned. The grantees then formed a partnership under the name of Robinson, Haines & Ranney, for the manufacture and sale of lumber from timber to be cut from the lands and sawed at the mill conveyed to them by Cunningham. On the 9th of January, 1869, a new partnership for the same purpose was formed, under the name of Cunningham, Robinson, Haines & Co., by taking into the firm Henry S. Cunningham. This firm continued in business until its dissolution in January, 1875. It was an unsuccessful venture. It never made or divided any profits. When it ceased business it had not assets sufficient to pay its debts. Three of its members Cunningham, Haines and Robinson, were adjudicated bankrupts, and Ranney, the fourth partner, was insolvent.

The bill in this case was filed March 12, 1873. It charged a conspiracy between Cunningham, Hunt, Eschleman, Robinson, Haines, and Ranney to defraud Oliver of his property. It averred that, before the Buffalo agreement was reduced to writing and signed, Oliver was compelled to leave, and did leave Buffalo, and was not present at its execution; that the agreement which, before leaving, he consented that Cunningham might make with C. Haines & Co. and Robinson was, that they should pay the Hunt and Eschleman, the James B. Wayne and the C. Haines & Co. mortgages, and half of the E. & G. R. Haines mortgage, and pay the Hill claim of $3,000, and release and discharge Hawkins from all his liabilities growing out of his business with Oliver, and pay all the debts of the firm of Oliver & Robinson, whereupon Cunningham should convey to them all the lands conveyed to him by Oliver and David Preston in townships 28 and 29 north, range 8 east. Having done this, Cunningham was to deed to Oliver all the lands outside of said towns. It was averred that, instead of making the contract to which he had assented, Cunningham made the Buffalo agreement, as hereinbefore set forth, by which Haines, Ranney and Robinson agreed not to pay off Oliver's debts, but to receive a conveyance of the lands subject to said mortgages, and bound themselves only to pay off one half of the mortgage to E. & G. R. Haines.

[216]

The bill then charged that Hunt and Eschleman were in fact members of the firm of Cunningham, Robinson, Haines & Co.; that Cunningham put no capital into the firm, and that all the defendants to the bill had carried on the lumber business under said firm name upon the lands and with the mill of the plaintiff, and had stripped the lands of their best pine timber; that Cunningham had in the manner above set forth secretly and fraudulently effected a sale of said lands to himself and his comortgagees; that the Buffalo agreement was a fraud on the plaintiff; that Cunningham's deed to Robinson, Haines and Ranney was procured by fraud and in furtherance of a conspiracy between all the defendants to obtain the plaintiff's property without consideration, and was made and delivered without payment or discharge by the vendees of the debts of the plaintiff and said Hawkins, and was without consideration and void; and that the mortgage to Hunt, Eschleman and Cunningham had been paid, and should be charged with the receipts of the mortgagees from the property, to wit: the profits of the said partnership.

The bill prayed that the deed and all the transfers made by Oliver to Cunningham, the Buffalo agreement, and the deed of Cunningham to Robinson, Haines and Ranney, might be canceled as fraudulent and void; that an account might be taken of the issues and profits of said lands received by Cunningham for the benefit of himself and Hunt and Eschleman, and the mortgage held by them be charged with the amount thereof; that the plaintiff might be at liberty to redeem; and that all the defendants might be required to deliver up possession of the mortgaged premises to the plaintiff, free and clear of all incumbrance put thereon by them.

Before the filing of the bill in the present case, to wit: on April 8, 1869, Hunt and Eschleman had filed their bill in the Circuit Court of the United States for the Eastern District of Michigan, to foreclose the mortgage executed to them and Cunningham by Oliver, to which Oliver and wife, George J. Robinson, Calvin Haines, Ranney and Cunningham were made defendants. Oliver filed an answer and cross bill, in which he set up by way of defense substantially the same facts as are relied on for relief in the present case. After the taking of a large mass of evidence in that case the court dismissed the cross bill without prejudice, and rendered a decree in favor of Hunt and Eschleman, on their note and mortgage, for $47,495, and directed a sale of the mortgaged premises to pay the same. Upon this decree a sale was made on August 28, 1873, to Garrett B. Hunt, for $50,699.44, which was confirmed on May 8, 1874. The premises brought sufficient to pay the debt secured by the mortgage.

The defendants, Hunt and Eschleman, filed a joint answer, in which they traversed all the material facts averred in the bill on which the plaintiff's prayer for relief was based, and set up the decree made in the suit for the fore

closure of their mortgage in bar of the present suit. Separate answers were also filed by the other defendants. After the taking of testimony and a reference to and report by a master, the circuit court, on final hearing, rendered a decree in favor of the plaintiff, against all the defendants, for $41,418.87, and that the defendants surrender to the plaintiff all the lands conveyed by him to Cunningham by deeds dated September 3, 1868.

From this decree Hunt and Eschleman alone have appealed.

The appeal brings up the question how far the evidence justifies the decree against Hunt and Eschleman. The *gravamen* of the bill is that the defendants, including the appellants, conspired with each other to secure for themselves without consideration the property of the appellee, and in pursuance of this purpose induced the plaintiff to execute deeds and transfers of all his property to Cunningham; that, having thus devested the title of the plaintiff and vested it in one of their own number, they caused the execution of the Buffalo agreement, which was greatly to the disadvantage of the plaintiff, and was different from the verbal agreement between him and Cunningham and the other defendants; that the Buffalo agreement as reduced to writing was never performed; but that the defendants, having organized the partnership of Cunningham, Robinson, Haines & Co., appropriated and used the property of the plaintiff without compensation or consideration passing to him, and by these means the large and valuable property of which the plaintiff was the owner before his conveyance thereof to Cunningham was wrested from him and used and consumed by the defendants.

We are of opinion, after a careful consideration of the record, that the decree of the circuit court, so far as it concerns the appellants, is not supported by the evidence.

The deeds and transfers of his property by the plaintiff were not made to the appellants, but to Cunningham, and there is no proof that they had any part in persuading Oliver to make them. On the contrary, Oliver himself testifies that the transfer of his property was suggested by himself for his own advantage; that he offered by letter to convey his real and personal estate to Hunt and Cunningham, jointly; and that they declined to accept his conveyance. He went from Ossineke, in Michigan, to Buffalo to try if he could not, by a personal interview, induce Hunt, Eschleman and Cunningham to accede to his wishes, but they refused to become his grantees. After much personal importunity he finally persuaded Cunningham to accept a transfer of his property for the purpose, as it seems to us, of delaying his creditors until he could make a favorable sale and thus save something for himself after paying his debts. Cunningham went from Buffalo to Ossineke for the purpose of receiving the deeds and transfer, but there is no proof that either Hunt or Eschleman solicited or advised Oliver to make the conveyances to him. It was the latter's own scheme, conceived and carried out by himself and in his own interest.

Nor is there any evidence that either Hunt or Eschleman took any part in the making of the Buffalo agreement. Oliver himself fails to connect them with it. He merely says that Hunt and Eschleman, Haines, Ranney, George J. Robinson and Henry M. Robinson were present at the discussion prior to the making of the Buffalo agreement. There is no proof that either Hunt or Eschleman urged or even advised the making of that agreement, or any agreement whatever, for the sale by Oliver and the conveyance by Cunningham of the lands and property transferred by Oliver to Cunningham. There is no proof that either of them was present when the Buffalo agreement was signed.

The charge that the agreement was not the contract to which Oliver had assented is supported by only one witness, and that is Oliver himself. On the other hand, there is much direct evidence to show that the agreement was just what he had consented it should be. Besides, Oliver's own conduct shows beyond controversy his assent to the agreement. He knew as early as the 10th of October what the written agreement was; for on that day, according to his own testimony, he went to the office of Williams, the lawyer who wrote the agreement and with whom it was left, and saw and read it. He says that, after reading it, he complained to Cunningham that the agreement was not the contract to which he had verbally assented. In this he is contradicted by Cunningham, and both Hunt and Eschleman swear that, after Oliver had read the agreement, he said to them that he was well satisfied with it. But Oliver does not swear, nor is there any proof, that he expressed any dissatisfaction with the agreement to Haines, Ranney, or Robinson, the other parties to the contract, and who by its terms were to become the vendees of the property. He took no steps whatever to prevent the execution of the agreement. On the contrary, on November 13, more than a month after he had seen and read it, he allows Cunningham, without objection from him, to make deeds for the property to Haines, Ranney and Robinson, in accordance with its stipulations. [220]

The record shows other pregnant facts. On October 2, 1868, the day before the execution of the Buffalo agreement, Oliver signed a contract in writing, in which, in consideration of the execution of that agreement, he covenanted to convey to Robinson, Haines and Ranney certain lands not included therein, and, on November 12, 1868, a month after he had seen and read the Buffalo agreement, he executed to Robinson, Haines and Ranney a deed for said lands, "together with the right to run logs through Devil River, over and through any lands owned by said David D. Oliver on the second day of October, 1868, and for that purpose to dam said river, and to flood any lands that may be necessary for the purpose of running logs," etc.; and afterwards, on January 12, 1869, he procured the acknowledgment of his wife to the deed, which was delivered, of course, after that date. This was equivalent to a ratification under his own hand and seal of the Buffalo agreement. Both the agreement by which he contracted to convey the lands and his deed of conveyance are in the record.

If Oliver was not satisfied with that agreement, as reduced to writing, he should have assailed it at once. As soon as he learned of

the fraud which he alleged had been practiced he should have repudiated the contract, and informed Robinson, Haines and Ranney thereof. But he did nothing of the kind. He allowed the contract to be carried out by Cunningham without objection. He himself made a deed in pursuance of the contract, and he permitted the vendees to expend large sums of money in establishing and carrying on the business for which they purchased the property. These facts prove beyond question, either that the Buffalo agreement was made upon the terms to which he had given his assent in advance, or if not, that he was satisfied with it as it was written, and ratified and performed it. All the complaints of Oliver, therefore, in reference to the execution of the Buffalo agreement, are shown to be groundless.

But the case stated in the bill fails for want of proof of the necessary and vital averment that these appellants were partners in the firm of [221] Cunningham, Robinson Haines & Co., and, as such, appropriated and converted to their own use the property of the plaintiff.

The partnership just named was formed under written articles, under which Henry S. Cunningham, George J. Robinson, Calvin Haines and Philip M. Ranney, and no others, became partners. With the exception of George J. Robinson, every member of the firm named in the articles of partnership testifies that neither Hunt nor Eschleman was in fact a partner. Hunt and Eschleman testify to the same effect. The testimony of George J. Robinson may be laid out of consideration. He is not only contradicted on this point by every other witness who testifies on the subject, but is flatly contradicted by his own deposition and answer in the foreclosure suit brought by Hunt and Eschleman against Oliver. Without going into details, it is sufficient to say that this witness is so thoroughly discredited that his deposition, uncorroborated, is not worthy of attention in settling the facts of the case.

It is shown beyond question that neither Hunt nor Eschleman ever agreed to become partners in the firm of Cunningham, Robinson, Haines & Co.; and that they never held themselves out as partners, or contributed anything to the capital of the firm, or derived any profit whatever from its business. They were, therefore, not partners in any sense. *Berthold* v. *Goldsmith*, 24 How. 536 [65 U. S. bk. 16, L. ed. 762]; *Felichy* v. *Hamilton*, 1 Wash. C. C. 491.

The only facts upon which the contention of the plaintiff is based, that Hunt and Eschleman were partners in the firm, are: first, that Cunningham appeared as a partner under circumstances which indicated, as the plaintiff claims, that his contribution to the capital of the firm was the money due on the mortgage to Hunt and Eschleman. This position, it may be observed, is at variance with the bill, which avers that Cunningham did not contribute any capital to the firm. The second fact relied on to show that Hunt was a member of the firm is that he lent it his credit by indorsing its paper.

But these facts are inconclusive. Hunt could aid Cunningham, his son-in-law, by advancing [222] him means and by indorsing paper of the firm of which Cunningham was a member, without himself becoming a partner in the firm. These acts of Hunt were perfectly consistent with his testimony, and that of all the other witnesses, that he was in no sense a member of the firm. Conceding, therefore, that Hunt and Eschleman allowed Cunningham to get a foothold in the firm by authorizing him to promise that the property of the firm should be protected from the Hunt and Eschleman mortgage, and the testimony shows nothing more, this does not prove or tend to prove that they were partners. If they had given Cunningham outright their whole interest in the mortgage, that fact would not have invested them with any rights in the property of the firm, or subjected them to its liabilities. The contention that they were partners in the firm of Cunningham, Robinson, Haines & Co. is based on vague conjectures built on the sayings and doings of others, which neither Hunt nor Eschleman is shown to have authorized or ratified.

Much stress is laid by Oliver's counsel upon the alleged fact that the assignment by Cunningham to Hunt and Eschleman of his interest in Oliver's mortgage to Hunt, Eschleman, and Cunningham, was without consideration and simulated. We regard this assignment as a fact of no weight in this controversy. As Hunt and Eschleman are shown not to have been partners in the firm of Cunningham, Robinson, Haines & Co., the assignment did not injuriously affect Oliver's rights as against them. Whether it was made with or without consideration was a matter of no concern to Oliver. The fact is, and so the record shows, that it was made upon the advice of counsel, and Oliver was told of it by Cunningham early in November, 1868. Its purpose evidently was to avoid any embarrassment to Hunt and Eschleman, in case Cunningham became Oliver's vepdee of the mortgaged lands, and not to gain any unfair advantage over him.

Finally, the evidence shows that all the stipulations in the Buffalo agreement for the benefit of Oliver have been performed by the parties, except when his own conduct has prevented performance; the $4,000 has been paid to Hunt on Oliver's account, and Hunt has acknowl- [22 edged its receipt, and the Hawkins mortgage has been assigned to Hunt according to the contract; all of the lands conveyed by him to Cunningham, and all of the Preston lands not in townships 28 and 29, have either been conveyed to him by Cunningham or will be upon his demand. There are over 6,000 acres of these lands to which he now has a clear legal or equitable title, and which are valued by an uncontradicted witness at $40,000. In short, the Buffalo agreement, which the bill assails, appears to have been made with Oliver's assent, to have been to his advantage and to have been fairly performed.

On every ground for relief alleged in the bill there is a failure of proof. This view renders it unnecessary to consider the effect, as a bar to the relief sought in this case, of the decree in the suit for foreclosure brought by Hunt and Eschleman against Oliver.

The decree of the Circuit Court against the appellants, Hunt and Eschleman, must, therefore, be reversed and the cause remanded, with directions to dismiss the bill as to them; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[250] WASHINGTON LIBBY, *Plff. in Err.*,

v.

WILLIAM H. CLARK.

(See S. C. Reporter's ed. 250-255.)

Title in special allotments to head men of Ottawa Indians—limitation on power of alienation—Treaty of June 24, 1862.

1. The special allotments to the chiefs and head men of the Ottawa Indian Tribe, authorized by the third article of the Treaty of June 24, 1862, were subject to the limitations on the power of alienation prescribed by the seventh article of the same Treaty.
2. Such limitation on the power of conveyance did not deprive the title of the character of a fee simple estate.

[No. 286.]

Submitted April 19, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the State of Kansas. *Affirmed.*

The case is stated by the court.

Messrs. **George R. Peck, A. T. Britten** and **A. B. Browne,** for plaintiff in error.

Mr. **William H. Clark,** in person.

Mr. Justice **Miller** delivered the opinion of the court:

[251] This is a writ of error to the Supreme Court of the State of Kansas.

It is an action in the nature of ejectment brought by Libby against Clark.

Both parties assert title through William Hurr, who is by birth and descent an Indian of the Ottawa Tribe, and was one of the chiefs and head men of the Tribe. On the trial the plaintiff read in evidence a patent from the United States to Hurr for the land in controversy, and offered a deed from said Hurr to J. S. Kallock, which, on objection of the defendant, the court refused to receive, and the exception to this ruling, which was affirmed by the supreme court, presents the question of federal law which gives jurisdiction to this court. The patent to Hurr reads as follows:

"The United States of America to all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land-Office a return, dated 17th March, 1864, from the Office of Indian Affairs, containing certain lists showing the selections of allotments made for the use of certain Ottawa Indians under the Treaty concluded on the 24th day of June, 1862, between the United States and the Ottawa Indians of Blanchard's Fork and Roche de Boeuf, in the State of Kansas, as ratified on the 28th day of July, 1862, which lists were duly approved by the Secretary of the Interior under date of March 9, 1864; and whereas, it appears from one of the lists aforesaid that the east half of the northwest quarter of section seven, in township seventeen, the east half of the west half of section thirty, and the east half of the northwest quarter of section thirty-one, in township sixteen, south of range twenty, east of the sixth principal meridian in Kansas, containing 320 acres, has been designated as the allotment of William Hurr: Now, know ye that the United States of America, in consideration of the premises, and pursuant to the third and seventh articles of the Treaty aforesaid, have given and granted, and by these presents do give and grant unto the said William Hurr and to his heirs the tract of land above de- [252] scribed; *Provided*, however, and these presents are upon the express condition, and with the limitation, as required by the Treaty aforesaid, That the said William Hurr shall not alienate or incumber the aforesaid tracts of land until he shall become, by the terms of said Treaty, a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered by said William Hurr, made before he shall become a citizen, shall be null and void; to have and to hold the said tracts of land, with the appurtenances, unto the said William Hurr and to his heirs and assigns forever, subject to the limitation and condition aforesaid.

"In testimony whereof, I, Andrew Johnson, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

"Given under my hand at the City of Washington, this first day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States the ninetieth.

"[Seal of the U. S. General Land-Office.]

"By the President:

"ANDREW JOHNSON,

By Edw. D. Neill, *Secretary.*

S. Granger,

Recorder of the General Land-Office."

The deed from Hurr to Kallock is dated December 1, 1865, and was unaccompanied by any consent of the Secretary of the Interior, or any evidence that Hurr had become a citizen of the United States, and it was for that reason rejected.

Whether Hurr could make a valid conveyance of the land at the time he made the deed to Kallock depends upon the construction to be given to the Treaty mentioned in the patent to Hurr, the third and seventh articles of which are as follows:

"Article III. It being the wish of said Tribe of Ottawas to remunerate several of the chiefs, councilmen and head men of the Tribe for their services to them many years without pay, it is hereby stipulated that five sections of land is (are) reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen and head men as the members of the Tribes shall in full council determine; and it shall be the duty of the Secretary of the Interior to issue [253] patents in fee simple of said land, when located and apportioned, to said Indians. In addition thereto, said last named persons, and each and every head of a family in said Tribe, shall receive 160 acres of land, which shall include his or her house and all improvements, so far as practicable; and all other members of the Tribe shall receive 80 acres of land each, and all the locations for the heads of families, made in accordance with this Treaty, shall be made adjoining and in as regular and compact form as possible, and with due regard to the rights of each individual and of the whole Tribe."

"Article VII. There shall be set apart ten acres of land for the benefit of the Ottawa Baptist Church; and said lands shall include the church building, mission house and graveyard, and the title to said property shall be vested in a board of five trustees, to be appointed by said church in accordance with the laws of the State of Kansas. And in respect for the memory of

Rev. J. Meeker, deceased, who labored with unselfish zeal for nearly twenty years among said Ottawas, greatly to their spiritual and temporal welfare, it is stipulated that 80 acres of good land shall be, and hereby is, given, in fee simple, to each of the two children of said Meeker, viz.: Emmeline and Eliza; their lands to be selected and located as the other allotments herein provided are to be selected and located, which lands shall be inalienable, the same as the lands allotted to the Ottawas. And all the above mentioned selections of lands shall be made by the agent of the Tribe under the direction of the Secretary of the Interior. And plats and records of all the selections and locations shall be made, and upon their completion and approval, proper patents by the United States shall be issued to each individual member of the tribe and persons entitled for the land selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner until they shall, by the terms of this Treaty, become a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void. And forty acres, including the houses and improvements of the allottee, shall be inalienable during the natural lifetime of the party receiving the title; *Provided*, That such of said Indians as are not under legal disabilities by the local laws may sell to each other such portions of the lands as are subject to sale, with the consent of the Secretary of the Interior, at any time."

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By the first article of the Treaty, it was declared that this branch of the Ottawa Tribe of Indians, and each one of them, should become citizens of the United States, and their tribal relations be dissolved, at the end of five years from the ratification of the Treaty, which was July 18, 1862. Hurr, therefore, lacked nearly two years of being a citizen when he attempted to convey to Kallock.

It is to be added that the records of the land-office show that the land named in that deed was part of the allotment to Hurr as one of the chiefs and head men of the Tribe, under article three of the Treaty, and not lands certified to him in common with all others of the Tribe under article seven. The question thus presented is whether Hurr held this land after the patent was delivered to him, subject to the stipulations found in it and prescribed by the seventh article, namely: "And plats and records of all the selections and locations shall be made, and, upon their completion and approval, proper patents by the United States shall be issued to each individual member of the Tribe and person entitled for the lands selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner, until they shall, by the terms of this Treaty, become a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void." The Supreme Court of Kansas held that his title was subject to this provision and, as Hurr had not become a citizen when the deed to Kallock was made, it was void. Counsel for Libby say this was error, because the special allotments to the chiefs and head men of the Tribe, authorized by the third article of the Treaty, were not subject to this rule, which applied only to the ordinary Indian who was not supposed to be capable of taking care of himself in such a contract of sale.

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In support of this view much stress is laid upon the use of the words "*fee simple*," in describing the estate conferred upon these head men by the third article, which is not used in that conferring title on the others in article 7.

The title conveyed to Hurr by the patent was a *fee simple;* that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. "An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever." 4 Comyn's Digest, 1, article, *Estates*. The limitation of the power of sale for five years is not inconsistent with a fee simple estate. Such also, seems to have been the practice of the government in other Treaties referred to by counsel in their brief. 7 Stat. at L. pp. 348 *et seq.*

The embodiment of the stipulation required by the seventh article of the Treaty in the patent to Hurr shows the construction of the executive department of the government, that it was applicable to the land granted by the third section, as Hurr's acceptance of it seems to imply his acquiescence in it.

Two decisions of the Supreme Court of Kansas on the same subject give this construction to the Treaty. The opinion of that court in the present case (14 Kan. 435) is an able examination of the question, and we concur in the views there stated.

The judgment of that court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE PLACE AND CHARLES PLACE, AND CHARLES D. BIGELOW, Survivor of BIGELOW AND TRASK, WILLIAM A. WRIGHT ET AL., Claimants of the Schooner GENERAL S. VAN VLIET, and DAN SMITH ET AL., Claimants of the Cargo, *Appts.*,

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v.

NORWICH AND NEW YORK TRANSPORTATION COMPANY.

(See S. C. "*The City of Norwich*" Reporter's ed. 468-506; 526-541.)

Admiralty—Limited Liability Act of 1851 construed—when owner entitled to benefits of Act—when value of owner's interest to be estimated—what freight included—insurance, not included—limitation applicable in proceedings

in rem—right to limitation, not lost by surrender to underwriters—practice.

In a case of collision occasioned by the negligence of the officers or hands of one of the vessels, without any neglect, privity or knowledge of her owner, and where said vessel took fire and sank with loss of cargo, and never completed her voyage nor earned any freight, but was afterwards raised and repaired, and was then libeled and seized on behalf of the owners of her cargo, and claimed and bonded at her then value by her owner, who filed an answer and a petition for limited liability; and where it further appeared that the owner received certain moneys for insurance of the ship against loss by fire, it was held:

1. That the owner was entitled to a limitation of liability to the value of its interest in ship and freight under the Act of 1851. §§ 4283-4287 R. S.
2. That the point of time at which the amount or value of the owner's interest in ship and freight is to be taken for fixing its liability is the termination of the voyage on which the loss or damage occurs.
3. That if the ship is lost at sea, or the voyage be otherwise broken up before arriving at her port of destination, the voyage is then terminated for the purpose of fixing the owner's liability.
4. That in the present case, the voyage was terminated when the ship had sunk, and that her value at that time was the limit of the owners' liability; and that the subsequent raising of the wreck and repair of the ship, giving her an increased value, had nothing to do with the liability of the owner.
5. That no freight except what is earned is to be estimated in fixing the amount of the owner's liability.
6. That insurance is no part of the owner's interest in the ship or freight within the meaning of the law, and does not enter into the amount for which the owner is held liable.
7. That the limitation of liability is applicable to proceedings *in rem* against the ship, as well as to proceedings *in personam* against the owner; the limitation extends to the owner's property as well as to his person.
8. That the right to proceed for a limitation of liability is not lost or waived by a surrender of the ship to underwriters.
9. In this case, although an application for limitation of liability had been originally overruled by the district court, and an interlocutory decree had been rendered in favor of the libelants for their entire damage, with a reference for proofs and a report by the master; yet the court, after the decision of this court in Norwich Co. v. Wright, 13 Wall. 104 [80 U. S. bk. 20, 585], relating to the same collision, and the promulgation of the additional rules adopted by this court, received a new petition and ordered a new appraisement to ascertain the value of the ship whilst lying sunk; and made a decree limiting the liability of the owner to the value at that time. *Held*, that the district court had jurisdiction to receive such new petition and to take such proceedings.

[No. 62.]

Argued, Nov. 16, 17, 1885. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court. See, also, the following cases of *Dyer* v. *National Steam Navigation Company*, and *Thommessen* v. *Whitwill*.

Mr. **J. Langdon Ward,** for Place and others, appellants:

The sum received by the petitioners from the insurance companies as indemnity for the damage caused to The City of Norwich by fire, with interest from the date of its receipt, should have been included in the appraisement of the petitioners' interest as owners in that vessel.

The Act of 1851 provides that the liability of the owner or owners of the vessel for damage caused, as in the present case, "without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending;" and then provides that where loss has been suffered by several owners of property, exceeding the whole value of the ship or vessel, and her freight for the voyage, they shall receive compensation from the owner or owners in proportion to their respective losses, and that anyone interested may take appropriate proceedings for the apportioning of the sum among the parties entitled thereto. The statute then provides that a transfer by the owner or owners of his or their interest in such ship or vessel and freight, for the benefit of the claimants, to a trustee to be appointed shall be deemed a sufficient compliance with the Act on his or their part.

The whole difficulty which has arisen in the application of this statute has been caused by doubt as to the precise time at which the value of the interest of the owners in the vessel, in each particular case, ought to be estimated. The point has been presented to this court on three occasions:

Norwich Co. v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585); *The Benefactor*, 103 U. S. 239, 246 (Bk. 26, L. ed. 351, 354); *The Scotland*, 105 U. S. 24 (Bk. 26, L. ed. 1001).

Acquiescing entirely in each of the above expositions of the law, as applicable to the cases in which they were made, and the points in decision, it seems to us that neither is sufficiently comprehensive to meet all the cases which might arise.

The North Star, 106 U. S. 17 (Bk. 27, L. ed. 91).

It seems to us that the meaning and intent of the Legislature, in the enactment of this statute, was to constitute the owners of a vessel—on the instant of the happening of any event by reason of which damage might result to others, for which they were or might be liable and for which they desired to limit their liability under the statute—trustees, holding the vessel and everything which might be realized from her thereafter during that voyage for the benefit of the sufferers.

Statutes must, if possible, be so construed as to operate with uniformity in all cases; and we believe that on no other theory can absolute uniformity be secured in the operation of this statute.

The responsibility of the vessel owner for damages caused by collision with another vessel, in a case where his responsibility for those damages would be limited by the statute, would arise from his responsibility for the act of his master or mariners, his servants, and would be an action for trespass on the case.

It is settled law that in such an action the right of action accrues at the instant of the commission of the fault, even though the resulting damages may not be suffered for some time afterwards.

Argall v. *Bryant*, 1 Sandf. 98; *Wilcox* v. *Plummer's Ears*. 4 Pet. 172 (29 U. S. bk. 7, L. ed. 821).

Such being the case, it seems to us equitably and fairly within the meaning of the law, that at the instant of the occurrence by which the liability of the ship owner is fixed, the ship itself and the freight that may be earned on that voyage should be deemed appropriated to the

*Head notes by *Mr. Justice* BRADLEY.

satisfaction of the resulting damages, and so it was held under the Statute, 53 Geo. III. chap. 159, the wording of which was entirely similar to the Act of 1851.

Dobree v. *Schroder*, 6 Simon, 291.

Our statute, it is true, provides that the owner may be deemed to have complied with the Act, if he shall transfer his interest in the vessel to a trustee; and hence, it has been argued and held, that our Act did not adopt the rule of the English Act. This is true, for under our Act, to some extent, the perils necessarily attending the completion of the voyage by the offending ship must be borne by the sufferer; but surely it could not have been in the contemplation of the Legislature that an owner whose ship was pledged to her full value, to answer for damages suffered, should thereafter benefit by any occurrence to that ship which should at the same time diminish the remedy of the sufferers against her.

Waldron v. *Willard*, 17 N. Y. 466.

If this proposition is correct, it is manifest that the rule enunciated by this court in the case of *The Scotland*, 105 U. S. 24 (Bk. 26, L. ed. 1001), that the liability of the owners is measured "by the value of the ship as she comes back into port," though correct in its results as applied to the point then in mind, was not intended as a universal rule applicable to all possible cases; and it would also follow that if in the case last supposed the vessel primarily liable for damage to her cargo, instead of being a total loss by reason of a subsequent collision was damaged thereby only to the extent of a portion of her value, whether greater or less, the right of action against the offending ship for that damage should also pass to the trustee under the assignment; otherwise the law would be uncertain in its application and the owner would benefit by that which reduced the security of the pledgees; and it would also result that the rule suggested in *Norwich Co.* v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585), and interpreted in *The Benefactor*, 103 U. S. 239 (Bk. 26, L. ed. 351), "that the value of the ship at the time of the surrender, if surrender is made in a reasonable time, would furnish a proper criterion of the amount of liability," though unquestionably correct in its application to the case as then in the mind of the court, is not to be interpreted as a universal rule applicable to all cases.

Again; if the proposition above stated is correct, it would seem to follow by parity of reasoning that if, by reason of the act or occurrence out of which their liability to the freighters arose, or of any subsequent occurrence to the ship on the same voyage, their vessel suffered damage for which her owners received compensation from any source (as, for instance, underwriters) moneys so received should be held as received to the use of the injured freighters and be held to pass under the assignment.

It has been urged in opposition to this view that the contract of insurance is a personal contract, and by the transfer of the insured property before the loss, right of action is gone and there remains no insurable interest in the holder; and, therefore, if the transfer contemplated by the Act were made before the loss, the trustee would have no right of action against the insurance company, and that this is a conclusive argument against the inclusion of the insurance moneys in the assignment of the interest of the owners in their vessel.

There are two answers to this position. In the first place, if as matter of fact the transfer to a trustee were made before the occurrence of subsequent disaster, there would be an opportunity for, and it would be the duty of, the trustee to insure the property forthwith, and by delay on the part of the owners for their own benefit in taking such a course the sufferers should not be prejudiced; and second, that in the case at bar the moneys have been collected from the insurance companies and received by the owners; and we say that, under the statute, the common case is presented of the legal title to property vested in one person and the beneficial interest in another. In analogous cases it has been uniformly held that if the loss or damage occurs to the property, and the holders of the legal title receive compensation therefor, they receive it for the benefit of the holders of the beneficial interest.

Wyman v. *Wyman*, 26 N. Y. 253; *Burbank* v. *Rockingham Mut. F. Ins. Co.* 4 Foster, 550; *Beach* v. *Bowery F. Ins. Co.* 8 Abb. Pr. 261, note; *Parry* v. *Ashley*, 3 Sim. Ch. 97; *Ins. Co.* v. *Updegraff*, 21 Pa. St. 513; *Gates* v. *Smith*, 4 Edw. Ch. 702; *Eagle's Case*, 3 Abb. Pr. 218–235.

We say that cases of this kind, where the benefit of the statute is sought, should be treated in all respects as if the ship owner had died at the instant of the commission of the wrong, and his ship had become the property of the sufferers of damage as his next of kin.

"If the principal has derived any benefit from such acts of the agent, to the extent of that benefit he is responsible, upon the principles of natural justice; and no man ought to be enriched by the loss and injury of another."

The Rebecca, 1 Ware, 188, 206.

The correctness of this principle and its solid foundation in morals cannot be questioned. We think it has a direct application to the case at bar and, properly applied, demonstrates that the moneys received by the appellee from the insurance companies should be surrendered by it to the appellants. The liability of the appellee to the appellants for the damage suffered by the latter arises from the wrongful act of the master of the steamboat "City of Norwich" in so navigating his vessel as to cause the collision. Under the Act of 1851 these appellants were entitled to indemnification for this damage, out of the offending vessel the "City of Norwich."

The fire reduced the value of the vessel, and this reduction has been made good to the appellee by the insurance. But the fire, as the court below held, was a consequence of the collision. It was, therefore, a result of the wrongful act of the master; and, unless the appellee shall turn over these moneys to the appellants, it has so profited to their injury; that is to say, to the extent of the moneys received from the insurance companies, it has derived a benefit from the wrongful act of its own agent; and, unless the moneys so received from the insurance companies shall be applied to the satisfaction of the appellants' claims, it will to that extent have been enriched by the loss and injury of the appellants.

If it be replied that the moneys received from

the insurance companies were received by reason of the contract of insurance and the premiums paid by the appellee, we say that it is true; but that, notwithstanding the contract of insurance and the moneys paid as premium, except for the wrongful act of the master in causing the collision and consequent fire appellee would not have received these moneys, and that the proximate cause of their receipt was the fire and the act of the master, and not the contract of insurance and premium.

Compare *Re Leonard*, 14 Fed. Rep. 53; *The O. H. Foster*, 1 Fed. Rep. 733.

Within the manifest purview and intent of the Act of 1851, both damages and insurance not only equitably but actually represent the vessel; and we most earnestly urge upon this court that it should not, unless compelled by some binding authority, adopt such a construction of the Act of 1851 as will impose upon courts in future the necessity of working out manifest equities by circuitous methods and fine-drawn subtleties, when, by the simple construction which we claim for that Act, absolute equity will be attained without difficulty in all cases.

Messrs. **C. R. Ingersoll** and *Huntley* and *Bower* for Wright and others, appellants:

The court below erred in not apportioning among the sufferers by the steamer's fault the whole value of the owners' interest in the offending vessel at the time the limitation of liability was sought; such value being fixed by the stipulation at $70,000.

That the stipulation taken upon the release of the vessel from custody is (independently of any peculiar provision) a substitute for the released vessel, and that the rights and remedies of all parties interested in the released vessel remain unaffected by the substitution, and are to be regarded precisely the same as though the vessel itself was now in court, as the actual *res* to be subjected to its decrees, we suppose, will be conceded.

United States v. *Ames*, 99 U. S. 42 (Bk. 25, L. ed. 300); *The Wanata*, 95 U. S. 611 (Bk. 24, L. ed. 461).

Our contention will be that the sole purpose of the statute is to limit the liability of the ship owner to his interest in the ship, but within that limit to leave his liability and, necessarily, the remedy of the creditor, as it was under the maritime law before the enactment of the statute.

When this statute was enacted, the general maritime law as administered, not only in the United States where no limitation of the ship owner's liability by federal law obtained, but in Continental Europe and England also, where the limitation existed, entitled the lien creditor to the full amount of the owner's interest in the vessel as that interest might be at the time of its appropriation for his benefit.

The Rebecca, 1 Ware, 188, *The Maggie Hammond*, 9 Wall. 449 (76 U. S. bk. 19, L. ed. 772); *The China*, 7 Wall. 68 (74 U. S. bk. 19, L. ed. 67); *The Siren*, 7 Wall. 155 (74 U. S. bk. 19, L. ed. 129).

And this maritime lien or hypothecation of the vessel adheres to the ship from the moment it attaches as a proprietary interest—a *jus in re*—and travels with her wherever she may go and in whatever condition she may be, so long as her identity as a ship is preserved.

1 Jacobsen, Sea Laws, chap. 1, p. 15; Reddie, Law, Mar. Com. 89; 2 Kay, Law Shipmasters and Seamen, 975; Williams and Bruce Adm. Jur. 65; *The Aline*, 1 W. Rob. 111; *The Europa*, 2 Moore, P. C. (N. S.) 1; *The Charles Amelia*, 2 L. R. Adm. 330; *The Bold Buccleugh*, 7 Moore, P. C. 267.

The source and origin of this lien is to be found in that ancient rule of the maritime law which gave a sort of personality to the ship, and imposed a responsibility for the faults of its navigation upon her as the offender or guilty thing, irrespective of the personality of her owner.

The *dictum* of *Dr.* Lushington in *The Druid*, 1 W. Rob. 398, that "The liability of the ship, and the responsibility of the owners, are convertible terms," has not passed unquestioned in England (Marsden on Collision 2d ed. 1885, 86, n), and if it has the meaning apparently given to it by the learned judge, in *Petition of N. & N. Y. Trans. Co.* 17 Blatchf. 287, that the ship is only liable through the owner, and the owner never through the ship, we venture to say does not correctly express the principle by which the maritime law determines the liability of the ship. And that *Dr.* Lushington did not so intend is, we think, clear by his opinion in the case of *The Aline*, 1 W. Rob., 111.

See *The Malek Adhel*, 2 How. 234 (43 U. S. bk. 11, L. ed. 239); *The China*, *supra*; *Freeman* v. *Buckingham*, 18 How. 189 (59 U. S. bk. 15, L. ed. 341).

And out of this responsibility which the maritime law imposes upon the offending vessel has grown the peculiar remedy of the court of admiralty, *in rem*. Its sole purpose is to enforce the lien by which the ship is bound.

The *Rock Island Bridge*, 6 Wall. 215 (73 U. S. bk. 18, L. ed. 754).

It was also out of this ancient distinction between the liability of the vessel and the liability of the person, that grew the mode by which the principle (grafted upon the Roman law by the maritime law) of limiting the personal liability of the shipowner to his sea fortune, was carried into effect.

The shipowner was allowed to discharge himself from his personal liability by abandoning to his creditor the ship and freight.

But he could not by any act limit the liability of the ship, nor impair in any degree the remedy which the maritime law gave the creditor *in rem*.

In *Norwich Company* v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585), it is justly said that, "The learned opinion of *Judge* Ware in the case of *The Rebecca* leaves little to be desired on the subject" of the history of the maritime law in this respect.

The sea fortune of the owner, which he exposes to hypothecation and risk, is his ship, however its value may fluctuate from time to time.

Under the maritime law as administered in France, we understand that the shipowner who should, after a collision resulting in serious damage to his vessel, repair his vessel fully and for a new voyage, would be held to have elected not to abandon, and therefore could not thereafter set up his privilege of limitation against the creditor.

Upon this review of the maritime law as it

was administered when the Act of Congress of March, 1851, was passed, it is plain that at that time the sufferer by collision, in this country, had his remedy against the offending vessel, to the full extent of the value of the owner's interest in that vessel at the time when such value was sought to be appropriated for his benefit.

Has this remedy been taken from him by the Act of March 3, 1851?

There is a twofold purpose in this statute. One purpose is to limit the shipowner's liability in every case of loss without his privity to the value of his interest in the vessel and pending freight; the other, to apportion that value among the sufferers by the wrong, in the special case where there are several on the same voyage and the whole value of the vessel and freight is not sufficient to make compensation to each of them.

The principle of limiting the shipowner's liability to the value of his interest in the ship comes, as we have seen, from the maritime law of Continental Europe; the principle of apportioning such value among the sufferers where the claimants are more than one, from the equity system of England.

But it must be conceded, we think, that the rule for measuring the shipowner's liability which the statute intends is a rule of uniform application—that is, a rule which will provide the same measure whether the creditor claimant be one or several, or whether the mode of applying that measure shall be by the specified mode of a "transfer," or any other appropriate proceeding.

We understand the circuit court to have held that the liability of the appellee, as owner of the steamer, is limited by the Act to the value of the vessel "as she was immediately after the injury was inflicted;" and as, in the opinion of the circuit court, "no liability can rest upon the vessel which does not exist against the owner;" therefore no liability can rest upon the vessel which will not be extinguished by the payment into court of a sum of money equivalent to "the value of the offending ship in the condition in which she was immediately after the disaster."

This construction of the statute we contest.

It is not easily understood why, if Congress had intended any such radical change of the maritime law of the country—a change so radical that it, in effect, does away with the ancient maritime rule that the maritime lien travels with the keel, and can only be extinguished by a sale, or its equivalent, of the vessel—the intention should not have been clearly expressed.

And in construing the statute it should be borne in mind that if its principle is not "tyrannical," as it is said to be in *The Ettrick*, 6 L. R. Prob. Div. 127, it is, certainly, as is said in *The Benares*, 14 Jur. 581, and approved by *Judge* Sprague in *Allen* v. *Mackay*, 1 Sprague, 224, "an intrenchment, so far as it goes, on the general principle of every man being entitled to recover the whole of his loss from the individual who inflicts it, and, therefore, must not be extended beyond the fair import of its language."

The reasoning of the circuit court we understand to be this: that, in cases of collision, the statute (1) measures the owner's liability by the value of his vessel immediately after the collision; and (2) as the vessel's liability is measured by the owner's liability, therefore, (3) the vessel is only liable to the extent of her value as she came out of the collision.

We deny both this conclusion and its premise.

If the freighter obtained a maritime lien upon the vessel as an element of his contract of affreightment, and the owners of the injured vessel a like lien upon the instant of the injury, we fail to find anything in the statute to impair the force of those liens, whatever may be the limitation it places upon the owner's liability, or the sufferer's remedy *in personam*.

We submit that the course of reasoning of the circuit court should be reversed, and that the premise should be that the statute expresses but one measure for the owner's liability, and that is the value of the vessel when it shall be transferred for the benefit of the creditor; and from this premise the only sound conclusion is that where there is an existing vessel, the owner's liability is, therefore, the value of that vessel when either the vessel itself or its representative value shall be appropriated for the benefit of the creditor.

In *Norwich Company* v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585), this court discovered the intention of Congress as to the measure of the shipowner's liability in "the provision for the shipowner to discharge himself, as in the maritime law, by giving up the vessel and freight."

But if this provision of a transfer is decisive evidence, as the court found it to be, of the intention of the statute to measure the owner's liability by the value of the vessel at some time after the collision, is it not with greater reason decisive evidence that the statute intends the absolute liability to remain until the owner shall either transfer the vessel "in compliance with the requirements of the Act," or do some other equivalent thing? And does it not necessarily follow that the equivalent thing to do must be something which will give to the claimants the value of the vessel at the time the thing was done? And that therefore, if the owner may pay value into court instead of transferring the vessel to a trustee, such value must be the value of the vessel as she then is when the payment into court is made?

If this is not so, the statute is open to the objection that it provides two differing measures of liability: one furnished by the value of the vessel when transferred, *in specie*, and the other by her value in money at some other time.

From the decision that the value of the vessel which measures the owner's liability is its value after the collision, and not before, because of the statute provision of transfer, it necessarily follows that the transfer intended by the statute is a present transfer. For if the provision is open to the construction that the transfer may be as of any past time, it may as well mean a time before the collision as after.

The Benefactor, 103 U. S. 246 (Bk. 26, L. ed. 351); *The Scotland*, 105 U. S. 24 (Bk. 26, L. ed. 1001).

If the transfer has any force by the statute whatever, it must be the force given it by the court in *The Benefactor*. It must carry to the creditor the value of the vessel at the time when the limit of the owner's liability arises, which

is not until the transfer is made. Then, and not till then, his liability becomes wholly real, and ceases to be at all personal.

The only other provision of the statute concerning the single creditor, whose case we are now considering, is that of section 3 of the original Act: the general provision that the liability of the owner, etc., "shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel and her freight then pending."

But this declaration is in close harmony with the provision of a transfer. If the provision for a transfer requires the owner to transfer his whole present interest in the vessel for the benefit of the creditor, the inference is necessary and unavoidable that this declaration means that in the case of an existing wrong-doing vessel which can be transferred, the liability of the owner shall not exceed the amount or value of the interest therein which the owner is required to transfer if he elects to transfer anything.

The declaration of section 3 is only the declaration of the maritime law that the shipowner, in the cases there mentioned, may, if he chooses, restrict his creditor to the remedy which the maritime law gives him *in rem* against the vessel: or, as it is expressed in *The C ina*, the "primary liability" is regarded as upon the vessel and the limitation "limits the creditor to this part of the owner's property."

For the statute makes no attempt to interfere with the ordinary jurisdiction of the admiralty court *in rem*. Indeed this provision for a transfer "to a trustee" seems to have been intended for the purpose of affording the state or common-law courts a method of applying the statute analogous to that which is peculiar to the admiralty court.

The section of the statute providing, with distinctness, for an apportionment, in the case of several claimants, of "the sum for which the owner may be liable among the parties entitled thereto," is also in entire harmony with the position we have sought to maintain.

What is the sum here referred to? Obviously the sum which is "not sufficient to make compensation to each" of these parties; and that sum is the "whole value of the vessel and freight for the voyage;" and that vessel is the vessel which, by the maritime law, is bound, and as she is bound, to make that compensation. And this is the value which, as we have seen, the creditor is entitled to receive by the statutory transfer.

In this discussion we have purposely kept in mind the case of an existing vessel—existing at the time when the application of the statute is sought. For that is the case of these appellants. In fact their case is that, not of an actually existing vessel merely, but of such a vessel lying under actual condemnation of the admiralty court.

The question concerning these appellants is simply whether this statute has the effect to discharge a vessel so situated from its obligations in any other way than by the usual one in which such obligations may be discharged in an admiralty court.

Messrs. **Jeremiah Halsey** and *J. W. C. Leveridge*, for appellee:

There are now, as there would have been if the steamer had been in the custody of the court when this petition was filed, only two questions to be considered:

1. Is the petitioner entitled to the limitation which the statute gives?

2. What is the amount at which the statute fixes such limitation?

That it is entitled to such limitation was settled by this court in the case of *Norwich C. v. Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585), and this proceeding was by that decision expressly authorized, and has been taken in strict conformity with it and the rules there established.

In that case this court held that "the rule of the maritime law was intended to be adopted," and that the owner's liability was limited to the value of his interest in the vessel and her freight, viz.: to that value which the owner would have been compelled under the general maritime law to surrender in order to be discharged from liability.

This amount has been fixed and accurately fixed by the report of the commissioner in this proceeding.

The valuation of the steamer at the time the stipulation was taken in the Place suit and after she had been raised and repaired in no way affects that amount, which is always the same whether the vessel is repaired or not.

See "*The Benefactor*," 103 U. S. 239 (Bk. 26, L. ed. 351); 17 Blatchf., 229.

Care should be taken to discriminate between the rule of limitation of liability and the proceedings to be taken to obtain such limitation.

The rule of limitation, under the maritime law, is that the liability is limited to the ship and the freight; *i. e.*, to the property which the shipowner put at risk for the expedition in question—to his sea fortune, and not his property on land.

Our statute contains both a rule of limitation and proceedings to obtain the benefit of it. The rule of limitation which it awards is, as was decided by the supreme court, the rule of the maritime law.

The proceedings which it provides are two: (1) appropriate proceedings before a competent court; (2) a transfer to a trustee by the shipowner or shipowners "of his or their interest in such vessel or freight."

And furthermore the defense of limited liability may be availed of by answer or plea, at least so far as to obtain protection against the libelants in a suit in admiralty, to recover for the damages caused by the collision; and where there is a total loss of ship and freight, the statute may be invoked as a full defense.

The Scotland, 105 U. S. 24 (Bk. 26, L. ed. 1001); *Thommesen* v. *Whitwill*, 21 Blatchf. C. C. 45.

Whatever be the proceeding, the rule of limitation must be the same.

The question raised by the claim of the appellants, that the amount collected of the insurers should have been included in the appraisement, has not been expressly determined by this court; but expressions used in various opinions indicate that ship owners are liable under the Act for such insurance.

The Benefactor, *supra*, 246 (854); *The North Star*, 106 U. S. p. 29 (Bk. 27, L. ed. 96); *Norwich Co.* v. *Wright*, *supra*, 126 (593); *The Scotland*,

supra, 28 (1002); *Moore* v. *Am. Trans. Co.* 24 How. 39 (65 U. S. bk. 16, L. ed. 674.)

The decisions of the district and circuit courts have been uniform against the claim of the appellants.

Watson v. *Marks*, 2 Am. Law. Reg. 157; 8 Ben. p. 317; 17 Blatchf. 233; *The Peshtigo*, 2 Flip. 466; *Thommesen* v. *Whitwill*, *supra*; *The City of Columbus*, 22 Fed. Rep. 460.

"The amount or value of the interest of such owner in such vessel and her freight then pending," which is made the measure of his liability, means simply the value of his interest or share.

The construction of section 4283, is aided by the language of section 4284, being section 4 of the original Act, which describes the liability as "the whole value of the vessel and her freight for the voyage."

All claims for damages arising from the disaster stand upon an equality when the whole value is insufficient to make full compensation; and the measure of the owner's liability is the same whether he surrenders his interest under section 4285, or takes "appropriate proceedings" under section 4284.

The "whole value of the vessel and freight for the voyage" is clearly the limit of the liability; and in the case of part owners, each is liable only for the value of his interest or share in the ship.

This construction gives full effect to the language of each section, and renders them harmonious.

The entire exemption from damage by fire given by section 4282 tends to show that insurance was not included in the amount of the owner's liability, under section 4283.

The Act should be fairly construed for the furtherance of the object in view. It was enacted "to encourage persons to become the owners of ships," and to encourage navigation and commerce.

This court, from the case of *The City of Norwich*, *supra*, to the case of the *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578 (Bk. 27, L. ed. 1033), has manifested no hostility to the Act, but has construed and applied its provisions in a liberal spirit, and in a manner to promote the great and important benefits which it was intended to confer upon the shipping interests of this country.

[469] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case arose out of a collision which occurred on Long Island Sound, opposite Huntington, on the 18th of April, 1866, between the Steamboat "City of Norwich," belonging to the Norwich and New York Transportation Company, the appellee, and the schooner "General S. Van Vliet," belonging to William A. Wright and others, appellants, by which the schooner and her cargo were sunk and lost, and the steamboat was set on fire and sunk, and her cargo lost. The owners of the schooner filed a libel *in personam* in the District Court of the United States for the District of Connecticut, against the owners of the steamboat, and obtained a decree for about $20,000 for the schooner, and about $2,000 for her cargo, with interest. Before the decree was passed, the respondent filed a petition, stating that proceedings *in rem* had been commenced against the steamboat in the District Court of the United States for the Eastern District of New York, for the recovery of damages for the loss of the cargo on board said steamboat; and it prayed leave to show the whole amount of damages sustained by all parties, and the value of the steamer and her freight then pending; and that the libelant might have a decree for only such proportion of damages sustained by it as the value of steamer and freight bore to the whole amount of damages sustained by all parties by the collision, this claim being made under the Limited Liability Act of 1851. The district court denied the prayer of this petition, holding that it had no jurisdiction to give relief. On appeal to the circuit court the decree was affirmed and the petition for limitation of liability was denied, on the ground that cases of collision were not within the Act. The case then came to this court, and we held, *first*, that [47 the Act of 1851 adopted the general maritime law in reference to limited liability as contradistinguished from the English law, measuring the liability by the value of ship and freight after, instead of before, the collision; *secondly*, that the Act embraced cases of damage received by collision as well as cases of injury to the cargo of the offending ship; *thirdly*, that the District Courts of the United States, as courts of admiralty, have jurisdiction to administer the law; *fourthly*, that the proper court to hear and determine the question is the court which has possession of the fund, that is, the ship and freight or the proceeds and value thereof. And in view of the want of rules of procedure, and of any uniform practice on the subject, we directed that proceedings should be suspended in the District Court of Connecticut, in order to give the respondent an opportunity of making the proper application to the District Court of the Eastern District of New York, which had possession of the steamer, or a stipulation for her value in lieu of the steamer itself. We also adopted some general rules of practice for the aid and guidance of the district courts in such cases. 13 Wall. 104 [80 U. S. bk. 20, L. ed. 585].

The libel *in rem*, filed in the District Court for the Eastern District of New York, was filed by George Place and Charles Place (now appellants here) in August, 1866, after the steamboat had been raised and carried to the shore of Long Island and repaired. The Norwich and New York Transportation Company appeared as claimant, and filed an answer and a petition to have the benefit of the Act of 1851 for a limitation of its liability to the value of the steamboat and freight pending at the time of the collision and fire. Other libels were also filed by other owners of cargo. The steamer as repaired was appraised at $70,000.

On the 18th day of June, 1872, after the decision of this court was rendered in the case of *Norwich and N. Y. Trans. Co.* v. *Wright*, the Company, by leave of the court, filed a new petition in the District Court for the Eastern District of New York for the benefit of limited liability under the Act of 1851, conformably to the rules adopted by this court.

The petition stated the various claims against [4 the vessel arising out of the collision (amounting to nearly $150,000), the previous proceed-

ings that had been taken, the libels that had been filed, the circumstances of the loss, the raising and repair of the vessel, etc.; and prayed for a new appraisement in accordance with the decision of this court, a monition to claimants, etc., as will more fully appear in the finding of facts made by the circuit court, hereinafter stated.

Orders for publication and appraisement were made pursuant to the prayer of the petition, and the commissioner appointed to make the appraisement reported as follows, to wit:

"In ascertaining the value of the steamboat City of Norwich, as directed by the order of reference herein, I have followed what I understood to have been the decision of the Supreme Court of the United States in the case of Wright against the owners of this boat (18 Wall. 104), and have ascertained her value in the situation and condition she was in after the collision and before she was raised; and I find from the testimony taken before me that she was at that time of the value of $2,500. I have arrived at such value by taking the testimony as to her value in New York after she was raised by her owners and brought there, which shows that she was then and there worth the sum of $25,000; and I have deducted from that amount the sum of $22,500, being the sum which, according to the testimony, it had actually cost to raise her and bring her to New York, which leaves $2,500 to be her value, as I have above stated."

Exceptions were taken to the report: first, that the former appraisement of $70,000 was binding on the parties and the court; secondly, that the appraisement should have been for the value of the steamer immediately before the collision; thirdly, that it should have been for the value immediately after the collision, before the occurrence of damage by the fire; fourthly, that there should have been no deduction for the expenses of raising the steamer; fifthly, that the sum of $600 should have been added for the pending freight; sixthly, that the money received for insurance on the vessel should have been added, amounting to $49,283.07.

[472] The exceptions were overruled, and a decree was made authorizing the petitioners to pay into court the sum of $2,500, the value of the steamer, and directing a monition to issue, citing all parties interested to appear and prove their claims, restraining the further prosecution of all suits, and appointing a commissioner to take proof of claims. On the subsequent report of the commissioner a final decree was made in January, 1879, distributing the fund in court and discharging the petitioners from further demands.

The case was appealed to the circuit court and argued before *Mr. Justice* Strong, who, in October, 1879, affirmed the decree of the district court, but the decree of affirmance was not entered until July 3, 1882. That decree is now before us for review.

The finding of facts by the circuit court is substantially as follows:

1. It states the fact of the collision, and that "it was caused by the negligence of the steamboat's officers or hands, without any design, neglect, privity or knowledge of her owners. Very soon, within half an hour after the collision, the boat took fire, her deck and upper works were burned off, and she sunk in about twenty fathoms of water. The fire was the direct consequence of the collision and inseparable from it. It was caused by the rushing of the waters through the broken hull of the boat, whereby the fire was driven out of the furnaces upon the wood work, and the boat sank by reason of her filling with water.

"2. At the time of the disaster the boat had a cargo of merchandise on board belonging to different freighters, all of which was totally lost. The freight then pending amounted to $600, but none of it was earned or received by the ship owners.

"3. Sometime after the steamboat was sunk and her cargo destroyed, she was raised by salvors and taken to the Long Island shore, within the Port of New York, where she was repaired."

4. It states the suit by Wright & Co., in the District Court of the United States for the District of Connecticut, and the decision of the supreme court in that case.

5. It states the proceedings upon libel filed by George and Charles Place in the District Court for the Eastern District of New York, [473] the appraisement at $70,000, and the release of the vessel to the complainant (The Norwich & N. Y. Trans. Co.) upon its giving stipulation therefor, adding: "The stipulation purported to be for the security not only of the Messrs. Place, but also for the benefit of all persons who might, by due proceedings in said court, show themselves entitled to liens upon the vessel by reason of said collision. The appraisement was of the value of the vessel as it was after she had been raised and repaired. It was returned into the court on the 11th of March, 1867, and the stipulation in the amount of the appraisement was filed on the 29th day of the same month. On the 20th day of December, 1869, the district court ordered decrees to be entered in favor of the libelants in all the suits commenced against the steamer as aforesaid.

"6. Such was the condition of the litigation when the present petition was filed in July, 1872, after the rendition of the judgment by the supreme court in the case of the libel of William A. Wright *et al.* in the District Court of Connecticut. The petition prayed that, in conformity with the Act of Congress, the decision of the supreme court, and the admiralty rules made in pursuance thereof, the court would cause an appraisement to be made of the value of the interest of the petitioner in the steamboat, and her freight for the voyage in which she was employed, for which it was liable; and that an order should be made for paying the amount of such valuation into court, or for giving a stipulation therefor, with sureties. It prayed further for a monition against all the persons claiming damages arising out of the said collision and fire, citing them to appear and make proof of their claims; and it prayed also for a restraining order against the further prosecution of all or any suits against the steamboat or the petitioner for any damage caused by the collision, fire and loss. There was also a prayer for general relief. The monition was issued, the appellants appeared, and an order was made for an appraisement of the amount or

value of the interest of the petitioners as owners, respectively, of said steamboat and her freight, pending for the voyage upon which she [474] was employed, for which the petitioners were liable. A restraining order, as prayed for, was also made. Pursuant to the direction of the court, an appraisement was made. The appraiser ascertained and reported the value of the steamboat, as she lay immediately after the collision and fire, and before she was raised, to have been $2,500; and the district court confirmed the report and ordered the amount to be paid into the registry, which was accordingly done.

"7. The value of the interest of the petitioners in the steamboat, as she was immediately after the disaster, was $2,500 and no more.

"8. The value of that interest immediately before the collision was $70,000.

"9. When the collision occurred the steamboat was insured against fire (not against marine disaster), and upon the several policies the petitioners, as owners, have recovered from the underwriters the sum of $49,283.07; that part of said sum was recovered by the petitioner herein in an action brought by it in the Circuit Court of the United States for the District of Connecticut on one of said five policies against the Western Massachusetts Insurance Company. One of the defenses in that action was that the loss and damages were occasioned by the collision (which is the same mentioned in these proceedings), while the petitioner herein claimed that the greater part of the loss was by fire. The court held in that case that there were two classes of losses: one, the damage done the steamer by the collision itself, and the other caused by the fire. The damages caused by the collision were proved at $15,000. The damages caused by the fire were determined to be $69,000. The said insurance company moved for a new trial, but the motion was denied.

"10. The steamboat itself has never been surrendered or transferred to a trustee for the persons injured by her fault."

The conclusions at which *Justice* Strong arrived upon these facts were: 1. That the value of the steamboat immediately after the collision and fire, as she lay at the bottom of the sound, with her pending freight, was the measure of the owners' liability, and the amount to be ap- [475] portioned. 2. That insurance is not an *interest* in the vessel within the meaning of the third section of the Act of 1851, or section 4283 of the Revised Statutes. 3. That the limitation of the owners' liability under the Act is as applicable when the proceeding is *in rem*, as when it is *in personam;* so that, if the owner's liability is only the amount of the vessel's value when at the bottom of the sound, the vessel's liability, after being raised and repaired, is no greater.

The first ground of error which we shall notice is the alleged want of jurisdiction in the district court to allow a reappraisement of the steamboat for the purpose of fixing her value as the limit of the owner's liability, after her value had once been appraised at $70,000, and she had been delivered to the claimants upon their stipulation for that amount. This ground cannot be maintained, because the question had not then been decided, what particular time was to be taken for fixing the value of the vessel in reference to the limited liability of the owners. They wished to have possession of her, and were willing to give a stipulation for her full value at that time in order to obtain such possession. Had the vessel remained in custody until the final petition for a limited liability was filed, the court would have been at liberty then to determine the time at which the value of the vessel should be taken for that purpose, and to order a new appraisement if necessary. The stipulation given merely stood in place of the vessel itself, and did not deprive the court of any of its power. The subsequent trial on the merits, the interlocutory decree in favor of the libelants, and the report of the commissioner showing the amount of their damage, did not preclude the claimants from exercising their right to proceed for a limitation of their liability under the rules of procedure adopted by this court. The trial on the merits resulted in determining which vessel was in fault, and in liquidating the amount of damage sustained by the libelants, to be used as a basis of their *pro rata* share in the fund which might ultimately be decreed, subject to their claim and the claims of other parties. It did not settle the amount of that fund, nor the extent of the liability of the owners of the steamer. In the case of *The Benefactor*, 103 U. S. 239 [Bk. 25, L. ed. 351], this matter was fully considered, and we held that "The amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the court of first instance or an appellate court, will stand as the recoveror's basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in the ordinary course." In view of the want of any settled practice on the subject, this court, in its opinion in the case of *Norwich & N. Y. Trans. Co.* v. *Wright*, suggested the precise course which was taken by the petitioners. (13 Wall. 126.) We think it was the proper course, and that the district court had jurisdiction to entertain the petition, and to order a new appraisement.

The next question to be considered is: At what time ought the value of the vessel and her pend- [490] ing freight to be taken, in fixing the amount of her owners' liability? Ought it to be taken as it was immediately before the collision or afterwards? And if afterwards, at what time afterwards? The first question has been repeatedly answered by the decisions of this court. We held in *Norwich Co.* v. *Wright*, and have held and decided in many cases since, that the Act of Congress adopted the rule of the maritime law as contradistinguished from that of the English law on this subject; and that the value of the vessel and freight after, and not before, the collision is to be taken. But at what precise time after the collision this value should be taken has not been fully determined so as to establish a general rule on the subject. That is a question which deserves some consideration. In the case of *The Scotland*, 105 U. S. 24 [Bk. 26, L. ed. 1001], the collision occurred opposite Fire Island Light, and the steamer, being much injured, put back, in order if possible to return to New York, but was unable to get further than the middle ground outside and south of Sandy Hook, where she sank, and nothing was saved but a few strippings, taken

from her before she went down. We held that these strippings were all of the ship that could be valued, although she had run thirty or forty miles after the collision. The value was taken, not as it was, or as it might have been supposed to be, immediately after the collision, but as it was after the effects of the collision were fully developed in the sinking of the ship.

An examination of the statute will afford light on this subject. Section 4283 declares that the liability of the owner of any vessel (for various acts and things mentioned) shall "in no case" exceed the value of his interest in the [491] vessel and her freight then pending. When it says "in no case," does it mean that for *each case* of "embezzlement, loss, destruction, collision, etc., happening during the whole voyage, his liability *may* extend to the value of his whole interest in the vessel? Twenty cases might occur in the course of a voyage, and all at different times. Does not the provision made in the 4284th section, for compensation *pro rata* to each party injured, apply to all cases of loss and damage happening during the entire voyage; happening, that is, by the fault of the master or crew, and without the privity or knowledge of the owner? Pending freight is of no value to the shipowner until it is earned; and it is not earned, if earned at all, until the conclusion of the voyage. Does this not show that every "case" in which the principle of limited liability is to be applied means every voyage? We think it does. It seems to us that the fair inference to be drawn from section 4283 is that the *voyage* defines the limits and boundary of the *casus*, or case, to which the law is to be applied.

This is rendered certain by the language of section 4284, which is: "Whenever any such embezzlement, loss, or destruction is suffered by several freighters, or owners of goods, wares, merchandise, or any property whatever, *on the same voyage*, and the whole value of the vessel, and her freight *for the voyage*, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses." There may be more than one case of embezzlement during the voyage, and more than one case of loss and destruction, and they may happen at different and successive times, yet they are to be compensated *pro rata*. This shows conclusively that it must be at the termination of the "voyage," that the vessel is to be appraised, and the freight (if any be earned) is to be added to the account for the purpose of showing the amount of the owner's liability.

This conclusion is corroborated by section 4285, which declares that it shall be a sufficient compliance with the requirements of the law if the owner shall transfer his interest in the vessel and freight to a trustee for the benefit of the claimants. In most cases this cannot be done until the voyage is ended, for, until then, the [492] embezzlement, loss, or destruction of property cannot be known.

And this was manifestly the maritime law, for by that law the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability; and, of course, this could only be done at the termination of the voyage. If the ship was lost, and the voyage never completed, the owners were freed from all liability. Boulay Paty, Droit Com. Mar. tit. III. sec. 1, pp. 263, 2.5, etc.; Emerigon, Contrats à la Grosse, chap. 4, sec. 11, Subs. 1, 2; Valin, Com. lib. II. tit. VIII. art. II.; Consolato del Mare, chaps. 84 (141), 186 (182), 227 (194), 239; Pardessus, Collection, vol. 2; Cleirac, Nav. de Rivierès, art. XV.

If, however, by reason of the loss or sinking of the ship the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value) at the time of such breaking up and ending of the voyage must be taken as the measure of the owners' liability. In most cases of this character no freight will be earned; but if any shall have been earned, it will be added to the value of the ship in estimating the amount of the owners' liability. These consequences are so obvious that no attempt at argument can make them any plainer.

If this view is correct, it follows, as a matter of course, that any salvage operations, undertaken for the purpose of recovering from the bottom of the sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can have no effect on the question of the liability of the owners. Their liability is fixed when the voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. And it makes no difference, in this regard, whether the salvage is effected by the owners, or by any other persons. Having fixed the point of time at which the value is to be taken, the statute does the rest. It declares that the liability of the owner shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. If the vessel arrives in port in a damaged condition, and earns some freight, the value at that time is the measure of liability; if she goes to the [493] bottom and earns no freight, the value at that time is the criterion. And the benefit of the statute may be obtained, either by abandoning the vessel to the creditors or persons injured, or by having her appraisement made and paying the money into court, or giving a stipulation in lieu of it, and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability; for the measure is the same whichever course is adopted; but it enables the owner to lay out money in recovering and repairing the ship, without increasing the burden to which he is subjected.

It follows from this that the proper valuation of the steamer was taken in the court below, namely: the value which she had when she had sunk, and was lying on the bottom of the sea. That was the termination of the voyage.

The next question to be considered is whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer, as a part of their interest in the same. The statute, section 4283, declares that the liability of the owner shall not exceed the amount or value of his *interest in the vessel and her freight*; and section 4285 declares that it shall be a sufficient compliance with the law, if he shall transfer his *interest in such vessel and freight*, for the benefit of the claimants, to a trustee. Is insurance an interest

in the vessel or freight insured, within the meaning of the law? That is the precise question before us.

It seems to us, at first view, that the learned justice who decided the case below was right in holding that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel, such as his aliquot share, if he was only a part owner, or his contingent interest, if that was the character of his ownership. He might be absolute owner of the whole ship, or he might own but a small fractional part of her, or he might have a temporary or contingent ownership of some kind or to some extent. Whatever the extent or character of his ownership might be, that is to say, whatever his interest in the ship might be, the amount or value of that interest was to [494] be the measure of his liability.

This view is corroborated by reference to a rule of law which we suppose to be perfectly well settled, namely: that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guarantying him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already, by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own, and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or nondestruction; but no interest in the property. A man's interest in property insured is so distinct from the insurance, that unless he has such an interest independent of the insurance, his policy will be void.

This rule of law manifests itself in various ways. If a mortgagor insures the property mortgaged, the mortgagee has no interest in the insurance. He may stipulate that the policy shall be assigned to him, and the mortgagor may agree to assign it; and if it be assigned with the insurer's consent, the mortgagee will then have the benefit of it; or, if not assigned according to agreement, the mortgagee may have relief in equity to obtain the benefit of it.

So where property is sold, the insurance does not follow it, but ceases to have any value, unless the insurer consent to the transfer of the policy to the grantee of the property. In other words, the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred.

It is hardly necessary to cite authorities for a rule which has become so elementary. We will only refer to a few of them. *Lord Chan.* King in *Lynch* v. *Dalzell*, 4 Bro. Parl. Cas. 497; *S. C.* 2 Marshall, Ins. 801; *Lord* Hardwicke in *Sadlers Co.* v. *Badcock*, 2 Atk. 554; *Carroll* v. *Boston Marine Ins. Co.* 8 Mass. 515; *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507, 512 [35 U. S. bk. 9, L. ed. 512, 514]; *Carpenter* v. *Providence W. Ins. Co.* 16 Pet. 495, 508 [41 U.S. bk. 10, L.ed. 1044, [495] 1048]; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 386, 397; *Wilson* v. *Hill*, 3 Met. 68; *Powles* v. *Innes*, 11 M. & W. 13; *McDonald* v. *Black's Admr.* 20 Ohio, 185; *Plimpton* v. *Ins. Co.* 43 Vt. 497.

Carroll v. *Boston Marine Ins. Co.*, *Powles* v. *Innes*, and *McDonald* v. *Black's Admr.*, were cases of marine insurance, and the same rule was followed in those cases as in cases of insurance against fire.

It is not an irrelevant consideration in this regard that the owner of the property is under no obligation to have it insured. It is purely a matter of his own option. And being so, it would seem to be only fair and right, and a logical consequence, that if he chooses to insure, he should have the benefit of the insurance. He does not take the price of insurance from the thing insured, but takes it out of the general mass of his estate, to which his general creditors have a right to look for the satisfaction of their claims. They are the creditors who have the best right to the insurance.

Stress is laid upon the hardship of the case. It is said to be unjust that the shipowner should be entirely indemnified for the loss of his vessel, and that the parties who have suffered loss from the collision by the fault of his employees should get nothing for their indemnity. This mode of contrasting the condition of the parties is fallacious. If the shipowner is indemnified against loss, it is because he has seen fit to provide himself with insurance. The parties suffering loss from the collision could, if they chose, protect themselves in the same way. In fact they generally do so; and when they do, it becomes a question between their insurers and the shipowner, whether they or he shall have the benefit of his insurance. His insurers have to pay his loss. Why should not the insurers of the other parties pay their loss? The truth is, that the whole question, after all, comes back to this: whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question.

Having, as we think, ascertained the true construction of the statute, the point in dispute is really settled. It is a question of construction, and does not require an examination of the general maritime law to determine it. If the rule [496] of the maritime law is different, the statute must prevail. But from such examination as we have been able to make, we think that the weight of maritime authority is in accord with the disposition of our statute as we have construed it, and that the statute has adopted the maritime law on this point as well as on the question of time for estimating the value of the ship.

The contract of insurance is of modern origin. It is not mentioned in the early treatises or compilations of the maritime law. It is but little noticed prior to the sixteenth century. On a question like the present we naturally turn to the French writers, who are distinguished for their great learning and acumen on maritime subjects. The principal text law on which they rely, prior to the Code of Commerce adopted in the present century, is the Ordinance de la Marine of 1681. By this ordinance it is declared that the owners of ships shall be responsible for the acts of the master; but they shall be discharged therefrom by abandoning their vessel and the freight. The Code of Commerce, art. 216, has substantially the same provision. Beyond this general declaration, which is simply an announcement of the maritime law on the subject, the special rules applicable to particu-

lar cases, and necessary for securing the benefit of the general rule in all, have to be drawn from the general principles of the same maritime law. Whether in abandoning the ship to the creditors the owners are, or are not, obliged to abandon the insurance effected on the ship, is a question which had to be decided by the application of the general principles referred to.

The history of opinion amongst maritime writers on this subject is briefly this: Valin and Emerigon, two great French jurists, contemporaries and friends, wrote on the maritime law. In 1760 Valin published his New Commentary on the Ordinance of the Marine of 1681. In 1783 Emerigon published his Treatise on Assurances and Contracts of Bottomry. (Traite des Assurances et Contrats a la Grosse). Emerigon furnished Valin a large portion of the materials of which the latter's commentary was composed. Both of them are regarded as great authorities on maritime law. These ju-
[497] rists differed on the question we are considering. Valin thought that those who furnished materials and supplies for a ship and those who labored on its construction or repair should have the power of transferring their lien on the vessel to the insurance money received by the owner for its loss. He reasons that this should be so because the materialmen and the workmen helped to make the thing which forms the subject of the insurance; whilst he admits that the Parlement of Bourdeaux had decided otherwise as late as September, 1758. So that the views expressed by Valin seem to be his opinion of what the law ought to be rather than what it was. Valin, Com. Vol. I.. 315, 316, lib. I. tit. XII. art. III.

Emerigon strenuously opposes Valin's opinion. His reasons are, that liens are *stricti juris*, and are not to be extended by construction; that if Valin's rule is well founded, a vendor on credit would have a lien on the price arising on a subsequent sale of the same thing by his vendee after the thing itself had ceased to exist, which was contrary to repeated decisions; that, by stronger reason, materialmen and workmen have no lien on the assurance of a ship which never belonged to them, for there is nothing essentially common between the right of pledge and that of property; that the ordinance gives no privilege to the materialmen and workmen, except on the ship; and, therefore, they have none on the insurance according to the rule of strict construction already stated; that if the ship were represented by the insurance, it would be necessary to give the same privilege to the seamen and all other privileged creditors, which would destroy the whole object of insurance; that, on the same principle, insurance ought to be represented by reinsurance, which, it is well settled, cannot be done. Emerigon, Contrats a la Grosse, chap. 12, sec. 7.

The opinion of Emerigon was followed with but little dissent until a recent period. The most prominent writer who disagreed with him was Pardessus, who, in the first edition of his Droit Commercial, published in 1814 (art. 663), after stating the general rule that the owner may discharge himself from responsibility by
[498] abandoning the ship and freight, added. "If these things have been insured, he ought to abandon also his rights against the insurers." This sentiment is repeated as his personal opinion in the subsequent editions of his work (same art. 663), but he is obliged to concede that the law is otherwise. In the edition of 1841, article 594, 2d, after asking the question "whether a creditor, having a privilege or a hypothecation on a thing insured, could require a distribution of the insurance money as would be made of the price on a sale, he says: "I think not; there is not the same reason. In the case of sale the price must, in the nature of things, represent the thing sold, the owner parting with it only for that; in the case of insurance the thing has perished—it has not been assigned in consideration of any price. The debtor has procured, it is true, a guaranty, by the effect of which the insurer pays him the value of it; but this guaranty is the result of an agreement, independent of the engagements of the assured with any particular creditors. The value paid does not represent the thing insured, except in the relations between the insurer and the insured; not in the relation between the latter and his creditors, except as an accession to the mass of his property, against which the creditors may prosecute their actions according to the principle of the civil law by which all the property of a debtor is the common pledge of his creditors; but without any preference, none of them having a peculiar right to a privilege on the contract of insurance which has caused the amount assured to be added to the assets of the common debtor. It would be otherwise, undoubtedly, if the debtor, in borrowing upon a hypothecation of a house insured, should at the same time assign to his creditor the contingent benefits of the insurance to serve for his discharge to that extent, and if the creditor should duly notify the insurer," etc.

This passage shows that even Pardessus admitted the law to be as Emerigon had declared it.

Boulay-Paty, the contemporary of Pardessus, who published his work on Maritime Commercial Law (Droit Commercial Maritime) in 1821, warmly espouses the views of Emerigon. His observations on the subject are exceedingly sensible and persuasive. After quoting the views of Valin and Emerigon, he says: "We must agree that Emerigon's opinion is most conformable to principle, and that the transfer or sub-
[499] rogation of which Valin speaks is not admissible;" that is, the transfer of the lien from the property to the insurance. He adds: "The axiom *subrogatum tenet locum subrogati* should be understood as applicable, when the thing has been changed into something else by the owner, who has received the other thing in its place; as in the case when the owner of a ship has sold it, it is certain that the lien is transferred according to undoubted law to the price. But when the thing is perished in the hands of the debtor certainly all lien is extinct. (L 8 ff *quibus modis pignus vel hypotheca solvitur*). Is it possible to suppose that an insurance, which is an agreement foreign to the creditors holding liens, which has been effected between the owners and a third party, can have the effect to bring again into life the lien on the ship?" Vol. I. p. 185.

He goes on to argue the question at great length, and with much force; but it would extend this opinion too much to quote his argument at length. One more extract will suffice.

After showing the difference between abandonment to the lien creditors and surrender to the insurers, and that the latter does not interfere with or prevent the former, he says:

"The product of the insurance is the price of the premium which the ship owner has paid to insure the ship. This premium is not bound as a security for debts and obligations contracted by the captain; the law expressly binds the ship and freight alone to that. The Code of Commerce gives to shippers a lien only on ship and freight; consequently they have none on the insurance. In general the ship is not represented by the insurance, which, after the loss of the ship, becomes a right existing by [500] itself which gives a direct personal action in favor of the insured.

"All these principles, besides, agree with equity and the well understood interests of commerce. Without this rule, indeed, insurances on the hull of a ship would become illusory for her owner, since he would have no way, even by stipulating for a guaranty against barratry of the master, which it is customary to do, to protect himself against any other loss than that of the premium; and yet this is both the object of insurance and the motive for which the premium is paid." Vol. I. pp. 291, 292.

During the seven years from 1827 to 1834 an animated controversy was carried on in France on the question whether article 216 of the Code of Commerce, in speaking of the "acts" (*faits*) of the master, meant to include his contracts lawfully made in the course of the voyage, or only his wrongful acts; and finally the matter came before the legislative body for solution. In 1841 that body modified article 216 so as to expressly embrace contracts of the master, as well as other acts. It was, at the same time, sought to introduce a clause which should render it the owner's duty, in abandoning the ship and freight to obtain the benefit of limited liability, also to abandon his claim for insurance on them; but this provision failed to receive assent. The law remained as it had always been.

In 1859 two very able works were published in France in which the subject was again discussed; one by Edmond Dufour, entitled "Droit Maritime," and one by J. Bedarride, entitled "Droit Commercial," a commentary on the Code de Commerce.

Dufour attempted to renew the controversy, although he admitted that the views of Emerigon had been acquiesced in even by Pardessus, and that Valin stood alone. He says: "Doctrine and jurisprudence, after some hesitation, pronounced themselves, as is well known, against the existence of a privilege or hypothecation on the indemnity due from the insurer; and in that way the general principle which Emerigon had adopted as the basis of his theory penetrated men's minds as an indisputable truth which ought thenceforth to govern all indemnities of insurance. Thus it is, for example, that M. Pardessus, speaking of this question in relation to maritime credits, comes back for its solution to the general principles relating to insurance. So that the opinion of Valin seems to be crushed under this imposing unanimity." Dufour, Droit Maritime, art. 261.

Dufour then devotes many pages to argue the question *ab origine*, persuading himself that he has established the correctness of Valin's views. But his admission at the beginning of his argument demonstrates that the maritime jurisprudence of France was in accordance with the opinion of Emerigon.

In consequence, probably, of this effort to bring the matter again into question, Bedarride [5 examined the subject with great care, both on principle and authority, and showed that the law was not only settled, but should not be disturbed. Bedarride, Droit Commercial, art. 295. But the advocates of change persisted in their efforts, until finally, on the 22d of December, 1874, on the passage of a law to render ships susceptible of hypothecation, they procured a section to be inserted (§ 17) declaring that, in case of loss or disablement of the ship, the rights of the creditors (that is, hypothecation creditors) may be enforced, not only against the portions saved, or their proceeds, but (in the order of registry) against the proceeds of any assurances that may have been effected by the borrower on the hypothecated ship. This law, however, does not extend to tacit liens or privileges.

For further authorities in the French law, to the same effect as Boulay-Paty and Bedarride, see Pouget, Principles de Droit Mar. Vol. 2, pp. 415-419, ed. 1858; Eloy et Guerrand, Des Capitaines, Vol. 3, art. 1894 (1860); Caumont, Dict. de Droit Mar. tit. Abandon Mar. §§ 54, 55; De Villeneuve et Massé, Dict. du Contentieux Commercial, verb, *Armateur*, 20.

In Germany the history of the question has been, to some extent, the reverse of what it has been in France. The Prussian Code, adopted in 1794, allowed shipowners to "free themselves from responsibility in all cases by a surrender of the ship, including all benefits of the voyage and their rights against the insurers." But Prussia was the only country that adopted this rule in relation to insurance. In 1856 a scheme was set on foot to have a conference to prepare a general commercial code for all the German States. Commissioners were appointed by the several States for this purpose, who held repeated sessions, but came to no agreement on a general code until March, 1862. The Prussian commissioners strenuously urged the adoption of their law on the subject of subrogation to the claims for insurance. The arguments presented by them are spread before us at some length in one of the briefs of the counsel for the appellants. The convention, however, were not convinced, and rejected the proposition, and the Prussian commissioners were obliged to yield the point, and now all Germany, under this new commercial Code, [50 adheres to the old maritime law. It is only necessary to add that, in the discussions of the convention it was conceded that the maritime law had never required the surrender of the insurance, but only that of the ship and freight. By the Commercial Code of Holland and the Ordinance of Bremen this rule is expressly formulated.

It appears, therefore, that the disposition of our statute is in conformity with the general maritime law of Europe; and that the recent legislation in France (1874) is an innovation upon that law.

It is next contended that the Act of Congress does not extend to the exoneration of the ship,

but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding *in rem*. But this argument overlooks the fact that the law gives a twofold remedy: surrender of the ship or payment of its value; and declares that the liability of the owner, in the cases provided for, shall not exceed the amount or value of his interest in the ship and freight. This provision is absolute, and the owner may have the benefit of it, not only by a surrender of the ship and freight, but by paying into court the amount of their value, appraised as of the time when the liability is fixed. This, as we have seen, enables the owner to reclaim the ship and put it into complete repair, without increasing the amount of his liability. The absolute declaration of the statute, that his liability shall not exceed the amount or value of the ship and freight, to wit: at the termination of the voyage, has the effect, when that amount is paid into court under judicial sanction, of discharging the owner's liability, and thereby of extinguishing the liens on the vessel itself and of transferring those liens to the fund in court. This is always the result when the owner is allowed to bond his vessel by payment of its appraised value into court, or by filing a stipulation with sureties in lieu of such payment. The vessel is always discharged from the liens existing upon it, when it has been subjected to a judicial sale by order of the admiralty court, or when it has been delivered to the owner on his stipulation, with sureties.

The claim that the lien attaches to the repairs [503] and betterments which the owner puts upon the vessel after the amount of his liability has been fixed is repugnant to the entire drift and spirit of the statute. In ordinary cases it may be true, and undoubtedly is true, that a lien or privilege on the ship extends to and affects all its accretions by repair or otherwise; but in the case of a claim for limited liability under the statute, the dispositions of the statute are to govern; and these, as we have seen, fix the amount of liability at a certain time; and when that liability is discharged the lien is discharged, no matter what the then value of the ship may have come to be by means of alterations and repairs.

The time when the amount of liability should be paid into court will depend upon circumstances. If the owner sets up his claim to limited liability in his answer, and does not seek a general concurrence of creditors, it will be sufficient if the amount is paid after the trial of the cause and the ascertainment of the amount of liability in the decree. Payment and satisfaction of the decree will be a discharge of the owner as against all creditors represented in the decree.

To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or subject to seizure for contraband cargo or illegal trade; and it may even be called "the guilty thing"; but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property. It is true, that in *United States* v. *Mason*, 6 Bissell, 350, it was held that in a proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him but against the goods. That decision, however, was disapproved by this court in the case of *Boyd* v. *United States*, 116 U. S. 616, 637 [Bk. 29, L. ed. 746, 753], in which it is said: "Nor can we assent to the proposition that the proceeding [*in rem*] is not in effect a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose [504] goods they are.'" Vaughan, *C. J.*, in *Sheppard* v. *Gosnold*, Vaugh. 159, 172, approved by *Ch. Baron* Parker in *Mitchell* v. *Torup*, Parker, 227, 236.

But the argument is at war with the spirit as well as the text of our decisions on the subject of limited liability. The case of *The Benefactor*, 102 U. S. 214; *S. C.* 103 U. S. 289 [Bk. 26, L. ed. 157, 351, 466], is precisely in point. That was a case of libel *in rem* against the vessel in fault, and the proceeding for a limited liability was sustained. It is true that this particular point was not raised; but the parties in the case were represented by able and experienced counsel, and the point would certainly have been raised if they had regarded it as tenable.

We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat the principal object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment. Now, to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To [505] hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business. It would virtually and in effect bring back the law to the English rule, by which the owner is made liable for the value of the ship before collision—the very thing which, in all our decisions on the subject, we have held it was the

intention of Congress to avoid by adopting the maritime rule. That this would be the result is evident, because all shipowners insure the greater part of their interest in the ship, and by losing their insurance they would lose the value of their ship in every case. No form of agreement could be framed by which they could protect themselves. This is a result entirely foreign to the spirit of our legislation.

When it was urged upon the Chamber of Peers of France, in 1841, to pass a law requiring the abandonment of insurance, as well as of ship and freight, in order to relieve the owner from liability, the suggestion was not entertained. The opinion of the majority was that the relations between the ship owner and lenders or shippers ought to remain entirely independent of contracts of insurance which either could make; that an obligation to abandon insurance would have no other tendency than to prevent insurance by the owner, since he would be deprived of the benefit of it in case of loss. Bedarride, art. 295, Vol. 3, p. 361.

The argument that to allow the owner to keep his insurance would encourage negligence and recklessness on his part can always be made in every case of insurance. It has been made and answered a hundred times. Generally a sufficient portion of the value of the thing insured remains uncovered by insurance to prevent indifference to loss; and if the temptation to wish it does exist in any case, the retributions are so fearful as to repress the thought. To the honor of human nature, the exceptions to the rule are exceedingly rare.

It is also contended that the right to proceed for a limited liability is waived and lost by a surrender of the vessel to the insurers, because it is then out of the owner's power to abandon the ship to the claimants who have liens upon her. This argument assumes that abandonment is necessary, which is not the case under our law. Payment of the ship's value into court, or setting up the matter as a defense, is quite as efficacious. But if abandonment were necessary, as it is by the maritime law, a surrender to the insurers does not interfere with or prevent a subsequent abandonment to the creditors. The insurers take the ship *cum onere*, and stand in no better plight than the original owners. The liens against the ship are not extinguished by the surrender to the insurers, but may be prosecuted by the creditors, notwithstanding such surrender, unless proceedings for a limited liability are instituted. This is fully shown by Boulay-Paty, Vol. 1, pp. 293-297, and by Bedarride, in article 291 of his work, before cited. The former, after showing that abandonment to the lien creditors may be made notwithstanding a previous surrender to the insurers, and explaining the reason of it, says: "It follows from thence that the owner may, by abandonment, turn the shippers (of cargo) over to the insurers (now become the owners by the surrender of ship and freight to them), and thus make abandonment and surrender at the same time." Boulay-Paty, Vol. 1, p. 295.

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This disposes of all the important points in the case, and leads to the conclusion that the decree of the Circuit Court was right; and it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Matthews** delivered the following dissenting opinion, entitled in this (No. 62) and the two following cases (Nos. 333 and 748):

[526]

Mr. Justice **Miller**, *Mr Justice* **Harlan**, *Mr. Justice* **Gray** and myself are unable to concur in the opinion and judgment of the court in the three cases just disposed of. The importance of the question decided justifies a statement of the grounds of this dissent.

The principal question, stated generally, involved in all the cases is whether under sections 4282 to 4285 inclusive, of the Revised Statutes, being re-enactments of sections 1, 3, and 4 of the Act of March 3, 1851, limiting the liability of shipowners, so that for the losses specified it shall not in any case exceed the amount or value of the interest of such owner in such vessel and her freight then pending, that value shall be estimated as including or excluding any sum received or receivable by the shipowner, on account of insurance upon his interest in the vessel or freight.

Although that is the main question in all the cases now decided, the circumstances which give rise to it in them, respectively, differ in some important particulars, a consideration of which will throw light upon the principle according to which it is to be determined.

[527]

The case of *Dyer* v. *National Steam Navigation Company* [*post*] was a libel *in personam*, in a cause of collision, for the loss of the ship Kate Dyer, run down on the high seas by the fault of the steamship Scotland, of which the respondents were owners. A former appeal in the same case decided by this court is found reported under the name of "*The Scotland*," 105 U. S. 24 [Bk. 26, L. ed. 1001]. The Kate Dyer was sunk immediately, and the steamship Scotland sank soon after, from the effects of the collision, and was a total loss, a portion of the wreck being saved. It was held on the former hearing that the respondents were entitled to the benefits of the statute limiting their liability. The decree for the several libelants amounts in the aggregate to $255,047.70. It is also found that The Scotland at the time of the collision was worth £100,000, was insured to the amount of £63,500, and that within nine months after the collision the respondents had received the amount thereof, equal to $299,867.42; but that the value of the articles saved from the wreck is the sum of $4,927.85, which the decree ascertains to be the amount for which alone the respondents are liable.

The case of *Thommessen* v. *Whitwill* [*post*] was a cause of collision in which the loss of the bark Daphne was found to be from the fault of the steamship Great Western, of which the respondents were owners, the libel being against them *in personam*. The libelants were domiciled subjects of the Kingdom of Norway and Sweden, and the respondents, of Great Britain. The libelants were found to have sustained damages from the injuries to the bark by the collision in the sum of $7,023.44, and the value of the steamship, both before and after the collision, until her subsequent stranding, was from $140,000 to $150,000. After the collision, while on the same voyage to New York, the steamship was stranded and wrecked from a cause in no way growing out of or connected with the collision, by the careless navigation

and fault of the persons in charge of her. Immediately thereafter, the owners of the steamship made an abandonment of her to various [528] underwriters who had insured her to the amount of £34,000, which was paid by them to the owners as a total loss. There was saved from the wreck materials which, on sale, realized to the owners $1,796.14. The decree limited the liability of the respondents to this amount.

The remaining case of Place and others, libelants, claimants of the schooner General S. Van Vliet and of the cargo, against the Norwich and New York Transportation Company presents other features. The collision in this case was caused by the negligence of the steamboat "City of Norwich," owned by the appellees. Immediately after the collision the steamboat took fire, her deck and upper works were burnt off, and she sank in about twenty fathoms of water. Her cargo of merchandise was thereby totally lost. The steamboat itself was raised by salvors, and taken to the Port of New York, where she was repaired. On May 9, 1866, less than a month after the disaster, William A. Wright and others, owners of the schooner, filed in the District Court for Connecticut a libel *in personam* against the appellees, as owners of the steamboat, and obtained a decree for the loss of the schooner and her cargo for $26,657.28, which on appeal to this court was affirmed, and will be found reported in 18 Wall. 104. On August 23, 1866, while that suit was pending in Connecticut, and after the steamboat had been raised, repaired, and brought into the Port of New York, two of the appellants, George and Charles Place, as owners of part of the cargo on the steamboat, filed their libel *in rem* against her in the District Court of the Eastern District of New York. Other libels *in rem* by other owners of cargo were also filed. The steamboat was seized under process in these suits, and the appellees intervened as claimants; an appraisement was ordered, and a stipulation for the appraised value in the sum of $70,000 having been given, the steamboat was released to them. This appraisement was of the value of the vessel, in her condition at the time, after the repairs had been made. Decrees were entered in favor of the libelants in all these cases. In July, 1872, after the final decision by this court in the case of *Norwich & N. Y. Trans. Co.* v. *Wright*, 18 Wall. 104 [80 U. S. bk. 20, L. ed. 585], on appeal from the Circuit [529] Court for the District of Connecticut, and after the decrees in the District Court for the Eastern District of New York in the proceedings *in rem*, the owners of the steamboat, the present appellees, filed their petition in the last named court, praying for the benefit of the Act limiting their liability. Such proceedings were thereupon had that an appraisement was made of the value of the steamboat in the condition and situation in which she was, after the collision and before she was raised, and it was found to be $2,500, being the difference between $25,000, her value when raised, and $22,500, the amount expended in raising her. A decree was finally entered in the circuit court on appeal, limiting the liability of the appellees to this amount, and it was distributed among the libelants, after refunding to the appellees $1,008.41, part thereof, for their costs in the litigation. The decree thereupon also perpetually enjoined all the libelants who had obtained decrees in their favor in the suits *in rem* in the Eastern District of New York from the enforcement of those decrees, and thus deprived them of their right to recover against the stipulators, who had filed a stipulation in the sum of $70,000 to answer the decrees in those causes. So that in these cases the owners are exonerated from all personal liability in excess of the sum of $2,500, but have received back their vessel free and discharged from all liens established by the decrees against her *in rem* in the Eastern District of New York. It is also found as a fact that when the collision occurred, the steamboat was insured against fire but not against marine disaster, and of the insurance money the appellees have recovered and received from the underwriters the sum of $49,288.07.

It thus appears that in one case the owners of a vessel, whose fault caused a loss to others of more than $250,000, escape all liability over $5,000, having received more insurance than necessary to pay the whole amount of the loss; in another, the owners are repaid the whole value of the vessel in insurance, and are exonerated from a decree against them of over $7,000 on payment of less than $2,000; and in the other, the owners keep their vessel discharged from all liens, and receive nearly $50,000 of insurance with which to repair and restore her, and relieve themselves of all liability on ac- [530] count of losses, decreed against them, to the amount of over $26,000, on payment of less than $2,000. The question is whether these results can be justified by a reasonable interpretation of the law limiting the liability of shipowners.

The question is now for the first time decided by this court. None of its previous decisions have expressly or by implication involved it. It is true, however, that in the opinion of the court in *Norwich Company* v. *Wright*, 18 Wall. 104, 117 [80 U. S. bk. 20, L. ed. 585], in stating the rule of the maritime law of the States of Continental Europe, limiting the liability of shipowners to their interest in their ship and its freight, the passage from Pardessus is quoted (Droit Commercial, part 3, tit. 2, chap. 3, § 2) as follows: "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and if they are lost, it suffices for his discharge to surrender all claims in respect of the ship and its freight," and it is added by the court, "such as insurance," etc. The court then further said: "The same general doctrine is laid down by many other writers on maritime law, so that it is evident that by this law the owner's liability was coextensive with his interest in the vessel and its freight, and ceased by his abandonment and surrender of these to the parties sustaining loss."

But the question of including insurance in the estimate of the value of the owner's interest in the ship and freight, and whether it followed the surrender of the latter to the parties sustaining loss, was not directly involved; and the expression of an opinion to that effect must be taken to be casual and *obiter dictum* merely. Inasmuch, however, as the Act of Congress of 1851, which is the law of the case, may be supposed to have adopted the rule of liability fixed

by it, in view of what was believed to be the rule of the general maritime law of Continental Europe, the quotation from Pardessus, and the application of it to the instance of insurance, as an incident which is involved in the surrender of the ship or in the estimate of its value, is not without significance. It is some evidence, indeed, of the very view of the rule of the maritime law which may have been in the contemplation of Congress when it passed the Act [531] of 1851, and proof to that extent of the meaning of that Act. And this is rendered more reasonable from the fact that *Baron* Parke, in *Brown* v. *Wilkinson*, 15 Mees. & Wels. 396, seems to have taken the same view as to the foreign maritime law. In that case, he said it was contended by counsel that the effect of the Statute, 58 Geo. III, chap. 159, § 3, "was to give to British shipping all the protection which the navigation of some foreign States extended to theirs; and this protection goes to the extent of permitting the owners, at the end of the voyage to give up the vessel in its then state by way of satisfaction to the parties injured, and, if it be lost the owners are altogether exempt, on abandoning the benefit of insurance, if any, and salvage."

If, now, on a more critical and extended inquiry into the maritime law of the modern States of Continental Europe, it should appear that the opinion of Pardessus, as quoted in the case above cited, was not universally accepted, and that the codes and commentators of various of those States differ in their legislation and interpretation of the general maritime law on the subject, it would not necessarily follow that Congress, in passing the Act of 1851, may not have intended to adopt the rule as stated by Pardessus and those who agreed with him, rather than that now insisted on as more generally prevailing.

There was, in fact, a controversy among writers on commercial and maritime law, both in France and Germany, on the point. The opinion of Pardessus coincided with that of Valin, while Emerigon, who was followed by Boulay-Paty and others, maintained the opposite opinion. This controversy was settled for French law by an amendment to article 216 of the Code de Commerce, which expressly excluded insurance from the *abandon* of ship and freight, in exoneration of the shipowner from his liability, though the debate seems to be reopened as a consequence of additional legislation by article 17 of the Law of December 10, 1874, which, in case of loss of the ship through becoming unnavigable or otherwise, allows subrogation in favor of hypothecation creditors. It also appears that the Prussian Code, adopted in 1794, and continued in force until 1862, provided expressly that "When the ship has been insured the right against the insurer must also [532] be ceded to creditors;" and, applying the principle to the particular case now under consideration, Kaltenborn, in a treatise on the subject, published at Berlin in 1851, says: "The Roman law, which held the owner absolutely liable with all his property, is nowhere put in practice, and was not current as early as the Middle Ages. Indeed, the Consulate of the Sea (c. 188, 224, 236), the Law of Wisby, reasoning from articles 13 and 68, that the Hanse Towns, reasoning from article 2, title X, render the owners, as a rule, answerable only to the extent of the ship's value; and the modern maritime laws free the owners, by the *abandon* of the ship and their several shares in the vessel, from all further liability for the ship enterprise, particularly for the acts and contracts of the captain. In the ship are included all gains arising during the voyage, as well as the insurance. Should the ship and the freight have perished, it is sufficient for exoneration of the owners if all claims and causes of action having reference to the vessel and freight are abandoned by them." This was the law of Prussia in 1851, when the Act of Congress of that year on the subject was passed, and continued to be so until March 1, 1862, when the Prussian Code was superseded by that of the Germanic Confederation, which omitted any provision on the subject, overruling the proposals of the Prussian delegates to the contrary.

This statement of the contemporary law of modern Continental Europe on the point is condensed from the very able and learned brief in these cases, prepared and submitted by Mr. Harrington Putnam, one of the counsel, who supports it by elaborate extracts and translations from foreign writers on the subject, whose citations have not in any way been questioned or impugned by opposing counsel, and have, therefore, been relied on as accurate. He states the further fact that, besides Holland, two other countries, Belgium, by a law of June 19, 1855, and Finland, Maritime Code of 1874, article 17, have expressly enacted that the insurance shall not be comprised in the shipowner's *abandon* to creditors. The inference is that there was nothing in the maritime law of Continental Europe in 1851 which justifies the conclusion that Congress must have intended to exclude insurance from the surrender required of the ship owner to limit his liability, but, on the contrary, the argument is strong, if not convincing, from the examples of European Codes [53 that it would require express language to effect that exclusion, if such was the intention.

But whatever bearing the foreign law may be thought to have upon the meaning of the statute, it is clear that the latter must be interpreted in the light of the antecedent domestic law which it modified and displaced. What that was is not a matter of dispute.

The passage of the Act of March 3, 1851, was no doubt due to the decision of this Court in the case of *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344 [47 U. S. bk. 12, L. ed. 465], where it was held that in admiralty, as at common law, the owners of a steamboat were liable *in personam* for the loss by fire of specie carried by their boat, notwithstanding a contract of exemption, the loss having occurred from want of ordinary care on the part of those engaged in the navigation of the vessel.

Accordingly it was provided, in the first section of the Act of March 3, 1851, that owners of vessels should not be liable for losses by fire of goods carried by them, unless such fire was caused by the design or neglect of the owner himself, with a proviso, now omitted from the corresponding section 4282 of the Revised Statutes, that the parties, nevertheless, might extend or limit the liability of shipowners by "making such contract as they please."

A reference to the debates in Congress upon

the bill during its progress will show that this was the only provision which excited any comment; and while allusion was made to English legislation on the subject of limiting the liability of shipowners, and to the Statutes of Massachusetts and Maine on the same subject, there was no mention whatever made of any supposed rule of general maritime law prevailing on the subject of Continental Europe, and no explanation of the expected operation and effect of the provision fixing the limit of liability at the value of the interest of the owner in the ship and freight, and of the effect of a surrender of the vessel and freight in exonerating the shipowner from any recovery beyond that limit.

In all cases of liability covered by the statute, there were provided by the existing law of ad- [534] miralty jurisdiction a remedy against the vessel itself *in rem* when it could be seized, and the alternative remedy *in personam* against the owners. There was no limit to their liability but, as in other cases of personal liability, all property of the defendants was subject to process in payment of the judgment or decree. The procedure *in rem* has for its object the enforcement of a liability which by the maritime law is a lien upon the vessel, which is a *jus in re*, and is treated as a proprietary right, capable of being realized by judicial process. *Ward* v. *Chamberlain*, 2 Black, 430 [67 U. S. bk. 17, L. ed. 319]; *Vandewater* v. *Mills*, 19 How. 82 [60 U. S. bk. 15, L. ed. 554]; *The Lottawanna*, 21 Wall. 558 [88 U. S. bk. 22, L. ed. 654]. And in cases of torts, as well as in many cases of contract, where the general owner has entrusted a special owner or charterer with authority to bind the ship but not himself, the vessel is treated by the maritime law as an actor and juridical person, capable of committing wrongs, and is pursued as a delinquent without regard to ownership or agency. *The China*, 7 Wall. 53 [74 U. S. bk. 19, L. ed. 67]; *The Malek Adhel*, 2 How. 210 [43 U. S. bk. 11, L. ed. 239]. And when the liability is not only a lien on the vessel, but a claim against the owner personally, if satisfaction is not secured by process *in rem*, the deficiency may be made good by proceedings *in personam*.

The subject matter of the Act of March 3, 1851, was the personal liability of shipowners to answer for the losses specified, and its limitation. It does not deal with the liability of the vessel itself to answer *in rem* for such losses, as it had no occasion to do; for the sole purpose of the Act was to limit the personal liability of owners, so that it should not exceed the value of the ship and freight. It left the vessel, therefore, to be proceeded against *in rem* precisely as before, leaving that procedure entirely untouched and unaffected. There is nothing whatever in the statute to forbid parties having suffered from its fault from prosecuting the offending vessel, as a *res*, to the full extent, as previously authorized by the maritime law, and with all the necessary consequences. On the contrary, the Act proceeds throughout on the assumption of that right and liability. It only adds that in cases where the owners are not personally guilty of the alleged wrong, on tak- [535] ing the steps pointed out in the law, there shall be no recovery against them personally in excess of the value of their interest in the ship and freight. The Act only operates as a limitation upon the personal liability of the owners, as distinguished from the liability of the offending vessel itself.

This seems to us very clear; and yet, in the case of *Place and others* v. *The Norwich and New York Transportation Company*, the libelants have been perpetually enjoined from prosecuting their decrees actually obtained against the steamboat City of Norwich, because the owners have obtained under the statute a release from their personal liability on account of its wrong. It is not to the purpose to say that, in a proceeding against the vessel, its appraisement included the cost of raising and repairs put upon it by the owners, which ought not to have been included; for that is a question which could only properly have been litigated in the case in which the decree complained of was rendered. Besides, it is difficult to see on what grounds an owner can rightfully complain who has voluntarily raised his sunken vessel and repaired her, that those having maritime liens upon her seek to enforce them, or how he can claim, as against them, a prior or any lien on his own vessel for raising and repairing her And we think it is quite plain that it was an error in the decree appealed from to deprive the libelants, who had obtained their decrees against the vessel, from prosecuting them to their legitimate results, when the whole force of the statute authorizing the proceeding is expended in a limitation of the recovery in suits against the owner *in personam*.

It is not to be assumed, however, that, because the proceeding *in rem* remains unaffected by the Act of 1851, the personal liability of owners in proceedings against them *in personam* is restricted to the same extent as it would be if the proceeding *in rem* were declared to be the sole remedy; for that would be to declare that, in all the cases within the purview of the Act, when a proceeding *in rem* could be brought against ship or freight, or the proceeds of either, there should be no personal liability of the owner and no proceeding *in personam* against him. But the statute does not proceed upon the idea that, in such cases, the personal liability of the owner is altogether superseded by [536] the proceeding *in rem*, but only that it is restricted within certain expressed limits, on compliance with certain definite conditions. In all cases the owner must surrender the vessel and its pending freight, or their value; whereas, in many such, as suits for pilotage and for damage by collision, no process *in rem* against freight is given by the fourteenth and fifteenth Rules in Admiralty, such as is authorized by the twelfth and thirteenth in suits by materialmen and for mariners' wages. So that the statute is not to be treated as if it confined the recovery of the party suffering loss strictly to what he might obtain by a proceeding *in rem* against the vessel alone. It, therefore, does not conclude the inquiry to say that, in a proceeding *in rem* against the vessel, the libelant had no lien which he could follow on any policies of insurance taken out by the owners, or the proceeds of any such when payable or paid. The question still recurs, what does the Statute of Congress require the owner to give up or account for, as a condition of his release from personal liability for the loss and wrong suffered by the libelant?

For the same reason, it is irrelevant and im-

material to say that the policy of insurance, taken out by the owner on his interest in the ship or freight, is a contract of personal indemnity, collateral to his ownership, which does not pass by operation of law with a transfer of the title to the thing which is the subject of the insurance, and to the benefit of which those having liens on the thing are not entitled, in case of its loss, on the principle of subrogation. All that may be true; but, if it is, it nevertheless remains to ascertain whether, recognizing the owner's independent right to recover for his own use insurance accruing to him by the loss of its subject, the statute has not said that he shall not have the privilege of release and exoneration from his personal liability for injuries inflicted by his agents and representatives, except upon the condition, as a price for its purchase, that he shall voluntarily surrender, as the value of his interest in the vessel and freight, whatever they have procured for him of pecuniary advantage, including the insurance money recoverable for their loss.

[537] The language of the statute (§ 4283, R. S.) is, that "the liability of the owner of any vessel," etc., in the cases described, "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." By section 4285 it is enacted "that it shall be deemed a sufficient compliance, on the part of such owner, with the requirements of this title * * * if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee," * * * "from and after which transfer all claims and proceedings against the owner shall cease." It was decided in the case of *The Scotland*, 105 U. S. 24 [Bk. 26, L. ed. 1001], that it is not necessary that ship owners should surrender and transfer the ship in order to entitle them to the benefit of the law. That is only one mode of relief. In the alternative, they may retain their interest in the ship, abiding a decree for the value of the ship and freight as ascertained by the court upon the proofs. But this double method of executing the purpose of the statute does not imply any difference in the estimated amount of the possible recovery. The limit of that, in every case, is the value of the owner's interest in the ship and freight, and is the same whether he makes an actual transfer, or whether he submits himself personally to the payment of the ascertained amount.

The question, then, upon the statute is reduced to this: Whether the insurance money payable or paid to the owner in case of the loss of or damage to the ship is to be included in the estimate of the value of the owner's interest in it. And that question turns, as we think, on another and a very simple one: Whether the value of the owner's interest in his lost or damaged ship, in the sense of the statute, means its money value to him, computed with reference to every pecuniary advantage and benefit it brings to him, or whether it means the price brought by the material things which remain when put to sale to the best bidder, leaving him still in possession of all those legal rights springing out of and supported by his interest in it, which, as a case of insurance, or a right of action against the cause or instrument of its loss, may result in restoring to him in money its full original value. It is true that the Act declares that a transfer of the owner's interest in the ship and freight shall be a sufficient compliance with its conditions; and by construing this with narrow and literal exactness, this transfer may be confined to the mere wreck and physical remnant of the broken ship, or, if sunk to the bottom of the sea, the mere *spes recuperandi*. But this construction, we think, *hæret in cortice*. The whole language of the Act must be taken together, and nothing less will satisfy its meaning or its policy than such a transfer or payment as will include the full money value to the owner of his interest in the ship, which the statute requires him to sacrifice in order to purchase the immunity which it bestows on that condition alone. For the policy of the Act was to encourage investments in ships by limiting losses from the risks of navigation to the amount and value of the investment, and that includes the insurance recovered by force of a premium which, when paid, constitutes part of the investment, the insurance money itself being the produce of the investment, which restores it when lost or impaired. Insurance adds to the ship a value of its own, by imparting to the subject of insurance the quality of reproducing itself or its value in case of injury or loss. It was the policy of the Act to encourage the shipping interest by a protection against the unlimited personal liability of shipowners for the acts and defaults of their agents and representatives, with reasonable regard to the rights and interests of others engaged in the same pursuit, and not to put a premium on its destruction by taking away from shipowners a principal motive for regarding either their own or the interests of others. And the language of the statute seems to us not only to bear such a meaning, but fairly to imply it. For certainly every pecuniary advantage or profit which the ownership of a thing actually secures by necessary operation of law may be estimated to ascertain the value of the thing to its owner. The insurance which in case of damage or loss repairs and restores the vessel or stands in its place, and is its produce and earning, being the purchase money paid for it by virtue of the contract which assumes the risks insured against, is strictly an accessory of the ship insured, as much so as the freight which she earns; and the express mention of the latter, as part of the interest to be transferred, is not to be held as excluding insurance because not expressly mentioned, for the reason that the mention of freight is sufficient to characterize the nature of the owner's interest to be valued, as including not merely the material remnants of the broken or sunk vessel *in specie*, but as well that which it produces, and which is in truth her representative, and of which it is the meritorious cause and consideration. For the insurance is the price paid by the insurer to the insured as the purchase *pro tanto* of the thing insured when damaged or lost, and, in the hands of the owner, or due to him, still remains as the value of an interest in the ship as that existed when damaged or lost, and ought to be accounted for as part of that value; as much so as freight paid, though no longer freight money in kind, must still be valued and accounted for by the owner who has received it. The insurance money is the interest of the owner in the ship reduced to

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money and, therefore, most accurately measures its value; for, in cases of total loss, actual or constructive, all interest of the owner, even though it be a mere *spes recuperandi*, on payment of the insurance money, passes by operation of law to the insurer. Yet that very interest, thus the property, on abandonment or payment of a total loss, the title to which passes to the insurer, is the same interest, the value of which, by the terms of the statute, must be decreed to the libelant to exonerate the owner from personal liability to any additional extent.

An effort was made in argument by counsel to restrict the meaning of the words "the interest of such owner," as used in section 4283, R. S., so as merely to distinguish between the several liabilities of part owners; but there is no foundation for this. The words are used as well with reference to the interest of a single owner as of part owners where there are more than one. It means, we are constrained to believe, and naturally suggests, not merely the naked title of the owner to the physical materials which constitute the ship, or its wreck, or its remnants, but every interest in, attached to, or growing out of it, capable of pecuniary valuation and measurement, so as to include every right of action accruing to its owner, by contract or by operation of law, growing out of its ownership, or any damage or loss previously occasioned to it by others, embracing rights of actions against others for torts causing the injury, if any there be, and upon policies of insurance or other contracts of indemnity, taking effect in consequence of or notwithstanding the loss. Suppose, for instance, that after the collision which gave to the libelants the lien and right to proceed against the offending vessel for the loss and damage, the latter had been effectually sold while still pursuing her voyage, and the title transferred to a purchaser, would not the purchase money, either in the hands of the vendor when paid, or in those of the vendee until paid, notwithstanding the subsequent total loss of the ship itself during the same voyage before reaching her home port, be the measure of the value of the owner's interest, to the full amount of which the injured party might recover? It seems to us there can be but one answer to that question, and that in the affirmative. It seems to us equally clear that no distinction can be drawn between the case just supposed and that of insurance. For the policy of insurance in cases of total loss is analogous to a contract of sale, by which the ship, or what remains of her, or the hope of her recovery, becomes on the happening of the contingency the property of the insurer, and the insurance money payable, the price, as upon a conveyance. In both cases, the interest of the owner is transferred from the thing to the money which represents it and stands in place of it, and the money is the measure of the value of the interest of the owner in the thing, for it is the price and equivalent paid for it. We cannot bring ourselves to think that Congress intended, by limiting the personal liability of the ship owner, in cases where previously his whole fortune was responsible for the wrongs committed through his agents and representatives, to the value of his interest in the ship, which was the instrument of the injury, to permit the innocent party suffering the damage to go entirely without redress, when the vessel in fault, by disaster subsequently happening during the whole period of the same voyage, has been totally lost, and the owner, by a contract in force when the wrong was done, receives full compensation by way of insurance for the loss he has incurred, and has thus restored to him the offending vessel, not indeed *in specie*, but in value. It seems to us it is the meaning of the statute that the owner shall receive no pecuniary benefit from his interest in the vessel doing the wrong, which shall not inure to the compensation of him who has suffered the loss which it has caused. And that meaning Congress has taken pains to express by the use of the word "interest," as the subject which, or the value of which, the owner must surrender and transfer or account for, as the price of his immunity from personal liability, because it is appropriate to convey the idea, being large enough to embrace, not the mere legal title to the vessel or the wreck and remnant of her which may be saved from the perils of the voyage, but every claim and benefit which constitutes to the owner its substance and value, capable of measurement in money.

[540] [541]

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[507]

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, JAMES PHILLIPS, THE REPUBLIC OF PERU, AND HENRY H. ROLLINS, *Appts.*,

v.

NATIONAL STEAM NAVIGATION COMPANY.

(See S. C. "*The Scotland*" Reporter's ed. 507-520.)

Admiralty—Limited Liability Act of 1851 construed—preceding case followed—interest.

*1. The decision in the previous case of Place v. Norwich & N. Y. Trans. Co., repeated on the question relating to the time when the value of ship and freight is to be taken for fixing the liability of the owner, and on the question of insurance.

2. Where a collision occurred by which the offending ship and her cargo were sunk at sea, but strippings from the ship were rescued before she went down, from which the owners afterwards realised several thousand dollars: *held*, that in awarding damages against the owners, limited to the amount of their interest in the ship, the court is not bound to allow interest on the proceeds of the wreck or strippings; but may, in its discretion, allow interest or not.

3. The circuit court is not bound to allow interest on costs awarded by the district court, although such costs are included in the decree of the circuit court.

4. The allowance of interest by way of damages in cases of collision and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.

[No. 748.]

Argued March 12, 13, 1885. Ordered for reargument with No. 333, April 6, 1885. Reargued, October 20, 21, 1885. Decided, May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of New York. *Affirmed.*

The history and facts of the case appear in

*Head notes by *Mr. Justice* BRADLEY.

the opinion of the court and in the report of the opinion of this court when the case was here in 1881: *The Scotland*, Bk. 26, L. ed. 1001. See also the preceding case of *Place* v. *The Norwich and New York Transportation Company*, and the following case of *Thommessen* v. *Whitwill*.

Mr. **James C. Carter**, for appellants:

The question shortly stated is, "What is included under the words 'amount or value of the interest of such owner in such vessel and her freight then pending,' contained in section 4283 of the R. S.?"

The interpretation of the statute in question cannot properly be removed from the control of those considerations of public policy from which the statute itself springs.

It is first to be observed that the principal field of the operation of this Act is the relations between carriers and the shippers of goods. By general law a most rigorous liability is imposed upon public carriers for the safety of goods and passengers. As to goods, they stand in the place of insurers; and as to passengers, they are bound to the exercise of the highest degree of diligence. These rigorous obligations are imposed in accordance with the supposed necessities of a sound public policy.

In view of that policy, the requisite measure of diligence can be secured only by that ever present sense of its necessity which is produced by the imposition of this severe obligation.

Railroad Company v. *Lockwood*, 17 Wall. 357, 377 (84 U. S. bk. 21, L. ed. 627, 639).

There has been from time immemorial in many continental nations, and more recently by express statute in this country, a relaxation of this severe obligation in respect to carriers by water; and such relaxation, like the rule itself, springs from the teachings of public policy, being an indulgence designed to encourage the building and employment of ships.

Norwich and N. Y. Trans. Co. v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585).

Serious question has been made as to whether, in ascertaining the value of an owner's interest, for the purpose of determining the extent of his liability, the value is to be taken before or after the casualty. Either construction of the statute is admissible; but, reasoning from grounds of public policy and imputing to Congress the intent to act in accordance therewith, it has been determined that the value to be ascertained is the value of the interest after the happening of the casualty.

Norwich Co. v. *Wright*, *supra*.

Applying the same methods to the determination of the question now brought before the court, there should be little doubt that the true construction of the language "the amount or value of the interest of such owner," should embrace any insurance upon such interest.

In all ordinary dealings the insurance is treated as simply incidental to the subject insured. Whenever there is a sale of the subject, be it ship or cargo, the insurance is transferred, along with the subject, to the purchaser.

Phillips, Ins. § 76; 2 Duer, Ins. § 35.

Unless in cases like the present, the amount of an insurance upon the offending vessel is, in case of loss, to be made subject to the claims of those who have suffered damage from such offending vessel, the plain consequence is that the owner of the guilty ship is enabled by the mere fact of an insurance upon his interest to achieve two things: *first*, full indemnity to himself for the loss of his own property; *second*, complete exemption from liability for the consequences of his own culpable negligence.

The procuring of insurance by the payment of a premium is only a mode of adding to the value of the subject insured, which the owner is at liberty to avail himself of or not, as he may choose. It is a part of the owner's investment in the adventure. One man might prefer to build his ship of iron instead of wood, and dispense with insurance; another might think it better economy to build of wood, and expend the additional cost of an iron vessel upon insurance. In either case, the whole amount expended is invested in the adventure; and it is the amount of this investment, or what may survive of it, which the law fixes as the limit of liability.

Mr. **E. N. Taft**, for Henry H. Rollins, appellant:

When the statute says "the value of the interest," etc., it plainly must mean one of two things: either the value to others, or the value to the owner. It would be no strained construction of the statute to make it read "the value to *him* of the interest, etc." And if it is to be the value to the owner, such value must include the amount of insurance.

Does the word "value" mean anything other than that value which the owner, by reason of his interest in the vessel at the time she does the wrong, can himself realize? We submit that that is precisely where the line was intended to be drawn by the statute, and that all the interest which the owner had in the vessel at the time of the wrongful act which resulted in damage and loss, is to be brought into account for the injured parties, either directly, as in cases of transfer, or indirectly as a measure of liability.

The rule should be the value of the interest of the owner in the vessel when it proceeds to commit the wrong, so far as that value can be realized in any way by the owner.

At the moment of threatened destruction the value of the owner's interest in the vessel is fixed almost entirely by the insurance he has upon it, and that interest after the destruction of the vessel takes the form of a claim upon the insurer for such value.

In a statute which changes our former maritime law and interposes a limitation where none before existed, the exact extent of that limitation, in view of what our former law deemed just, is to be found by going no further in the way of limitation than is clearly expressed.

Mr. **John Chetwood**, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This case presents nearly the same questions which have just been considered in the case of *Place* v. *Norwich & N. Y. Trans. Co.* [*ante*]. It was before this court in October Term, 1881, and was decided in March, 1882. See *The Scotland*, 105 U. S. 24 [Bk. 26, L. ed. 1001]. From the report of the case, but not from the record now before us, we learn that the ship Kate Dyer and the steamship Scotland, the latter belonging to

the appellee, came into collision in December, 1866, opposite Fire Island Light, and the former immediately sank and was lost. The Scotland, being badly injured, put back for New York, but sank outside and south of Sandy Hook, only some strippings being rescued from [518] her before she went down. The owners of The Kate Dyer and others who had suffered loss, filed libels *in personam* against the National Steam Navigation Company, respondent and now appellee, who filed an answer denying that The Scotland was in fault, and pleading that she was sunk and destroyed, and, therefore, that there was no liability against the respondent. The circuit court, on appeal from the district court, found The Scotland in fault, and rendered a decree in favor of the libelants for the full amount of their damage, amounting with interest to upwards of $250,000, besides the costs of the libelants in the district court amounting to $2,173.10.

This decree was reversed by this court in March, 1882, so far as it condemned the respondent to pay the whole amount of damages sustained by the libelants and intervenors, and affirmed as to the residue; the court, in its opinion, holding that the amount of the respondent's liability was the value of the ship's strippings which were saved from the wreck.

The case went back to the circuit court, but was not further prosecuted until June, 1883, when the libelants applied for leave to file a supplemental allegation to their libel, for the purpose of showing that the respondent had received a large amount of insurance for the loss of The Scotland, which the libelants claimed should be included in the amount of the respondent's liability. The amendment was allowed, without prejudice to the respondent and with a reservation of the question as to the legality of such an amendment after the decree of this court had been rendered and a mandate sent down. The case was then referred to ascertain the amount realized from the strippings, and from the insurance, of The Scotland. The finding of facts in the court below, based on the report of the commissioner, on evidence and on admissions of the parties, states that the amount realized from the strippings was $4,927.85, received on or before the 27th of July, 1868; that the freight for the voyage was $18, 703.20, but no part of it was earned or received; that the passage money was $1,703.65, but was all absorbed in refunding part, and employing the residue in transferring and reshipping the passengers; that the value of The Scotland before the collision was £100,000; and that the insurance effected on her and received [520] by the respondent was £61,647, equal to $299,807.42. As conclusions of law, the court held that the proper amount to be paid by the respondent, as depending upon the value of the articles saved, was $4,927.85; and that the insurance received by the respondent formed no part of its interest in the steamship to be surrendered in limitation of its liability under the statute. A decree was thereupon made that the respondent pay into the registry of the court the sum of $4,927.85 as the value of the strippings and remnants of The Scotland; and the sum of $2,173.10, the costs of the libelants in the district court, and the costs in the circuit court; and that upon such payment the respondent should be discharged from all liability to the libelants and intervenors.

To the findings of fact and conclusions of law of the circuit court the libelants excepted, on the following grounds, to wit:

1. That interest should have been allowed on the sum of $4,927.85.
2. That all freight and passage money should have been added.
3. That the amount of insurance received should have been added.
4. That the libelants should have had a decree for their entire loss.

On the argument it was also claimed that interest should have been allowed on the costs of the district court, $2,173.10.

These points are all disposed of in the previous case of *Place* v. *National Steam Navigation Company*, except the question of interest. Were the libelants entitled to interest on the amount received from the strippings? In answering this question it must be borne in mind that this is not a question of debt, but of damages. The limitation of those damages to the value of the ship does not make them cease to be damages. The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very [519] much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. The record now laid before us contains no part of the pleadings or proceedings in the cause prior to the first decree of the circuit court. We are without any means of knowing the circumstances in the pleadings or the evidence upon which the court was called upon to act, except the bare facts stated in the finding of facts before referred to. The right to a limitation of liability seems to have been denied to the respondent from the beginning. If it offered to pay the value of the strippings into court in its discharge from liability, or desired to do so, it is evident that the court would not allow it to do so, and that the libelants resisted it with all their power. The respondent was obliged to wait till the decision of this court in March, 1882, before getting a declaration of its rights in the matter; and the first move afterwards made was the attempt of the libelants to change the whole form of the controversy by setting up the new claim to the insurance money received by the respondent. Without stopping to decide whether this amendment of the proceedings was lawfully allowed after the decision of this court, it is sufficient to say that the circuit court, so far as we have anything before us to show to the contrary, may have had very good reasons for not allowing interest on the value of the strippings. We are not disposed to disturb its decree in this respect.

The question relating to interest on the costs requires but brief examination. Costs in admiralty, as well as in equity, are in the discretion of the court. Benedicts, Adm. § 549. Appeals in matter of costs only are not usually entertained; but when the entire case is before the appellate court, it has control of the subject of costs, as well as of the merits. *Trustees* v. *Greenough*, 105 U. S. 527 [Bk. 26, L. ed. 1157]; 2 Conk. Adm. Pr. 373. In the present case, the circuit court by its original decree, made in

1878, adjudged to the libelants their costs in the district court, amounting to $2,173.10. In March, 1882, we affirmed this part of the decree, but without interest. In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included. *Hemmenway* v. *Fisher*, 20 How. 255 [61 U. S. bk. 15, L. ed. 799]. No interest on these costs, therefore, can be claimed up to the date of our decree. The new departure then taken by the libelants in claiming the insurance, opened the matter so as to postpone a final decree in the case in the circuit court until the decree now appealed from was made. This decree adjudges to the libelants their costs in the district court precisely in accordance with our mandate. All delay in entering the decree was caused by the libelants themselves. If any interest was allowable on the costs in question, it would only have been that accruing from the date of our decree, March 20, 1882, to the time of rendering the decree appealed from, September 22, 1884. In view of the circumstances of the litigation which took place in that period, we do not think that the decree of the circuit court is open to objection.

[520]

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Matthews**, *Mr. Justice* **Miller**, *Mr. Justice* **Harlan**, and *Mr. Justice* **Gray**. See dissenting opinion, *ante*, 148.

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[520] JENS THOMMESSEN AND JULIUS SMITH, Owners of the Norwegian Bark DAPHNE, *Appts.*,

v.

MARK WHITWILL.

(See S. C. "*The Great Western*" Reporter's ed. 520-526.)

Admiralty—Limited Liability Act of 1851 construed—how limited liability claimed.

*1. The decision in Place v. Norwich & N. Y. Trans. Co., in relation to the time when the value of the owner's interest in the ship is to be taken for fixing the amount of his liability, applied to a case where the offending ship did not sink in consequence of the collision, but was afterwards sunk and wrecked in the same voyage by the negligent navigation of those in charge of her; this sinking being held to be the termination of the voyage.

2. The decision in the same case as to insurance repeated.

3. Limited liability may be claimed, 1, merely by way of defense to an action; or, 2, by surrendering the ship or paying her value into court. The latter method is only necessary when the shipowner desires to bring all the creditors claiming damage into concourse for distribution.

[No. 333.]

Argued Oct. 19, 20, 1885. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court. See also the preceding cases of *Place* v. *Norwich & N. Y. Trans. Co.* and *Dyer* v. *National Steam Nav. Co.*

*Head notes by *Mr. Justice* BRADLEY.

Messrs. **C. Van Santvoord, Harrington Putnam,** *James K. Hill* and *Wing & Shoudy*, for appellants:

By the common and general admiralty and maritime law of the United States the rule in cases of collision is that the party in fault must suffer his own loss and compensate the other party for what loss he may sustain.

1 Pars. Adm. and Mar. Law, ed. 1869, 525, citing *The Scioto*, Daveis (2 Ware), 359; *The Woodrop Sims*, 2 Dods. 83; *Reeves* v. *Ship Constitution*, Gilpin, 579; *The Sappho*, 9 Jur. 560.

The first question to be considered is how far the rule has been altered by the Act of Congress.

The limitation in section 4283, R. S., is not a limitation of the liability of the owner of a vessel for any and all of the causes of action therein described, but a limitation of his liability only for any one of the several causes for which an action is brought against him.

The time of the valuation of the vessel and freight pending, for the purpose of determining the extent of the limitation in this section, is the time of the loss or of the accruing of the cause of action.

The words "pending freight" in the description of the subject to be valued is freight previously contracted for; it is not freight lost nor freight earned. As freight contracted, it is capable of being valued, and in every day's experience is covered by insurance.

The vessel and her freight pending is a description of the vessel proceeding on her voyage; and the word "then" in the limitation to the value of the vessel and her freight pending is an express reference to the time of the loss, or the accruing of the cause of action as the time of the valuation.

In the English decisions of an earlier date than the Act of Congress of 1851, it was well established that in applying the provisions of the English Acts (26 Geo. III. chap. 86, A. D. 1786, and 53 Geo. III. chap. 159, A. D. 1813), limiting the liability of a ship owner to the value of the vessel and the freight due and to grow due, when no time was mentioned in the Act, that the existing value at the time of the loss or of the accruing of the cause of action determined the limitation.

Wilson v. *Dickson*, 2 B. & Ald. 3; *Cannan* v. *Meaburn*, 1 Bing. 465.

In *Norwich Co.* v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 585), as applied by *Judge* Strong, in *Re Petition of the Norwich, etc. Co.* 17 Blatchf. 229, 232, the limitation of the recovery against the offending ship was to her value as left by or as reduced by the collision.

In the case of *The Scotland* 105 U. S. 24 (Bk. 26, L. ed. 1001), in this court, judgment was given in favor of the libelants, to the amount of the value of the wreck and strippings to which The Scotland, the offending ship, was reduced by or in consequence of the collision through her fault.

The limitation of the recovery involved in this judgment to the value of the offending ship, as reduced by or in consequence of the collision, is the same in principle as that adopted by *Judge* Strong in *Re Petition of Norwich Co.* v. *Wright*, *supra*.

The system of limitations of the liability of a shipowner prescribed by the Act of Congress,

being a limitation only of his liability in actions for certain enumerated causes of action, is so far inconsistent with and repugnant to the above supposed system of limitation of the general maritime law that it repealed it by substituting a different, narrower system of limited liability of the ship owner.

United States v. *Claflin*, 97 U. S. 546 (Bk. 24, L. ed. 1082); *Butler* v. *Russell*, 3 Cliff. 251; *S. C.* 11 Int. Rev. Rec. 30; *Heckman* v. *Pinkney*, 81 N. Y. 211; *People* v. *Gold and Stock Tel. Co.* 96 N. Y. 76.

There being no proof that the systems of limitation of the liability of a ship owner in Norway and Sweden and Great Britain are the same, the only limitations applicable to the case are the limitations of the law of the forum, of which the above mentioned system of the limitations of the general admiralty law forms no part.

Messrs. **James Thomson** and **E. C. Henderson** for appellee:

The insurance effected upon The Great Western by her owners is not an element in their interest in such vessel and her freight pending, within the meaning of the Revised Statutes.

Neither the maritime law nor the continental authorities extend the liability of the shipowner to the insurance upon the vessel.

The Phebe, 1 Ware, 265; *Norwich Co.* v. *Wright*, 13 Wall. 104 (80 U. S. bk. 20, L. ed. 365); *The Scotland*, 105 U. S. 24 (Bk. 26, L. ed. 1001); *The Rebecca*, 1 Ware, 188; *Watson* v. *Marks*, 2 Am. Law Reg. 157; *Matter of Petition N. & N. Y. Trans. Co.* 17 Blatchf. 227.

The history of the phrase "interest of the owner in such vessel and her pending freight," proves that it has always been used with reference to part owners, to relieve them from a liability *in solido* to the extent of the value of the vessel and freight, and to limit their liability to the value of their shares therein.

The history of English legislation on this subject, prior to the Act of 1851, has been related in *Norwich Co.* v. *Wright*, in *Walker* v. *Ins. Co.* 14 Gray, 288, and by Mr. Lathrop, in his article in 1 Am. Law Rev. 598.

The limit of liability prescribed by the English Acts, whether in the case of a part owner or of an owner of the whole ship, is the same, the value of the vessel and freight. The phrase, "interest of the owner in vessel and freight," does not appear, because it would have no application.

The Act of 1851 was principally drawn from the Act 26 Geo. II. chap. 86, and from either the Revised Statutes of Maine (Revision 1840, chap. 47, § 9 *et seq.*), or the Revised Statutes of Massachusetts (Revision 1836, chap. 32, § 1 *et seq.*), probably the former.

The phrase "interest in the ship and freight," in both revisions, is taken from the Act of Massachusetts (Laws 1819, chap. 122), which constituted the earliest legislation in the United States on this subject, and was almost literally copied in the Maine Statute (Laws 1821, chap. 14), the phrase, of course, on well settled principles, retaining in the revisions the meaning which it had in the statute revised.

Bish. Wr. L. §§ 98, 144; *United States* v. *Bowen*, 100 U. S. 508 (Bk. 25, L. ed. 631).

The language of the Act of 1851 shows that in that statute the phrase retains this meaning.

Re Norwich & N. Y. Trans. Co. 17 Blatchf. 221.

It is impossible from the nature of the contract of insurance that it should be an interest in the subject matter insured.

Lynch v. *Dalzell*, 4 Bro. Cas. in Parl. 431; *Sadler's Co.* v. *Babcock*, 2 Atk. 544; *Lucena* v. *Crawfurd*, 2 N. R. 270; Dixon, Marine Ins. 6; 2 Duer, Ins. 52, 58; Marshall, Ins. 7; 1 Phillips, Ins. 1; *Dalby* v. *India & London Life Assur. Co.* 15 C. B. 365, p. 387; May, Ins. § 6; Wood, Fire Ins. § 249; *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 512 (35 U. S. bk. 9, L. ed. 514); *Carpenter* v. *Providence Wash. L. Ins. Co.* 16 Pet. 496 (41 U. S. bk. 10, L. ed. 1044).

The purpose of this legislation will be frustrated if insurance be held to be an interest in the vessel.

The Phebe, 1 Ware, 265; *The Rebecca*, 1 Ware, 198; Holmes, Com. L. p. 25.

If the surrender of insurance should be enforced, the consequence would be, not to secure the insurance for the injured party, but to prevent the shipowner from collecting it.

Since the decision of this court in the case of *Norwich Co.* v. *Wright*, there has been a practical unanimity of opinion, whenever the question has been presented, that insurance is not an interest in the vessel.

Petition of N. & N. Y. Trans. Co. 8 Ben. 317; *The C. H. Foster*, 1 Fed. Rep. 734; *Re Long Island etc. Trans. Co.* 5 Fed. Rep. 612; *Petition of Norwich & N. Y. Trans Co.* 17 Blatchf. 234, 237; *Watson* v. *Marks*, 2 Am. Law Reg. 157.

Although this question has never been, in terms, adjudicated by this court, its utterances in construing this statute have been, it is submitted, inconsistent with any construction of the Act extending the shipowner's liability to the insurance upon the ship.

Norwich Co. v. *Wright, supra; The Benefactor*, 103 U. S. 239 (Bk. 26, L. ed. 351); *The Scotland*, 105 U. S. 24 (Bk. 26, L. ed. 1001); *Ex parte Slayton*, 105 U. S. 451 (Bk. 26, L. ed. 1066); *Providence & N. Y. Steam Ship Co.* v. *Hill Mfg. Co.* 109 U. S. 578 (Bk. 27, L. ed. 1038).

The policies of insurance effected on The Great Western by her owners were not effected for the benefit of the libelants; but if they had been, this fact would be entirely immaterial, and could not increase the limit of the respondent's liability for the collision stated in the pleadings.

By the general maritime law, the liability of the shipowner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collision or anything else, and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage.

The City of Norwich, The Scotland, The Phebe and *The Rebecca, supra.*

The Act of 1851 adopted this rule of the maritime law for the cases to which the Act applies.

Norwich Co. v. *Wright, Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.* and *The Scotland, supra.*

Interpreted and administered as statute law, this rule of the maritime law remains unchanged. The Act has provided that for these maritime torts a recovery *in personam* shall not be greater than a recovery *in rem*.

[523] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case grew out of a collision which occurred on the 25th of March, 1876, on the high seas, 150 miles from Sandy Hook, between the Norwegian bark, Daphne, belonging to the appellants and bound to Marseilles, and the British steamship, Great Western, belonging to the respondent and others and bound to New York. [524] The Daphne was injured about $7,000 worth, and the court below found that The Great Western was in fault, and was worth $150,000, both before and immediately after the collision; but that after the collision, and on the same day, the steamer, while still on her voyage to New York, was stranded and wrecked on the south coast of Long Island by the careless navigation and fault of those in charge of her, and from no cause connected with the collision. No freight was received by her owners. On the 29th of March they abandoned her to the underwriters, and received from them insurance to the amount of £34,000 as for a total loss. After this the wreck and materials saved were sold for account of the underwriters and by direction of the owners, and realized $1,796.14. On the 27th of March, 1876, the libel was filed in this case on account of the owners of The Daphne, and Whitwill, the respondent, appeared and answered, denying that The Great Western was in fault, and claiming that if she should be found in fault, the owner's liability was limited to the amount or value of his interest in the vessel and her freight, and that this interest was of no value whatever; and to this he added, by leave of the court during the trial, the following words: "And he hereby surrenders the same to the libelants." He also during the trial tendered an assignment of his interest to the libelants, and offered to give another assignment to a trustee for the benefit of the libelants under section 4285 of the Revised Statutes of the United States. The court below held that the owners of The Great Western were only liable for the proceeds of the wreck, amounting to $1,796.14, and gave a decree for that amount and interest, and for the costs of the libelants in the district court.

The errors assigned for the reversal of this decree are substantially as follows, to wit: *First*, That the limitation of the respondent's liability to the value of the ship and freight in the condition in which they were after the stranding and wreck is contrary to the rule contained in section 4283 of the Revised Statutes. *Secondly*, Because the insurance received by the owners was not included in the value of their interest in the ship, liable to be surrendered in order to obtain a limitation of liability, and was not [525] taken into account in fixing the measure of such liability. *Thirdly*, Because the court allowed the respondent to amend his answer by the words "and he hereby surrenders the same to the libelants;" and permitted him to give in evidence his written surrender of his interest in the steamer to the libelants; and his offer to make a like surrender to a trustee for the benefit of the defendants. *Fourthly*, Because, without proof that the laws of Sweden and Great Britian are the same on the subject, the only law applicable to the case was the law of the forum, of which the general admiralty law forms no part.

The points raised in the first and second assignments have been already discussed and decided in the case of *Place* v. *Norwich and New York Trans. Co.* [*ante*, 184]. There is nothing peculiar in the present case, unless it be that The Great Western was not sunk or wrecked by means of the collision, but afterwards, by the carelessness of her master or crew. This can make no difference. We showed in the opinion referred to that the termination of the voyage is the point of time at which the value of the offending vessel is to be taken. The voyage in the present case was not terminated until the vessel was sunk and stranded on the Long Island coast. The carelessness of the master and crew cannot vary the result. It is against their faults and negligence that the law was intended to protect the shipowner, provided the loss and damage sustained were caused without his privity or knowledge.

The third assignment of error cannot be maintained, because the evidence referred to therein, which the court allowed to be given on the trial, could not affect the result; nor was the amendment of the answer material. The answer, as originally framed, set up the defense that the liability of the respondent was limited to the amount or value of his interest in The Great Western and her freight upon the voyage, and averred that that interest was of no value. The issue being thus raised, the respondent was entitled to have the decree against him in that cause limited to the amount which should be shown, by the proofs on the trial, to be the value of said steamer and freight at the [52 termination of the voyage. He did not need to make any surrender or attempt at a surrender. A surrender of the vessel, or payment of her proceeds, or value, into court would have been necessary in order to bring other creditors into concourse with the libelants; but for the mere defense of that cause it was not necessary. This disposes of the supposed difficulty in making an abandonment to the libelants after a surrender or abandonment to the insurers; a difficulty which we have already shown to be groundless, in the opinion referred to.

The fourth assignment of error is not well taken, because the case was altogether decided according to the maritime law of this country, which is the law of the forum.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Matthews**, *Mr. Justice* **Miller**, *Mr. Justice* **Harlan** and *Mr. Justice* **Gray**. See dissenting opinion *ante*, 148.

WILLIAM GARDNER ET AL., *Appts.*, [180

v.

MARTIN HERZ ET AL.

(See S. C. Reporter's ed. 180-198.)

Patent law—new matter in reissue—what is not a patentable invention.

1. In an action brought for the alleged infringement of reissued (second reissue) letters patent No. 9094, for an improvement in chair seats, this court

holds that, the fabric being old, the suggestion to construct chair seats out of it being old, the shaping of it in a former being old, the perforation of a seat for ventilation and ornamentation being old, and the giving of a concave shape to a wooden seat by pressure being old, there cannot, in view of the disclaimers, be anything patentable in the structure.

2. The suggestion in the second reissue, that "the seat is adapted to be secured to any chair frame, as it is easily cut and fitted to the same," not being found in the original patent or in the first reissue, is new matter, and does not confer patentability on the article. No ground for patentability can be derived from the insertion of such matter in suggestions in the second reissue.

[No. 177.]

Argued April 19, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The case is stated by the court.

Mr. **Edward N. Dickerson,** for appellants.

Mr. **James P. Foster,** for appellees, on the question of the patentability of the complainants' structure, cited:

Aggregation of old elements — no new product—unpatentable.

Wilson Packing Co. v. *Chicago Pack. & Prov. Co.* 105 U. S. 566 (Bk. 26, L. ed. 1172); *Thatcher Heating Co.* v. *Burtis*, 12 Fed. Rep. 569; *Reckendorfer* v. *Faber*, 92 U. S. 357 (Bk. 23, L. ed. 724). See 12 Fed. Rep. 727; *Hayes* v. *Seton*, 12 Fed. Rep. 120; *The Packing Co. Cases*, 13 Fed. Rep. 304, decided May 8, 1882; *Perfection Window Cleaner Co.* v. *Bosley*, 2 Fed. Rep. 574; *Sawyer* v. *Bixby*, 9 Blatchf. 361; *Double Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 3 Fed. Rep. 26; *Williams* v. *Rome, W. & O. R. R. Co.* 15 Blatchf. 200; *Hailes* v. *Van Wormer*, 5 Off. Gaz. 89.

Elements must co-operate.

Doubleday v. *Roess*, 11 Fed. Rep. 737; *Pickering* v. *McCullough*, 21 Off. Gaz. 75.

Old material and form. No new functions.

Wallace v. *Noyes*, 13 Fed. Rep. 172.

No novelty where process is a single one, and there is no succession.

Wallace v. *Noyes*, 13 Fed. Rep. 180.

"No combined patentable result."

Perry v. *Co-op. Foundry Co.* 12 Fed. Rep. 436.

Piece of India Rubber with a hole in it. No one could lack skill to make the hole.

Rubber Tip Pencil Co. v. *Howard*, 9 Blatchf. 490.

Hole for light in fare box. Anyone could make it.

Slawson v. *Grand St. P. P. & F. R. R. Co.* 4 Fed. Rep. 581.

Air spaces and nail holes in corrugated iron. No invention to make larger, or different shape. Might work well, but anyone could make it.

Belt v. *Crittenden*, 2 Fed. Rep. 82.

Change caused simply by difference in material.

Albright v. *Celluloid Harness Tr. Co.* 12 Off. Gaz. 227.

Reduction of size of old device for new use is no invention.

Double Pointed Tack Co. v. *Two Rivers Mfg. Co.* 3 Fed. Rep. 31.

"Substantially same article."

Griffiths v. *Holmes*, 8 Fed. Rep. 154; *Kerosene Lamp Heater Co.* v. *Little*, 3 Ban. & Ard. 312; *Dunbar* v. *Albert Field Tack Co.* 4 Fed. Rep. 543.

"Mechanical skill is one thing; invention is another thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable."

Reckendorfer v. *Faber*, *supra*.

"Ordinary mechanical adaptation, nothing 'more,' is not patentable."

Mahn v. *Harwood*, 3 Ban. & Ard. 515.

Used flesh instead of grain side of leather. No invention.

Brummitt v. *Howard*, 8 Fed. Rep. 801.

Sheet metal instead of *papier-maché*, no invention.

Ingersoll v. *Turner*, 12 Off. Gaz. 189.

Need not be practically useful apart from other known instrumentalities. Test is not "whether in present state of the art his (patentee's) invention (without improvement) would be deemed of any value, or be salable for use."

Wheeler v. *Clipper Mower & Reaper Co.* 10 Blatchf. 181.

Failure to attract attention is no proof invention is not complete and valuable.

Crandall v. *Richardson*, 8 Fed. Rep. 808.

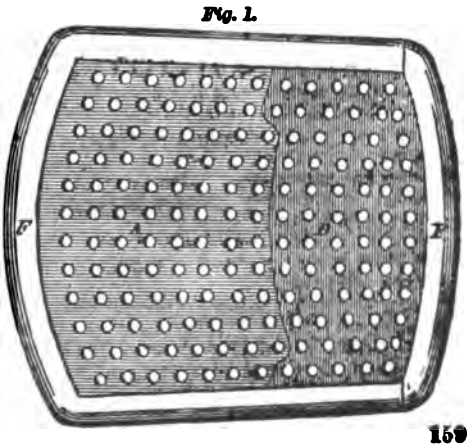
Great sales, no proof of invention.

Crandall v. *Richardson*, *supra*.

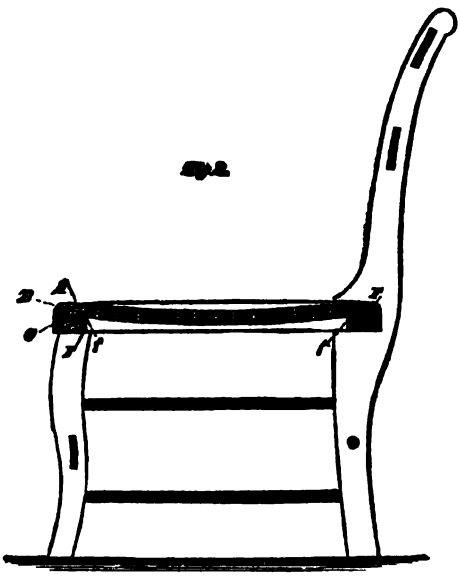
Mr. Justice **Blatchford** delivered the opinion of the court: [181]

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by William Gardner, Oliver L. Gardner and Jane E. Gardner against Martin Herz and John K. Mayo, for the infringement of reissued letters patent No. 9094, granted to the plaintiffs, February 24, 1880, for an improvement in chair seats (the original patent, No. 127045, having been granted to George Gardner and Gardner & Gardner, as assignees of George Gardner, as inventor, May 21, 1872, and having been reissued as No. 7203, to George Gardner, William Gardner and Jane E. Gardner, July 4, 1876). The application for the first reissue was filed April 8, 1876, and that for the second, October 31, 1879. The drawings annexed to the original patent and each of the reissues were substantially the same. Those of the second reissue were as follows:

Fig. 1.



[182]



The specification and claim of the original patent were in these words:

"Figure 1 is a plan view, partly in section, the section showing the middle layer of veneer. Figure 2 is a longitudinal section, taken on the line *x x* of figure 1. Similar letters of reference refer to like parts in both of the figures.

This invention relates to chair seats; and it consists in constructing a seat out of veneers of wood, with the grain running across each other and glued together.

I have shown, in the drawing accompanying this specification, three layers of veneers, they being represented by the letters A B C. The grain of veneer A crosses that of veneer B, as shown in section in figure 1, and the grain of veneer B crosses that of veneer C, as seen in figure 2. Veneers when thus arranged, that is to [183] say, with the grain running in diverse directions, will make a seat which, for economy and durability, will be found to be a very useful improvement. The seats may be left solid, or perforated after some design agreeable to the fancy of the one having them made. A slightly concave configuration may be given to the seat, as shown in figure 2.

Seats thus made do not cost as much as those that are made of cane, and are better by far in point of durability.

The veneers rest upon a shoulder, *f*, of a frame, F, which surrounds them.

Having thus described my invention, what I claim and desire to secure by letters patent is:

As a new article of manufacture, a chair seat constructed of veneers of wood with the grain running crosswise of each other and glued together, all substantially as set forth, and for the purpose specified."

The specification and claims of the first reissue were in these words:

"Figure 1 is a plan view, partly in section, of my improved seat, the section showing the middle layer of veneer. Figure 2 is a view of my improved seat for chairs, settees, etc., this figure showing a longitudinal section of the seat, taken on the line *x x* of figure 1. Similar letters of reference refer to like parts in both of the figures.

This invention relates to bottoms for seats, and consists in constructing the said seats of two or more veneers of wood, with the grains crossing each other, the said veneers of wood being glued together by an adhesive substance.

I have shown in the drawing accompanying this specification three layers of veneer, applied to the construction of and forming a seat for chairs. These layers of veneer are represented by the letters A, B and C. The grain of veneer A crosses that of veneer B, as shown in section in figure 1, and the grain of veneer B crosses that of veneer C, as seen in figure 2. Veneers, when thus arranged, that is to say, with the grains crossing each other, or diversified, will make a seat which, for durability and economy, will be found to be a very useful improvement. I make the seat either solid, or perforated as shown in figure 1. A slight con [1 cave configuration may be given to the seat.

The perforated seats are made by boring a round hole of any design desired; and they may be bored either by hand or by machinery adapted for the purpose. The perforated seats are desirable, as they are ventilated and ornamental.

I have especially shown and described my improved seat for chairs. The veneers of which this seat is constructed rest upon a shoulder, *f*, of a frame, F, which surrounds them, as shown in figure 2 of the drawing. The veneers, with the grains crossed or diversified and glued together, become homogeneous, thus making a solid piece of wood, from which I make the bottom of the seat, which, when perforated and varnished, is ready for the market.

Veneers, when thus arranged, that is to say, with the grain running crosswise or in diverse directions, will make a bottom for a seat which, for economy and durability, will be found to be a very useful improvement. The bottoms thus made may be left solid, or perforated after some design agreeable to the fancy of the one having them made. A slightly concave configuration may be given to the bottom, as shown in figure 2, which greatly adds to the comfort of the party using it. The bottom thus made is secured to a frame, F, which surrounds it, and through the latter is secured to the seat frame K.

Having thus described my invention, what I claim is:

1. As a new article of manufacture, a bottom for a seat, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance, substantially as set forth.

2. As a new article of manufacture, a bottom for a seat frame, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, said layers being secured together by an adhesive substance, and having perforations formed therein for the purpose of ventilation or ornamentation, substantially as set forth.

3. The combination of a seat bottom, constructed of two or more veneers or thin layers [1 of wood, with the grain of the one layer crossing that of the other, and the whole secured to-

gether by an adhesive substance, with the frame of the seat, substantially as set forth.

4. The combination of a seat bottom, constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and the whole secured together by an adhesive substance, and provided with perforations for the purpose of ventilation or ornamentation, with the frame of a seat, substantially as set forth.

5. As a new article of manufacture, a wooden bottom for seats, provided with perforations for the purpose of ventilation or ornamentation.

6. As a new article of manufacture, a seat bottom constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and secured together by an adhesive substance, said bottom thus formed having a curved or concave configuration on its upper side, substantially as set forth."

The specification and claims of the second reissue were in these words:

"The state of the art in relation to devices having a similarity to my invention may be set forth as follows: In letters patent No. 15552" granted to John H. Belter, "August 19, 1856, a bedstead is described made of veneers glued together, with the grains crossing; and in such patent there is a statement that veneers crossing and glued together had been used for combining strength and lightness. In letters patent No. 19405," granted to John H. Belter, "February 23, 1858, chairs and other articles of furniture are described as made of layers of wood or veneers crossing each other, glued together, and pressed to shape. In letters patent No. 40509, granted November 3, 1863, boxes are described as made of veneers or layers of wood crossing each other and glued together. In letters patent No. 23225, granted" to Zebulon B. Bellows, "March 15, 1859, a chair bottom is described as made of a piece of board softened by steam and pressed up to shape in molds. [186] In letters patent No. 110096, December 13, 1870, a barrel is described of laminæ of wood with the grain crossing and glued together. Sheet metal perforated to form chair bottoms is set forth in A. S. Smith's patent, reissued" to Isaac P. Tice, "June 27, 1865. Chair seats of enameled hard rubber and gutta-percha perforated are set forth in letters patent No. 54863," granted to J. W. Cochran, "May 7, 1866. Letters patent No. 51785, granted December 26, 1865, to J. K. Mayo, sets forth numerous articles made of laminæ of wood; and in a subsequent reissue, dated August 18, 1868, mention is made of a chair seat, but the same was neither concave nor perforated.

My invention, as distinguished from the foregoing, relates to a new article of manufacture, consisting of a chair seat made of veneers of wood, with the grains of one veneer crossing the other and glued together, and having a concave or dishing form, and perforated.

From the foregoing it will be apparent that I do not lay any claim to the veneers crossing each other and glued together, as these have been used for various purposes, and even for furniture, and have become public property. Neither do I claim the pressing of a chair seat into a concave form by dies. Neither do I claim a perforated seat, as sheet metal has been employed; but it is cold to the person, and liable to break and to catch the clothing. Neither do I claim a single layer of such material as hard rubber or gutta-percha perforated. This is so expensive as not to be adapted to general use.

My chair seat is a new article, possessing great strength and durability. It is very light and cheap. It forms an agreeable seat. It is not hot in summer or cold in winter. The perforations give the wood a handsome appearance and afford the required ventilation; and the seat is adapted to be secured to any chair frame, as it is easily cut and fitted to the same, and the cost of these seats is less than those made of cane, and they are much more durable.

In the drawings, figure 1 is a plan, with the upper layer of veneer partially removed. Figure 2 is a vertical section of the chair and seat.

I have shown three layers of veneers, A, B, C. The grain of the veneer A crosses that of the veneer B, and the grain of the veneer B crosses that of the veneer C, and these are cemented together by suitable adhesive substance, such as glue. [187]

The seat is of a concave or dishing form, so as to be better adapted to the shape of the person, and the under side of the seat is convex.

The perforations through the seat are to be arranged to produce any design that may be agreeable to the fancy of the person making or using the chair. These perforations make the seat light, and also ventilate the same.

The edges of the seat rest upon and are secured to the chair frame; and in Fig. 2 the frame is rabbeted to form shoulders *f*, upon which the edges of the seat rest.

I claim as my invention:

1. As a new article of manufacture, a chair seat formed of laminæ of wood with the grain crossed, glued together, and concave on the upper surface and convex on the lower surface, adapted to a chair frame, substantially as set forth.

2. A chair seat made of laminæ of wood glued together, with the grains in one layer crossing those of the next, concave on the upper surface, convex on the lower surface, and perforated, as a new article of manufacture, substantially as set forth."

While the first reissue was in life the owners of it brought a suit in equity against the present defendants, in the same court, alleging infringement of the first five claims of the first reissue. An application being made for a preliminary injunction it was denied, in May, 1879. 16 Blatchf. 303. The patent of December, 1865, to the defendant Mayo, and division E of its reissue of August 18, 1868 (both of them mentioned in Gardner's second reissue), being put in evidence, it was held that what was claimed in the first claim of Gardner's first reissue was described in the two Mayo patents, both of which were reissued prior to Gardner's original patent. This related to the veneers, with crossing grains, glued together, of the first four claims of Gardner's first reissue. As to the perforations of the second, fourth and fifth claims of that reissue, the Tice reissue of June 27, 1865, and the Cochran patent of May 22, 1866 (both of them mentioned in Gardner's second reissue), were put in evidence, and it [188] was held that they showed a chair seat of perforated sheet metal, and one of perforated

enameled India rubber or gutta-percha, containing every feature of ventilation and ornamentation, resulting from perforations, which Gardner's perforated chair seat exhibited; and that, in view of those prior perforated seats, there was no patentable novelty in perforating a wooden bottom. The conclusion of the court was that there was nothing new or patentable in the first five claims of Gardner's first reissue, in view of the patents referred to. It was not claimed that the sixth claim of that reissue had been infringed. The defendants' seat bottom involved in that case was made of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance; and there were slots or slits cut through the seat, as long as the length of the seat bottom from front to rear, leaving longitudinal holes of that length, and thus forming ribs or slats, the effect of which was to make the seat bottom yielding and elastic.

A little over five months after this decision was made, the second reissue was applied for, and about four months after it was granted this suit was brought. The answer attacks the novelty and patentability of the invention and the validity of both reissues. After issue, proofs were taken, and in June, 1882, the circuit court rendered a decision, dismissing the bill (20 Blatchf. 588), and from the decree to that effect the plaintiffs have appealed.

The second claim is the only one in question. It will be well here to repeat it: "2. A chair seat made of laminæ of wood glued together, with the grains in one layer crossing those of the next, concave on the upper surface, convex on the lower surface, and perforated, as a new article of manufacture, substantially as set forth." The defendants made and sold such chair seats.

Referring to the decision as to the first reissue, to the effect that veneers, with the grains of the successive layers crossed and cemented together, adapted for the construction of chairs and settees, were shown in the two Mayo patents, and that the Mayo reissue, division E, described the shaping of the material, when made pliable, by compression in a matrix or on formers, and that the Tice and Cochran patents showed perforated chair seats of metal and gutta-percha, the circuit court held, in this case, that the only question open, as to the second reissue, was whether the concavity of form, made an element of the second claim of that reissue, would support the patent. Concurring, as we do, in the views and conclusions of the court, and finding them well expressed in its opinion, we repeat them here:

[189]

"Chair bottoms made of board and softened by steam and pressed to a concave shape in a mold, so that the form of the seat will conform to the shape of the person who may occupy it, are shown in the letters patent issued to Z. B. Bellows, bearing date March 15, 1859. So, also, the concave or dishing form of chair seats had been adopted long before Gardner's patent, in ordinary chair seats. In the specification of the present reissue the inventor states that he does not lay any claim to the veneers crossing each other and glued together, as these have been used for various purposes and have become public property, and that he does not claim the pressing of a chair seat into the concave form by dies.

If there was no patentable novelty in using the perforations of the metal or gutta-percha chair seats in the veneer seat by Gardner, neither can there seem to be any in employing a well known form of chair seat in his veneer seat. As it had been pointed out by Mayo that the material used is pliable and can be pressed into any desired form, and as the reissue disclaims the pressing of a chair seat into a concave form, and as chair seats had been so formed, it is difficult to see how there was any invention in Gardner's chair seat. Gardner merely applied a process that was old to a material that was old, to obtain an old form. Considered as a combination, it is hardly possible to believe that the perforations or the concavity performed any new functions in the Gardner seat. An ingenious feature has been presented, to the effect that the perforations and concavity cooperate, in Gardner's seat, to prevent warping and curling of the material used. If this is true, the same elements were combined in the Baillie chair back and performed there the same functions they performed in the Gardner seat. It may be that the Gardner seat is mechanically a better seat than any which preceded it, but his improvement is not a patentable one.

It is strenuously insisted that the popularity and success achieved by the Gardner seat, beyond those of his predecessors, affords cogent evidence both of the utility and patentable novelty of his invention. The answer to this argument is that the success of his seat is probably due to a feature which is not suggested in the original patent; that is, its adaptability for use by unskilled workmen. His seats, as now made, can be fitted without mechanical skill to a bottomless chair, and are largely used to repair chairs in which the original seats have been worn out, and can be so used without any special skill. They are, also, largely sold to chair manufacturers, because they can be easily adapted to chairs of different sizes and seats of different forms. But the chair seat described in Gardner's original patent, and shown in the drawings, did not practically possess this characteristic of adaptability, but was a frame seat, which could only be fitted to a chair by a skilled laborer. Such a chair seat would fail to meet the peculiar want which the present chair seat supplies. Considered as a new article of manufacture, if the complainant's chair seat has no frame, and its novelty and utility consist in its adaptability to be sold separate from the frame, and to be readily applied by any person to any chair, then the reissue is for a different invention from that disclosed in the original patent.

In conclusion, in view of the former decision of this court, the complainant can only succeed upon the theory that, by imparting a concave form to his chair seat, he has imparted sufficient patentable novelty to his article to sustain a patent; and this, when such a form of chair seat was old, the material used was old, and the method of imparting the form to the material was old. This theory cannot stand."

On the argument of the appeal the following considerations were strongly urged, as grounds for reversing the decree: an article of manufacture is patentable under section 4886 of the

[191] Revised Statutes, if it is new and useful. This chair seat was new and useful. There did not exist before, as an article of manufacture, a chair seat composed of laminæ of wood, with the grains crossed and glued together, molded to be concave, and perforated. The statute makes novelty and utility the only test of patentability. In a suit for infringement, the decision of the Commissioner of Patents is final, as to the matters involved in granting a patent, except as to the questions specifically enumerated as defenses in the five subdivisions of section 4920 of the Revised Statutes. Unless substantially the same thing existed before, the article, if useful, is new and patentable. The decision of the Commissioner of Patents to that effect is not reviewable in a suit on the patent.

It is a sufficient answer to these suggestions to say that the questions presented are not open ones in this court.

In *Mahn* v. *Harwood*, 112 U. S. 354, 358 [Bk. 28, L. ed. 665, 667], it was said: "The statutory defenses are not the only defenses which may be made against a patent. Where it is evident that the Commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no sound principle to prevent a party sued for its infringement from availing himself of the illegality, independent of any statutory permission so to do. * * * In cases of patents for inventions, a valid defense not given by the statute often arises where the question is whether the thing patented amounts to a patentable invention. This being a question of law the courts are not bound by the decision of the Commissioner, although he must necessarily pass upon it." Several cases in this court were there cited to this effect.

On the other point presented it was said, in *Thompson* v. *Boisselier*, 114 U. S. 1, 11 [Bk. 29, L. ed. 76, 79], that, under article 1, section 8, subdivision 8 of the Constitution, a patentee "must be an inventor and he must have made a discovery;" that "the statute has always carried out this idea," referring to section 6 of the Act of July 4, 1836, 5 Stat. at L. 119, and section 24 of the Act of July 8, 1870, 16 Stat. at L. 201, and section 4886 of the Revised Statutes; that "it is not [192] enough that a thing shall be new, in the sense that, in the shape or form in which it is produced, it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery." A large number of cases in this court were there referred to, and one especially where the thing claimed was new, "in the sense that it had not been anticipated by any previous invention, and it was shown to have superior utility; yet it was held not to be such an improvement as was entitled to be regarded in the patent law as an invention." A case to the same effect at this term is *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554 [Bk. 29, L. ed. 952].

It is strongly urged that Gardner's seat is cheap, strong, durable, can be applied to different chair seat frames, can be sold separate from chair seat frames, and can be applied to chair seat frames by unskilled labor; and that, therefore, it was patentable. But these views are fully met by the observations of the court below, above set forth.

The fabric being old, the suggestion to construct chair seats out of it being old, the shaping of it in a former being old, the perforation of a seat for ventilation and ornamentation being old, and the giving of a concave shape to a wooden seat by pressure being old, there cannot, in view of the disclaimers in the second reissue, be anything patentable in the structure. It was convenient to sell and convenient to buy, and commercially a good article. But a patent cannot be taken out for an article, old in purpose and shape and mode of use, when made for the first time out of an existing material, and with accompaniments before applied to such an article, merely because the idea has occurred that it would be a good thing to make the article out of that particular old material. Beyond that, the suggestion in the second reissue, that "the seat is adapted to be secured to any chair frame, as it is easily cut and fitted to the same," is not found in the original patent, or in the first reissue, and is new matter, so far as anything in it can be invoked to confer patentability on the article.

The second reissue appears, by the decision of the examiners-in-chief of the Patent Office, on appeal, found in the record, to have been granted on the sole ground that Gardner's chair seat was an independent article, formed and shaped as described, to be put on the market by itself, and ready to be attached to a chair frame, and not to be marketed as a component part of [193] a chair, but as a seat ready to be fitted and affixed to a chair. Nothing to this purport being found in the original patent, or in the first reissue, and the first reissue having been applied for more than three years and ten months, and the second reissue more than seven years and five months, after the original patent was granted, no ground for patentability can be derived from the insertion of such suggestions in the second reissue.

There was a recent instructive case in England, in the Court of Appeal, before *Lord* Coleridge and *Justices* Field and Bowen (*Saxby* v. *Gloucester Waggon Co.* 7 Q. B. Div. 305), where the question was, whether "the invention specified was such a substantial improvement on what had already been known and published as to render it the proper subject of a patent." The specified patented combination did not before exist, but it existed with the exception of two pieces of mechanism, and their use for the purpose of doing what they did in the combination was well known. But it was held that the combination might have been made "by any intelligent mechanical workman," with no other instructions than those contained in a prior patent to the same inventor; and that there was no novelty in the combination sufficient to constitute a patent. In regard to another branch of the case, it appeared that, taking two prior separate inventions together, every element of the patent in question was to be found in one or the other of those inventions, and it was held that the combination of the two prior inventions did not require "an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant." This case is referred to for the purpose of showing that the question of patentability, as depending on the *quantum* of inventive skill in a given case, is one which the courts of England con-

sider in a suit for infringement. See also *Pa. R. R. Co.* v. *Locomotive Truck Co.* 110 U. S. 490 [Bk. 28, L. ed. 222], and the cases there collected.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[389] UNITED STATES, *Appt.*,
v.
JOHN M. LANGSTON.

(See S. C. Reporter's ed. 389-394.)

Salary of minister to Hayti—repeal of statute by implication.

A statute fixing the salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriate a less amount for the services of such officer for particular fiscal years, and which contain no words that expressly or by clear implication modify or repeal the previous law.

[No. 1322.]

Submitted April 26, 1886. Decided May 10, 1886.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Messrs. A. H. Garland, Atty-Gen, and *Ed. M. Watson,* for appellant.

Mr. Geo. A. King, for appellee.

[390] *Mr. Justice* **Harlan** delivered the opinion of the court:

From September 28, 1877, until July 24, 1885, the claimant, John M. Langston, held the office of Minister Resident and Consul-General of the United States at the Republic of Hayti. At the time he entered upon the discharge of his duties it was provided by statute as follows: "There shall be a diplomatic representative of the United States to each of the Republics of Hayti and Liberia, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be accredited as Minister Resident and Consul-General. The representative at Hayti shall be entitled to a salary of $7,500 a year, and the representative at Liberia to a salary not exceeding $4,000 a year." R. S. § 1683. The sum of $7,500 has been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883. 12 Stat. at L. 534, 569; 13 *Id.* 139, 424; 14 *Id.* 225, 414; 15 *Id.* 58, 321; 16 *Id.* 219, 417; 17 *Id.* 142, 471; 18 *Id.* 67, 321; 19 *Id.* 170, 233; 20 *Id.* 92, 267; 21 *Id.* 134, 339.

In the Act making appropriations for the consular and diplomatic service for the fiscal year ending June 30, 1879, it is provided "That the following sums be and the same are hereby appropriated for the service of the fiscal year ending June 30, 1879, out of any money in the treasury, not otherwise appropriated, for the objects hereinafter expressed, namely: * * * For minister resident and consul-general to Hayti, $7,500 * * * And the salaries provided in this Act for the officers within named, respectively, shall be in full for the annual salaries thereof from and after July 1, 1878; and all laws and parts of laws in conflict with the provisions of this Act are hereby repealed." 20 Stat. at L. 91, 92, 98. Similar provisions were in the Diplomatic and Consular Appropriation Act for the fiscal year ending June 30, 1880. *Id.* 267, 274. A like sum was appropriated for the fiscal years ending June 30, 1881, and June 30, 1882; [391 but the appropriation Acts for those years did not repeat the declaration contained in the Acts for the fiscal years of 1879 and 1880, to the effect that "The salaries provided in this Act for the officers within named, respectively, shall be in full for the annual salaries thereof," etc. 21 Stat. at L. 133, 134, 339.

In the Diplomatic and Consular Appropriation Act of July 1, 1882, certain sums were appropriated "for the service of the fiscal year ending June 30, 1883, out of any money in the treasury, not otherwise appropriated, for the objects therein expressed," one of them being "for ministers resident and consuls-general to Liberia, Hayti, Switzerland, Denmark and Portugal, at $5,000 each, $25,000." 22 Stat. at L. 128. The same Act provided that "hereafter the Secretary of State shall, in the estimates for the annual expenditures of diplomatic and consular service, estimate for the entire amount required for its support, including all commercial agents, and other officers, whether paid by fees or otherwise, specifying the compensation to be allowed or deemed advisable in each individual case." *Id.* 133. It is stated in the brief of the Attorney-General that the Secretary of State made a specific estimate for the salary of the minister resident and consul-general to Hayti for the fiscal years commencing July 1, 1883 and 1884, and that estimate was $5,000 in each report. For each of the fiscal years ending June 30, 1884, and June 30, 1885, the appropriations for the minister resident and consul-general at Hayti was $5,000, and in the same language as that employed in reference to that officer in the Act for the fiscal year ending June 30, 1883.

In the Consular and Diplomatic Appropriation Bill of 1884, the Committee on Appropriations in the House of Representatives reported the following paragraph as part of the bill:

"And the foregoing appropriations for Envoys Extraordinary and Ministers Plenipotentiary, Ministers Resident and Charges d'Affaires, Ministers Resident and Consuls-General, Secretaries of Legation, and Interpreters, shall, after June 30, 1884, be the salary of each officer respectively; and all Acts or parts of Acts inconsistent or in conflict therewith, or which allow a larger salary to any officer or employé herein named, shall be, and are hereby, repealed." Cong. Rec. 48th Cong. 1st sess. part [39 4, p. 4194. This paragraph was omitted from the Act as passed.

The claimant was paid at the rate of $7,500 a year up to and including June 30, 1882, and for the balance of his term at the rate only of $5,000 a year. He brought this suit to recover the difference between those amounts for the period from June 30, 1882, to July 24, 1885. His claim was sustained in the court below, and judgment was rendered in his behalf for $7,666.66.

This case is distinguishable from *United States* v. *Fisher*, 109 U. S. 143, 146 [Bk. 27, L. ed. 885, 887], and *United States* v. *Mitchell*, Id. 146, 149 [*Id.* 887]. In *Fisher's Case* it was held that the clause in the Revised Statutes, fixing the salary of the Chief Justice and

Associate Justices of Wyoming at $3,000 per annum, was suspended by the provision in each of the appropriation Acts for the legislative, executive, and judicial expenses of the Government for the fiscal years ending June 30, 1879, and 1880, which declared that the sums therein specified—among which was $2,600 each to the Governor, Chief Justice, and two Associate Judges of Wyoming—were appropriated "in full compensation," for the service of those years. The claim of Fisher for compensation, on the basis fixed by the Revised Statutes, was consequently rejected. This court said: "We cannot adopt the view of the appellee, unless we eliminate from the statute the words 'in full compensation,' which Congress, abandoning the long used form of the appropriation Acts, has *ex industria* inserted. Our duty is to give them effect. When Congress has said that the sum appropriated shall be in full compensation of the services of the appellee, we cannot say that it shall not be in full compensation, and allow him a greater sum."

In *Mitchell's Case* the claim was for compensation as an Indian interpreter under sections 2070 and 2076 of the Revised Statutes, the first one of which declared that interpreters of a certain class shall be paid $400 a year each, and by the second one of which it was provided that the several compensations prescribed "shall be in full of all emoluments and allowances whatsoever." During the period for which Mitchell claimed compensation at that rate, he received pay at the rate of $300 per annum, under Acts appropriating various sums for interpreters, including seven interpreters [393] for the Indian Tribes among whom Mitchell was assigned to duty, "at $300 per annum, $2,100." 19 Stat. at L. 271. In those Acts there was also a clause to this effect: "For additional pay of said interpreters, to be distributed in the discretion of the Secretary of the Interior, $6,000." It was held that these Acts manifested a change of policy upon the part of Congress, "namely: that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries, and place a fund at the disposal of the Secretary of the Interior from which, at his discretion, additional emoluments and allowances might be given to the interpreters." The appropriation by those Acts of a fixed sum as compensation for certain interpreters during a prescribed period, followed by the appropriation of a round sum as *additional* pay, to be distributed among them in the discretion of one of the Executive Departments, evinced the intention of Congress not to allow further compensation to such appointees during the periods specified.

The case before us does not come within the principle that controlled the determination of the other cases. The salary of the minister to Hayti was originally fixed at the sum of $7,500. Neither of the Acts appropriating $5,000 for his benefit, during the fiscal years in question, contains any language to the effect that such sum shall be "in full compensation" for those years; nor was there in either of them an appropriation of money "for additional pay;" from which it might be inferred that Congress intended to repeal the Act fixing his annual salary at $7,500. Repeals by implication are not favored. It cannot be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each. *Chew Heong* v. *United States*, 112 U. S. 549 [Bk. 28, L. ed. 778]; *State* v. *Stoll*, 17 Wall. 425, 430 [84 U. S. bk. 21, 650]; *Ex parte Yerger*, 8 Wall. 85, 105 [75 U. S. bk. 19, L. ed. 332, 339]; *Ex parte Crow Dog*, 109 U. S. 556, 570 [Bk. 27, L. ed. 1030, 1035]. The suggestion of most weight in support of the view that Congress intended to reduce the salary of the diplomatic representative at Hayti is the improbability that that body would neglect, in any year, to appropriate the full sum to which that officer was entitled under the law as it then existed. On the other hand, it is not prob- [394] able that Congress, knowing, as we must presume it did, that that officer had, in virtue of a statute—whose object was to fix his salary—received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the Act of 1878, 20 Stat. at L. 91, 98, that he should receive that salary from and after July 1, 1878, and again in 1879, that he should receive the same amount from and after July 1, 1879, should, at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible. While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

RICHARD FRANCIS, WM. T. LEVINE, [385]
C. W. READ ET AL., *Appts.*,

v.

JAMES M. FLINN.

(See S. C. Reporter's ed. 385-389.)

Equity jurisdiction—sufficiency of legal remedy.

A bill, the object of which is to have the defendants enjoined from interfering with the pilot business of the complainant, in which the gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have so publicly stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting, is obnoxious to demurrer. Upon the allegations of the bill the plaintiff had a complete legal remedy.

[No. 242.]

Argued and submitted April 20, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Reversed.*

Statement by *Mr. Justice* **Field:**

This is a suit in equity to restrain the defendants from doing certain things charged against them intended to injure the plaintiff, and destroy his property and business. The bill alleges that he is a citizen of Florida, and brings the bill against Richard Francis, individually and as agent for others, and W. T. Levine and thirty-seven others, who are named, and who are citizens of Louisiana. It sets forth that he is a one eighth owner of the steam pilot boat Mary Lee, a decked vessel of over fifty tons burden; that his interest exceeds the value of $5,000; that she was built, and is manned and equipped, [386] and in all respects fitted for the purposes of a pilot boat, and for some months has been, and is now, used as a pilot boat at South Pass, known as The Jetties, at one of the mouths of the Mississippi River; that by Act of Congress of June 1, 1874, the pass, or channel, has been since the beginning of the construction of the jetties under control of the Secretary of War; that the Government has caused the obstructions formerly existing in the channel, known as the bar, to be removed; that the pass is subject to no other regulations than those prescribed by the Secretary; that the plaintiff in his business of pilot has, in all respects, conformed to them; that the captain and other officers of his vessel are duly commissioned under the laws of the United States; that certain persons named Pliny Cox, George A. Falconi, and Hiram Follett are on board as branch pilots, and they act as pilots on vessels inward and outward bound to and from the sea through the South Pass; and, as part owners of the pilot boat, they are licensed under the laws of the United States as branch pilots for the Port of New Orleans; and that as such they are entitled to pilot vessels from the sea to the Mississippi River, and from the river to the sea.

The bill further alleges that, under the laws of the United States relating to the channel known as The Jetties, and to the vessels and steamers of the character of The Mary Lee, the plaintiff, as owner, has a right to have the captain and the pilots, Cox, Falconi, and Follett, protected in the business of piloting through the channel to and from the sea, and is entitled to a decree recognizing his right to render services with his pilot boat to all vessels to and from the sea through the said pass and channel whenever any one of such branch pilots employed by him shall be on board of such vessel, inward and outward bound, drawing more than twelve feet of water; and that any law of Louisiana, or any rules or regulations made by the defendants in contravention of the laws of Congress and the regulations of the Secretary of War, are null and void.

The bill also alleges that the defendants have combined and confederated together for the purpose of destroying the business and property of [387] the plaintiff by publications in the newspapers and by divers and sundry suits, and by injunctions, and "in various other and divers ways," and have instituted suit against J. W. Black, George A. Sheldon, Hiram Follett, Pliny Cox, and George A. Follett [Falconi], all of whom are part owners of The Mary Lee, and three of whom are branch pilots for the Port of New Orleans.

The bill mentions three suits thus brought, one in the United States Circuit Court and two in the state courts, and alleges that they were instituted at the instance of the defendants, and that in them they have charged that Black and others are towing vessels drawing more than twelve feet of water through The Jetties, without branch pilots of the Port of New Orleans; that Follett and Cox are not such branch pilots, but intruders into office; and that Falconi, although a branch pilot, has no right to pilot vessels through The Jetties in the service of the owners or agents of The Mary Lee, because of some agreement with the defendants not to act as pilot on any ship or vessel against their interest. The bill also alleges that the defendants have formed themselves into a pretended partnership, and bound themselves not to do any service as branch pilots for the Port of New Orleans with any other persons than those mentioned in the said confederation; and that these acts are intended to injure and will injure the plaintiff and make his property worthless unless they are restrained by the court. Then follows a prayer that the defendants be enjoined from interfering with the business of the plaintiff in the use of the pilot boat, and with its captain, and with Hiram Follett, Pliny Cox, and George A. Falconi, branch pilots of the Port of New Orleans, in the exercise of their duty as such while in the service of the plaintiff pending the proceedings, "with a view of preserving from waste and destruction his business and property;" and, after due proceedings had, that the injunction be made perpetual, and a decree be entered adjudging that the association or confederation of the defendants, so far as it was designed to interfere with the rights of the plaintiff, his pilot boat and business and branch pilots, is *contra bonos mores*, and in violation of law and of good order, and that all acts done in pursuance thereof are null and void, and that [38 the right of the plaintiff to pursue his occupation with his pilot boat to pilot vessels through the South Pass to and from the sea be recognized pursuant to the Acts of Congress, and for general relief.

The defendants demurred to the bill on various grounds, and, among others, that it does not state any sufficient cause for equitable cognizance or relief in favor of the plaintiff against them, or either of them. The court overruled the demurrer and, the defendants' answer and replication having been filed, proofs were taken and the case heard thereon and on the pleadings. An injunction *pendente lite* was granted, and the decree of the court made the injunction perpetual, from which an appeal was taken to this court.

Mr. **J. R. Beckwith,** for appellants.
Mr. Joseph P. Hornor, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

The bill does not state what the publications were of which the plaintiff complains, or what the divers suits instigated by the defendants were other than those mentioned, in which charges were made as to towing vessels through the pass without pilots, and as to certain per-

sons not being branch pilots, or contracting not to serve as such. Nor does it state any of the other "various and diverse ways" in which he is injured by the defendants.

The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants or others, he can prosecute them for the wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts [280] to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

We think the court below should have sustained the demurrer of the defendants for want of equity in the bill.

The decree must, therefore, be reversed and the cause remanded, with instructions to dismiss the bill; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[279] CAROLINE CARSON, *Plff. in Err.*,

v.

MARY A. HYATT ET AL.

CAROLINE CARSON, *Appt.*,

v.

MARY A. HYATT ET AL.

(See S. C. Reporter's ed. 279-289.)

Removal of causes—questions of fact arising on the petition to be tried in federal court—when petition to be filed.

Where, had the defendant answered on the 4th of November, which was the earliest day she could have been required so to do, there would not have been fourteen days between that and the term of court; and under the Code of Practice of South Carolina the case could not have been tried until the next February Term without her consent; and the same would be true if she had put in her answer on the 16th of December, which was probably the day it was really due, and her petition for removal of the cause had been presented at the February Term, it was held that it was presented "at the term at which the cause could be first tried," according to the meaning of that phrase in the Act of 1875 for the removal of causes.

[Nos. 245, 462.]

Argued Apr. 20, 21, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the State of South Carolina.

APPEAL from the Circuit Court of the United States for the District of South Carolina. *Reversed.*

The case is stated by the court.

Messrs. **H. E. Young, James Lowndes, Clarence A. Seward** and **A. G. Magrath,** for plaintiff in error and appellant.

Messrs. **Edward McCrady, Jr.** and *Edward McCrady,* for defendants in error and appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The records in these cases show that William [280] A. Carson, a citizen of South Carolina, died on the 17th of August, 1856, leaving a will, by which he devised the bulk of his property, real and personal, to his executors, Alexander Robertson and John F. Blacklock, substantially in trust for his widow, Caroline Carson, and his sons, William Carson and James P. Carson, but with a power of sale in the executors. Under these circumstances the executors sold a plantation known as "Dean Hall" to Elias N. Ball, and for the unpaid purchase money he, on the 2d of March, 1857, executed his bonds conditioned for the payment in all of the sum of $31,000, in five equal annual installments from January 14, 1857, with interest from March 2, payable annually, and secured by mortgage on the property. The debts of the estate were all paid in June, 1857, and from that time the executors held the bonds and mortgage of Ball in trust for Mrs. Carson and her two sons. The sons afterwards assigned their interest in the bonds to their mother. Mrs. Carson left South Carolina early in 1861 and went to New York to live. She has never since returned to South Carolina. Her son William came of age in 1863, but he left South Carolina before the late civil war and has been absent [281] ever since. James did not come of age until after the war; and the executor Blacklock was absent from the United States during the whole of it.

In March, 1863, the firm of Hyatt, McBurney & Company, doing business in Charleston, bought "Dean Hall" from Ball, and he, at their request, induced Robertson, the only trustee then in America, to accept payment of the bonds held for Mrs. Carson in confederate treasury notes and discharge the mortgage. This being done, Ball conveyed the property to Edmund Hyatt, William McBurney, William Hasseltine, Thomas R. McGahan, and Alfred L. Gillespie, who composed the firm of Hyatt, McBurney & Co. On the 8th of May, 1863, Hyatt sold his interest in the firm to his other partners, and executed to them a conveyance of this property among the other assets, and the remaining partners gave to him a bond for $40,000, secured by a mortgage on these premises.

After the war ended, Mrs. Carson, then a citizen of New York, brought suit in the Circuit Court of the United States for the District of South Carolina to re-establish the mortgage and to set aside the release which had been executed by Robertson, and for a foreclosure. A decree was entered by the circuit court in accordance with the prayer of the bill; but on appeal to this court that decree was reversed for want of proper parties, and the cause sent back for

further proceedings. *Robertson* v. *Carson*, 19 Wall. 94 [86 U. S. bk. 23, L. ed. 178]. When the case got back to the circuit court the required additional parties were made, and another decree was finally entered, establishing the rights of Mrs. Carson, and ordering a sale of the property. This decree was affirmed here at the October Term, 1878. *McBurney* v. *Carson*, 99 U. S. 567 [Bk. 25, L. ed. 378]. Hyatt was not a party to that suit, he being then a citizen of New York, the same as Mrs. Carson at that time. Under this decree the property was sold, and bought by Mrs. Carson. Hyatt died in New York on the 20th of September, 1876, leaving a will appointing his daughter, Mary A. Hyatt, executrix, and Joaquin Delmonte, executor. Mary A. Hyatt and Julia Delmonte are devisees under the will and heirs at law of his estate, and Mary E. Hyatt is his [282] widow and an heir at law. Joaquin Delmonte is a citizen or subject of Spain, and all the others are citizens of New York. At some time, but precisely when does not appear from the records, these parties filed in the Court of Common Pleas of Charleston, South Carolina, their complaint, which was sworn to on the 15th of October, 1879, against William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, "members of the late firm of Hyatt, McBurney & Co.," and Caroline Carson, for the foreclosure of the mortgage given Hyatt on his retirement from the firm. It does not appear how or by what process the defendants were brought into court, but there is in the record a stipulation of which the following is a copy:

"Mary A. Hyatt, as Executrix and as Devisee and Heir at law of the late Edmund Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt; Mary E. Hyatt, Widow and Heir at law of the said Edmund Hyatt, deceased; and Julia Delmonte, as Devisee and Heir at law of the said Edmund Hyatt,

vs.

"William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

"The time for the defendants in this case to answer having expired, on motion of McCrady & Son, plaintiffs' attorneys, it is ordered that the case be referred to W. D. Clancy, Esq., one of the masters of this court, to take testimony and report the same; and, with the consent of the said plaintiffs' attorneys, it is further ordered that the defendant Caroline Carson do have further time to answer the complaint herein, to wit: until the twenty-fourth day of January next, and that she be allowed to file the same, under the signature of her counsel, who has entered an appearance in the cause, without oath thereto.

"December 16, 1879. A. P. Aldrich.
"We consent. McCrady & Son.
A. G. Magrath."

The record shows an answer of Mrs. Carson, [283] not under oath, and signed only by her counsel, setting up her defense upon the same facts on which she recovered in the other suit. In this answer it is, among other things, stated that early in 1861 she "left South Carolina and went to New York, where she has ever since resided and had her domicil." This answer was filed January 31, 1880, and, on the 16th of February, Mrs. Carson presented her petition for the removal of the suit to the Circuit Court of the United States, the material parts of which are as follows:

"To the Honorable the Judges of the said court:

"Your petitioner, Caroline Carson, respectfully sheweth that the above entitled suit is of a civil nature, and is now pending in this court; the matter or amount in dispute is, exclusive of costs, the sum or value of $500, and is of the value of over $10,000; that the controversy in the said suit is between citizens of different States and between citizens of a State and a citizen or subject of a foreign State; that your petitioner was, at the beginning of this suit, and still is, a citizen of the State of Massachusetts; that the said Joaquin Delmonte then was, and still is, a citizen or subject of Spain, and all the other parties, plaintiffs above mentioned, then were, and still are, citizens of the State of New York; that William McBurney and Thomas R. McGahan then were, and still are, citizens of South Carolina; that Alfred L. Gillespie then was, and still is, a citizen of Tennessee; and William Hasseltine then was, and still is, a citizen of California.

"Your petitioner further says that in the above mentioned suit there is a controversy which is wholly between citizens of different States and between a citizen of a State and a foreign State, namely: between the said plaintiffs and your petitioner, and which can be wholly determined as between them."

Accompanying this petition was the following affidavit:

"Personally appeared before me James Lowndes, and made oath that he is the attorney of Caroline Carson, and has read her petition for the removal of the said cause to the Circuit Court of the United States for the District of South Carolina, and that the facts therein stated are true to the best of his information and be- [28 lief, save that he cannot aver that Dean Hall is of greater value than five thousand dollars and five hundred dollars; that his information as to the domicil of Hasseltine is drawn from a statement made to him by some person, whose name he cannot recall; that his information as to the domicil of Caroline Carson is drawn from these facts, viz.: That about the 1st July, 1877, he received in due course of mail a letter from the said Caroline Carson, dated at Brookline, Massachusetts, in which she informed the deponent that she had made a declaration or affidavit of her change of domicil from New York to Massachusetts; and that deponent continued to receive letters from her in the latter State during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts; and he knows that she has not in fact for many years resided in New York.

"James Lowndes."

On the 25th of March the court refused to stop further proceedings, giving its reasons therefor as follows:

"The plaintiffs in this case, except one a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, who in her answer states that she is also a citizen of that State. She has also filed with her answer an exhibit of a previ-

ous case in the United States Court relating to the same matter, in which cases she was plaintiff, suing as a citizen of the State of New York. No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted showing that her answer was erroneous and the matter therein in reference to her citizenship was inserted by inadvertence or mistake. After this case had been referred to the master, and after the filing of her said answer by the said defendant, and the master, attended by the attorneys for plaintiffs and said defendant, had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this court praying a removal of this case to the Circuit Court of the United States, and alleging that she is a citizen of the State of Massachusetts.

[285] "That petition is not properly verified, and the insufficient affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit.

"I, therefore, hold that the controversy in this case is between a citizen of the State of New York on the one side, and other citizens of the same State and a Spanish subject on the other side; and further, that the petition of defendant for the removal of the case was not filed until after the trial had commenced.

"She is, therefore, not entitled to have the case removed from this court, and her motion to that effect is refused."

On the 9th of March, 1880, a transcript of the record was filed by Mrs. Carson in the Circuit Court of the United States, and on the 10th of December, 1881, the cause came up for hearing in that court on a motion to remand. At this time affidavits were filed showing clearly that Mrs. Carson, in May or June, 1877, changed her citizenship from New York to Massachusetts, and that she had not from that time resided in New York or represented that State as her home. The answer was drawn by her counsel and her domicil in New York stated by inadvertence, without her knowledge. As soon as the answer was seen by her she called attention to the mistake which had been made in this particular. The court, upon consideration of the record and the affidavits, granted the motion to remand, on the ground that, as the petition had not been filed in the state court until after answer and after the master had under the order of reference proceeded to take testimony, it was too late, as the trial had been begun. From this order an appeal was taken, which is one of the cases now under consideration.

Before the motion to remand was decided in the circuit court the state court proceeded with the suit, and on the 30th of August, 1880, a decision was rendered in favor of Mrs. Carson. An appeal was thereupon taken to the supreme court, where the judgment of the common pleas was reversed, on the 16th of July, 1881, and the cause remanded for further proceedings. Afterwards, on the 9th of September, 1881, a decree was rendered in the common pleas against Mrs. Carson, from which she appealed, on the ground, among others, that because of her petition for removal all [286] rightful jurisdiction of the court of common pleas ceased, and its proceedings thereafter were null and void. Afterwards the supreme court affirmed the decree, and in so doing sustained the jurisdiction of the common pleas, giving its reasons as follows:

"The facts stated in this petition were, perhaps, sufficient to entitle the petitioner to the order had the petition been filed within proper time, and had the facts stated been sustained by the record as a whole, but the petition broke down at both of these points. It was not filed as required by the Act of Congress (1875) at or before the term at which the suit could have been tried; nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True, this fact was stated in the petition, but her answer distinctly stated that she was a citizen of New York. Thus the record on its face failed to show the important fact required for removal. *Meyer* v. *Construction Co.* 100 U. S. 457 [Bk. 25, L. ed. 593]. Hence, *Judge* Pressley had no other alternative but to dismiss the petition upon both of the grounds mentioned."

From this decree of affirmance a writ of error has been taken to this court, which presents the other of the two cases now before us.

In our opinion the state court erred in retaining jurisdiction of the suit after the petition for removal was presented, and the circuit court in remanding it after it had been docketed there. The record presents but a single controversy in the suit, and that between the plaintiffs and Mrs. Carson as to the priority of her lien. This is conceded. In this controversy all the other defendants may properly be arranged on the same side with the plaintiffs, and thus leave Mrs. Carson at liberty to apply for a removal without joining the others with her. *Removal Cases*, 100 U. S. 457 [Bk. 25, L. ed. 593]. So far there is no dispute, but the objections to the removal are:

1. That upon the face of the record, as the case stood in the state court, after the petition for removal was presented, Mrs. Carson appeared as a citizen of the same State with some of those on the other side of the controversy; and,

2. That the petition was not in time, because it was not presented "before or at the term at which said cause could be first tried, and before the trial thereof." [287]

1. As to the citizenship. In *Stone* v. *South Carolina*, 117 U. S. 430 [Bk. 29, L. ed. 962] it was said, following the former cases on the subject, that a state court is not bound to surrender its jurisdiction until a case has been made which, on its face, shows that the petitioner for removal has a right to the transfer; but it was also said that "all issues of fact made upon the petition for removal must be tried in the circuit court." The state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further.

In the present case the petition stated, in positive terms, that Mrs. Carson was, at the beginning of the suit, and still continued to be, a citizen of Massachusetts. With that fact established, the necessary citizenship for a removal existed. Whether it was a fact or not, could, under the ruling in *Stone* v. *South Carolina*, only be tried in the circuit court, unless the

statement in the answer filed on behalf of Mrs. Carson estopped her from denying her citizenship in New York. The record of the former suit, which is referred to in the opinion of the common pleas judge, we put entirely out of this branch of the case, because the statements there related to a time long anterior to that in which, according to the affidavit, the change of her citizenship occurred. At most it was only evidence, and had nothing to do with the "face of the record." Neither can we look on the statement in the answer as to her domicil, signed by her counsel only, and not under oath, which was filed some days before her petition for removal was presented, as estopping her from asserting the truth. The affidavits on that subject, filed in the circuit court, show how the mistake arose, and that the statement was promptly denied by Mrs. Carson as soon as it was brought to her attention. Upon the hearing of the motion to remand in the circuit court, there was a full argument by McCrady & Son for the complainants, and by Mr. Young for Mrs. Carson; and the evidence, which was submitted and which was uncontradicted, sufficiently established a change of citizenship [288] from New York to Massachusetts as early as the middle of 1877, and long before this suit was brought.

2. As to the time. The record is silent as to the manner in which Mrs. Carson was brought into court. The complaint could not have been filed before October 15, 1879, because that is the date of its verification. The evidence establishes the fact beyond question that Mrs. Carson was not in South Carolina between October 15 and December 16, 1879. Consequently she could not have been served personally with process in the State between those days. By the Statutes of South Carolina the terms of the Common Pleas of Charleston County began on the second Monday of February, June, and November in each year. The second Monday of November, 1879, fell on the 10th of the month. Consequently, there were only twenty-five days between the 15th of October and the beginning of the November Term of the court for that year. By the Code of Practice of South Carolina, Mrs. Carson, if she had been served personally with process on the 15th of October, could not have been required to answer before November 4, and if by publication, as she might have been, not before December 16. A section of the Code, section 278, as amended, provides: "At any time after issue and at least fourteen days before court, the plaintiff shall file in the clerk's office the summons and complaint in the cause, indorsing thereon the nature of the issue and the number of the docket upon which the same shall be placed; and if the plaintiff fail to do so, the defendant, seven days before the court, may file copies of said papers, with like indorsement, and the clerk shall thereupon place said cause upon its appropriate docket, and it shall stand for trial without any further notice of trial or notice of issue."

The stipulation of December 16, 1879, amounted to a waiver of all default previous to that date, and put the parties in no worse condition than they would have been if Mrs. Carson had filed her answer and put the case at issue at rules. Certainly, we are not to presume, on the face of this record, that she could have been forced to trial at the November Term. Had she answered on the 4th of No- [28
vember, which was the earliest day she could have been required to do so, there would not have been fourteen days between that and the term, and so, under the Code of Practice, the case could not have been tried until the February Term without her consent; and the same would be true if she had put in her answer on the 16th of December, which is probably the day it was really due. Her petition was presented at the February Term, and consequently it was "at the term at which the cause could be first tried," according to the meaning of that phrase in the Act of 1875, as it has been construed. *Babbitt* v. *Clark*, 103 U. S. 606 [Bk. 26, L. ed. 507]; *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84 [Bk. 28, L. ed. 925].

It remains only to consider whether the petition was presented before a trial was begun. The stipulation was not to send the case to the master for "trial," but "to take testimony and report the same." In its effect this was nothing more than an agreement for the appointment of an examiner before whom the testimony in the suit, which was in its nature a suit in equity, could be taken. The master had no authority to find either the facts or the law. His duty was to take and write out the testimony to be reported to the court for use on the trial when it should be begun.

We conclude, therefore, that the suit was removable, and that the petition therefor was presented in time.

The judgment of the Supreme Court of South Carolina is reversed and the cause remanded, with directions that it be sent to the Court of Common Pleas of Charleston County for removal to the Circuit Court, in accordance with the prayer of the petition for that purpose, and the order of the Circuit Court remanding the suit is reversed, and that court is directed to take jurisdiction and proceed to a final determination of the matter in controversy. Reversed.

Mr. Justice **Blatchford** took no part in the decision of these cases.

True copy. Test.
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN MULLAN AND FRANCIS AVERY, [27
Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 271-279.)

Evidence that bill was filed by direction of Attorney-General—resulting benefit to private parties immaterial—coal lands not subject to selection as lieu school lands—when patent set aside.

1. The production of a certified copy of an order, from the Attorney-General to a United States District Attorney, to proceed in the case is sufficient to overcome the objection that the bill does not show on its face that it was filed by the Attorney-General.

2. Coal lands are mineral lands within the meaning of the term as used in the statutes regulating the disposition of the public domain, and were not

subject to selection as lieu school lands by the State of California under the Act of March 3, 1853.

3. Notwithstanding the fact that coal lands were in fact listed to the State by the proper officers of the Government as lieu school lands, the selection can be vacated and the titles under it annulled in a suit in equity brought by the United States directly for that purpose.

[No. 203.]

Argued April 1, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the District of California. *Affirmed.*

The case is stated by the court.

Mr. **Walter H. Smith**, for appellants.

Messrs. **William W. Morrow** and *Wm. A. Maury, Assist. Atty-Gen.*, for appellee.

[272] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a suit brought by the United States to vacate and annul the title of John Mullan and Francis Avery to the N. ½, sec. 8, T. 1 N., R. 1 E., Mount Diablo meridian, listed by the Secretary of the Interior on the 3d of January, 1871, to the State of California as a school indemnity selection, on the ground that when the selection was made and when it was listed the land was coal land, and so known to be, both by the officers of the State who made the selection, and by Mullan and Avery when they afterwards acquired title from the State. The facts are these:

The land in question lies in the midst of a coal-bearing district, and has upon it a valuable coal bed. It is rugged and broken, and of very little if any value for agricultural purposes. As early as 1861 the Black Diamond Coal Mining Company took possession of it and opened a coal mine. The company erected at great expense, upon this and adjoining land, all the necessary works for mining, hoisting and shipping the coal, and continued its operations on the property extensively from the time it entered into possession until evicted in 1877, at the suit of Avery. Its possession was open and notorious; and the principal market for its coal was in San Francisco, or with persons trading there. There was also located on this and adjoining property quite a large mining town, which sometimes had more than one thousand inhabitants. The lands in the township were surveyed and divided into sections in March, 1864, under the direction of the United States Surveyor-General. In the progress of these surveys the mines were found, and to some extent indicated on the plats, which contained abundant evidence of the coal-bearing character of this particular tract.

[273] On the 13th of May, 1865, Frank Barnard, an officer or agent of the Black Diamond Coal Mining Company, applied to the locating agent of the State of California, under the provisions of a Statute of the State entitled "An Act to Provide for the Sale of Certain Lands Belonging to the State," approved April 27, 1866, to purchase these lands and to have them located under the authority of an Act of Congress of March 3, 1853, chap. 145, § 7, 10 Stat. at L. 247, in lieu of an equal quantity of school lands which had in some way been lost to the State. In accordance with this application the location was made for the use of Barnard on the 30th of June, 1865, and approved by the state surveyor-general on the 11th of August. Barnard, however, did not pay for the land, and consequently his title under the location was never perfected.

On the 23d of August, 1868, while the Black Diamond Company was in possession and actually working its mine, Mullan applied to the Surveyor-General of California to purchase the land from the State, as land which had before been selected as school section indemnity. The surveyor-general at first objected because the land was coal land. After some conversation on the subject, in which Mullan was told that the lands were in the neighborhood of the Mount Diablo coal mine and were probably coal lands, his application for the purchase was accepted, he insisting that the lands were state lands, and that the register of the land-office had acknowledged the right of the State to make the selection. This acceptance was on the 25th of August, 1868, and afterwards, on the 27th of April, 1869, the surveyor-general made a formal certificate, of which the following is a copy:

"State of California,
"Office of Surveyor-General,
"Sacramento, 27th April, 1869.

"I hereby certify that, in accordance with the provisions of an Act entitled 'An Act to Provide for the Management and Sale of the Lands Belonging to the State,' approved March 28, 1868, I have located, as a portion of the school lands, 320 acres of public land in the County of Contra Costa, at the request and for the use of John Mullan. Said land is described as follows: [274]

"N. ½ of sec. 8, T. 1 N., R. 1 E., Mount Diablo meridian.

"Taken in lieu of E. ½ of sec. 16, T. 2 N., R. 8 W., Mount Diablo meridian.

"This location has been made by me in the name and for the benefit of the State of California, at the United States Land-Office for the San Francisco District, in the City of San Francisco, and with the consent of John F. Swift, register of said district, bearing date the 28th day of May, A. D. 1865, and the same is entered and numbered upon my register of locations. The said location is hereby approved, and the treasurer of Contra Costa County shall receive in payment therefor, from John Mullan, one hundred and one $\frac{65}{100}$ (101.65) dollars, within fifty days from the date of the surveyor-general's approval, being 20 per cent of the purchase money, and interest on the balance in advance, at the rate of 10 per cent per annum from the date of the approval of the location in the surveyor-general's office.

"John W. Bost, *Surveyor-General.*"

Afterwards, on the 21st of May, Mullan having made the advance payment, a certificate of purchase was executed and delivered to him.

The selection was at some time reported to the General Land-Office, and on the 3d of January, 1871, listed with other tracts by the Secretary of the Interior, to the State, 'subject to any interfering rights that may exist in them."

On the 28th of March, 1871, Mullan got from Avery $1,000 and assigned the certificate of purchase to him as collateral security, at the same time agreeing that on the sale of the land Avery might retain one sixth of the purchase money, and also the $1,000 and interest. At the same time he also executed to Avery a form-

al assignment of all and every his right or cause of action against the Black Diamond Coal Company for taking coal from the premises. Afterwards Avery paid the State the balance due on the purchase money and received a state patent for the land on the 5th of April, 1871. Mullan had resided in San Francisco for [275] at least a year before he made his application for the purchase, and was engaged in real estate business. Avery had also resided there from December 3, 1868, and from his testimony appears to have been familiar with operations of the character of those in which Mullan was engaged.

Not long after Avery got his patent he brought suit against the Black Diamond Company, to recover possession of the property and $1,350,000 for the value of coal taken from it. This suit resulted in a judgment in his favor, on the 6th of June, 1877, for the land and $1,500 damages. He then brought another suit to recover the value of coal taken from the land during the pendency of the former one, in which he claimed damages to the amount of $3,000,000.

After the first suit was begun the coal company applied to the General Land-Office for a recall of the listing of the land to the State, but on an examination of the matter this was refused on the 14th of March, 1872. After the second suit was brought, the Attorney-General, on the application of the company, authorized a bill to be filed in the name of the United States to set aside the title of the State, "upon the understanding that any and all costs and expenses in the matter shall be defrayed by the applicants, and that the proceeding shall be subject to the direction and control of the Attorney-General, in order that the interests of the Government may be fully protected and justice done to any and all parties interested." Under this authority the present bill was filed by the United States Attorney for the District of California, and signed:

"Charles Devens, *Attorney-General.*
By Philip Teare,
United States Attorney for the District of California.

"Hoyt & M'Kee,
Special Attorneys and Counsel."

Upon these facts the circuit court entered a decree vacating the title of the State and of Mullan and Avery, and from that decree this appeal was taken.

It is first objected that the bill should be dis- [276] missed, because it does not show on its face that it was filed by the Attorney-General. On the argument, however, the Assistant Attorney-General produced from the Department of Justice a certified copy of an order of the Attorney-General directing the United States Attorney for the District of California to proceed in the matter; and this it was held, in *Western Pacific R. R. Co.* v. *United States*, 108 U. S. 512 [Bk. 27, L. ed. 806], was enough to overcome such an objection. There is no doubt that the bill was filed on the request of the coal company, and that it is expected some advantage will accrue indirectly to that company from a decree vacating the title under the state selection; but if the title is vacated the lands will be restored to the public domain and be subject to sale by the United States, as coal lands. The United States has, therefore, a direct pecuniary interest in the suit, and this being the case, it is a matter of no importance that others may possibly be benefited by the decree which may be obtained. The Acts of July 1, 1864, 13 Stat. at L. 343, chap. 205, and March 3, 1865, 13 Stat. at L. 529, chap. 107, make ample provisions for the sale of such lands at a price not less than $20 an acre.

The important question in the case is whether the land, being coal land, was open to selection by the State as lieu school land. This was most elaborately considered by the circuit judge, and his opinion, reported in 7 Sawyer, 466, leaves little to be said on the subject. In *Mining Company* v. *Consolidated Mining Co.* 102 U. S. 167 [Bk. 26, L. ed. 126], this court decided that the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the Act of March 3, 1853, was not intended to cover mineral lands. Such lands were by the settled policy of the General Government excluded from all grants at that time, and we quite agree with the circuit judge that "If sections 16 and 36, being mineral lands, do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of lands to be selected under section 7, in lieu of sections 16 and 36." The confirmatory Act of July 23, 1866, 14 Stat. at L. 218, chap. 219, expressly excludes from its operation all selections of mineral land. The case therefore turns on the question whether coal lands are mineral lands, within the meaning of that term [2 as used in the statutes regulating the disposition of the public domain.

The first statute which made any reference to minerals on the public lands was that of September 4, 1841, 5 Stat. at L. 453, chap. 16, sec. 10, which provided that no preemption entry should be made on "lands on which are situated any known salines or mines;" and by the Act of July 1, 1864, 13 Stat. at L. 343, chap. 205, sec. 1, it was provided that "Any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the preemption Act of 1841, and which under past legislation are not liable to ordinary private entry," might be disposed of at a price not less than $20 an acre. This is clearly a legislative declaration that "known" coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that after it was made coal lands were to be treated as mineral lands. That the land now in dispute was "known" coal land at the time it was selected no one can doubt. It had been worked as a mine for many years before, and it had upon its surface all the appliances necessary for reaching, taking out and delivering the coal. That Barnard knew what it was when he asked for its location for his use is absolutely certain, because he was one of the agents of the coal company at the time, and undoubtedly acted on its behalf in all that he did. If Mullan and Avery were ignorant of the fact when they acquired their respective interests in the property, it was because they willfully shut their eyes to what was

going on around them, and purposely kept themselves in ignorance of notorious facts. But the evidence satisfies us entirely that they were not ignorant. The assignment of Mullan to Avery of his claim against the company for coal taken out, made at the same time that he transferred the certificate of purchase, shows the knowledge of all the facts by both when Avery acquired his interest, and Mullan's information on the subject is shown by what took [278] place between him and the Surveyor-General of California when he made his purchase.

At the time the selection was actually made, therefore, it cannot be doubted that the land was mineral land, both in law and in fact, within the meaning of the Act under which the State and those who purchased from the State undertook to acquire title; and we agree with the circuit court in the opinion that the rights of the parties are to be determined by the law as it stood then. Such being the case, we have no hesitation in deciding that the land was not open to the State for selection.

It remains to consider whether, since the land was in fact listed to the State by the proper officers of the Government, the selection can be vacated and the titles under it annulled in a suit in equity brought by the United States directly for that purpose; and about this we have no more doubt than the circuit court seems to have had. The lands were, as we have seen, known coal lands. No one seriously disputes that now; and, in our opinion, upon the well established facts, Mullan and Avery occupy no better position than the State would if no patent had been issued to Avery. They are in every sense of that term purchasers with notice. The case is, therefore, directly within the decisions of this court in *McLaughlin* v. *United States*, 107 U. S. 526 [Bk. 27, L. ed. 621], and *Western Pacific R. R. Co.* v. *United States*, 108 U. S. 510 [Bk. 27, L. ed. 806], where it was distinctly held that patents to the Western Pacific Railroad Company for known mineral lands could be canceled on a bill in equity filed by the United States for that purpose. It is no doubt true that the actual character of the lands was as well known at the Department of the Interior as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the Act of 1853, and that they were open to selection by the State; but this does not alter the case. The list was certified without authority of law, and, therefore, by a mistake against which relief in equity may be afforded. As was said in *United States* v. *Stone*, 2 Wall. 535 [69 U. S. bk. 17, L. ed. 767]: "The patent is but evidence of a grant, and the officer who issues it [279] acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land-office is not competent to cancel or annul the act of his predecessor. This is a judicial act, and requires the judgment of a court." That language is equally applicable to the present case, and its correctness has been often recognized. *Moore* v. *Robbins*, 96 U. S. 533 [Bk. 24, L. ed. 850]; *United States* v. *Schurz*, 102 U. S. 396 [Bk. 26, L. ed. 171]; *Steel* v. *Smelting Company*, 106 U. S. 454 [Bk. 27, L. ed. 229]; *Moffat* v. *United States*, 112 U. S. 24 [Bk. 28, L. ed. 623].

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES [233]
v.
JOHN HAILEY, Admr. of A. H. ROBIN, Deceased.

(See S. C. Reporter's ed. 233-235.)

Jurisdiction—practice.

A suit at law, the trial being by jury, can only be brought to this court by writ of error.

[No. 219.]

Submitted April 7, 1886. Decided May 10, 1886.

FROM the Supreme Court of the Territory of Idaho. *Dismissed.*

Mr. **John Goode,** *Solicitor-Gen.*, for the United States.

No one appeared for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case has been docketed here as an appeal from the Supreme Court of the Territory of Idaho; but, on looking into the transcript, we find that the suit was at law and the trial by a jury. Under such circumstances the only proper way of bringing it here for review would have been by writ of error. *Stringfellow* v. *Cain*, 99 U. S. 610 [Bk. 25, L. ed. 421]; *U. S.* v. *Union Pac. R. R. Co.* 105 U. S. 263 [Bk. 26, L. ed. 1021]; *Hecht* v. *Boughton*, 105 U. S. 235 [Bk. 26, L. ed. 1018]; *Woolf* v. *Hamilton*, 108 U. S. 15 [Bk. 27, L. ed. 635]. In point of fact, however, there has been neither a writ of error, nor an appeal, nor a citation, nor an appearance by the defendant or respondent. It is clear, therefore, we have no jurisdiction, and the case is *dismissed.*

UNITED STATES, *Appt.*, [235]
v.
CENTRAL PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 235-241.)

"Thurman Act"—retention by the Government of earnings of Pacific roads on parts of lines not aided by the Government.

Where one construction of a section of a statute would not only render that section a breach of faith on the part of the United States but an invasion of the constitutional rights of the appellee, we are bound, if possible, so to construe the law as to lay it open to neither of these objections.

[No. 1291.]

Argued April 29, 1886. Decided May 10, 1886.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Mr. **John Goode,** *Solicitor-Gen.*, for appellant.

Messrs. **Joseph E. McDonald** and **John F. Dillon,** for appellee.

[236] *Mr. Justice* **Woods** delivered the opinion of the court:

The appellee, the Central Pacific Railroad Company, brought this suit in the court of claims, against the United States, to recover compensation for services rendered the United States in transporting persons and freight over those parts of its railroad in the building of which it had not been aided by the Government. The United States demurred to the petition, on the ground that it did not allege facts sufficient to constitute a cause of action. The demurrer was overruled and judgment rendered in favor of the claimant for the sum demanded. From that judgment the United States has brought this appeal.

The appellee alleges in its petition that it was originally incorporated on June 28, 1861, under the laws of the State of California; that, with the aid of the grant of lands in alternate sections, and of bonds of the United States issued to it under the Acts of Congress approved July 1, 1862, and July 2, 1864, it built, either directly or indirectly, and became the owner of 865.66 miles of railroad. In addition to this line of road, the construction of which was so aided by the United States, the appellee, during the period covered by the petition, controlled and used 383.67 miles of railroad, acquired by consolidation with other companies, and 1,791.35 miles of railroad leased by it from other companies, making 2,175.02 miles; all of which had been constructed without any aid from the [237] United States under the said Acts of Congress. The petition demanded pay for service of transportation rendered the United States over the 2,175.02 miles of railroad which had been so constructed without its aid.

The contention of the United States was that it was justified in withholding the compensation sued for, by virtue of the provisions of section 2 of the Act of May 7, 1878, chap. 96, 20 Stat. at L. 56, commonly known as the Thurman Act. We do not think this contention is well founded.

The Act of July 1, 1862, chap. 120, 12 Stat. at L. 489, was passed "to aid"—so the title declared—"in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes." The Act of July 2, 1864, chap. 216, 13 Stat. at L. 356, was an amendment to the Act of July 1, 1862. By these Acts certain railroad companies were aided in the construction of their roads. Among them was the appellee, which built the 865.66 miles above mentioned. It was aided in the construction of this part of its road by an issue of bonds made to it by authority of the Acts of July 1, 1862, and July 2, 1864. The Act of July 1, 1862, made the following provisions to secure the payment of the principal and interest of the bonds so issued:

Sec. 5. * * * "The issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph," etc.

Sec. 6. "The grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad, for the Government, whenever required to do so by any department thereof; and the Government shall at all times have the preference in the use of the same for all the purposes aforesaid; * * * and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest, until the whole amount is fully paid; * * * and after said road is completed, until said [23 bonds and interest are paid, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

By the Act of July 2, 1864, it was provided as follows:

"Sec. 5. * * * Only one half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads."

These sections, taken together, constitute the contract between the United States and the appellee. *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 72 [Bk 23, L. ed. 224]; *Sinking Fund Cases*, 99 U. S. 700, 718 [Bk. 25, L. ed. 496]; *Union Pacific R. R. Co.* v. *U. S.* 104 U. S. 662 [Bk. 26, L. ed. 884]. This contract is binding on the United States, and it cannot, without the consent of the Company, change its terms by any subsequent legislation. *Sinking Fund Cases, ubi supra.*

These provisions of the statute law of the United States being still in force, Congress passed the Act of May 7, 1878, being the Thurman Act above referred to. The preamble of this Act mentions by name the companies which have been aided by bonds of the United States, under the Acts of July 1, 1862, and July 2, 1864. The first section declares how the net earnings referred to in those Acts shall be ascertained, and the second section provides as follows:

"That the whole amount of compensation which may, from time to time, be due to said several railroad companies, respectively, for services rendered for the Government, shall be retained by the United States; one half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it, as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned."

The case turns on the true interpretation of this section, the appellant contending that it authorized it to retain compensation earned for transportation over all the roads owned or leased by the appellee, whether the construction of such roads had been aided by the issue of government bonds or not, and the appellee contending that the compensation referred to was that earned by transportation [23 over that part only of its lines which had been assisted by the government subsidy.

The Acts of July 1, 1862, July 2, 1864, and May 7, 1878, all relate to the same subject. The latter Act is declared by its title to be

amendatory of the first two, and its last section provides that each and every of its provisions shall be "held as in alteration and amendment" of the two Acts first mentioned. The three Acts are, therefore, to be construed together as one Act, and one part to be interpreted by another. *U. S.* v. *Freeman*, 3 How. 556, 564 [44 U. S. bk. 11, L. ed. 724, 728]; *Crespigny* v. *Wittenoom*, 4 T. R. 793; *Commonwealth* v. *Slack*, 19 Pick. 304.

One of the provisions of the Act of July 1, 1862, closely allied to the one under consideration, was construed by this court in the case of *U. S.* v. *Kansas Pacific R. Co.* 99 U. S. 455 [Bk. 25, L. ed. 289]. The Kansas Pacific Railway Company was one of the companies to which the United States issued bonds in aid of the construction of its road under the Act just mentioned. Assisted by this issue of bonds, it had built 393¼ miles of road. It afterwards built 245 miles without aid from the Government. The United States brought suit against the company to recover the 5 per cent of net earnings, to be applied to the payment of the bonds and interest, as provided by section 6 of the Act of 1862. One of the controversies in the case was whether the Government was entitled to the 5 per cent net earnings on that part of the road which had been built without government aid. This court decided that it was not. Speaking by *Mr. Justice* Bradley it said: "We are of opinion * * * that the subsidy bonds granted to the company, being granted only in respect of the original road, * * * are a lien on that portion only, and that the 5 per cent of the net earnings is only demandable on the net earnings of said portion." With this decision in view, it would be impossible to hold with any show of reason that the compensation for services rendered the United States, which by the same section was required to be applied to the payment of the same bonds, included compensation for services rendered by a road the construction of which had not been aided by the issue to the company of government bonds.

[240] In the case of *U. S.* v. *Denver Pacific R. Co.*, 99 U. S. 460 [Bk. 25, L. ed. 291], decided at the same term, and in which the judgment was delivered by the same justice, it was held that the United States had no right, under the sixth section of the Act of 1862, to retain compensation for services rendered upon a road, the construction of which it had not aided by its bonds. The ground upon which the court placed its decision was that the Government had no lien except upon a road which it had so aided, and could retain neither the 5 per cent of the earnings of a road to which it had issued no bonds, nor compensation for transportation services thereon.

This court having thus interpreted the Act of July 1, 1862, we cannot, consistently with the established rules of construction, give a different meaning to substantially the same words in the Act of May 7, 1878. *Reiche* v. *Smythe*, 13 Wall. 162 [80 U. S. bk. 20, L. ed. 566]. In the Act of July 1, 1862, the provision is, that "All compensation for services rendered for the Government shall be applied to the payment of said bonds." In the Act of May 7, 1878, the words are, that "The whole amount of compensation * * * for services rendered for the Government shall be retained by the United States," one half to pay interest and the other half to be turned into the sinking fund. If the two Acts are to be construed together and as one Act, we must give the same meaning to like expressions in both. We cannot say in one case that the compensation mentioned means compensation only for services on aided roads, and in the other that it includes compensation for services on roads not aided.

There is another view of this controversy which seems to us conclusive. As the contract between the United States and the Railroad Company contained in the Acts of July 1, 1862, and of July 2, 1864, has been interpreted by this court to authorize the retention by the Government of compensation for services only on those roads which the United States aided in building, the construction which the appellant seeks to put on the second section of the Act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee. We are bound, if possible, so to construe the law as to lay it open to neither of these objections. *Broughton* v. *Pensacola*, 93 U. S. 266 [Bk. 23, L. ed. 896]; *Red Rock* v. *Henry*, 106 U. S. 596 [Bk. 27, L. ed. 251]; *Hobbs* v. *McLean* [Bk. 29, L. ed. 940] decided at the present term, and cases there cited. *U. S.* v. *Coombs*, 12 Pet. 72 [37 U. S. bk. 9 L. ed. 1004]. The construction contended for by the appellee preserves the good faith of the Government, and frees the Act from the imputation of impairing rights secured by the Constitution of the United States. [241]

In our view the construction of the second section of the Act of May 7, 1878, is plain, and not fairly open to controversy. By the Act of July 1, 1862, "all compensation for services rendered for the Government" was to be applied to the payment of the bonds issued by the United States to aid in building the road. By the Act of July 2, 1864, only "one half of the compensation for services rendered for the Government" by said Company was required to be applied to the payment of the bonds. The Act of May 7, 1878, merely restored the provisions of the Act of July 1, 1862, and again required all compensation for services rendered the Government to be applied to the payment of the bonds. This compensation, as we have seen, has been limited by the decisions of this court to compensation for services rendered by the aided roads. The construction of the second section of the Act of May 7, 1878, contended for by the appellee, is therefore right.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[256]

SALT LAKE CITY, *Appt.*, v. ORLANDO J. HOLLISTER, Collector of Internal Revenue.

(See S. C. Reporter's ed. 256-263.)

Internal revenue tax—on spirits distilled by City—want of corporate power on part of City to engage in distilling business, no defense to payment of tax.

1. Corporations are responsible for acts not strictly within their corporate powers, but done in their corporate names and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured. This rule may require a more careful scrutiny in its application to municipal corporations than to corporations for pecuniary profit, but we do not agree that the former are wholly exempt from liability for wrongful acts done, with all the evidence of their being acts of the corporation to the injury of others or in evasion of legal obligations to the State or the public.

2. The question of the liability of corporations on contracts which the law does not authorise them to make, and which are wholly beyond the scope of their powers, is governed by a different principle from that which controls a municipal corporation which seeks to make its want of authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction, by whomsoever conducted. The party entering into a contract with a corporation does so voluntarily. The powers of the corporation are matters of public law, open to his examination, and he must judge for himself as to the power of the corporation to bind itself by the proposed agreement.

3. In cases where corporations have been sued on contracts, the enforcement of which they have resisted, because they were *ultra vires*, the courts have gone a long way to enable parties, who have parted with property or money on the faith of such contracts, to obtain justice, by recovery of the property or the money specifically, or as money had and received to plaintiff's use.

[No. 235.]

Argued April 19, 22, 1886. Decided May 10, 1886.

APPEAL from the Supreme Court of the Territory of Utah. *Affirmed.*

This case is stated by the court.

Messrs. **Franklin S. Richards** and *Sheeks & Rawlins*, for appellant.

Mr. **John Goode**, *Solicitor-Gen.*, for appellee.

Mr Justice **Miller** delivered the opinion of the court:

This suit was instituted by the City of Salt Lake to recover of Hollister the sum of $12,057.75, illegally exacted by him, as Collector of Internal Revenue for the District of Utah, from the City for a special tax upon spirits alleged to have been distilled by said City, and not deposited in the bonded warehouse of the United States by plaintiff, as required by law.

Plaintiff alleges that, under threat of selling sufficient property of the City to pay said tax, it paid the sum demanded under protest, appealed to the Commissioner of Internal Revenue, who failed and neglected to make any decision or to refund the money, and after six months' waiting this suit was brought.

To the petition the defendant made the following answer:

"Now comes the defendant in the above entitled cause, O. J. Hollister, and for answer to the plaintiff's complaint admits that the plaintiff is a public, municipal Corporation, created and organized under and by virtue of the laws of the Territory of Utah, and that it has continued [25 to be such a Corporation since its organization in February, 1850, and that the defendant was at the time mentioned, and as alleged in plaintiff's complaint, and still is, the acting United States Collector of Internal Revenue for the District of Utah.

"Defendant admits that in June, A. D. 1876, the United States Commissioner of Internal Revenue set down to and assessed against the plaintiff a gallon tax of $10,760 upon spirits distilled by said plaintiff at various times between the 2d day of March, A. D. 1867, and the 26th day of August, A. D. 1868, and not deposited in the bonded warehouse of the United States by the plaintiff, as required by law; but denies that said gallon tax was illegally or erroneously set down to or assessed against the plaintiff by said Commissioner of Internal Revenue, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plaintiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

"Said plaintiff, during all the time it operated said distillery, and especially from said 2d day of March, 1867, to said 26th day of August, 1868, was distilling and producing spirits as aforesaid, and receiving and appropriating the benefit arising therefrom.

"Defendant further alleges that the plaintiff, during the time mentioned in plaintiff's complaint, regularly reported and paid to the Collector of Internal Revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but that plaintiff neglected to report all of the spirits it actually produced and distilled, and for and upon which the said gallon tax was due and [258 owing to the United States; and that the tax so assessed as aforesaid is the tax due upon the spirits produced and distilled in excess of the amount so reported by said plaintiff, and upon which no tax was ever assessed and collected up to the time of the payment mentioned in plaintiff's complaint, and hereinafter stated.

"Defendant, answering, admits that the list containing the said gallon tax assessed by the Commissioner of Internal Revenue of the United States was placed in the hands of this defendant as Collector of Internal Revenue.

"And defendant alleges that said plaintiff having engaged in the business of distilling and producing spirits as aforesaid, and said tax having been assessed by the Commissioner of Internal Revenue as aforesaid and placed in the hands of the defendant, as Collector of Internal Revenue, for collection, it became and was his duty as such Collector to collect said tax.

NOTE.—*Taxation; exemption from.* See, generally, Tucker v. Ferguson, 89 U. S. bk. 22, 805, *note.*

"Defendant denies that he knew that said gallon tax, so assessed as aforesaid, was erroneous and illegal, and avers that said tax was legal and correct, and was assessed and collected because plaintiff was liable to said tax.

"Defendant admits that he did threaten to seize and sell the property of plaintiff to pay said tax, as alleged by plaintiff, and that the plaintiff on the 14th day of August, 1877, paid the defendant the amount of the gallon tax, with interest which had accrued thereon from the date of said assessment; but for what reason plaintiff paid defendant said gallon tax defendant is not advised, and upon that subject has no knowledge, information or belief, and therefore cannot answer."

A demurrer to the answer was overruled, and the plaintiff refusing to plead further, a judgment was rendered for the defendant, which was affirmed on appeal to the Supreme Court of the Territory.

It will be perceived that this demurrer admitted that the plaintiff, the City of Salt Lake, had been for a period of about eighteen months engaged in the business of distilling and producing spirits and selling the same, and placing the proceeds of the sale in its treasury. That during this time the plaintiff made regular reports as to the quantity produced and paid the tax on the amount so reported. But that while it thus [259] operated said distillery, it failed and neglected to report all the spirits which it produced; and the tax assessed and collected, and which the present suit is brought to recover back, was for the spirits of which no report was made.

The Commissioner of Internal Revenue having assessed plaintiff for these distilled spirits and placed the assessment in the hands of defendant, he, as a means of collecting the tax, did threaten to seize and sell property of plaintiff; whereupon, plaintiff paid the sum mentioned.

It would seem that this unqualified admission that the City was actually engaged in the business of distilling spirits liable to taxation, and replenishing her treasury with the profits arising from the operation, ought to be a justification of the officer who collected the tax due for the spirits so distilled. And this argument is all the stronger since the City acknowledged its liability as a distiller by paying voluntarily the tax due on the larger part of the spirits produced.

But while the City does not deny the *actual* fact of distillation, and of fraudulent returns by it, it denies the whole affair by argument. It says that, though it is very true the City did distill spirits, did sell them, and did receive the money into its treasury, it cannot be held liable for this because it had no legal power to do so. Its want of corporate authority to engage in distilling is to be received as conclusive evidence that it did not do so, while by the pleading it is admitted that it did. Because there was no statute which authorized it as a City of Utah to distill spirits, it could engage in this profitable business to any extent without paying the taxes which the laws of the United States require of everyone else who did the same thing.

If the Territory of Utah had added to its other corporate powers that of making and selling distilled spirits, then the City would be liable to the tax; but because it had no such power by law, it could do it without any liability for the tax to the United States, or to anyone else.

It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters [260] or articles of incorporation, for they would thus escape taxation and ruin all competitors.

It is said that the acts done are not the acts of the City, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the City grows rich in the performance. It is to be taken as a fair inference on this demurrer that all that the City might have done was done in establishing this business. The officers who, it is said, did this thing, must be supposed to have been properly appointed or elected. Resolutions or ordinances of the governing body of the City, directing the establishment of the distillery and furnishing money to buy the plant, must be supposed to have been passed in the usual mode. Everything must have been done under the same rules and by the same men as if it were a hospital or a town hall. If the demurrer had not admitted this, it could no doubt have been proved on an issue denying it.

But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defense.

The truth is that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their cor- [261] porate name and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured.

This doctrine was announced by this court nearly thirty years ago in a carefully prepared opinion by *Mr. Justice* Campbell in the case of *Philadelphia, W. and B. R. R. Co.* v. *Quigley*, 21 How. 202 [62 U. S. bk. 16, L. ed. 73]. That was an action for libel by Quigley against the company for the publication of a letter addressed to the company in the course of an investigation by its directors in regard to the con-

duct of some of its subordinates. This letter contained statements in regard to plaintiff's skill and capacity as a mechanic, very disparaging in that respect. This, with much other testimony, was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. The argument that only the individuals who ordered the publication could be made responsible was urged then as here, but the court held that if it was a libel the corporation was responsible for it in damages.

It was also insisted that the existence of malice was a necessary element in the action for libel, and that the abstract entity which constituted a corporation was incapable of malice, which could only be predicated of the officers who ordered the publication. This was likewise overruled, and it was held that if the act implied malice, the corporation was liable for it.

The whole question was very fully considered. We can here do no more than make a single extract from the able opinion. After examining the authorities, it was said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body and their agents, with the natural persons with whom they are brought into contact or collision. The result is that for acts done by the agents of a corporation, either [262] *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents of nearly every variety."

In the case of *Reed* v. *Home Sav. Bank*, 130 Mass. 445, the bank was held liable to an action for malicious prosecution. The court said: "It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions for torts as individuals are. The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for nonfeasance and for misfeasance, are against corporations. * * * And, by the great weight of modern authority, a corporation may be liable, even where a fraudulent or malicious intent is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation, as in actions for fraudulent representations, for libel or for malicious prosecution." Many authorities are cited in support of this proposition, which may be found on page 445 of the report of the case.

Another well considered case in which a corporation is held liable for malicious prosecution is that of *Copley* v. *Grover & Baker Sewing Machine Co.* 2 Woods, 494.

It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.

While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted. See *McCreary* v. *Guardians of Poor of Phila.* 9 Serg. & R. 94.

It remains to be observed that the question of the liability of corporations on *contracts* which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong—cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas* v. *R. R. Co.* 101 U. S. 71 [Bk. 25, L. ed. 950]; *Louisiana* v. *Wood*, 102 U. S. 294 [Bk. 26, L. ed, 158]; *Chapman* v. *Douglas Co.* 107 U. S. 355 [Bk. 27, L. ed. 381].

The judgment of the Supreme Court of Utah Territory is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[42

EXTEIN NORTON, *Plff in Err.*,

v.

SHELBY COUNTY, STATE OF TENNESSEE.

(See S. C. Reporter's ed. 425–454.)

Municipal bonds—construction of state statutes—when decision of state courts followed—officer de facto—*existence of an office, essential—ratification of issue of bonds.*

1. The Supreme Court of the State of Tennessee having authoritatively determined that the Act of that State of March 9, 1867, Stat. 1867, chap. 48, sec. 6, etc., creating the board of commissioners of Shelby County and vesting them with authority to issue bonds of the County, was unconstitutional and void, this court is bound by that decision and will not review the question.

2. There can be no officer, either *de facto* or *de jure*, if there be no office to fill. The apparent existence of an office created by an Act of the Legislature, which has been decided to be unconstitu-

tional, does not render it possible that there should be an officer *de facto*. An unconstitutional Act is, in legal contemplation, as inoperative as though it had never passed.

3. The acts of the County Court of Shelby County, in voting taxes for the payment of the bonds in question did not amount to a legal ratification of the issue of the bonds, there not having been a majority of the justices present when these votes were passed, as required by the Act of February 25, 1867.

4. The new Constitution of Tennessee, providing that no county shall loan its credit to an incorporated company or become a stockholder in such company, except upon a prior election and the vote of three fourths of the qualified voters of the county, having gone into effect May 5, 1870, no subsequent act of the county court could operate to render valid a previous void issue of bonds to such a corporation without an election as required by the new constitution.

[No. 194.]

Argued March 24, 25, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Joseph H. Choate, D. H. Poston** and *W. K. Poston*, for plaintiff in error:

That provision of the 25th section of the Act of March 9, 1867, creating the county commissioners of Shelby County, by which, in addition to vesting in them the powers and duties vested in the quarterly court of the County, they were expressly and specifically authorized, among other things, "to subscribe stock in railroads, which the County Court of Shelby County has been authorized by general and special law to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections of directors, and provide for payment of subscriptions as made," was constitutional and valid; even though in deference to the subsequent decision of the Supreme Court of Tennessee, the first clause of the section should be condemned as unconstitutional and void. And the proposition here stated has not been passed upon or considered by any court of the State, but is an original question to be determined here and now.

The well settled rule is that although parts of an Act, or, indeed, most of the provisions of it, be unconstitutional, because beyond the scope of legislative power to enact, yet other provisions in the same Act, which are clearly within the power of the Legislature to enact, and are severable from the rest, may and must be saved from the judicial condemnation.

Cooley, Const. Lim., pp. 211-216, and cases there cited. *Bank of Hamilton* v. *Dudley*, 2 Pet. 526 (27 U. S. bk. 7, L. ed. 508); *Packet Co.* v. *Keokuk*, 95 U. S. 89 (Bk. 24, L. ed. 381); *Allen* v. *La.* 103 U. S. 80 (Bk. 26, L. ed. 318); *Poindexter* v. *Greenhow*, 114 U. S. 271 (Bk. 29, L. ed. 185); *Presser* v. *Ill.* 116 U. S. 252 (Bk. 29, L. ed. 615); *People* v. *Briggs*, 50 N. Y. 553; *Mayor etc. of Hagerstown* v. *Daniel Dechert*, 32 Md. 369.

Viewed in the light of these authorities, the provisions of the 25th section of the Act of March 9, 1867, by which, after completely vesting in the board of commissioners the entire powers which inhered in the county court, it proceeded to confer upon the commissioners, "in addition," certain express powers, which were not, by the Constitution, vested in that court, powers neither judicial nor legislative in their character, but purely administrative, respecting the business affairs of the county, and among the rest "to subscribe for stock in railroads," etc., may well be sustained as constitutional, although the first clause of the section (35), which attempts to substitute the commissioners in the place of the justices of the peace as judges of the county court, be condemned.

It will not be contended that the Legislature might not have created a board of county commissioners and conferred upon them these additional powers alone; or that it could not originally have conferred upon the County the right to subscribe for the stock of railroads by vesting the exercise of it in such a board; and if it could not do that, then clearly having once directed it to be exercised by the justices composing the county court, it could well by a subsequent Act substitute a new agent for the County to exercise the power in its behalf; and that is in substance what the 25th section of this Act does.

The fact that the good, and alleged bad parts of the Act in question appear in the same section is of no importance.

Cooley, Const. Lim. 5th ed. 212.

The decisions of the Supreme Court of Tennessee, relied upon by the defendant in error as declaring the 25th section of the Act of March 9, 1867, to be unconstitutional and void, do not touch the question of the validity of those parts of the section substituting the board of commissioners as the designated agent of the County to subscribe for stock in railroads and issue bonds for the same.

The Supreme Court of Tennessee itself has declared exactly what was decided in *Pope* v. *Phifer* and *Walker* v. *Merriman*, thus: "That the law creating the board of county commissioners, so far at least as it authorized said board to usurp the constitutional functions of the county court, was in violation of the Constitution, and their acts without authority of law, is a proposition not denied."

McLean v. *State of Tenn. and Co. of Shelby*, 8 Heisk. 237.

The power to subscribe for the stock of a railroad and to issue bonds therefor was certainly not one of the constitutional functions of the county court.

That the power to subscribe for stock of a railroad and to issue bonds therefor is a distinct and different power from the power of taxation, although after its exercise the power of taxation which resides in the County must also be exercised to provide for the payment of the bonds; and that it depends wholly on special legislative grant to the County; and that the Legislature may prescribe the mode of its exercise, and the agents by whom it may be exercised, are propositions habitually recognized in the decisions of this court.

Police Jury v. *Britton*, 15 Wall. 566 (82 U. S. bk. 21, L. ed. 251); *Claiborne Co.* v. *Brooks*, 111 U. S. 406 (Bk. 28, L. ed. 470); *U. S.* v. *New Orleans*, 98 U. S. 381 (Bk. 25, L. ed. 225).

There is nothing in the Constitution of Tennessee which expressly, or by implication, restricts or impairs the power of the Legislature to designate any agent it may select to make a

subscription and issue bonds on behalf of a county or other municipal corporation.

See *U. S.* v. *Baltimore & O. R. R. Co.* 17 Wall. 322 (84 U. S. bk. 21, L. ed. 597); *Louisville & N. R. R. Co.* v. *County Ct.* 1 Sneed. 637.

We, therefore, confidently submit that the Legislature of Tennessee might have originally vested the power to subscribe for the railroad stock and issue the bonds therefor on the part of the County in commissioners designated by it for the purpose; and after first designating as such agents the justices of the peace composing the county court, it could by a subsequent Act transfer that agency to the commissioners; that by the 25th section of the Act of March 9, 1867, it did so transfer the agency; that this intent in the enactment was manifestly distinct from, independent of and additional to the intent to invest in the commissioners the inherent powers of the county court which were secured to it by the Constitution; and that although the latter intent may have been beyond the Legislature's power, and so the enactment to that extent may be declared unconstitutional, yet, as it is not merely possible but entirely practicable to separate the two provisions so that each can stand alone, the court will not, and indeed for want of power cannot, involve the separate sound enactment in the condemnation of the unsound, which is embraced in the same section, especially where vested rights have accrued upon the faith of the constitutional provision, and negotiable securities have been issued to *bona fide* holders upon the strength of it. And finally, that there is nothing in the decisions of the courts of Tennessee, on the general question of the unconstitutionality of the law, to embarrass this court in so holding.

Even though the 25th section of the Act of March 9, 1867, should be condemned as unconstitutional in all its parts; yet the subscription to the stock made by the commissioners, and the bonds issued by them while in the undisturbed tenure of their office as justices of the county court, are good and binding as regards third persons and the public, including the holders of the bonds, as the acts of a *de facto court* or of the *de facto officers*.

Clearly, there was legislative authority conferred upon the County itself, by the Act of February, 1867, to subscribe for the stock and to issue the bonds. The power was not vested in the agents, but in the principal, the County, to be exercised through the agents.

The authority to subscribe and issue the bonds having thus been conferred upon the County, to be exercised in its behalf by the county court, the board of commissioners attempted to be created by the Act of March 9, 1867, entered upon the discharge of all the official functions apparently conferred upon them by that Act, and continued to discharge them for more than two years and a half until November 15, 1869. Upon bill filed in the court of chancery they were adjudged by the Chancellor to be lawfully in office. "They were sustained therein by the state authorities," as was subsequently said by the Supreme Court of Tennessee, in the case of *McLean* v. *State of Tenn. and County of Shelby*, 8 Heisk. 235.

Thus under the supposed authority of the Legislature, of the executive power of the State, and of the branch of the judicial power of the State having jurisdiction in the premises in the first instance, the commissioners acted as justices of the county court; and in so doing, and in assuming to be such court, they made the subscription and authorized the issue of the bonds in suit at the regular term of the quarterly court of the County, held by them in January, 1869, at a time when for more than a year and a half all the world had apparently acquiesced in their official authority.

The court will particularly observe that the 25th section of the Act of March 9, 1867, did not abolish or attempt to abolish the county court, known as the quarterly court of the County. It merely substituted the commissioners as the judges to hold that court, in place of the justices of the peace, and vested in them all their powers and duties. The identity of the court was preserved, and its powers, functions and jurisdiction remained unaltered.

The question is, therefore, whether the acts and doings of the commissioners thus holding the county court, though wrongfully installed under an unconstitutional law, performing all the functions and duties of the court for more than two years and a half, are to go for nought, or whether, as to the public and third persons, they are binding and effectual. On this proposition we assert, without the fear of contradiction, that, although their tenure of office may have been unconstitutional and illegal, they were *de facto* officers, and their acts as such were, as to the public and third persons, just as binding and effectual as the acts of the justices of the peace assembled in the county court would have been, if the statute installing the commissioners in their place had not been passed.

Cocke v. *Halsey*, 16 Pet. 71 (41 U. S. bk. 10, L. ed. 891); *Co. of Ralls* v. *Douglass*, 105 U. S. 728 (Bk. 26, L. ed. 957).

Office held under a law enacted by the Legislature, though void as being unconstitutional, is, before it is adjudged to be so, held under such color of title and color of authority as to make the person holding the office an officer *de facto*; and acts of officers performed under such a law are valid as respects the public and third persons interested therein.

State v. *Carroll*, 38 Conn. 449; *Brown* v. *O'Connell*, 36 Conn. 447; *Taylor* v. *Skrine*, 3 Brev. 516; *People* v. *White*, 24 Wend. 520; *Clark* v. *Comm.* 29 Pa. 129; *Comm.* v. *McCombs*, 56 Pa. 436; *Re Ah Lee*, 5 Fed. Rep. 899; *State* v. *Bloom*, 17 Wis. 521; *Demarest* v. *Wickham*, 63 N. Y. 320; *Kimball* v. *Alcorn*, 45 Miss. 151; *Fleming* v. *Mulhall*, 9 Mo. App. 71; *Woodside* v. *Wagg*, 71 Me. 207; *Sheehan's Case*, 122 Mass. 445; *Fowler* v. *Bebee*, 9 Mass. 231.

The courts of Tennessee seem also to have acquiesced in the doctrine.

Ward v. *State*, 2 Cold. 605; *Blackburn* v. *State*, 3 Head, 690.

That, supposing the officer whose act is relied upon to be acting under such color of title as to constitute him an officer *de facto*, an obligation executed by him is as binding on behalf of third persons as any other official act, seems never to have been questioned.

Co. of Rolls v. *Douglass, supra; Knight* v. *Corporation of Wells*, 1 Lutwyche, 188.

By the acts of the county court subsequent to their reinstatement the previous issue of the bonds was ratified by the County.

The acts referred to consist of all those kinds of acts *in pais*, which are usually regarded by courts as equivalent to a formal and express ratification by a principal of acts previously done on his behalf and in his name by one assuming to act for him, but with imperfect authority or no authority at all.

They kept the stock obtained by the original subscription; they confirmed and collected the tax levied therefor by the commissioners, and applied the same to the payment of the bonds; they voted upon the stock at all meetings of the company; from year to year they levied and collected a special tax for the payment of the interest on the bonds, and the installments of principal falling due; in this way they paid the entire issue of the bonds except about 88 bonds, and the interest upon those up to the year 1875; finally they voted for the consolidation of the railroad with the new company, and upon that being consummated, exchanged the original stock for the stock of the new consolidated company, which they still hold and enjoy.

Of the quality and sufficiency of these acts to work a ratification there can be no doubt. The only questions raised are:

1. Whether the original issue of the bonds can be ratified at all.

2. As to the effect of the constitutional provision of 1870 denying power to the counties of the State to lend their credit without a prior vote of the people.

There was complete legislative authority to the County, the party sought to be charged, to make the subscription and issue the bonds. The question presented is whether, when such a power has been granted, and it has been exercised in the name and on behalf of the county by a different agent than that prescribed by the Legislature, the county can afterwards be bound by a ratification deliberately made by the very agent prescribed by the Legislature.

Legislative grants of such authority to a county court, or to any other representative body, have uniformly been construed and treated as grants to the county.

Ralls Co. Ct. v. *U. S. supra; Co. of Daviess* v. *Huidekoper*, 98 U. S. 98 (Bk. 25, L. ed. 112); *Supervisors of Marshall Co.* v. *Schenck*, 5 Wall. 772 (72 U. S. bk. 18, L. ed. 556); *Co. of Scotland* v. *Thomas*, 94 U. S. 682 (Bk. 24, L. ed. 219).

The taking of stock and voting it, and the levy and collection of taxes to pay the subscription or bonds issued therefor, estop the County from denying its liability, assuming it had the right to subscribe.

Nugent v. *Supervisors of Putnam Co.* 19 Wall. 241 (36 U. S. bk. 22, L. ed. 83); *Anderson* v. *State*, 8 Baxt. (Tenn.) 543; *Supervisors* v. *Schenck, supra; Co. of Pendleton* v. *Amy*, 13 Wall. 297 (80 U. S. bk. 20, L. ed. 579); *Co. of Ray* v. *Vansycle*, 96 U. S. 687 (Bk. 24, L. ed. 800); Burr. Pub. Secur. 347-349; *Johnson* v. *Stark Co.* 24 Ill. 90; *Keithsburg* v. *Frick*, 34 Ill. 421; *Hatton* v. *Stewart*, 2 B. J. Lea, 285; *Hart* v. *Dixon*, 5 B. J. Lea, 336; *Bronson* v. *Chappell*, 12 Wall. 683 (79 U. S. bk. 20, L. ed. 436).

All these acts had been done before the Constitution of 1870 went into effect.

The acts of the General Assembly which authorized the counties through which this road ran, to make subscriptions without a submission of the proposition to the vote of the people, was a valid amendment to its charter, conferring new and additional privileges upon the company not in violation of the Constitution, and as such are not rendered void by the Constitution of 1870, nor impaired thereby.

Co. of Scotland v. *Thomas, supra; Tipton Co.* v. *Locomotive Works*, 103 U. S. 523 (Bk. 26, L. ed. 340); *Empire* v. *Darlington*, 101 U. S. 87 (Bk. 25, L. ed. 878).

All the cases cited on behalf of the defendant in error, where ratification was held to be impossible, are cases where there was no grant whatever of legislative authority, or what is the same thing, where the grant offered by the Legislature was made expressly dependent upon a prior vote of the people of the County, which failing, the grant never took effect, and left the County as destitute of power as if the Act had not been passed.

The Constitution of 1870 left the county courts in full control of all previously made subscriptions and debts for them.

See 8 Ohio St. 304; 11 Ohio St. 25; 41 Mo. 457; 44 Mo. 553; 51 Mo. 531; 54 Mo. 58; 2 Ohio St. 607; 14 Ohio St. 472; 13 B. Mon. (Ky.) 1; 23 Minn. 422.

This construction has been followed by the Supreme Court of the United States.

Co. of Callaway v. *Foster*, 98 U. S. 567 (Bk. 23, L. ed. 911); *Co. of Scotland* v. *Thomas*, 94 U. S. 688 (Bk. 24, L. ed. 219); *Co. of Henry* v. *Nicolay*, 95 U. S. 619 (Bk. 24, L. ed. 394); *Co. of Macon* v. *Shores*, 97 U. S. 272 (Bk. 24, L. ed. 889); *Co. of Schuyler* v. *Thomas*, 98 U. S. 169 (Bk. 25, L. ed. 88); *Supervisors* v. *Galbraith*, 99 U. S. 214 (Bk. 25, L. ed. 410); *Fairfield* v. *Gallatin Co.* 100 U. S. 47 (Bk. 25, L. ed. 544); *Ray Co.* v. *Vansycle*, 96 U. S. 684 (Bk. 24, L. ed. 803).

The bonds having been issued before the constitutionality of the Act of March 9, 1867, under which the issue was made, had been passed upon by the highest court of the State, its subsequent decisions holding said Act invalid are not binding upon this court.

Anderson v. *Santa Anna*, 116 U. S. 356 (Bk. 29, L. ed. 633).

We insist that the case of *Pope* v. *Phifer*, 3 Heisk. 682, and *Walker* v. *Merriman*, MS., are out of harmony with the plain reading of the Constitution of 1834, and the decisions of the Supreme Court of Tennessee in *Moore* v. *State*, 5 Sneed, 510, and *Wilcox* v. *State*, 3 Heisk. 110, decided before the *Pope* v. *Phifer* case, and with the case of *Halsey* v. *Gaines*, 2 B. J. Lea, 319, decided afterwards.

In fact in *Lauderdale Co.* v. *Fargason*, 7 Lea, 153, Freeman, *J.*, who delivered the opinion in *Pope* v. *Phifer, supra*, delivered the opinion and decided exactly the reverse of his former opinion, and held that these Acts were not partial laws and were not obnoxious to the Constitution of 1834. This court has uniformly followed the rulings of the Supreme Courts of the several States upon the construction of their own Constitutions and legislative Acts, in so far as they are harmonious, sustained by reason or

authority and not violative of all truth, law and justice; but they refuse to follow the oscillating and unsatisfactory opinions rendered in conflict with previous well adjudicated opinions, and especially where to follow them would affect rules and rights of property acquired in good faith, and predicated upon such former adjudication and interpretation, legislative, executive and judicial.

Gelpcke v. *Dubuque*, 1 Wall. 175 (68 U. S. bk. 17, L. ed. 519).

A contract valid under the laws and adjudications existing, and understood at the time of its execution will not be invalidated by subsequent legislation or adjudication to the contrary.

Havemeyer v. *Iowa City*, 8 Wall. 294 (70 U. S. bk. 18, L. ed. 88); *Ohio Life & T. Co.* v. *Debolt*, 16 How. 432 (57 U. S. bk. 14, L. ed. 1003); *Pine Grove* v. *Talcott*, 19 Wall. 677 (86 U. S. bk. 22, L. ed. 227); *Cass Co.* v. *Johnston*, 95 U. S. 360 (Bk. 24, L. ed. 416); *Douglass* v. *Pike Co.* 101 U. S. 679 (Bk. 25, L. ed. 969).

Questions affecting the validity of commercial securities belong to the domain of general jurisprudence, and are not controlled by state adjudications. A construction tending to destroy contracts, already made, put by a state court upon its own statutes, will not be followed by this court.

Groves v. *Slaughter*, 15 Pet. 449 (40 U. S. bk. 10, L. ed. 800); *Rowan* v. *Runnels*, 5 How. 134 (46 U. S. bk. 12, L. ed. 85); *Planters Bank* v. *Sharp*, 6 How. 324 (47 U. S. bk. 12, L. ed. 456); *State Bank* v. *Knoop*, 16 How. 369, 391 (57 U. S. bk. 14, L. ed. 977, 986); *Ohio Life & T. Co.* v. *Debolt*, *supra*; *Butz* v. *Muscatine*, 8 Wall. 575 (75 U. S. bk. 19, L. ed. 490); *Olcott* v. *Supervisors* 16 Wall. 678 (83 U. S. bk. 21, L. ed. 382); *Pine Grove* v. *Talcott*, *supra*.

Messrs. **Julius A. Taylor, R. D. Jordan** and **W. B. Glisson**, for defendant in error:

It is essential to the plaintiff that the bonds and coupons sued on should have been executed by persons authorized to execute them by the laws of Tennessee; for if there is a total want of authority to issue them, there can be no such thing as a *bona fide* holding.

East Oakland v. *Skinner*, 94 U. S. 258 (Bk. 24, L. ed. 125); *Floyd's Acceptances*, 7 Wall. 666 (74 U. S. bk. 19, L. ed. 169).

The power to issue is claimed to have been conferred by the 25th section of the Act of March 9, 1867, on the persons who did issue them.

If this provision would otherwise be a grant of the power claimed, then no authority was conferred by it; for the Act of 9th March, 1867, has, by a course of decision in Tennessee, been held unconstitutional.

Pope v. *Phifer*, 3 Heisk. 683; *State* v. *Peacock*, MS. 1871; *Shelby Co.* v. *Butterworth*, MS. 1871; *State* v. *Merriman*, MS. 1871; 8 Heisk. 22.

As this court will administer the law in this case as it has been uniformly declared by the Supreme Court of Tennessee—*Olcott* v. *Supers.* 16 Wall. 678 (83 U. S. bk. 21, L. ed. 382); *Township of Elmwood* v. *Marcy*, 92 U. S. 289 (Bk. 23, L. ed. 710); *Town of South Ottawa* v. *Perkins*, 94 U. S. 260 (Bk. 24, L. ed. 154); *Co. of Cass* v. *Johnson*, 95 U. S. 360 (Bk. 24, L. ed. 416); *Fairfield* v. *Gallatin*, 100 U. S. 47 (Bk. 25, L. ed. 544); *Roberts* v. *Bolles*, 101 U. S. 119 (Bk. 25, L. ed. 880); *Scipio* v. *Wright*, 101 U. S. 665 (Bk. 25, L. ed. 1037); *Douglass* v. *Co. of Pike*, 101 U. S. 678 (Bk. 25, L. ed. 968); *Dixon* v. *Field*, 111 U. S. 90 (Bk. 28, L. ed. 363); *Green Co.* v. *Conness*, 109 U. S. 104 (Bk. 27, L. ed. 872); *Taylor* v. *Ypsilanti*, 105 U. S. 71 (Bk. 26, L. ed. 1012);—it will hold the enabling Act relied on violative of the Constitution of Tennessee, of which all persons dealing in bonds issued under it must take notice at their peril.

South Ottawa v. *Perkins*, *supra*; *Pendleton Co.* v. *Amy*, 13 Wall. 297 (80 U. S. bk. 20, L. ed. 579); *Kenicott* v. *Supers.* 16 Wall. 452 (Bk. 21, L. ed. 319); *St. Joseph* v. *Rogers*, 16 Wall. 644 (21 U. S. bk. 21, L. ed. 328); *Town of Coloma* v. *Eaves*, 92 U. S. 484 (Bk. 24, L. ed. 579).

The County of Shelby did not have power to make a subscription, but its county court did for it; and while the Legislature is omnipotent, except when the Constitution imposes limitations, yet as it delegated the power of binding the counties of the State to their quasi local Legislatures, created each county a corporation, gave the justices of the peace in county court assembled the power to act so as to bind the County, that is the only mode and the only tribunal or agency under the laws of Tennessee which could make a valid subscription of stock to the Mississippi Railroad Company.

Code, 402: *Tipton Co.* v. *Locomotive Works*, 103 U. S. 253 (Bk. 26, L. ed. 340); *Lauderdale Co.* v. *Fargason*, 7 Lea, 153; *State* v. *Anderson Co.* 8 Baxt. 258; *Winston* v. *Tenn. & Pac. R. R. Co.* 1 Baxt. 62; *Grant* v. *Lindsay*, 11 Heisk. 664.

The question of legislative authority is always open to inquiry against a *bona fide* holder, and if there is a want of power no legal liability can be created.

McDonald v. *Hovey*, 110 U. S. 619 (Bk. 28, L. ed. 269).

But it is argued that even if the Act was void, then the board of county commissioners was a *de facto* court, and its acts those of *de facto* officers, and binding on the County of Shelby, under the cases of—

Moore v. *State*, 5 Sneed, 514; *Blackburn* v. *State*, 3 Head, 690; *Ward* v. *State*, 2 Cold. 605; *Venable* v. *Curd*, 2 Head, 582; *Pearce* v. *Hawkins*, 2 Swan, 87; *Commonwealth* v. *McCombs*, 56 Pa. 436; *Brown* v. *Lunt*, 37 Me. 333; *Cocks* v. *Halsey*, 16 Pet. 71 (41 U. S. bk. 10, L. ed. 891); *M'Instry* v. *Tanner*, 9 Johns. 135; *Bucknam* v. *Ruggles*, 15 Mass. 180; *Carleton* v. *People*, 10 Mich. 250; *People* v. *White*, 24 Wend. 520; *State* v. *Carroll*, 38 Conn. 449; 12 Am. L. Reg. 165.

These cases all hold that where the act done was *colore officii*, the act is valid as to third parties and the public in a collateral proceeding. The distinction is, where the act is under color of office it is valid; where it is not, it is void; and such has been the holding of the Supreme Court of Tennessee.

Shelby Co. v. *Butterworth*, *supra*; *Reese* v. *Comrs.* 6 Cold. —; *McKean* v. *State*, 8 Heisk. 249; *Brown* v. *Elms*, 10 Humph. 135; *Smith* v. *Ishenhour*, 8 Cold. 214.

There can be no *de facto* officer where no *de jure* office is provided for.

Carleton v. *People*, *supra*; *Ex parte Strang*, 21 Ohio St. 610; *Hooper* v. *Goodwin*, 48 Me. 79.

There must be a legal office in existence, which is being improperly held, to give to the

acts of the incumbent the validity of an officer *de facto*.

Hildreth v. *M'Intire*, 1 J. J. Marsh. 206; *Butterworth* v. *Shelby Co.* MS. 1871.

The doctrine involved here is one of protection to the public and third persons, on the ground of public policy, they not being required to inquire into or be compelled to show title in an officer. When, therefore, in civil cases the public or third persons have knowledge that the officer was not an officer *de jure*, the reason for validating the acts to which they submitted or which they invoked, failed and the law no longer protected them.

State v *Carroll*, 12 Am. L. Reg. 175; *Rex* v. *Lisle*, Strange, 1090; *Rex* v. *Level*, 6 East, 356.

When the plaintiff in error appeared before the county court in October, 1871, he knew, as a matter of fact, that the highest tribunal of Tennessee had decided that the commissioners who issued the bonds in suit were usurpers, and that the Act under which they held office was unconstitutional and void. He cannot now be heard to say that the commissioners were *de facto* officers.

The State of Tennessee has passed no law creating a board of commissioners for Shelby County; no law imposing duties on them; no law abrogating the quarterly court; no law giving the powers hitherto vested in that court to the board of commissioners; for what it cannot do it certainly, in contemplation of law, has not done.

Virginia Coupon Cases, 114 U. S. 288 (Bk. 29, L. ed. 185).

When a statute is adjudged unconstitutional it is as if it had never been, and rights cannot be built up under it.

Cooley, Const. Lim. 227; *Strong* v. *Daniel*, 6 Ind. 348; *Astrum* v. *Hammond*, 3 McLean, 107; *Woolsey* v. *Bank*, 6 McLean, 142; *Detroit* v. *Martin*, 34 Mich. 170; *Hoover* v. *Barkhoof*, 44 N. Y. 118; *Clark* v. *Miller*, 54 N. Y. 528; *Sumner* v. *Beeler*, 50 Ind. 341; *Meagher* v. *Storey Co.* 6 Nev. 244.

It is next insisted that the court below erroneously held that voting, and receiving the stock, levying taxes to pay the coupons and bonds as they matured, and the assurances of the county court given the plaintiff, were not a ratification by the defendant of the unauthorized act of the county commissioners.

If there had been a defective execution of a power to issue the bonds, they could be validated. But here there was no power to issue; the Act under which they were issued was void; hence they were void *ab initio*—even in the hands of an innocent purchaser.

Marsh v. *Fulton Co.* 10 Wall. 676 (77 U. S. bk. 19, L. ed. 1040); *Loan Asso.* v. *Topeka*, 20 Wall. 655 (87 U. S. bk. 22, L. ed. 455); *Thompson* v. *Perrine*, 103 U. S. 806 (Bk. 26, L. ed. 612); *Harshman* v. *Bates Co.* 92 U. S. 569 (Bk. 23, L. ed. 747); *Ottawa* v. *Carey*, 108 U. S. 110 (Bk. 27, L. ed. 669); *Lewis* v. *Shreveport*, 108 U. S. 287 (Bk. 27, L. ed. 730).

The ratification by a public corporation of an Act originally void is of no effect.

House v. *Hilton*, 27 Conn. 538; *People* v. *Flagg*, 17 N. Y. 584; *Mills* v *Gleason*, 11 Wis. 470; *Bles* v. *Bear River Co.* 20 Cal. 602; *Burrell* v. *Burton*, 2 Cliff. C. C. 490; *Marsh* v. *Fulton Co.* *supra*; *Lewis* v. *Shreveport*, 108 U. S. 282 (Bk. 27, L. ed. 728); *Ottawa* v. *Carey*, *supra*.

It matters not whether the County levied taxes to pay and did pay other bonds of this issue, or that it retained and voted the stock, etc. These things are of no avail to plaintiff in error if the want of authority existed in the beginning.

Ottawa v. *Carey* and *Lewis* v. *Shreveport*, *supra*.

Mr. Justice **Field** delivered the opinion of the court: [434]

This is an action upon twenty-nine bonds, of $1,000 each, alleged to be the bonds of Shelby County, Tennessee, issued on the first of March, 1869, and payable on the first of January, 1873, with interest from January 1, 1869, at 6 per cent per annum, payable annually on the surrender of matured interest coupons attached; and three coupons of $60 each. The following is a copy of one of the bonds and of a coupon:

"$1,000 UNITED STATES OF AMERICA, $1,000,

Issued under and by virtue of section 6 of an Act of the Legislature of the State of Tennessee, passed February 25, 1867, amended on the 12th day of February, 1869, and by authority conferred upon the county commissioners of Shelby County by section 25 of an Act passed March 9, 1867.	*State of Tennessee.* (Vignetta.)	A special tax is levied by authority of law upon all the taxable property in the County of Shelby, to meet the principal and interest of these bonds, collectible in equal annual instalments running through six years, as the bonds themselves mature.

Shelby County Railroad Bond No. 176.

Be it known that the County of Shelby, State of Tennessee, is indebted to the Mississippi River Railroad Company or bearer in the sum of one thousand dollars, payable in the City of Memphis on the first day of January, eighteen hundred and seventy-three, with interest at the rate of six per cent per annum from January 1, 1869, payable annually in said city, upon surrender of the matured interest coupons hereto attached.

1,000 dollars.

This is one of three hundred $1,000 bonds, all of the same denomination and rate of interest, issued by Shelby County in payment of a subscription of three hundred thousand dollars to the Mississippi River Railroad Company, made by the county commissioners under the authority of the Acts above recited, transferable by delivery and redeemable in six years, at the rate of fifty thousand dollars a year, commencing January 1, 1870. [435]

Dated at the City of Memphis, County of Shelby, State of Tennessee, the first day of March, 1869.

[Seal, County Court of Shelby County, Tenn.]

Barbour Lewis,
President of the Board of County Commissioners of Shelby County.

Jno. Loague,
Clerk of County Court of Shelby County."

$60 STATE OF TENNESSEE. $60
Shelby County.

Coupon No. —— of Bond No. 264.

The trustee of Shelby County will pay to the bearer sixty dollars in the City of Memphis on

the 1st day of January, 1875, being interest due on bond No. 264, for $1,000, of bonds issued to Mississippi River Railroad Company.

[Seal, County Court of Shelby County, Tenn.]

(Signed) John Logue,

Clerk of Shelby County Court."

The plaintiff contends:

1. That the commissioners, by whose direction the bonds were issued, and whose president signed them, were lawful officers of Shelby County, and authorized, under the Acts mentioned in the heading of the bonds, to represent and bind the County by the subscription to the railroad company, and that the bonds issued were, therefore, its legal obligations.

2. That if the commissioners were not officers *de jure* of the County, they were officers *de facto*, and, as such, their action in making the subscription and issuing the bonds is equally binding upon the County; and,

3. That the action of the commissioners, whatever their want of authority, has been ratified by the County.

The defendant contends:

1. That the commissioners were not lawful [436] officers of the County, and that there was no such office in Tennessee as that of county commissioner.

2. That there could not be any such *de facto* officers, as there was no such office known to the laws; and, therefore, that the subscription was made and the bonds were issued without authority and are void; and,

3. That the action of the commissioners was never ratified, and was incapable of ratification by the County.

Upon the first question presented, that which relates to the lawful existence and authority of the county commissioners, we are relieved from the necessity of passing. That has been authoritatively determined by the Supreme Court of Tennessee, and is not open for consideration by us.

From an early period in the history of the State—indeed from a period anterior to the adoption of her Constitution of 1796, to the passage of the Act of March 9, 1867—the administration of the government in local matters in each county was lodged in a county court, or quarterly court as it was sometimes called, composed of justices of the peace, elected in its different districts. The Constitution of 1796 recognizes that court as an existing tribunal, and the Constitution of 1834 prescribes the duties of the justices of the peace composing it. This county court alone had the power to make a county subscription to the Mississippi River Railroad Company, to issue bonds for the amount, and to levy taxes for its payment unless the Act of March 9, 1867, invested the board of commissioners with that authority. Stat. of 1867, chap. 48, § 6. That Act created the board, and provided that it should consist of five persons, residents of the County for not less than two years, each to serve for the period of five years and until his successor should be elected and qualified. The twenty-fifth section vested in it all the powers and duties then possessed by the quarterly court of the county, and in addition thereto the authority "to subscribe stock in railroads which the County Court of Shelby County has been authorized by general and special law to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections for directors, and provide for payment of subscriptions as made."

The validity of this Act superseding the county court was at once assailed as in violation of the Constitution of the State. Within a month after its passage, William Walker and other justices of the peace of the County, in [43 their official character and as citizens and taxpayers, filed a bill in chancery in the name of the State, at their relation, against the commissioners appointed, alleging that they had usurped and were unlawfully exercising the powers and functions of the justices, and had taken into custody the records of the County under the Act, which the relators insisted was in violation of the Constitution, mentioning several sections with which it conflicted; and praying that the Act be adjudged void, that the attempt of the commissioners to exercise the powers of the justices be declared an usurpation, and that the commissioners be perpetually enjoined from exercising them. The case having been decided adversely to the relators, an appeal was taken to the Supreme Court of the State and, pending the appeal, the subscription to the stock of the Mississippi River Railroad Company was made by the commissioners, and the bonds were issued. Before the appeal was heard the supreme court of the State had under consideration a similar statute passed on the 12th of March, 1868, for Madison County, and extended to White County, which, in like manner, undertook to supersede the quarterly courts of those counties and substitute in their place boards of commissioners with the same powers as those conferred upon the commissioners of Shelby County. The case in which such consideration was had was *Pope* v. *Phifer*, reported in 3 Heisk. 682. Reports of the Supreme Court of the State. Under this Act three Commissioners were appointed by the governor, being the number prescribed to constitute the board of White County. The bill was filed to restrain them from organizing as a board, to have the Act declared unconstitutional, and to perpetually enjoin them from acting under it. The court states in its opinion that the question as to the validity of the Act was argued with great ability by counsel on both sides, and the opinion itself shows that the question was carefully considered. The chancellor, as in the case of the State at the relation of Walker and others against the commissioners, dismissed the bill. The supreme court reversed the decree, and perpetually enjoined the defendants from acting as a board of commissioners. It held that the Act creating the board and conferring on the commissioners appointed by the governor the powers of justices [43 of the peace of the county court, was unconstitutional and void; that the county court was one of the institutions of the State, recognized in the Constitution; that the powers conferred by it upon the justices of the peace in their collective capacity were intended to be exercised by that court; and that the power to tax for purposes of the county could not, by any special or local law, be taken from the justices of the peace as a county court and conferred upon local tribunals of particular counties composed of commissioners appointed by the governor.

This decision was made in February, 1871. In June following the case mentioned above of the State at the relation of Walker and others against the Commissioners of Shelby County was decided in conformity with it, the supreme court holding that at the time the bill was filed the justices were entitled to the relief prayed, and that the decree dismissing the bill was erroneous, and it so adjudged and decreed. But it said that as the Act under which the bill alleged that the defendants had usurped office had since them been repealed, that as they had not afterwards assumed to exercise the powers and perform the duties named in the Act, it was only necessary, in addition to what was decreed above, to dispose of the costs; and that disposition was made by taxing them against the defendants and awarding execution therefor.

In the same month the supreme court decided the case of *Butterworth* against *Shelby County*, which also involved a consideration of the validity of the Act creating the Board of Commissioners of that County.* The action was upon county warrants issued by the board and signed by Barbour Lewis as its president, as the bonds in this suit are signed. The court held that the Act creating the board was unconstitutional, that the board was an illegal body, and that, as a necessary consequence, the warrants of the County were invalid. Judgment was accordingly rendered for the defendant. *Chief Justice* Nicholson, in delivering the [439] opinion of the court, referred to the two decisions mentioned, and said that they had "determined that the Legislature exceeded its constitutional powers in assuming to abolish the county court and substitute in its place a board of county commissioners, with the powers before belonging to the county court. The Act of March 9, 1867, was, therefore, a nullity, and the board of commissioners appointed and organized thereunder was an unauthorized and illegal body. The Act was inoperative as to the existing organization, powers and duties of the county court. Neither the board of commissioners nor Barbour Lewis, its president, had any more powers under said Act than if no Act had been passed."

Counsel for the plaintiff have endeavored to show that the adjudication in these cases has been questioned by later decisions, and therefore should have no controlling force in this litigation. A careful examination of those decisions fails to support this position. The opinion that the Act was invalid because it was special legislation applicable only to certain counties would seem indeed to be thus modified. But the adjudication that the Constitution did not permit the appointment of commissioners to take the place of the justices of the peace for the County, and perform the duties of the county court, stands unimpaired, and as such is binding upon us. Two of the cases, as we have seen, were brought against the commissioners, in one case, of Shelby County, and in the other, of White County, to test the validity of the Acts under which they were appointed, or about to be appointed, and their right to assume and exercise the functions and powers of the justices of the peace, and hold the county court in their place. From the nature of the questions presented we cannot review or ignore this determination. Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a federal statute, or a rule of commercial or general law. In these cases no principle of the Federal Constitution or of any federal law is invaded, and no rule of general or commercial law is disregarded. The determination made relates to the existence of an inferior tribunal of the State, and that, depending upon the constitutional power of the [440] Legislature of the State to create it and supersede a pre-existing institution. Upon a subject of this nature the federal courts will recognize as authoritative the decision of the state court. As said by *Mr. Justice* Bradley, speaking for the court in *Claiborne County* v. *Brooks*: "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on the subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." 111 U. S. 400, 410 [Bk. 28, L. ed. 470, 474]. It would lead to great confusion and disorder if a state tribunal, adjudged by the state supreme court to be an unauthorized and illegal body, should be held by the federal courts, disregarding the decision of the state court, to be an authorized and legal body, and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a state or a federal court. Conflicts of this kind should be avoided if possible, by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction.

On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of their officers; and the passage of her laws. No federal court should refuse to accept such decisions as expressing on these subjects the law of the State. If, for instance, the supreme court of a State should hold that an Act appearing on her statute book was never passed and never became a law, the federal courts could not disregard the decision and declare that it was a law and enforce it as such. *South Ottawa* v. *Perkins*, 94 U. S. 260 [Bk. 24, L. ed. 154]; *Post* v. *Supervisors*, 105 U. S. 667 [Bk. 26, L. ed. 1204].

The decision of the Supreme Court of Ten- [441] nessee as to the constitutional existence of the board of commissioners of Shelby County is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal

*This case does not appear to be reported. A copy of the opinion was furnished the court by counsel.

body; that its members were usurpers of the functions and powers of the justices of the peace of the County; and that their action in holding the county court was utterly void. This court should neither gainsay nor deny the authoritative character of that determination. It follows that in the disposition of the case before us we must hold that there was no lawful authority in the board to make the subscription to the Mississippi River Railroad Company and to issue the bonds of which those in suit are a part.

But it is contended that if the Act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the County. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the Act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the Supreme Court of the State. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, [449] if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative Act, although unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

In *Hildreth* v. *McIntire*, 1 J. J. Marsh. 206, we have a decision from the Court of Appeals of Kentucky which well illustrates this doctrine. The Legislature of that State attempted to abolish the court of appeals established by her Constitution, and create in its stead a new court. Members of the new court were appointed and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional court of appeals. The question was whether the the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another—whether they were judges of the court of appeals and the person acting as their clerk was its clerk. The court said: "Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and [44 void unless they had been regularly appointed under, and according to, the Constitution. A *de facto* court of appeals cannot exist under a written Constitution which ordains one supreme court, and defines the qualification and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one Court of Appeals in Kentucky as long as the Constitution shall exist, and that must necessarily be a court "*de jure*." When the government is entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and a *de facto* Legislature, must be recognized as valid. But this is required by political necessity. There is no government in action except the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them, to others who, sustained by a power above the forms of law, claim to act, and do act, in their stead. But when the Constitution or form of government remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of the incumbents of such department or office cannot be enforced conformably to the Constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional Executive and Legislature, there cannot be any other than a constitutional judiciary. Without a total revolution there can be no such political solecism in Kentucky as a "*de facto*" court of appeals. There can be no such court while the Constitution has life and power. There has been none such. There might be under our Constitution, as there have been, "*de facto*" officers. But there never was and never can be, under the present Constitution, a "*de facto* office." And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed.

In some respects the case at bar resembles [444] this one from Kentucky. Under the Constitution of Tennessee there was but one county court. That was composed of the justices of the county elected in their respective districts. The commissioners appointed under the Act of March 9, 1867, by the governor were not such justices, and could not hold such court, any more than the legislative tribunal of Kentucky could hold the Court of Appeals of that State. In *Shelby County* v *Butterworth*, from the opinion in which we have already quoted, *Chief Justice* Nicholson, speaking of the claim that Barbour Lewis, the president of the board of county commissioners, was a *de facto* officer, after referring to the decisions of the Supreme Court of the State holding that the board of commissioners was an illegal and unconstitutional body, said: "This left the organization of the county court in its former integrity, with its officers entitled to their offices and creating no vacancy to be filled by the illegal action under the Act of 1867. It follows that Barbour Lewis could not be a *de facto* officer, as there was no legal board of which he could be president, and as there was no vacancy in the legal organization. The warrants issued by him show the character in which he was acting, and repel the presumption that he was a *de facto* officer. He could be, under the circumstances, as we can judicially know from the law and the pleadings in the case, nothing but an usurper. There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*."

Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel; but, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanction the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by *Mr. Justice* Manning, of the Supreme Court of Michigan, in *Carleton* v. *People*, 10 Mich. 259, "Where there is no office there can be no officer *de facto*, for the reason that there can be none *de jure*. The county office existed by virtue of the Constitution the moment the new county was organized. No Act of legislation was necessary for that purpose. And all that is required when there is an office to make an officer *de facto*, is that the individual claiming the office is in possession of it, performing its duties and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary that his election or appointment be valid, [445] for that would make him an officer *de jure*. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact."

The case of *State* v. *Carroll*, 38 Conn. 449, decided by the Supreme Court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a landmark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The Constitution of Connecticut provided that all judges should be elected by its General Assembly. An Act of the Legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto* and, as such, his acts were valid. The opinion of *Chief Justice* Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases: that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto*:

"An officer *de facto* is one whose acts, though [446] not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement or condition, as, to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

Of the great number of cases cited by the Chief Justice none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the Act creating the office, but to the unconstitutionality of the Act by which the officer is appointed to an office legally existing. That such was the meaning of the Chief Justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made.

One of them, *Taylor* v. *Skrine*, 3 Brevard, 516, arose in South Carolina in 1815. By an Act of that State of 1799, the governor was authorized to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick, or become unable to hold the court in his circuit. A presiding judge of the court was thus appointed by the governor. Subsequently the Act was declared to be unconstitutional, and the question arose whether the acts of the judge were necessarily void. It was held that he was a judge *de facto* and acting under color of legal authority, and that as such his acts were valid. Here the judge was appointed to fill an existing office, the duties of which the legal incumbent was temporarily incapable of discharging. Another case is *Cocke* v. *Halsey*, in 16 Pet. 71 [41 U. S. bk. 10, L. ed. 891]. It there appeared that, by the Constitution of Mississippi, the judges and clerks of probate were elected by the people. The Legislature provided by law that, in case of the disability of the clerk, the court might appoint one. An elected clerk having left the State for an indefinite period, the judge appointed another to serve during his absence. The law authorizing the appointment was declared unconstitutional, but the acts of the clerk were deemed valid as those of an officer *de facto*. Here the office was an existing one created by law.

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To *Carleton* v. *People*, 10 Mich., 250 we have already referred. By the Constitution of Michigan the laws of the Legislature took effect ninety days after their passage. The Legislature on the 4th of February passed an Act creating a new county, and authorized the election of county officers in April following. The officers were elected within the ninety days, that is, before the Act took effect, and they subsequently acted as such officers. The validity of their acts was questioned on the ground that there was at the time no law that authorized the election, but the offices were existing by the Constitution, and as they subsequently entered upon the duties of those offices, it was held that they were officers *de facto*.

In *Clark* v. *Commonwealth*, from the Supreme Court of Pennsylvania, 29 Pa. 129, the question related only to the title of the officer. The Constitution of that State provided for a division of the State into judicial districts, and for the election of the presiding judge of the county court for each district by the people thereof. The Legislature passed a law transferring a county from one judicial district to another during the term for which the judge of the district had been elected, and while presiding judge of the district to which the county was thus transferred he held court, at which a prisoner was convicted of murder. It was contended that the Act of the Legislature was equivalent to an appointment of a judge for that county, and, therefore, unconstitutional. The supreme court held that, admitting the law to be unconstitutional, the judge was an officer *de facto*, and that the prisoner could not be heard to deny it. Here, also, the office was one created by law, and the only question was as to the constitutionality of the law authorizing the judge to exercise it.

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It is evident, from a consideration of these cases, that the learned Chief Justice, in *State* v. *Carroll*, had reference, in his fourth subdivision, as we have said, to the unconstitutionality of Acts appointing the officer, and not of Acts creating the office. Other cases cited by counsel will show a similar view.

In *Brown* v. *O'Connell*, 36 Conn. 432, the Constitution of the State provided that the judges of the courts should be appointed by the General Assembly. An Act of the Legislature established a police court in the City of Hartford, and provided for the appointment of judges of the court by the common council. It was held that the judge could be appointed only by the General Assembly, and to that extent the Act was unconstitutional. There was no question as to the validity of the Act, so far as it established a police court, and the appointee of the common council was held to be a judge *de facto*.

The case of *Blackburn* v. *State*, 3 Head, 690, only goes to show that the illegality of an appointment to a judicial office does not affect the validity of the acts of the judge. The Constitution of Tennessee requires a judge to be thirty years of age. A judge under that age having been appointed, it was held that he could be removed by a proper proceeding, but until that was done his acts were binding.

In *Fowler* v. *Beebe*, 9 Mass. 231, the Legislature passed an Act erecting the County of Hampden, and provided that the law should take effect from the first of August next ensuing. Before that date the governor, with the advice and consent of the then council, commissioned a person as sheriff of the county. There was no such office at the time his commission was issued, but when the law went into effect he acted under his commission. It was only the case of a premature appointment; and it was held that he was an officer *de facto*, and that the legality of his commission could not be collaterally questioned.

None of the cases cited militates against the doctrine that, for the existence of a *de facto* officer, there must be an office *de jure*, although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of Shelby County who undertook to act as the county court, which could be constitutionally held only by justices of the peace. Their right to discharge the duties of justices of the peace was never recognized by the justices, but from the outset was resisted by legal proceedings, which terminated in an adjudication that they were usurpers, clothed with no authority or official function.

[44

It remains to consider whether the action of the commissioners in subscribing for stock of the Mississippi River Railroad Company and issuing the bonds, of which those in suit are a part, being originally invalid, was afterwards ratified by the County. The county court, consisting of the justices of the peace, elected in their respective districts, alone had power to make a subscription and issue bonds. The sixth section of the Act of February 25, 1867, to which the bonds on their face refer, provides: "That the county court of any county

through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two thirds the estimated cost of grading the roadbed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed, without further reference or delay, to levy an assessment on all the taxable property within the county sufficient to pay said subscription; and the same shall be payable in three equal annual installments, commencing with [450] the fiscal year in which said subscription shall be made. And it shall be lawful for county courts making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated." Stat. 1867, chap. 48, § 6.

On the fifth of the following November the Legislature passed an Act declaring "That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the county courts of said counties, or at any special term of said courts; *Provided*, That a majority of all the justices in commission in the counties respectively shall be present when any such subscription is made; and *Provided further*, That a majority of those present shall concur therein." Stat. 1867, chap. 6, § 1.

Neither of these Acts, as counsel observe, recognizes or in any way refers to the county commissioners, though the last Act was passed eight months after the Act creating the board of commissioners for Shelby County. Both provide that the subscription may be made by the county court, but upon the condition that a majority of all the justices in commission shall be present and a majority of those present shall concur therein.

The county court met on the 15th of November, 1869, for the first time after the passage of the Act of March 9, 1867, and assumed its legitimate functions as the governing agency of the county. On the 11th of April, 1870, it again met and established the rate of taxation for the Mississippi River Railroad bonds at 20 cents on each $100 worth of taxable property. At its meeting on the 16th of that month it ordered that the tax for those bonds should be 10 cents on each $100 worth of property. At the meeting on the 11th there were twenty-two justices of the peace present, of whom eighteen voted for the tax levy, and on the 16th only [451] twelve justices were present. There were in the County at that time forty-five justices in commission. There were no other meetings of the county court until after May 5, 1870, on which day the new Constitution of Tennessee went into effect, which declares that "The credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority."

By this provision of the Constitution the county court, as thus seen, was shorn of any power to order a subscription to stock of any railroad company without the previous assent of three fourths of the voters of the county, cast at an election held by its qualified voters, and of course it could not afterwards, without such assent, give validity to a subscription previously made by the commissioners. It could not ratify the acts of an unauthorized body. To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified. As we said in *Marsh* v. *Fulton County*, where it was contended, as in this case, that certain bonds of that county, issued without authority, were ratified by various acts of its supervisors, "A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could without such [452] vote, by simple expressions of approval or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition." 10 Wall. 676, 684 [77 U. S. bk. 19, L. ed. 1040, 1043]. See also *County of Daviess* v. *Dickinson*, 117 U. S. 657 [Bk. 29, L. ed. 1026]; *McCracken* v. *San Francisco*, 16 Cal. 591, 628.

No election was held by the voters of Shelby County with reference to the subscription for stock of the Mississippi River Railroad Company after the new Constitution went into effect. No subsequent proceedings, resolutions or expressions of approval of the county court with reference to the subscription made by the county commissioners, or to the bonds issued by them, could supersede the necessity of such an election. Without this sanction the county court could, in no manner, ratify the unauthorized act, nor could it accomplish that result by acts which would estop it from asserting that no such election was had. The requirement of the law could not, in this indirect way, be evaded.

The case of *Aspinwall* v. *Comrs. of Daviess Co.* 22 How. 365 [63 U. S. bk. 16, L. ed. 296], is

directly in point on this subject. There the charter of the Ohio and Mississippi Railroad Company, created by the Legislature of Indiana in 1848, as amended in 1849, authorized the commissioners of a county, through which the road passed, to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted on the first of March, 1849, that this should be done. The election was held on that day, and a majority of the voters voted that a subscription should be made. In September, 1852, the board of commissioners pursuant to the Acts and election, subscribed for 600 shares of the stock of the railroad company, amounting to $30,000, and in payment of it issued thirty bonds of $1,000 each, signed and sealed by the president of the board and attested by the auditor of the county, and delivered the same to the company. These bonds drew interest at the rate of 6 per cent per an-
[453] num, for which coupons were attached. The plaintiffs became the holders of sixty of these coupons, and upon them the suit was brought against the commissioners of the county. After the subscription was voted, but before it was made or the bonds issued, the new Constitution of Indiana went into effect, which contained the following provision: "No county shall subscribe for stock in any incorporated company unless the same be paid for at the time of such subscription, nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." Art. 10, § 6. This provision was set up against the validity of the bonds and coupons; and the question arose whether, under the charter of the company and its amendment, the right to the county subscription became so vested in the company as to exclude the operation of the new Constitution. The court held that the provisions of the charter authorizing the commissioners to subscribe conferred a power upon a public corporation, which could be modified, changed, enlarged or restrained by the Legislature; that by voting for the subscription no contract was created which prevented the application of the new Constitution; that the mere vote to subscribe did not of itself form a contract with the company within the protection of the Federal Constitution; that until the subscription was actually made no contract was executed; and that the bonds, being issued in violation of the new Constitution of the State, were void. That Constitution withdrew from the county commissioners all authority to make a subscription for the stock of an incorporated company, except in the manner and under the circumstances prescribed by that instrument, even though a vote for such subscription had been previously had, and a majority of the voters had voted for it. The doctrine of this case was reaffirmed in *Wadsworth* v. *Supervisors*, 102 U. S. 534 (Bk. 26, L. ed. 221].

It follows that no ratification of the subscription to the Mississippi River Railroad Company, of the bonds issued for its payment, could be made by the county court subsequently to the new Constitution of Tennessee, without the previous assent of three fourths of the voters of the County, which has never been given.

[454] The question recurs whether any ratification can be inferred from the action of the county court on the 11th and 16th of April, 1870, which was had before that Constitution took effect. At the meeting of the court on those days a rate of tax was established to be levied for the payment of the bonds, but it appears from its records that on both days less than a majority of the justices of the County were present; and the county court under those circumstances could not even directly have authorized the subscription. The levy of a tax for the payment of the bonds, when a less number of justices was present than would have been necessary to order a subscription, could not operate as a ratification of a void subscription. It is unnecessary to pursue this subject further. We are satisfied that none of the positions taken by the plaintiff can be sustained. The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they subscribed, is still held by the County. If so, the County may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit; and as that cannot be sustained, *the judgment below must be affirmed, and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

THOMAS HOPPER, *Plff. in Err.*,
v.
TOWN OF COVINGTON, INDIANA.

(See S. C. Reporter's ed. 148-151.)

Municipal bonds—power of Indiana municipality to issue—pleading—estoppel.

1. Where a township has no general power to issue negotiable bonds, and bonds issued by it contain no statement of the purpose for which they were issued, and no recital which can bind the town by way of estoppel, special authority to issue them must be alleged and proved.
2. An averment in general terms that the town was authorized to issue the bonds is insufficient. The plaintiff must state the facts which bring the case within the special authority.
3. Gelpcke v. Dubuque, Bk. 17, explained.

[No. 249.]

Argued Apr. 21, 22, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the District of Indiana. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action by a citizen of New York against a Town in Indiana upon certain bonds and coupons.

The complaint alleged "That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana, with full power and authority, pursuant to the laws of said State to execute negotiable commercial paper; that, pur-

suant to the laws of said State regulating the execution of such negotiable commercial obligations, said defendant, on the first day of October, 1878, by its proper officers and agents, executed its negotiable commercial bond payable to bearer ten years after date, at the Farmers' Bank in Covington, Indiana, which bank then was a bank of deposit and discount at said Town of Covington, Indiana; that thereafter and before the maturity of said bond plaintiff purchased the same for a valuable consideration, and is still the owner thereof; a copy of said bond is filed herewith and hereby made part of this complaint, marked Exhibit A," to wit:

"No. 21. United States of America. $500.

"The Town of Covington, State of Indiana, will pay, ten years after date, to the bearer, five hundred dollars, with interest at eight per cent per annum, the interest payable as designated by coupons hereto attached, and the principal upon presentation of the bond when the same [149] shall have become due. This bond shall be payable after five years from the date hereof, at the option of the Town of Covington. Payable at the Farmers' Bank in Covington, Indiana. Each coupon attached shall be *prima facie* evidence of payment of the accrued interest.

"In witness whereof, the corporation seal of said Town is hereto affixed, and this bond is signed by the president of this board of trustees and attested by the clerk thereof, this first day of October, A. D. 1870.

[SEAL.] A. Gish, President.

"Attest: Frank M. Hicks, Clerk."

The complaint then alleged that the plaintiff was the owner of thirty-nine other bonds of precisely like tenor and effect, except that they were differently numbered, and that twenty of them were for $100 each (stating the numbers and amounts of each), and that he purchased each before maturity and for a valuable consideration. "Plaintiff says that said bond, Exhibit A, and each of said other bonds, is past due and wholly unpaid; wherefore plaintiff prays judgment for $20,000 against said defendant, and for all proper relief."

The complaint also contained a count, with similar allegations, upon coupons for interest, attached to such bonds at the time of their execution, and in this form:

"$40 Covington, Ind., October 1, 1879.

"One year after date the Town of Covington, Ind., will pay to the bearer, in the City of New York, forty dollars, being one year's interest on bond No. 21. A. Gish, Pres't.

"Attest: Frank M. Hicks, Clerk."

The defendant demurred to the complaint, because it stated no cause of action against the defendant; because it did not allege under what law or for what purpose the bonds and coupons sued on were issued; because it contained no allegation showing authority in the defendant to make the bonds and coupons sued on; [150] and because the allegation in the complaint, of power and authority in the defendant to make the bonds and coupons in suit, was an averment of a legal conclusion.

The court sustained the demurrer, and rendered judgment for the defendant; and the plaintiff sued out this writ of error.

Messrs. **Joseph E. McDonald** and *John M. Butler*, for plaintiff in error:

Incorporated towns, as municipal corporations of the State of Indiana, are empowered by law to issue commercial obligations for some purposes.

Bank of New Albany v. *Danville*, 60 Ind. 504; *Smith* v. *Madison*, 7 Ind. 86; *New England, etc. Co.* v. *Robinson*, 25 Ind. 536; Ang. and Ames Corp. § 257; *The Board, etc.* v. *Day*, 19 Ind. 450; *Mills* v. *Gleason*, 11 Wis. 470; *Miller* v. *Board of Comrs.*, 66 Ind. 162; *Evansville, etc. R. R. Co.* v. *Evansville*, 15 Ind. 412; 1 Dill. Mun. Corp. § 83.

Obligations of this character have been uniformly recognized by this court and by all the courts of the country as having in fact, as well as in name, all the qualities of commercial paper.

Gelpcke v. *Dubuque*, 1 Wall. 206 (68 U. S. bk. 17, L. ed. 519); *Mercer Co.* v. *Hackett*, 1 Wall. 95 (68 U. S. 17, L. ed. 548); *Ackley School Dist.* v. *Hall*, 113 U. S. 140 (Bk. 28, L. ed. 954); *Mfg. Co.* v. *Bradley*, 105 U. S. 180 (Bk. 26, L. ed. 1034); *Rogers* v. *Burlington*, 3 Wall. 666 (70 U. S. bk. 18, L. ed. 79); *Commissioners, etc.* v. *Clark*, 94 U. S. 287 (Bk. 24, L. ed. 63).

It is a presumption of law that public officers act in accordance with, and not contrary to, law.

They are not mere agents, with reference to such bonds as these in suit; but they are as well the tribunal vested with power to determine as to whether they may rightfully issue the bonds.

Martin v. *Mott*, 12 Wheat. 19 (25 U. S. bk. 6, L. ed. 537); *Coloma* v. *Eaves*, 92 U. S. 490 (Bk. 23, L. ed. 579); *U. S.* v. *Crusell*, 14 Wall. 4 (81 U. S. bk. 20, L. ed. 821); *Strother* v. *Lucas*, 12 Pet. 438 (37 U. S. bk. 9, L. ed. 1137); *U. S.* v. *Clarke*, 8 Pet. 452, 453 (33 U. S. bk. 8, L. ed. 1001); *Delassus* v. *U. S.*, 9 Pet. 134 (34 U. S. bk. 9, L. ed. 71); *U. S.* v. *Peralta*, 19 How. 347 (60 U. S. bk. 15, L. ed. 678); *Bank of U. S.* v. *Dandridge*, 12 Wheat. 70 (25 U. S. bk. 6, L. ed. 552); *Cornett (Nash)* v. *Williams*, 20 Wall. 250 (87 U. S. bk. 22, L. ed. 254); *Carpenter* v. *Rannels*, 19 Wall. 146 (86 U. S. bk. 22, L. ed. 77); *McNitt* v. *Turner*, 16 Wall. 363 (83 U. S. bk. 21, L. ed. 341); *Supervisors* v. *Schenck*, 5 Wall. 782 (72 U. S. bk. 18, L. ed. 556); *Pendleton* v. *Amy*, 13 Wall. 305 (80 U. S. bk. 20, L. ed. 579); *Commissioners* v. *January*, 94 U. S. 205, 206 (Bk. 24, L. ed. 110).

The authorities above cited in support of our second proposition illustrate its applicability to a great variety of cases. In no case is its applicability more apparent than in the case at bar. The town officers are authorized to act upon the existence of certain conditions, but of the existence of those conditions they are made the exclusive judges as to third parties. The fact that they act presupposes the existence of necessary conditions and their own judicial determination as to the performance of such precedent conditions. The existence of these bonds, the execution of which is averred, implies everything precedent; and "what is implied in a record, pleading, will, deed or contract is as effectual as what is expressed."

Cornett (Nash) v. *Williams*, *supra*.

When a corporation has power under any

circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.

Lexington v. *Butler*, 14 Wall. 296 (81 U. S. bk. 20, L. ed. 809); *Gelpcke* v. *Dubuque*, 1 Wall. 203 (68 U. S. bk. 17, L. ed. 519; *Supervisors* v. *Schenck, supra; San Antonio* v. *Mehaffy*, 96 U. S. 314 (Bk. 24, L. ed. 816); *Co. of Macon* v. *Shores*, 97 U. S. 278, 279 (Bk. 24, L. ed. 889); *Merchants Nat. Bank* v. *State Bank*, 10 Wall. 604 (77 U. S. bk. 19, L. ed. 1008); *Farm. and Mech. Bank* v. *Butchers and Drovers Bank*, 16 N. Y. 125; *Mayor* v. *Lord*, 9 Wall. 414 (76 U. S. bk. 19, L. ed. 704).

The plaintiff in error cannot be required to aver or prove the performance of any of the requisites necessary to give the bonds validity. The want of such performance (if any exists), is a matter of defense.

Lincoln v. *Cambria Iron Co.* 103 U. S. 416 (Bk. 26, L. ed. 518); *Co. of Clay* v. *Society for Savings*, 104 U. S. 586 (Bk. 26, L. ed. 856); *Gelpcke* v. *Dubuque*, 1 Wall. 223 (68 U. S. bk. 17, L. ed. 519).

Recitals in municipal bonds neither give to nor take away from such bonds their character as commercial securities governed by the law-merchant; they may, and often do, create an estoppel in favor of a *bona fide* holder, which would not exist but for the recitals, but they never create authority to issue such bonds, nor do they make the bonds when issued any more or less commercial securities governed by the law-merchant than they are without recitals.

Ackley School Dist. v. *Hall*, 113 U. S. 130 (Bk. 28, L. ed. 954); *Dixon Co.* v. *Field*, 111 U. S. 83 (Bk. 28, L. ed. 360); *Hayes* v. *Holly Springs*, 114 U. S. 126 (Bk. 29, L. ed. 81).

Absolute lack of authority of law, upon the part of a municipal corporation, to issue commercial obligations for any purpose whatever, would be equally fatal to the bonds, whether they did or did not contain recitals, no matter how innocent a *bona fide* holder might be.

But in the case at bar it has been shown that the Town of Covington had full, lawful authority to issue commercial obligations for some purposes under some circumstances. The Town of Covington did issue these bonds. They are in form and character commercial obligations governed by the law-merchant.

The plaintiff is a *bona fide* purchaser for value before maturity.

The fact that the Town of Covington paid the interest on these bonds for six years—while we do not claim that it works an estoppel in favor of plaintiff, or that it is, of itself, conclusive against the defendant—certainly is a circumstance entitled to much weight in the consideration of the case.

Messrs. **Thomas F. Davidson,** and *John C. Black*, for defendant in error.

Mr. Justice **Gray,** after stating the case as above, delivered the opinion of the court:

The Town of Covington had no general power to issue negotiable bonds. If the general Statute of Indiana of June 11, 1852, under which it was incorporated, conferred any power upon towns to issue bonds, it was only for certain municipal purposes therein specified; and the general Statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only. 1 Gavin & Hord, Stat. 623-626, Davis, Supp. 116.

The bonds in suit containing no statement of the purpose for which they were issued, and no recital which can bind the Town by way of estoppel, anyone suing upon the bonds is bound to allege and prove the authority of the Town to issue them.

The plaintiff relies on the statement of *Mr. Justice* Swayne in *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203 [68 U. S. bk. 11, L. ed. 520, 524], repeated by him and by *Mr. Justice* Clifford in later cases, that "When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." *Supervisors* v. *Schenck*, 5 Wall. 772, 784 [72 U. S. bk. 18, L. ed. 556, 560]; *Lexington* v. *Butler*, 14 Wall. 282, 296 [81 U. S. bk. 20, L. ed. 809, 812]; *San Antonio* v. *Mehaffy*, 96 U. S. 312, 314 [Bk. 24, L. ed. 816, 817;] *Macon Co.* v. *Shores*, 97 U. S. 272, 279 [Bk. 24, L. ed. 889].

But the circumstances thus spoken of were the preliminary facts requisite to the exercise of the power, not the limits, fixed by law, of the objects and purposes for which the power could be exercised at all. In each of the cases [15
cited, the defects suggested were in the requisite preliminary proceedings, and the bonds sued on appeared by recitals on their face to have been issued according to law. When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. *Marsh* v. *Fulton Co.* 10 Wall. 676 [77 U. S. bk. 19, L. ed. 1040]; *East Oakland* v. *Skinner*, 94 U. S. 255 [Bk. 24, L. ed. 125]; *Buchanan* v. *Litchfield*, 102 U. S. 278 [Bk 26, L. ed. 138]; *Dixon County* v. *Field*, 111 U. S. 83 [Bk. 28. L. ed. 360]; *Hayes* v. *Holly Springs*, 114 U. S. 120 [Bk. 29, L. ed. 81]; *Davies Co.* v. *Dickinson*, 117 U. S. 657 [Bk. 29, L. ed. 1026].

A demurrer admits only facts, and facts well pleaded. The Town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the Town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority. There is nothing in this declaration, or in the copies of instruments annexed to and made part of it, which shows, or has any tendency to show, for what purpose the bonds were made. The averment, that the defendant is a municipal corporation under the laws of Indiana, "with full power and authority, pursuant to the laws of said State, to execute negotiable commercial paper," if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the State, of which the courts of the United States take judicial notice. The averment that the bonds held by

the plaintiff were executed pursuant to the laws of the State, is but a statement of a conclusion of law which is not admitted by demurrer. The declaration is fatally defective for not stating the facts necessary to enable the court to judge for itself whether that conclusion of law has any foundation in fact. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 175 [80 U. S. bk. 20, L. ed. 557]; *Cragin* v. *Lovell*, 109 U. S. 194 [Bk. 27, L. ed. 903]; *Kennard* v. *Cass Co.* 8 Dill. 147; *Broome* v. *Taylor*, 76 N.Y. 564; *Cotton* v. *New Providence*, 18 Vroom, 401.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[152] NICHOLAS E. PAINE, *Plff. in Err.*,

v.

CENTRAL VERMONT RAILROAD COMPANY.

(See S. C. Reporter's ed. 152-161.)

Action on demand note, with interest, made and delivered by corporation to subscriber for advances—Massachusetts and Vermont Statutes—payment by stock assessments—when overdue—practice.

1. The only question presented by a writ of error in a case which was submitted to the judge of the circuit court as referee, in accordance with state statutes and practice, is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee.

2. A promissory note payable on demand, with interest, was made by the defendant corporation and delivered to a subscriber to its stock in consideration of money advanced by him, it being understood that subsequent stock assessments should, when payable, be not only set off against, but considered as payments upon, the note. Upon such assessments being made on the payee's stock to an amount larger than that of the note, he paid the difference but did not surrender the note. In a suit upon the note by a subsequent indorsee, it is *held* that, as between the defendant and the payee, or any one taking the note when overdue, it was paid.

3. The Statutes of Massachusetts and Vermont fix the reasonable time beyond which a demand note shall be deemed overdue, at sixty days.

[No. 221.]

Argued April 8, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the District of Vermont. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action of assumpsit, brought October 1, 1878, in the Circuit Court of the United States for the District of Vermont, by a citizen of New York as indorsee, against a Vermont corporation as maker, of the following promissory note:

"$5000. Boston, July 10, 1878.

"On demand after date, with interest, we promise to pay to the order of H. B. Wilbur, Treasurer, five thousand dollars.

"Central Vermont R. R. Co.

"As Receivers and Managers Vermont Central, and Vermont and Canada R. R.

"By H. B. Wilbur, Treasurer.

"No. 8. Value received. Approved.

"J. Gregory Smith, President.

"H. B. Wilbur, Treasurer."

On August 28, 1879, the defendant pleaded the general issue, with a specification of defense, in accordance with the Statutes of Vermont (Gen. Stat. 1862, chap. 30, §§ 15, 32; Rev. Laws 1880, §§ 908, 909), that the defendant was organized as a corporation on May 27, 1878; that on July 10, 1878, it delivered the note in suit to John Q. Hoyt, an original subscriber to the defendant's capital stock, and then holding shares of that stock of the par value of $50,000, only partially paid for; that on that day the defendant being in urgent need of money, and not having time to regularly lay and collect an assessment on its capital stock, Hoyt advanced to the defendant $5,000, and the defendant gave him this note, under an agreement that he should hold it until an assessment covering that amount should be made on his stock; and it was understood and agreed by and between him and the defendant that, when such assessment should be made, the $5,000 so advanced should be applied in payment thereof, and the note should be thereby paid and extinguished, and should be surrendered; that on August 10, 1878, such an assessment was made by the defendant upon its capital stock, including Hoyt's shares; that on October 28, 1878, the $5,000 advanced as aforesaid was duly applied in payment of that assessment, whereby the note was paid and extinguished, and the note was suffered to remain in his hands through inadvertence; and that the plaintiff received the note from Hoyt long after its payment and extinguishment as above stated, as security for a pre-existing debt from Hoyt to the plaintiff, and with full knowledge of such satisfaction and payment, and after the note had ceased to be current. [153]

On May 16, 1882, the counsel of the parties signed and filed an agreement in writing, by which it was "stipulated and agreed to refer this case to Hon. Hoyt H. Wheeler to try and decide this case as referee."

On September 6, 1882, the referee filed his report, the material parts of which were as follows:

"On the hearing, it appeared from the evidence that in 1872 several persons were in possession of and operating the Vermont Central and Vermont and Canada Railroads as receivers and managers of the Court of Chancery of the State, in Franklin County, and had prepared to issue a series of long-time bonds, called income and extension bonds, a part of which had not been negotiated. The defendant was chartered with power to temporarily operate those roads, subject to the order of that court, and to assume the contracts of the receivers [154]

NOTE.—*Negotiable paper; payable on demand; reasonable time.*

A note in this country payable on demand, like a check (see Mohawk Bank v. Broderick, 13 Wend. 133, note, L. ed.; Conroy v. Warren, 3 Johns. Cas. 259, note, L. ed.), will be deemed overdue after a "reasonable time." What is a reasonable time depends upon the circumstances of each individual case, and is a question of law for the court. See, in addition to the principal case and authorities there cited, Carlton v. Bailey, 7 Fost. (N. H.) 220; Pourman v. Mills, 39 Cal. 345; Parker v. Tuttle, 44 Me. 359.

There are cases however which hold that what is reasonable time is a question for the jury, under proper instructions from the court. See Tomlinson v. Kinsella, 31 Conn. 268.

See generally Crim v. Starkweather, 88 N. Y. 339; Salmon v. Grosvenor, 66 Barb. 160; Furman v. Haskin, 2 Cal. 369, note, L. ed.; La Due v. Kasson Bank, 31 Minn. 33; 1 Ames Cases on N. & B. 782, note.

and managers. Subscriptions to the capital stock of the defendant were opened, and $2,000,000 in amount subscribed for April 30, 1873, of which John Q. Hoyt, of the City of New York, subscribed for $50,000, and it was expected by the subscribers that when the Company should be organized it would be appointed receiver of those roads, and assume the obligations of the other receivers. Five per cent of the subscriptions was required by the commissioners of subscription to be paid down. The receivers were in need of funds, and by arrangement with them one of the subscribers advanced $200,000—10 per cent of the subscriptions—in behalf of all the subscribers, as a temporary loan to the receivers, pending the organization of the Company and proceedings to carry out the expectations of the subscribers, and a note of that amount was made, and, with $400,000 in amount of the income and extension bonds as collateral security for its payment, delivered to the subscriber making the advance, upon the understanding that the note should be paid if the defendant Company did not come into possession of the roads and assume the obligations of the receivers, and stand against the subscriptions for stock if it did.

"The defendant Company was organized May 27, 1873; was appointed receiver and manager of the roads June 21, 1873; and went into possession of the roads, assuming the obligations of the former receivers and managers, July 1, 1873. An assessment of 30 per cent on the subscriptions for stock was laid June 24, another of 10 per cent August 13, and another of 10 per cent October 28, 1873, the last payable on or before December 1, 1873. The assessment of June 24 was paid by the subscribers respectively, including Hoyt. After the arrangement for making the defendant receiver of the roads was consummated, the note of $200,000 was given up, and new notes of the defendant were given, running to the subscribers separately, each in proportion to the amount of his subscription. The other subscribers paid to the one who made the advance each his proportion of it, and received the notes and a proportionate amount of the collateral bonds. Hoyt paid $5,000, and received the note in suit and $10,000 of the bonds. Hoyt paid the assessment of August 13, and one half the assessment of October 28; the other half of the latter was rescinded, and stock issued for one half the amount subscribed. The assessments paid amounted to 50 per cent of the subscription. Hoyt paid, as stated, 50 per cent, and no more, of his subscription. There was no other consideration for this note; and by the understanding of the parties it was to be delivered up, with the collateral bonds, on delivery to him of stock certificates for his stock.

"About November 1, 1873, Hoyt became indebted to the plaintiff, at New York, for $7,000 lent, with the understanding that the loan should be increased to $10,000, and delivered this note and these bonds to him as security for the payment of the loan. The plaintiff at that time knew, from previous conversations with Hoyt, generally about the subscription for stock and the situation and circumstances of the roads, but he did not know before, and was not then informed, that the note was to stand against the subscription for the stock, nor that the bonds, which then had a long time to run, were collateral to the note, but took all of them supposing that they were valid securities for what they purported to be."

"Certificates of stock were issued for all the subscribers in 1874, and delivered to them, and all but Hoyt delivered up the notes and bonds. He endeavored to procure the note and bonds of the plaintiff to deliver up to the defendant, but was unable to do so."

"In April, 1876, the plaintiff called on the president of the defendant for payment of the note in suit, who told him the circumstances under which the note was given, but did not state that they would be relied on as a defense to the note, or that any question would be made about its validity, and requested him to wait and endeavor to get payment from Hoyt, and encouraged him that he would succeed in doing so. He had a similar interview with a like result afterwards, the president adding that if Hoyt did not pay the plaintiff's note the defendant would not ask him to wait again, but would provide for the payment of this one. Just before this suit was brought, a similar interview was had, during which the president told him that he thought and had been advised that the circumstances under which the note was given would constitute a good defense to the note, and did not pay it.

"The income and extension bonds were sold in the market, March 24, 1881, for $5,000, less $12.50 commission, without notice to Hoyt or the defendant. They had been worth more while the plaintiff held them, but this was their then market value.

"The note is made a part of this report. It was executed, as to time and place, according to its purport."

"All the evidence showing the circumstances under which the note was given, and the proceedings in relation to it, were seasonably objected to, and admitted against the objections.

"The respective rights of the parties to recover in this action are, upon these facts, submitted to the court.

"Hoyt H. Wheeler, Referee."

The record stated that afterwards "Said cause came on for trial, upon the report of the referee, before the Honorable Hoyt H. Wheeler, District Judge of the United States within and for the District of Vermont, and, after hearing the arguments of counsel for the plaintiff and defendant, the court, on November 7, 1882, filed its decision in said cause, rendering judgment for the defendant," being the opinion reported in 14 Fed. Rep. 269.

On the same day, judgment for the defendant was entered upon the docket, and four days afterwards the following order was filed:

"Upon the report of the referee the court rendered judgment for the defendant, to which decision and judgment the plaintiff excepted. Exceptions allowed and ordered to be placed on record.

"Hoyt H. Wheeler."

Mr. **John F. Dillon,** for plaintiff in error.

The court below erred in holding that the note in suit was overdue when transferred to the plaintiff.

Instances may be readily cited where the courts, applying the doctrine of reasonable

time to demand notes, have held that the presumption of dishonor was not justified upon a lapse of periods ranging from three months to a year and a half or more.

Vreeland v. *Hyde*, 2 Hall, N. Y. 249,—19 months; *Hendricks* v. *Judah*, 1 Johns. 319,—1 year; *Sanford* v. *Mickles*, 4 Johns. 224,—5 months; *Chartered Merc. Bank, etc.* v. *Dickson*, L. R. 3 P. C. App. 574,—10 months; *Merritt* v. *Todd*, 23 N. Y. 28,—3 years. See also, *Morgan* v. *U. S.* 113 U. S. 476, 501 (Bk. 28, L. ed. 1044, 1053); Dan. Neg. Inst. p. 451; *Leith Bkg. Co.* v. *Walker*, 14 S. D. & B. 332.

Speaking of demand notes payable with interest, the Supreme Court of Connecticut says:

"The note in question, although on demand and negotiable, is also expressed to be 'with interest.' From this and the other facts found it sufficiently appears that an immediate demand was not contemplated, and that the note was intended to lie as continuing security."

Rhodes v. *Seymour*, 36 Conn. 6. See, also, *Shutts* v. *Fingar*, 1 Cent. Rep. (N. Y.) 781; *Parker* v. *Stroud*, 98 N. Y. 379; *Merritt* v. *Todd, supra; Pardee* v. *Fish*, 60 N. Y. 265; *Brooks* v. *Mitchell*, 9 M. & W. 15 (cited in *Morgan* v. *U. S. supra*); *Gascoyne* v. *Smith*, McClel. & Y. 338; *Borough* v. *White*, 6 Dowl. & R. 379.

The court erred in receiving evidence concerning, and also, in giving legal effect to the alleged collateral, verbal understanding between the defendant Company and Hoyt.

Specht v. *Howard*, 16 Wall. 564 (83 U. S. bk. 21, L. ed. 348); *Forsythe* v. *Kimball*, 91 U. S. 291 (Bk. 23, L. ed. 352); *Brown* v. *Spofford*, 95 U. S. 482 (Bk. 24, L. ed. 508); Dan. Neg. Inst. § 81 *et seq.*, and cases cited; *Potter* v. *Ernest*, 45 Ind. 418; *Tower* v. *Richardson*, 6 Allen, 351; *Spring* v. *Lovett*, 11 Pick. 417.

The court erred in holding that the plea of payment was established and that equities existed in favor of defendant, which constituted a defense to the note.

St. Louis Per. Ins. Co. v. *Homer*, 9 Met. 39.

As an independent right of set-off, the defense is incapable of assertion against Paine. A right of set-off is not an equity.

2 Dan. Neg. Inst. § 1435; Chitty, Bills, p. 220; Byles, Bills, Sharswood's ed. p. 529; Pars. N. & B. 603, 604; and the leading case of *Burough* v. *Moss*, 10 B. & C. 558.

If such a right be regarded as an equity, it had not accrued at the time the note was transferred.

Waterman, Set-Off, § 109 *et seq.*, and cases cited; *McAlpin* v. *Wingard*, 2 Rich. 547; *Martin* v. *Kunzmuller*, 37 N. Y 396; Byles, Bills, p. 265; *Watson* v. *Mid-Wales R. Co.* L. R. 2 C. P. 593.

In Vermont no debt can be set off in an action unless it be the personal debt of the plaintiff.

Phelps v. *Bulkeley*, 20 Vt. 17.

The equities subject to which a transferee takes overdue paper are defined and certain. They are failure or want of consideration, fraud and payment. No one of these defenses is found by the court to have existed at the time the note was transferred. The transaction between the Company and Hoyt is found to have been a loan by Hoyt of $5,000, and a delivery by the Company of its absolute promissory note for that sum, together with $10,000 in amount of income and extension bonds as collateral security. The consideration was "actual cash advanced" (see the parallel case of *Spring* v. *Lovett*, 11 Pick. 417), and could not have been more adequate. Fraud was not pretended. Payment is equally disposed of by the finding that the note was only to cease to be obligatory on the delivery of certificates of stock to Hoyt.

The court erred in refusing to give effect to the promise of the defendant Company, through its president, to the plaintiff to pay the note in suit.

This promise and request for time having been acted upon by Paine, the Company is estopped from setting up a defense inconsistent with its promise.

1 Greenl. Ev. 207, 208; *Frost* v. *Saratoga Mut. Ins. Co.* 5 Denio, 157; *Dezell* v. *Odell*, 3 Hill, 215; *Albee* v. *Little*, 5 N. H. 277. See also *Thompson* v. *Emery*, 27 N. H. 269; *Wiggin* v. *Damrell*, 4 N. H. 69; *Mayo* v. *Giles*, 1 Munf. 533; *Edson* v. *Fuller*, 22 N. H. 183; *Bridge* v. *Johnson*, 5 Wend. 342; *Mowry* v. *Todd*, 12 Mass. 281; *Henry* v. *Brown*, 19 Johns. 49.

Messrs. **Guy C. Noble, Geo. F. Edmunds,** *E. C. Smith* and *Daniel Roberts*, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court: [158]

This case was not submitted to the decision of the court without a jury, pursuant to the Revised Statutes of the United States, sections 649, 700; but to the decision of the judge as a referee, in accordance with the Statutes and practice of Vermont. Gen. Stat. 1862, chap. 30, § 52; Rev. Laws 1880, § 985; *White* v. *White*, 21 Vt. 250; *Melendy* v. *Spaulding*, 54 Vt. 517. The only question presented by the writ of error, therefore, is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. See *Bond* v. *Dustin*, 112 U. S. 604, 606, 607 [Bk. 28. L. ed. 835, 837] and cases there cited.

The report of the referee, although a little obscure in parts, sufficiently shows that the material facts were as follows: Subscriptions were made to the capital stock of the defendant Corporation to the amount of $2,000,000 (of which Hoyt subscribed $50,000), with the expectation that the defendant, when organized as a corporation, should be appointed, pursuant to its charter, receiver of two other railroad corporations, and should assume the obligations of the former receivers. Those receivers were short of money, and by arrangement with them one of the subscribers, in behalf of all, advanced as a temporary loan to the receivers $200,000 (10 per cent of the whole subscription), and a note for that amount was made to him, with the understanding that the note should be paid if the defendant did not come into possession of the roads and assume the obligations of the receivers, and should "stand against the subscriptions for stock if it did." After the defendant had been organized and been appointed receiver, and had assumed the obligations of the former receivers, the note of $200,000 was given up, and instead thereof the defendant gave new notes to each sub- [159]

scriber separately for 10 per cent of the amount of his subscription, and each of the other subscribers paid his proportion of the sum of $200,000 to the one who had advanced that sum. Hoyt paid him $5,000, and received the note in suit, which was made and dated at Boston, July 10, 1873, and was payable on demand, with interest. The assessments laid on the subscriptions for stock amounted to 50 per cent, of which 5 per cent was paid at the time of subscribing; 30 per cent was laid June 24, which is stated to have been "paid by the subscribers respectively, including Hoyt;" 10 per cent was laid August 13, and 5 per cent laid October 24, and payable December 1, 1873, both of which Hoyt paid. This part of the report of the referee, after stating the above facts, concludes thus: "The assessments paid amounted to 50 per cent of the subscriptions. Hoyt paid, as stated, 50 per cent, and no more, of his subscription. There was no other consideration for this note; and by the understanding of the parties it was to be delivered up, with the collateral bonds, on delivery to him of stock certificates for his stock."

It is evident that the 10 per cent on Hoyt's stock, which had been included in the sum of $200,000 stated to have been originally advanced by the lender "in behalf of all the subscribers," and which was repaid to him by Hoyt when the notes to the several subscribers were substituted for the single note for the whole original advance, is to be considered as part of the 50 per cent paid by Hoyt towards his subscription, and that he paid directly to the defendant only 40 per cent. The difference in form of the statements, that "the assessment of June 24 was paid by the subscribers respectively, including Hoyt," but that "Hoyt paid" the two later assessments is, to say the least, quite consistent with this view. And any other is wholly inconsistent with the ultimate facts expressly found, that "Hoyt paid, as stated, 50 per cent, and no more, of his subscription," and that "there was no other consideration for this note."

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The effect of the agreement between the defendant Corporation and Hoyt was that the assessments to be laid upon his stock in the Corporation should, when payable, be not only set off against, but considered as payments upon, the note for $5,000 from the Corporation to him, now in suit. When Hoyt delivered this note to the plaintiff, on November 1, 1873, the assessments already due and payable upon his stock amounted to much more. As between the defendant and Hoyt, therefore, as well as against anyone who took this note from Hoyt, when overdue, the note had been paid. *American Bank* v. *Jenness*, 2 Met. 288; *Gilson* v. *Gilson*, 16 Vt. 464.

In this country, a promissory note payable on demand has always been held to be overdue, so as to subject anyone taking it to all defenses to which it would be open in the hands of the payee, unless transferred within a reasonable time after its date; and what is reasonable time is a question of law, depending upon all the circumstances of the particular case. *Morgan* v. *U. S.* 113 U. S. 476, 501 [Bk. 28, L. ed. 1044,1053]; *Losee* v. *Dunkin*, 7 Johns. 70; *Sylvester* v. *Crapo*, 15 Pick. 92; *Dennett* v. *Wyman*, 13 Vt. 485; *Camp* v. *Clark*, 14 Vt. 387. See also *Chartered Merc. Bank* v. *Dickson*, L. R. 3 P. C. 574, 579.

The difficulties of applying this test, and the convenience of a more definite rule, have led the Legislatures of many States to regulate the matter by statute; and before the making of the note in suit the Statutes both of Massachusetts and of Vermont had defined reasonable time, for this purpose, to be sixty days from the date of the note. Mass. Gen. Stat. 1860, chap. 53, §§ 8, 10; Pub. Stat. 1882, chap. 77, §§ 12, 14; Vermont Stat. 1870, chap. 70; Rev. Laws 1880, § 2013. The power of the state legislatures to establish such a rule prospectively, with regard to promissory notes made and payable within their respective jurisdictions, has not been and cannot be doubted.

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The note in suit was indorsed to the plaintiff more than sixty days after its date. It was made in Massachusetts, and, if not payable there, was payable in Vermont, where the defendant was incorporated. The construction and effect of the contract must be governed by the law of the one or the other of those States; and it is superfluous to consider by which, because by the law of either the note was overdue when the plaintiff took it, and therefore he cannot recover upon it.

As to the evidence, stated in the report of the referee, upon which the plaintiff relies as tending to prove a promise to himself by the defendant to pay the note, it is sufficient to say that, it not being shown that the plaintiff, in consideration of or reliance upon such a promise, either agreed to forbear or actually forbore to sue, there was no consideration for the promise, and no ground for giving it effect as an estoppel.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM F. GRAHAM AND AMELIA TERESA RAYMOND, *Appts.*

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v.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 161-180.)

Railroad corporation chartered by different States—meeting of stockholders may be held in any State—mortgage—legislative ratification of irregularities—foreclosure in a state court not reviewable in collateral proceeding—shareholders, parties to bankruptcy proceedings—laches.

1. A State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction.

2. The Boston, Hartford and Erie Railroad Company, by acting upon the authority to purchase property conferred by the Act of the Legislature of New York of April 25, 1884, became a New York corporation by its then existing name.

3. Where a corporation is chartered by several States a meeting of its stockholders in one of them is valid in respect to its property in all.

4. The Boston, Hartford and Erie Railroad Company, although made up of distinct corporations, chartered by different States, was, in organization and action, and the practical management of its property, one corporation, having a capital stock

which was a unit, one set of shareholders interested alike in all of its property, and one board of directors. In its relation to any State it was a separate corporation, governed by the laws of that State as to its property therein. It had a domicil in each State, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any State so as to bind the Corporation in respect to its property everywhere.

5. If there were any irregularities in the proceedings of said Company in making the mortgage executed by it on March 19, 1886, they were ratified by the subsequent ratifications of such proceedings by the Legislatures of Massachusetts, Rhode Island, Connecticut and New York, which ratifications included, as a part of said proceedings the holding of the meeting of shareholders in New York.

6. The fact that some of the bonds may have been invalid did not affect the mortgage or the proceedings for its foreclosure.

7. The mortgage having been duly foreclosed in a state court, which had jurisdiction of the parties and subject matter, and the injured party having had opportunity to apply to the state court to reverse the decree of foreclosure, said decree cannot be reviewed in a collateral proceeding in a Circuit Court of the United States, upon the ground that it was obtained by fraud.

8. The complainant, and the shareholders whom he represents, form an integral part of the Corporation, and as such were parties to bankruptcy proceedings involving said Corporation. He is therefore bound by the decree entered in said proceedings, and cannot impeach it collaterally on the ground of fraud.

9. The bill was properly dismissed on demurrer on the ground of laches, as it was filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings, nine years after the entry of the decree of foreclosure, and seven years after the foreclosure became absolute and the road was conveyed to the new corporation.

[No. 232.]

Argued April 15, 16, 17, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Eugene M. Johnson, Benj. F. Butler** and *Roger A. Pryor*, for appellants:

The court erred in holding the Boston, Hartford and Erie Railroad Company to be a New York corporation.

The power to confer corporate franchises is vested exclusively in the Legislatures of the several States, and, as to the Territories and for the purposes of the Federal Goverement, in Congress.

Morawetz, Corp. § 4, and cases cited; *Franklin Bridge Co.* v. *Wood*, 14 Ga. 80; *Pa. R. R. Co.* v. *Canal Comrs.* 21 Pa. 9.

A railroad corporation cannot be created by implication.

Tenn. & A. R. R. Co. v. *Adams*, 3 Head, 596; *Pa. R. R. Co.* v. *Canal Comrs. supra; Wright* v. *Briggs*, 2 Hill, 77; *Camden & A. R. R. & Trans. Co.* v. *Briggs*, 22 N. J. L. 623.

Unless the Boston, Hartford and Erie Railroad Company be a corporation, chartered and incorporated by an Act of the Legislature of the State of New York, constituting it a body corporate in plain and unequivocal words, it has no corporate existence in that State.

Wood, Railways, § 6; Morawetz, Corp. § 10.

The New York Legislature, having created the New York corporations, had clearly the power, in a proper case, to authorize them to sell their property and franchises to a foreign corporation, and it likewise had the right to license such foreign corporation to acquire and take title to the property, and to use and enjoy it in a lawful manner. This we submit was the intent and effect of the Act of April 25, 1884.

There is nothing in the Act from which it is fair to infer that the Legislature knew it was creating a new corporation by the Act, or meant to create a new corporation, or ever even thought of the possibility of creating thereby a new body corporate. The idea that any such thing was accomplished by this Act should be dismissed.

R. Co. v *Whitton*, 13 Wall. 270, 284 (80 U. S. bk. 20, L. ed. 571); *Hart* v. *Boston, H. & E. R. R. Co.* 40 Conn. 524; *Covington* v. *C. & C. Bridge Co.* 10 Bush, 69; *Baltimore & O. R. R. Co.* v. *Cary*, 28 Ohio St. 208; *Erie R. Co.* v. *Stringer*, 32 Ohio St. 468; *State* v. *Delaware L. & W. R. R. Co.* 30 N. J. L. 473; Pierce, Railways, 17.

If this Corporation has been recognized in any manner by the Legislature of New York, it has been recognized only as a Connecticut corporation, for such it is. Corporations are created, not by recognition, but by plain words, manifesting positive intent to create.

Shelton v. *Banks*, 10 Gray, 401; *Atty-Gen.* v. *R. R. Co.* 35 Wis. 425, 602; *Wallace* v. *Loomis*, 97 U. S. 146 (Bk. 24, L. ed. 895); *Atty-Gen.* v. *American L. Ins. Co.* 82 N. Y. 172.

The court erred in holding that the pretended meeting of the shareholders of the Boston, Hartford and Erie Railroad Company, on March 14, 1866, in the City of New York, was lawful and regular, and the proceedings at that meeting valid and binding upon the Company.

Miller v. *Ewer*, 27 Me. 509; *Bank of Augusta* v. *Earle*, 13 Pet. 519; (38 U. S. bk. 10, L. ed. 274); *Freeman* v. *Machias Water Power & Mill Co.* 38 Me. 343; *Aspinwall* v. *Ohio & M. R. R. Co.* 20 Ind. 492; *Camp* v. *Byrne*, 41 Mo. 525; *Heath* v. *Silverthorn Lead M. & S. Co.* 39 Wis. 146; *Bellows* v. *Todd*, 39 Iowa, 209; *Ohio & M. R. R. Co.* v. *McPherson*, 35 Mo. 13; *Mitchell* v. *Vermont Copper Min. Co.* 40 N. Y. Super. Ct. 406; *Farnum* v. *Blackstone Canal Corp.* 1 Sumn. 46; *Day* v. *Newark India R. Mfg. Co.* 1 Blatchf. 628; Taylor, Corp. § 382; Morawetz, Corp. § 363; Ang. & Ames, Corp. § 448; Potter, Corp. § 356–359; Wood, Railways, § 139.

The mortgage of March 19, 1866, is void, and in no way effectual to bind the Company. 1. Because the pretended meeting of the shareholders in the City of New York, at which the mortgage is pretended to have been authorized, was an unlawful meeting and its proceedings wholly void. 2. Because, even upon the theory that the meeting in New York was lawful and regular, no mortgage was authorized at that meeting, nor have the shareholders at any subsequent meeting ever pretended to authorize it. 3. Because the whole transaction from beginning to end was *ultra vires*.

Head, etc. v. *Ins. Co.* 2 Cranch, 127 (6 U. S. bk. 2, L. ed. 229); *Hill* v. *Manchester & S. Water Co.* 5 B. & Ad. 874; *Thomas* v. *R. R. Co.* 101 U. S. 71 (Bk. 29, L. ed. 950).

No amount of legislative ratification is sufficient to make a contract, or to make an act which is absolutely void, valid and effectual. *Thompson* v. *Lee County*, 3 Wall. 327 (70 U. S. bk. 18, L. ed. 177).

If these legislative ratifications be operative and effectual, their effect will be to bind parties by a contract they never made, and then to forfeit their property for nonfulfillment of that contract.

Barnes v. *Town of Lacon*, 84 Ill. 461; *People* v. *Batchellor*, 53 N. Y. 128.

The court erred in holding that the proceedings and decree in the Ellis suit in the Supreme Judicial Court of Massachusetts was valid and regular, and binding upon these appellants, and the decree of foreclosure a bar to this suit.

A suit against the corporation is not a suit against an individual incorporator, and such incorporator is, in no proper view, a party to such a suit. The property of the corporation is not the property of the shareholder.

Morgan v. *N. O. M. & C. R. R. Co.* 1 Woods, 15.

Nor is the stock which is the property of the shareholder in any way the property of the corporation.

People v. *Comrs. etc.* 23 N. Y. 220.

It is even sometimes said that no trust relation subsists between stockholder and corporation.

Hodges v. *New England Screw Co.* 1 R. I. 350; Ang. & Ames, Corp. § 313.

A stockholder is not a creditor of the corporation.

Verplanck v. *Merc. Ins. Co.* 1 Edw. Ch. 84.

The suit was a mere collusion. There was no such genuine controversy as to give a court jurisdiction. The judgment was therefore null and void upon challenge, and of no effect to bind any stockholder not a party to the fraud. In such a case and by such a pretended litigation we are not bound.

Fletcher v. *Peck*, 6 Cranch, 87 (10 U. S. bk. 3, L. ed. 162); *Lord* v. *Veazie*, 8 How. 251 (49 U. S. bk. 12, L. ed. 1067); *Cleveland* v. *Chamberlain*, 1 Black, 419 (66 U. S. bk. 17, L. ed. 93); *Wood-Paper Co.* v. *Heft*, 8 Wall. 333 (75 U. S. bk. 19, L. ed. 378); *Cf. Hoskins* v. *Lord Berkeley*, 4 T. R. 402; *Re R. J. Elsam*, 3 Barn. & C. 597.

The judgment of any court may be impeached by strangers to it for fraud or collusion.

2 Phill. Ev. 4 Am. ed. 95, note 291; Freem. Judg. § 334; *Duchess of Kingston's Case* 20 Howell, St. Tr. 355; *S. C.* 2 Smith, Lead. Cas. 8th ed. 734 and note: *Fermore's Case*, 3 Rep. 77; *Twyne's Case*, Coke, Rep. 80.

Laches, in such a case as this, will be understood to mean unreasonable delay in seeking to enforce a right in equity. What shall constitute, in any given case, such unreasonable delay as to raise the presumption of laches is to be resolved by the sound discretion of the court.

Brown v. *Co. of Buena Vista*, 95 U. S. 157 (Bk. 24, L. ed. 422); Wood, Lim. §§ 58, 59, 60; *Harwood* v. *Railroad*, 17 Wall. 81 (84 U. S. bk. 21, L. ed. 558); *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 591 (Bk. 23, L. ed. 328).

Lapse of time will not bar a continuing and subsisting trust, such as that subsisting between directors and officers and the corporation. In such case the statutes of limitation are inapplicable.

Cholmondeley v. *Clinton*, 4 Bligh, O. S. 1; *S. C.* 2 Meriv. 360; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; *S. C.* 4 Mylne & C. 41; *Stone* v. *Stone*, L. R. 5 Ch. App. 74; *Prevost* v. *Gratz*, 6 Wheat. 481 (19 U. S. bk. 5, L. ed. 311); *Boone* v. *Chiles*, 10 Pet. 177 (35 U. S. bk. 9, L. ed. 388); *Bank of U. S.* v. *Beverly*, 1 How. 134 (42 U. S. bk. 11, L. ed. 75); *Oliver* v. *Piatt*, 3 How. 333 (44 U. S. bk. 11, L. ed. 622); *Seymour* v. *Freer*, 8 Wall. 202 (75 U. S. bk. 19, L. ed. 306); *Lewis* v. *Hawkins*, 23 Wall. 119 (90 U. S. bk. 23, L. ed. 113); *Decouche* v. *Savetier*, 3 Johns. Ch. 190; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Carpenter* v. *Cushman*, 105 Mass. 417; Wood, Lim. § 200; Kerr, Frauds, 344; Pom. Eq. §§ 490, 1080; Perry, Trusts, 863, and authorities in note.

If the mortgage of March 19, 1866, was in fraud of our rights; if the bonds secured by that mortgage were converted, and the proceeds not honestly expended—every dollar thereof—in paying the debts of the Corporation, and in increasing the value of the corporate property; if the proceedings taken to foreclose the mortgage in the Supreme Judicial Court of Massachusetts were collusive and fraudulent; if the bankruptcy proceedings in the District Court of Massachusetts were fraudulent and without jurisdiction; if by this mortgage and those proceedings, we have been injured substantially in our property rights, and if we have commenced our suit within a reasonable time, under the circumstances, seeking redress in a court of chancery, in a regular and proper manner, we respectfully urge that we are entitled to such relief as a court of equity can give, and that the court below erred fatally in refusing even to hear us.

Messrs. **William Caleb Loring** and **William G. Russell**, for the New York and New England Railroad Company, and others, appellees:

Apart from the allegations of fraud, it is clear that the decree in the Ellis suit is a bar.

The invalidity of the mortgage, or the fact that there was no breach of the condition, might have been set up in defense of the suit, and therefore are concluded by the decrees of foreclosure made therein.

Stout v. *Lye*, 103 U. S. 66 (Bk. 26, L. ed. 428); *Life Ins. Co.* v. *Bangs*, 103 U. S. 780 (Bk. 26, L. ed. 608); *Frieson* v. *Bates College*, 128 Mass. 464; *Shears* v. *Dusenbury*, 13 Gray, 292; *Haven* v. *Grand Junc. R. R. & Depot Co.* 12 Allen, 337; *Ramsden* v. *Jackson*, 1 Atk. 292.

The stockholders are barred by that decree equally with the Corporation.

Sanger v. *Upton*, 91 U. S. 56 (Bk. 23, L. ed. 220).

The rights which the plaintiffs seek to enforce in this bill are the rights of the Corporation.

Hawes v. *Oakland*, 104 U. S. 450, 453 (Bk. 26, L. ed. 828); *Brewer* v. *Boston Theater*, 104 Mass. 378.

If the plaintiffs wish to attack the decree of foreclosure for fraud, they should intervene in the Ellis suit, which is still open in the state court, show the fraud, and have the decree vacated; as was done in *Thomas* v. *Brownville Ft. K. & Pac. R. R. Co.* 109 U. S. 522 (Bk. 27, L. ed. 1018).

As the plaintiffs can have the decree vacated, they cannot attack the decree collaterally.

Allen v. *McPherson*, I. H. L. 191, cited with approval in *Broderick's Will*, 21 Wall. 503, 511 (88 U. S. bk. 22, L. ed. 599, 602); *Barnesly* v. *Powell*, 1 Ves. Sr. 284, 289

The state court is the forum in which relief must be sought against its decrees, even if the possession of the *res* has been parted with, especially when the case is still pending.

Peck v. *Jenness*, 7 How. 612 (48 U.S. bk. 12, L. ed. 841); *Randall* v. *Howard*, 2 Black, 585 (67 U. S. bk. 17, L. ed. 269); *Pacific R. R. of Mo.* v. *Missouri Pac. R. Co.* 111 U. S. 505, 522 (Bk. 28, L. ed. 498, 504).

If the suit was begun in fraud, it was not a fraud on the plaintiffs; and the fraud was not consummated.

Alabama v. *Burr*, 115 U. S. 413 (Bk. 29, L. ed. 435); *Atlantic Delaine Co.* v. *James*, 94 U. S. 207 (Bk. 24, L. ed. 112); *Grymes* v. *Sanders*, 93 U. S. 55 (Bk. 23, L. ed. 798); *Morgan* v. *Bliss*, 2 Mass. 111.

The Boston, Hartford and Erie Railroad Company was a New York corporation.

Clark v. *Barnard*, 108 U. S. 436 (Bk. 27, L. ed. 780).

The mortgage was valid, because the meeting of the stockholders in New York was legalized, and the mortgage was ratified by the Legislatures of Massachusetts, Connecticut, Rhode Island and New York, before the mortgage deed was recorded, or any bonds were issued under it.

Subsequent ratification is equivalent to an original authority.

Grenada Co. Supervisors v. *Brogden*, 112 U. S. 261 (Bk. 28, L. ed. 704); *Galveston R. R.* v. *Cowdrey*, 11 Wall. 474, 475 (78 U. S. bk. 20, L. ed. 199); *Anderson* v. *Santa Anna*, 116 U.S. 356 (Bk. 29, L. ed. 633).

If there was originally a right to attack the Ellis decrees for fraud, that right has been lost by laches.

Laches can be taken advantage of on demurrer.

Landsdale v. *Smith*, 106 U.S. 391 (Bk. 27, L. ed, 219); *Dimpfell* v. *Ohio & M. R. R. Co.* 110 U. S. 209 (Bk. 28, L. ed. 121).

That a plaintiff may be barred by laches, though the statutory period has not run, is also clear.

Sullivan v. *Portland R. R. Co.* 94 U. S. 806, 811 (Bk. 24, L. ed. 324); *Brown* v. *Buena Vista*, 95 U. S. 157 (Bk. 24, L. ed. 422); *Hayward* v. *National Bank*, 96 U.S. 611 (Bk. 24, L. ed. 855); *Dimpfell* v. *Ohio & M. R. R. Co. supra*.

The bill is clearly within the decided cases.

Dimpfell v. *Ohio & M. R. R. Co. Sullivan* v. *Portland R. R. Co.*, and *Brown* v. *Buena Vista*, *supra; Twin-Lick Co.* v. *Marbury*, 91 U. S. 587 (Bk. 23, L. ed. 328); *Peabody* v. *Flint*, 6 Allen, 52; *Royal Bank of Liverpool* v. *Grand Junc. R. R. & D. Co.* 125 Mass. 490; *Boston & P. R. R. Corp.* v. *N Y. & N. E. R. R. Co.* 13 R. I. 260.

The laches in question is the laches of the body of stockholders, not of the individual in whose name the suit is brought.

Re Cape Breton Co. L. R. 29 Ch. Div. 795, 798; *Erlanger* v. *New Sombrero Phos. Co.* L. R. 3 App. Cas. 1218, 1232, 1263, 1280; *Brinckerhoff* v. *Bostwick*, 99 N.Y. 185.

The plaintiffs are parties to the bankruptcy proceedings, and bound by them equally with the Corporation.

Sanger v. *Upton*, 91 U. S. 56 (Bk. 23, L. ed. 220.

Messrs. **C. S. Bradley** and **John C. Gray**, for Charles S. Bradley and others, appellees.

Mr. **Charles M. Reed**, for executors of Mark Healy, appellees.

Mr. Justice **Blatchford** delivered the opinion of the court: [163]

This is a bill in equity, filed in the Circuit Court of the United States for the District of Massachusetts, on the 8th of July, 1880, by William F. Graham, an alien, the owner of 500 shares of the capital stock of the Boston, Hartford and Erie Railroad Company, on behalf not only of himself, but of every stockholder and creditor of the Company who may join in the suit and contribute to its expense, to set aside as invalid a mortgage given by the Company dated March 19, 1866, covering its railroad, franchises and property, existing and future, to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, as trustees, to secure the payment of an issue of bonds of the Company to the amount of $20,000,000. The defendants are that Company and its assignees in bankruptcy, the New York and New England Railroad Company, which is in possession of and operating the railroad, certain persons now living, and the personal representatives of others now deceased, who have at different times acted as trustees under the mortgage, the treasurer and receiver general of the Commonwealth of Massachusetts, George Ellis, Frederick A. Lane, and William C. Eayrs.

Afterwards Amelia T. Raymond, a holder of 100 shares, and two other shareholders, were admitted as coplaintiffs. Four separate demurrers to the bill were filed, one of them being by the assignees in bankruptcy, and another by the New York and New England Railroad Company. They set forth, as grounds of demurrer, among other things, want of equity and laches. The case was heard on the demurrers, and in January, 1883, a decision was rendered (14 Fed. Rep. 753) dismissing the bill, on which a decree to that effect was entered, from which Graham and Raymond have appealed.

The mortgage covered all the property of the Company in Massachusetts, Rhode Island, Connecticut and New York. In December, 1865, there remained to be built, of the projected line of the road, 74 miles between Waterbury, Connecticut, and Fishkill, New York, and 26 miles in Connecticut, between Willimantic and Mechanicsville. The aggregate amount of liens, at that time, on the property and franchises owned or leased by the Company, and which were prior liens to the $20,000,000 mortgage (which will be called the Berdell mortgage), was $9,904,650. The object of making the Berdell mortgage was to retire this prior lien debt, and complete and equip the road from Boston to Fishkill. [164]

In January, 1870, default was made in paying the six months' interest which then fell due on the mortgage. Soon thereafter the Company's property was taken on legal process in several suits.

In July, 1870, George Ellis and two other persons filed a bill in equity, in the Supreme Judicial Court of Massachusetts, to foreclose the mortgage. Receivers were appointed, who took possession of the road August 2, 1870.

In October, 1870, an involuntary petition in bankruptcy was filed against the Company in

the District Court of the United States for the District of Massachusetts, on which an adjudication was made March 2, 1871. Assignees were appointed, who, after the foreclosure was perfected, released to the trustees under the mortgage all the rights of the Company in the mortgaged property.

On the 9th of May, 1871, a decree was made in the Ellis suit, providing for the delivery of the mortgaged property by the receivers to the trustees; for the filing by the latter, in the office of the Secretaries of State of Massachusetts, Rhode Island, Connecticut and New York, of a notice that they had taken possession of the property for default in the payment of interest on the bonds, "and with their purpose" to foreclose the mortgage for such default; and for the vesting of the property absolutely and in fee in the trustees, if default in the performance of the condition of the mortgage should continue for eighteen months after the notice should be filed, in which case all equity of redemption of the mortgagor should be barred.

In September, 1871, the trustees entered and took possession for foreclosure and filed the no- [165] tices so provided for. The notices were of the character mentioned in the mortgage, which provided that, if a default in paying principal or interest should continue for eighteen months after the filing of the notices, the property should vest in fee in the trustees without further process of law, and all equity of redemption of the mortgagor should be barred.

The foreclosure having been perfected, the trustees, pursuant to a decree made in June, 1875, in the Ellis suit, conveyed the mortgaged premises and franchises to the New York and New England Railroad Company, a corporation organized by the former bondholders, and delivered to it the property.

The first ground alleged in the bill for declaring the mortgage invalid is that it was authorized and made at a meeting of the shareholders of the Company held in the City of New York; that it was not a corporation of New York, but was a corporation of Connecticut, Massachusetts and Rhode Island; and that, therefore, the meeting was illegal and the mortgage void. The circuit court held that the corporation was a New York corporation; that the meeting was lawfully held; and that its proceedings were valid and binding on the Company.

In the mortgage the Company is described as "a corporation existing under the laws of the States of New York, Connecticut, Rhode Island and Massachusetts." The mortgage recites that "the shareholders of the Boston, Hartford and Erie Railroad Company, at a meeting duly and lawfully called and held at the City of New York, on the fourteenth day of March, A. D. 1866, voted to authorize the directors to make application to the several Legislatures of the States in which the chartered rights of the road exist, for authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue and dispose of, at the best rates that can be obtained, their convertible bonds, payable in the City of New York, on the first day of July, A. D. 1900, for one thousand dollars each, not to exceed the amount of twenty millions of dollars in all," with authority to the directors to make a portion of the bonds payable in London, "interest payable semi-annually on the first days of January and July in each year, at the rate of 7 per cent per annum, interest and principal to be payable at such places in the City of New York or in London as the directors may [166] authorize; and the particular form of bonds, interest warrants thereon, and mortgage, to be left entirely at the discretion of the board of directors; the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road;" that "the said board of directors, at a meeting duly convened and held in the City of New York on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first mortage bonds of said Company, in the following form" (a form of a bond is here inserted); and that "the said directors, at their said meeting, further voted to empower bonds of said form * * * hereafter to be issued, and to be secured under the mortgage, * * * but not in a greater principal sum than twenty millions of dollars in all; * * * and further, at the same time, voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents." It then conveys to the trustees named the railroad of the Company, commencing at the foot of Summer Street in Boston, and thence extending through the States of Massachusetts, Connecticut, Rhode Island and New York, to the western terminus of its location on the east bank of the Hudson River, at Fishkill, together with all the privileges, franchises and property then owned or thereafter to be acquired by the Company.

On the 25th of April, 1864, an Act had been passed by the Legislature of New York, Laws of N.Y. 1864, chap. 385, p. 884, entitled "An Act to Consolidate the Boston, Hartford and Erie, the Boston, Hartford and Erie Extension, and the Boston, Hartford and Erie Ferry Extension Railroad Companies." It provided as follows: "The Boston, Hartford and Erie Extension Railroad Company, and the Boston, Hartford and Erie Ferry Extension Railroad Company may both, or either, sell and convey to the Boston, Hartford and Erie Railroad Company the franchise and property of said several corporations, upon such terms as may be mutually agreed upon; and whenever certificates, under oath, of said Boston, Hartford and Erie Railroad Company, and a like [167] certificate, under oath, of the other contracting corporation, shall be lodged in the office of the Secretary of State, showing such sale and conveyance, and containing a full description of the rights and property conveyed, then, and in such case, such sale and conveyance shall be effectual in law to pass title to the franchise and property sold, conveyed and described in such certificate, without other or further registry of the instrument of conveyance. And on the leaving of such certificate as above provided, the Secretary of State shall file and record the same, and said Boston, Hartford and Erie Railroad Company shall become possessed of the rights of charter and property sold, conveyed and described in said certificates, and may have, hold and use the same in their own name and right as a portion of their rail-

way line and property, and have all the rights the corporation making sale and conveyance had, at the time of such conveyance, to construct and operate a railway within the terminal points designated in the charter of the company making the conveyance, and subject to the laws of this State, passed or that may be passed, concerning railroad corporations."

This Act professes, in its title, to be an Act to consolidate the three companies. It authorizes the sale to the Boston, Hartford and Erie Company of the franchises and property of the other two corporations (which were New York corporations), and provides that such sale shall pass the title to such franchises and property, and that the purchasing Company shall thereby "become possessed of the rights of charter and property sold," and thereafter have, hold and use the same in its "own name and right."

As a purchaser of what this Act authorized to be sold to it, the Company purchasing became a New York corporation, by its then existing name The case is directly within the ruling of this court in *Clark* v. *Barnard*, 108 U. S. 436, 448 [Bk. 27, L. ed. 780]. There this same Company had, as a Connecticut corporation, purchased the franchises and railroad of the Hartford, Providence and Fishkill Railroad Company, a consolidated corporation under the laws of Connecticut and Rhode Island. Afterwards the Legislature of Rhode Island ratified [168] the sale, so far as the railroad was situated in Rhode Island, by an Act which proceeded to declare that the "said Boston, Hartford and Erie Railroad Company, by that name, shall and may have, use, exercise and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State." On this state of facts, this court said: "The Hartford, Providence and Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford and Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that State," and the case of *Railroad Co.* v. *Harris*, 12 Wall. 65, 82 [78 U. S. bk. 20, L. ed. 354, 358], and other cases in this court were cited, to the effect that one State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction.

That this Statute of New York was acted upon and availed of by the Boston, Hartford and Erie Company sufficiently appears from the bill. It is not pretended there was any other charter to the Company from the State of New York when the mortgage was made. The ratification of the mortgage by the Legislature of New York, hereafter mentioned, the recording of the mortgage and of the resignations and appointments of trustees, in counties in New York, and the recognition, by a Statute of New York, passed May 21, 1873, Laws of N. Y. 1873, chap. 550, p. 861, of the New York and New England Company as the successor, as a corporation, through the mortgage, of the mortgagor Company sufficiently show that the New York interest came through the New York Act of April 25, 1864. See also, *Re Boston, Hartford and Erie R. R. Co.* 9 Blatchf. 409, 415.

That a meeting in one of several States of the stockholders of a corporation chartered by all those States is valid in respect to the property [169] of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States, is, we think, a sound proposition. Whether it be or be not true that proceedings of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void (*Miller* v. *Ewer*, 27 Me. 509), there is no principle which requires that the corporators of this consolidated Corporation should meet in more than one of the States in which it has a domicil, in order to the validity of a corporate act.

It appears by the bill that the mortgagor Corporation was chartered by its name, by the Legislature of Connecticut, at its May session, 1863; that thereafter Acts were passed by the Legislatures of Massachusetts and Rhode Island, making it a corporation of those States; that, in August, 1863, the Southern Midland Railroad Company, having previously acquired all the franchises and property of the Boston and New York Central Railroad Company, a corporation chartered under the laws of Massachusetts, Connecticut and New York, conveyed all its franchises and property to the Boston, Hartford and Erie Company; and that, in November, 1863, the latter Company, under authority contained in Acts of the Legislatures of all four of the States, acquired the franchises and property of the Hartford, Providence and Fishkill Railroad Company, a corporation created under the laws of New York, Rhode Island and Connecticut.

The Boston, Hartford and Erie Company, therefore, though made up of distinct corporations, chartered by the Legislatures of different States, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of their ownership of shares of such stock, in all of its property everywhere. In its organization and action, and the practical management of its property, it was one corporation, having one board of directors, though, in its relations to any State, it was a separate corporation, governed by the laws of that State as to its property therein. It, therefore, had a domicil in each State, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one [170] State, so as to bind the Corporation in respect to its property everywhere. *Covington & Cin. Bridge Co.* v. *Mayer*, 31 Ohio St. 317; Pierce, Railroads, 20.

In addition to this, the Legislatures of Rhode Island, New York, Massachusetts and Connecticut, by Acts passed after the mortgage was made, expressly ratified and confirmed the proceedings of the Company in making it, each Act being substantially in these words: "The proceedings of the Boston, Hartford and Erie Railroad Company, whereby, by indenture dated March 19, 1866, they conveyed their railroad and property in mortgage to Robert H.

Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed." Private Acts of R. I. Jan. Sess. 1866, p. 294; Laws of N. Y. 1866, chap. 789; Laws of Mass. 1866, chap. 142; Private Acts of Conn. May Sess. 1866, p. 169. These Acts ratified "the proceedings" of the Company, whereby the mortgage was made. As the mortgage states on its face that the meeting of the shareholders at which they voted to authorize the directors to apply for legislative authority to make the mortgage was "duly and lawfully called and held at the City of New York," the holding of the meeting there was ratified as a part of the proceedings.

The irregularity, if any, was one which the Legislatures of the four States could rectify, as they did, because all of them, acting together for the one purpose, could have authorized in advance the holding of the meeting at New York. *Grenada Co.* v. *Brogden*, 112 U. S. 261 [Bk. 28, L. ed. 704]; *Anderson* v. *Santa Anna*, 116 U. S. 356 [Bk. 29, L. ed. 633]; *Shaw* v. *Norfolk Co. R. R. Co.* 5 Gray, 162; *Howe* v. *Freeman*, 14 Gray, 566.

It is urged by the appellants, that it appears, from the mortgage, that the vote at the meeting was merely one to authorize the directors to apply to the several Legislatures for authority to make a mortgage; that five days after the vote the mortgage was executed; that the shareholders never voted to authorize the making of a mortgage; and that, therefore, the [171] mortgage was invalid. The sufficient answer to this contention is that the terms of the vote, as recited in the mortgage, are adequate to confer authority on the directors, acting for the Company, to make the mortgage, after the Legislatures should have granted authority to make it; and that the subsequent ratification by the Legislatures is equivalent to previous authority. The terms of the mortgage are specified in detail in the vote, the mortgage conforms to them, and the vote is to be construed as covering authority from the shareholders to make the mortgage, if legislative authority should be given. It sufficiently appears that the four confirmatory Acts were passed before the mortgage was recorded anywhere, and before any bonds secured by it were issued.

Moreover, the mortgage has been ratified by Acts of the Legislatures of the four States confirming the organization of the New York and New England Railroad Company, as successor, through the mortgage, of the Boston, Hartford and Erie Company. The Acts of Massachusetts and Connecticut are substantially in these terms: "The proceedings of the holders of the bonds secured by mortgage, dated March 19, 1866, from the Boston, Hartford and Erie Railroad Company to Robert H. Berdell and others, whereby they have formed a corporation under the name of the New York and New England Railroad Company, are ratified and confirmed." Laws of Mass. 1873, chap. 289; Special Acts of Conn. May Sess. 1873, p. 8. The Act of Rhode Island is in these terms: "The New York and New England Railroad Company, being a corporation formed under the provisions of a mortgage made by the Boston, Hartford and Erie Railroad Company to Robert H. Berdell and others, trustees, and ratified and confirmed by the General Assembly at the January session, 1866, is hereby recognized and declared to be a corporation invested with all the powers, privileges and franchises, and subject to all the duties, liabilities and restrictions of said Boston, Hartford and Erie Railroad Company, as is provided in said mortgage, and the proceedings of the holders of the bonds secured by said mortgage, whereby they have formed said corporation, are hereby ratified and confirmed." Private Acts of R. I. May Sess. 1873, p. 13. [172] The Act of New York extends for two years the time for the completion of the Boston, Hartford and Erie Railroad, and then says: "The benefit of this extension of time shall vest in the New York and New England Railroad Company, a corporation formed under the provisions of the mortgage ratified and confirmed by chapter 789 of the laws of 1866. Laws of N. Y. 1873, chap. 550.

It is also contended by the appellants, that the mortgage was void for fraud. The bill contains these allegations: "And your orator is informed and believes, and therefore avers, that said meeting was held in the State of New York, beyond the States in which said Corporation was created, so that as few stockholders as possible, because of the distance from their homes, might attend said meeting, in order that the stockholders present, representing or acting in the interest of the Erie Railway, might, by authorizing a mortgage of its franchises, raise a large sum of money, a portion of which should afterwards be diverted to the use of said Erie Railway; which was done, as is hereinafter fully set forth, to the extent of five millions of dollars. And your orator claims that by reason of the meeting being so held for the purposes aforesaid, and in the place aforesaid, said meeting was illegal, and all its acts and doings were null and void." "And your orator, upon information and belief, further avers, that on or about October in the year 1867, said Eldridge, then being the president of the Boston, Hartford and Erie Railroad, and also president of the Erie Railway, and while said Davis and Gregory were trustees as aforesaid, and said Davis being the legal counsel and adviser of said Erie Railway, said parties colluded and agreed together as such trustees, and the president of said Boston, Hartford and Erie Railroad, and as well of the Erie Railway, of which the majority of said trustees were counsel and president, and sold five millions of said bonds at a discount of 20 per cent, receiving therefor the promises to pay at future dates, the exact dates of which your orator is ignorant, but which will appear upon the books of said railroad, which were afterwards discounted at [173] great loss and cost to said Boston, Hartford and Erie Railroad, in order to convert the same into cash, and the money obtained thereon was not used in equipping and finishing said road, nor in taking up the underlying liens on said road, but was used in paying the losses that said officers of said Boston, Hartford and Erie Railroad had made in speculations in stocks in the name of said road. And your orator, upon information and belief, further avers, that said Erie Railway guarantied the payment of the interest on the $5,000,000 of Berdell bonds, and sold and disposed of the same in buying certain prop-

erty for said Erie Railway at ninety cents on the dollar for said bonds; and that this whole transaction was made for the benefit of said Erie Railway, in accordance with a contract made between the officers of the two roads, the said officers that made and concluded said transactions and contract being substantially one and the same persons."

The substance of these allegations is that the persons who acted in the interest of the Erie Railway Company intended, by means of the mortgage, to raise money which should be diverted to the use of that company. But it is not alleged that the price of 80 per cent was not the full value of the $5,000,000 of bonds; and the guaranty by the Erie Railway Company of the payment of the interest on those bonds, may very well have enhanced their value by 10 per cent. The diversion of the proceeds of the 80 per cent by the officers of the Boston, Hartford and Erie Company to pay for losses by them in speculations in stocks is something which—as regards that Company and its rights, which alone the appellants are seeking to enforce—cannot affect the rights of the ultimate purchasers of the $5,000,000 of bonds, represented now by the New York and New England Company.

Of the $20,000,000 of bonds, the $7,404,650 used in retiring underlying mortgage bonds, and the $275,350 used in completing or equipping the road, being, in all, $7,680,000, were clearly valid. As to the $2,500,000 of bonds, which were, by the terms of the mortgage, to be applied to the retirement of underlying liens, and were apparently issued to the State of Massachusetts in exchange for a loan of its scrip, that State, taking the bonds with notice [174] of the diversion, might have been liable, as a constructive trustee, to the holders of such underlying liens, for the proper application of the bonds, but certainly owned them as against all the world but such *cestuis que trust*; and it would seem that the proceeds of the bonds were used in completing and equipping the road. As to the $4,819,000 alleged to have been stolen by Eldridge there is nothing to show that they had not come to be held by *bona fide* holders.

Some of the bonds being valid, the mortgage was valid as to them, though there may have been some invalid bonds. In the Ellis foreclosure suit, the fact that some of the bonds may have been invalid was of no importance unless and until the mortgagor offered to redeem the valid bonds. The holders of the invalid bonds could not share in the benefits of the foreclosure, and the holders of the valid bonds would see that that rule was observed in the foreclosure suit. The agreement of facts on which the Ellis suit was heard states that all of the 20,000 bonds but one were issued, and that the same were, at that time, "wholly or in great part owned by *bona fide* holders thereof."

It is contended by the appellants that they were not parties to the Ellis foreclosure suit; that it was a collusive suit, without any real controversy; that it is still pending; and that the proceedings and decree in it are not binding on the appellants.

There are provisions in the Bardell mortgage that, in case of default by the Company in the payment of either principal or interest of the bonds, the Company shall deliver possession of the mortgaged premises to the trustees; that, on taking possession, the trustees shall file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice that they have taken possession of the mortgaged property, franchises, and estate, for default in the payment of principal or interest, or both, as the same may be, and of their purpose to foreclose the mortgage for the default; that, if the default shall continue for eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the trustees, and all the right or equity of redemption of the Company therein shall be forever barred and [175] foreclosed; that, in case of an absolute foreclosure, it shall be the duty of the trustees to call a meeting of the bondholders, by an advertisement of the time and place and object thereof, in newspapers published in Boston, Providence, Hartford, New York City and London, at which meeting the bondholders may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, which new corporation shall have all the powers, privileges and franchises, and be subject to all the duties, liabilities and restrictions of the old Company, and shall consist of the holders of the mortgage bonds, at a prescribed rate; and that the trustees shall convey to the new corporation all the mortgaged property and franchises. The mortgage also contains provisions for the filling of vacancies in case of the death, resignation or removal of any of the trustees, and for the vesting of all the mortgaged property in the persons so appointed.

The following facts appear from the bill in this suit, and from a copy of proceedings in the Ellis suit, made a part of it: On the 15th of July, 1870, George Ellis and others filed their bill of complaint in the Supreme Judicial Court of Massachusetts, sitting in equity, in behalf of themselves and all other holders of the mortgage bonds, representing that they were the owners of 47 of the bonds, and of the interest warrants thereon which had matured on the first days of January and July of that year and were unpaid, and praying for the appointment of a receiver and for the foreclosure of the mortgage. On the 2d of August, 1870, an order was entered in the cause appointing receivers and directing them to take possession of the road and property. On the 9th of May, 1871, a decree was entered in the cause, in which, after reciting that the court, on the 24th of April, 1871, had decided and decreed that Moses Kimball, Thomas Talbot and Avery Plumer were, in law, the present trustees under the mortgage, it was adjudged and decreed by the court, that the receivers deliver into the possession and control of these trustees, or their successors in office, all the roads, railways, property and franchises which they had [176] in their hands and possession, or under their management and control, as such receivers; that the trustees, or their successors in office, upon taking possession of the property, should file in the office of the Secretaries of State of

the four States the notice authorized by the mortgage; and that, if default in the performance of the condition of the mortgage should continue for the space of eighteen months after the filing of such notice, the mortgaged premises and franchises should vest absolutely and in fee in the trustees and their successors, and all right or equity of redemption of the Company therein should be forever barred and foreclosed. By a decree entered July 28, 1871, William T. Hart, George T. Oliphant, and Charles P. Clark were declared by the court to be, by valid succession and appointment, trustees in place of Kimball, Talbot and Plumer, who had resigned, and their successors in the trusts. Under these decrees the trustees entered into possession of the mortgaged property, and on the 16th of September, 1871, filed in the office of the Secretaries of State of the four States the notices of foreclosure, and, the default still continuing, maintained their possession for a period of more than eighteen months thereafter. On the 18th of March, 1873, they called a meeting of the bondholders, as authorized in the mortgage, for the purpose of organizing themselves into a corporation. At this meeting, held in Boston on the 17th of April, 1873, a corporation was formed, under the name of the New York and New England Railroad Company. By the before mentioned Acts of the Legislature of the several States, the proceedings of the meeting were ratified and confirmed; and the new corporation has since been in possession of the road and franchises, under a conveyance from the trustees, so authorized. The bill contains an averment that the Ellis suit has never proceeded to a final determination and decree, and is still pending in court.

There is, in the bill, an alternative prayer, that, if the court shall not decree the mortgage to be invalid, it will establish and confirm the trusts under it, and remove the persons now administering the trusts, and appoint new trustees to take possession of the mortgaged property, and hold it, under the direction of the [177] court, for the benefit of the creditors and stockholders; and that an account be taken of the earnings of the road.

On the foregoing statement of the case the circuit court said, in its decision: "The case thus presented shows that prior to the filing of this bill, under a decree of a court of equity having jurisdiction of the parties and of the subject matter, the mortgage had been completely foreclosed. To avoid the effect of the foreclosure, the bill charges that the Ellis suit was the result of a fraudulent conspiracy on the part of Ellis, the plaintiff, Lane, the president of the Company, who represented it in its defense, and the receivers and trustees appointed by the court, entered into for the purpose of embarrassing the Company and depriving it of its road and property; and that this fraud was perpetrated by submitting to the court false statements of facts for its decision, and thus obtaining a decree against the Company. The bill does not allege in what particulars the statements of fact were false; nor does it allege that there was not a breach of the condition of the mortgage, nor that the plaintiffs were not the actual holders of the bonds and unpaid interest warrants, nor that any part of the interest which has accrued since 1869 has ever been paid; nor is there any offer or suggestion of redeeming the mortgage. There is no allegation that the new corporation, or any considerable number of the bondholders, had any knowledge of the alleged fraud. The obvious inquiry arises, at this stage of the case, why the plaintiff has not brought to the attention of the state court the fraud alleged to have been practiced upon it, and there sought to have the foreclosure decree revoked." "In *Nougué* v. *Clapp*, 101 U. S. 551 [Bk. 25, L. ed. 1026], it was held that a Circuit Court of the United States cannot reverse or set aside a final decree rendered by a state court which had complete jurisdiction of the parties and subject matter, upon the ground that the decree was obtained by fraud, where the injured party has had an opportunity to apply to the state court to reverse the decree. The plaintiff is a party to the foreclosure suit, as a shareholder in the old corporation. The state court is still open to listen to the complaint of the corporation and its shareholders. The decree of [178] foreclosure, though final in one sense, as determining the respective rights of the parties to the property in question, is still in its nature interlocutory, and is open to review by the court, upon petition or motion in the cause, or by bill of review for good cause shown. Story Eq. Pl. § 421, and note; *Evans* v. *Bacon*, 99 Mass. 213; Mass. P. S. chap. 151, § 12. The plaintiff has, therefore, an ample and complete remedy, for all his alleged grievances, in the state court, and there is no occasion for his application to this court for relief by bill in equity. The decree of foreclosure, therefore, now in full force and unrevoked, is a bar to this suit." These views, so well expressed, are conclusive of this branch of the case, and require nothing more to be said.

The mortgage being a valid mortgage, even if some of the bonds issued under it were invalid, and the right of redemption having passed to the assignees in bankruptcy, and been released by them to the New York and New England Company, and a demurrer having pointed that out, the bill was amended so as to allege that the bankruptcy proceedings were void for fraud. It is claimed that those proceedings were a part of the conspiracy of Ellis and Lane and others, to which Adams, the petitioning creditor in bankruptcy, became a party, to wreck the road; and that the petitioning creditors' debt was insufficient to give the bankruptcy court jurisdiction.

The circuit court, as to these matters, correctly held these propositions: An adjudication of bankruptcy, made by a district court having jurisdiction of the bankrupt, cannot be impeached collaterally by any person who was a party to the bankruptcy proceedings. Until vacated in the manner prescribed by the Bankruptcy Act, it is binding upon all the parties to it. The district court is always open for a reexamination of its decrees in an appropriate form. Any order made in the case may be set aside and vacated on proper showing made, due regard being had to rights which have become vested under it and will be disturbed by its revocation. The only remedy provided for the correction of errors made by the district court is to be found in the supervisory jurisdiction of the circuit court, under the statute, which is ex

[179] clusive, and not reviewable in this court. In *Lamp Chimney Co.* v. *Brass & Copper Co.* 91 U. S. 656 [Bk. 23, L. ed. 336], it was held that a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the *status* of the corporation; and that, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. No such defect appears in these proceedings. The district court had jurisdiction to make the decree, and it has never been vacated. The plaintiff and all the shareholders whom he represents form an integral part of the Corporation, and as such were parties to the bankruptcy proceedings. He is, therefore, bound by the decree, and cannot impeach it collaterally in this suit.

On the subject of laches, the circuit court said: "This bill was filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings, nine years after the entry of the foreclosure decree in the Ellis suit, and seven years after the foreclosure became absolute and the road was conveyed to the new corporation by the trustees. During all this time the records of the courts upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated have been open to inspection and examination, and what has been done under them might have been known to the plaintiff if he had seen fit to make inquiry. In the meantime, it is apparent that many persons must have acquired rights in the stock of the new corporation, who were ignorant of the alleged frauds. Under such circumstances, to set aside this mortgage, to disregard the decree of foreclosure and the adjudication in bankruptcy, and to take the road out of the hands of the bondholders, who have received no interest on their bonds since 1869, and to place it in the hands of receivers for the benefit of the shareholders in the old Corporation, is a proposition so wild and preposterous as hardly to merit serious consideration." We concur fully in these views.

The grounds for dismissing the bill being adequate, we do not deem it necessary to say anything as to the frame of the bill, within the [180] settled rules of equity jurisprudence, in a case where a stockholder in a corporation seeks to enforce, in equity, a right of the corporation. Much might be said as to the defects of this bill, and we only allude to the point lest it might be inferred we regard the bill as properly framed under those rules.

Decree affirmed.

Mr. Justice **Gray** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[223] JOHN F. HARTRANFT, Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*

v.

LAMONT DU PONT.

(See S. C. Reporter's ed. 223-228.)

Inspection of steam vessels—Revised Statutes—what boats are subject to inspection.

A small boat, propelled by steam, habitually carrying four persons and sometimes more, and capable of carrying twenty-five, is subject to inspection under title 52, §§ 4399 etc., R. S.

[No. 237.]

Submitted Apr. 19, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The case is stated by the court.

Mr. Wm. A. Maury, Asst. Atty-Gen., for plaintiff in error.

No counsel appeared for defendant in error.

[224] *Mr. Justice* **Woods** delivered the opinion of the court.

This was an action at law brought by Du Pont, the defendant in error, against Hartranft, Collector of Customs, to recover $500, that sum being the amount of a penalty unlawfully exacted by Hartranft, as Collector, from Du Pont, as the latter alleged. The facts were as follows: The plaintiff resided in Wilmington, Delaware. He was the proprietor of certain powder works at Thompson's Point, upon the Delaware River, across from Chester, Pennsylvana, and distant about two miles. He owned a wooden boat called The Repauno, open except her forward part, which was boarded over. Her dimensions were as follows: length of water line, 37 feet; length of keel, 34 feet; width of beam, 8 feet; depth of hold, 8 feet 9 inches; draught of water, 2 feet 1 inch. She had a small engine and boiler, and was used by the plaintiff to transport himself and his superintendent across the Delaware River, between Thompson's Point and Chester. Occasionally the plaintiff used the boat to carry over his workmen, sometimes as many as nine or ten. When the water was smooth the boat could carry twenty-five persons. She never carried freight or passengers for hire. She had been inspected, but her papers had expired. When she was seized she was sailing without inspection papers. The plaintiff, to get possession of her again, paid to the defendant, under protest, a penalty of $500, and brought this suit to recover it back.

The jury returned a verdict for the plaintiff for $500, based upon a finding of the foregoing facts, with point of law reserved, which was stated as follows:

"If the court should be of the opinion that a vessel of the size and description, and used as found by the jury, is liable to inspection under the Statutes of the United States, the verdict and judgment to be entered for the defendant *non obstante veredicto;* and if the court should be of the opinion that such a vessel is not liable to such inspection, then the judgment to be entered for the plaintiff on the verdict." Upon [225]

this verdict the court rendered judgment for the plaintiff: whereupon, the defendant sued out this writ of error.

The defendant relies on the following provisions of title 52 of the Revised Statutes, "Regulation of Steam Vessels," to justify the exaction of the penalty:

Sec. 4399. "Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title."

Sec. 4400. "All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title."

Sec. 4418, which provides, among other things, that "The local inspectors shall also inspect the boilers of all steam vessels before the same shall be used, and once at least in every year thereafter."

Sec. 4421, which provides, in substance, that when the inspection of a steam vessel is completed, and she and her equipment are approved, a certificate of inspection, verified by the oaths of the inspectors, shall be issued.

Sec. 4426. "The hull and boilers of every ferry boat, canal boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life, as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted; and no such vessel shall be navigated without a licensed engineer [226] and a licensed pilot."

The seizure in the present case was made under section 4499, which provides: "If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any District Court of the United States having jurisdiction of the offense."

The Repauno was a vessel propelled by steam and navigating the Delaware River, which is a water of the United States, and a common highway of commerce. She was, therefore, by the terms of section 4400 of the Revised Statutes, made subject to the provisions of title 52. But, if there were any doubt about the application of the inspection laws to The Repauno, it would be removed by section 4426. It seems to us clear that The Repauno comes within the class of boats described in this section. Of course she bears no resemblance to a canal boat, but she only differs from a ferry boat, as it is generally understood, in not conveying passengers for hire: and she differs from a yacht in not being sea going, if, in fact, she is not sea going, and in not being designed and used for pleasure merely. But, if neither a ferry boat nor a yacht, she clearly falls within the meaning of the phrase "other small craft of like character." If such a boat, so constructed and used, is not included in that phrase, it would be difficult to name any that would be. If it is argued that The Repauno is not such a craft as Congress would require to carry a licensed engineer and a licensed pilot, the reply is that, as section 4426 makes this requirement of a canal boat propelled by steam, and subjects it to the other provisions of law for the better security of life, there is no reason why the same exactions should not be made of the boat in question.

The reason of the law applies to The Repauno. The purpose of title 52 is primarily the protection of the passengers and crew and property on vessels propelled by steam. The law was passed also to protect the lives and property of persons on other boats and at the wharves. The Repauno was of sufficient size to cause peril to life and property by an explosion of her boiler. She was not a skiff. She was not a mere toy incapable of doing harm. The plaintiff's superintendent, who daily, and his workmen, who occasionally, were carried back and forth upon her, and the pilot and engineer, who were required for her navigation, and the people in other boats who passed her on the water, or those who stood on the docks where she landed, were entitled to the same protection which the law provided against the [227] explosion of the boilers of larger craft. A boat propelled by steam, which habitually carries four persons and sometimes more, and is capable of carrying twenty-five, ought to be subject to inspection. The fact that, if her boiler should explode or her hull spring a leak, probably only four lives would be imperiled, does not occur to us as ground why she should be exempted from the provisions of the law requiring inspection of vessels propelled by steam.

In reaching this conclusion we have not overlooked the case of *U. S.* v. *The Mollie*, 2 Woods, 318. In that case the craft in question was of smaller dimensions than The Repauno, and was occasionally run by her owners for amusement on the Buffalo Bayou below Houston, Texas. She was held not to be within the inspection laws.

It may be difficult to draw the line between vessels propelled by steam which are so small and insignificant that they do not come within the inspection laws, and larger boats which do. But we are clearly of opinion that The Repauno belongs to the latter class, and that the penalty sued for in this case was lawfully enforced.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

Mr. Justice **Bradley** dissenting:

I cannot agree to the judgment in this case. It seems to me that it carries the application of the statute to an unreasonable length. The boat in question was a mere skiff, not larger than a ship's yawl, with a capacity not exceeding that of a good sized canoe, without deck, with a boiler not much larger than a tea-kettle, and a cylinder of seven inches stroke, and not much larger than a pop-gun. I think we are in danger of sticking in the bark by construing the statute as requiring such a vessel to be inspected. Indeed, it seems to me that the terms of the law do not apply to such

a boat. Its language is, "every ferry boat, canal boat, yacht, or other small craft of *like character*," Section 4426. The same section declares that "No such vessel shall be navi-
[228] gated without a licensed engineer and a licensed pilot." The boat in question is not of "like character," within the meaning of the statute. It seems absurd to require a man to have an inspection made of a mere skiff which he has rigged up to take him across the river to his shops, and to have a licensed engineer and licensed pilot to navigate it. With all due respect, I think it is running the application of the statute into the ground.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[346] LORENZO SNOW, *Plff. in Err.*,
v.
UNITED STATES.

SAME *v.* SAME.

SAME *v.* SAME.

(See S. C. Reporter's ed. 346-355.)

Jurisdiction—writ of error to Supreme Court of Utah—conviction under Act of 1882.

1. A review of the statutes shows that there was no statute in force at the time to which the Revised Statutes related which gives this court jurisdiction to review a decision of the Supreme Court of the Territory of Utah in a case arising under section 3 of the Act of March 22, 1882.
2. A statutory provision authorizing a writ of error from this court to the Supreme Court of Utah in cases of conviction of polygamy or bigamy does not authorize one in case of a conviction, under section 3 of the Act of 1882, for cohabiting with more than one woman.
3. Where the question is, whether or not there is an error in the administration of a statute, the case does not fall within the provision authorizing a writ of error "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."
4. No test of money value can be applied to the deprivation of liberty, whether as punishment for crime or otherwise, to confer jurisdiction on this court.

[Nos. 1277, 1278, 1279.]

Argued Apr. 28, 29, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the Territory of Utah. *Dismissed.*

The case is stated by the court.

Messrs. **George Ticknor Curtis** and **Franklin S. Richards**, for plaintiff in error.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

[347] *Mr. Justice* **Blatchford** delivered the opinion of the court:

These are three writs of error to the Supreme Court of the Territory of Utah to review judgments of that court affirming judgments of the District Court of the First Judicial District of that Territory, rendered on convictions of the plaintiff in error on indictments founded on section 3 of the Act of March 22, 1882, 22 Stat. at L. 31, for cohabiting with more than one woman. Each of the judgments imposed imprisonment for six months and a fine of $300.

The question of the jurisdiction of this court over these writs of error presents itself at the threshold. It was not suggested by the counsel for the United States at the argument, nor referred to by the counsel for the plaintiff in error, for the reason, as the court has been advised by both parties since the argument, that a decision on the merits was desired; and for the further reason that this court, at the present term, in *Cannon* v. *U. S.* 116 U. S. 55 [Bk. 29, L. ed. 561], took cognizance of a writ of error in a like case. But the question has presented itself to the court, and, since the argument, we have been furnished with a brief, on the part of the plaintiff in error, in support of the jurisdiction.

Section 702 of the Revised Statutes provides as follows: "The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the supreme court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the Territory of Washington, the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

So much of this section 702 as relates to the Territory of Utah was carried into the section from section 9 of the Act of September 9, 1850, establishing a territorial government for Utah (9 Stat. at L. 455), which provided that writs of error and appeals from the final decisions of the Supreme Court of the Territory should be allowed and might be taken to the Supreme Court of the United States, "where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness," should exceed $1,000, except only that in all cases involving title to slaves, and on any writ of error or appeal on a *habeas corpus* involving the question of personal freedom, no regard should be had to value.

So much of section 702 as provides for the review of "any final judgment or decree" of the Supreme Court of the Territory of Washington "in any cause when the Constitution or a statute or treaty of the United States is brought in question," is taken from the Act of March 2, 1853, establishing a territorial government [348]
for Washington (10 Stat. at L. 175), which—after providing that writs of error and appeals from the final decisions of the Supreme Court of the Territory should be allowed and might be taken to the Supreme Court of the United States, "where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness," should exceed $2,000—went on in these words which were not found in the prior Act of 1850 in regard to Utah: "and in

all cases where the Constitution of the United States, or Acts of Congress, or a treaty of the United States, is brought in question."

It is plain that section 702, so far as Utah is concerned, does not cover the present cases, and that the provision in it in regard to cases where the Constitution, or an Act of Congress, or a treaty, is brought in question has reference only to Washington and not to Utah.

Section 1909 of the Revised Statutes provides that writs of error and appeals from the final decisions of the supreme court of any one of eight named Territories, of which Utah is one, "shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars," except that a writ of error or appeal shall be allowed "upon writs of *habeas corpus* involving the question of personal freedom." This section does not cover the present cases.

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Section 1911 relates exclusively to writs of error and appeals from Washington Territory, and contains a provision that they shall be allowed "in all cases where the Constitution of the United States, or a treaty thereof, or Acts of Congress, are brought in question." That provision exists only in regard to Washington, and is not found in section 1909 in regard to the eight other Territories.

Section 709 of the Revised Statutes applies only to a writ of error to review a final judgment or decree in a suit in the highest court of a State.

There being thus no statute in force on December 1, 1873, to which time the enactments in the Revised Statutes related, giving to this court jurisdiction of a writ of error to the Supreme Court of Utah in a case like those before us, an Act was passed on June 23, 1874, 18 Stat. at L. 253, entitled "An Act in Relation to Courts and Judicial Officers in the Territory of Utah," section 3 of which contained this provision: "A writ of error from the Supreme Court of the United States to the Supreme Court of the Territory shall lie in criminal cases, where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy." The writ of error in *Reynolds* v. *U. S.* 98 U. S. 145 [Bk. 25, L. ed. 244], was brought under that statute, the conviction being for bigamy under section 5352 of the Revised Statutes. This section 5352 was taken from section 1 of the Act of July 1, 1862, 12 Stat. at L. 501, entitled "An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah;" which section 1 declares that every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, shall, with certain exceptions, be adjudged guilty of bigamy. The Act then proceeds to disapprove and annul all Acts and parts of Acts theretofore passed by the Legislative Assembly of Utah, "which establish, support, maintain, shield or countenance polygamy," with the proviso that the Act should "not affect or interfere with the right 'to worship God according to the dictates of conscience,' but only to annul all Acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances." Hence, section 3 of the Act of 1874, in speaking of "bigamy or polygamy," referred to the crime denounced by section 1 of the Act of 1862, as carried into the Revised Statutes.

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Then came the Act of March 22, 1882, 22 Stat. at L. 30, section 1 of which amended section 5352 of the Revised Statutes, the original and new sections 5352 (leaving out the exceptions) being as follows, the parts in each which differ from the other being in italic:

Original.	*New.*
"Every person *having* a husband or wife living, who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of *bigamy*, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years."	"Every person *who has* a husband or wife living, who, *in a Territory or other place over which the United States have exclusive jurisdiction, hereafter* marries another, whether married or single, *and any man who hereafter simultaneously, or on the same day, marries more than one woman*, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of *polygamy*, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term *of* not more than five years."

Section 3 of the Act of 1882 is the one on which the indictments in these cases were founded. It is in these words: "If any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments in the discretion of the court." This section creates a new and distinct offense from bigamy or polygamy, one which is declared to be a misdemeanor (there having been and being no such declaration as to bigamy or polygamy), and the punishment for which is much less than the punishment for bigamy or polygamy. The Act of 1882 made no provision for any writ of error from this court in a case under section 3, while, by the then existing Act of July, 23, 1874, a writ of error could lie on a conviction of bigamy or polygamy. By no proper construction can the offense of cohabiting with more than one woman be regarded as identical with the offense of bigamy or polygamy. The Act of 1882, in sections 1, 3 and 5, classes bigamy or polygamy as a different offense from the offense of cohabiting with more than one woman; and we cannot regard a statutory provision for a writ of error on a conviction of bigamy or polygamy as authorizing one on a conviction, under section 3 of the Act of 1882, of cohabiting with more than one woman.

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On the 3d of March, 1885, the following Act

was passed, 23 Stat. at L. 443: "No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." Sec. 2. "The preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

This Act is relied on by the plaintiff in error as covering the present cases. The first section of it applies solely to judgments or decrees in suits at law or in equity, measured by a pecuniary value. If the second section applies to a criminal case wherein "is drawn in question the validity of a" "statute of, or an authority exercised under, the United States," without regard to whether there is or is not any sum or value in dispute, the question still remains for consideration, whether, in the present cases, the validity of a statute of the United States, or the validity of an authority exercised under the United States, is drawn in question.

The peculiar language of section 2 is to be noted. In section 709 of the Revised Statutes, allowing a writ of error to review a final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, the language is, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." This language is taken from section 2 of the Act of February 5, 1867, 14 Stat. at L. 386, where it is reproduced *verbatim* from section 25 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 85. In section 2 of the Act under consideration the words "and the decision is against their validity" are not found. In section 1911 of the Revised Statutes, in regard to Washington Territory, the language, adopted substantially from the Act of March 2, 1853, 10 Stat. at L. 175, is: "In all cases where the Constitution of the United States, or a treaty thereof, or Acts of Congress, are brought in question;" and is not limited to the case of a decision against the validity of the Act. Section 2 of the Act of 1885 applies not where merely an Act of Congress is brought in question, but only where the validity of a statute of the United States is drawn in question, or where the validity of an authority exercised under the United States is drawn in question: but this is not limited by the requirement tha the decision shall have been against such validity.

In the present cases, the validity of a statute of the United States is not drawn in question. No such question is presented by the bills of exceptions, or the requests for instructions, or the exceptions to the charges, or anywhere else in the records. Nor is the validity of an authority exercised under the United States drawn in question. The plaintiff in error contends that the construction of the Act of 1882 is drawn in question, and also the authority exercised under the United States Statute, by which he was tried and convicted; that the authority of the United States is invoked to deprive him of his liberty, in a court established by Congress and acting solely by federal power; and that the question is, whether the authority exercised by the court under the Act of 1882 is a valid authority, and within the scope of that Act, because the contention is that the court misconstrued the statute and acted beyond the authority which it conferred. The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an "authority" as is intended by the Act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in a Territory where the prosecution is based on a statute of the United States; and, indeed, might go still further, for the authority of every court sitting in a Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of "an authority exercised under the United States" is drawn in question.

There is a decision of this court on this point, in *Bethell* v. *Demaret*, 10 Wall. 537 [77 U. S. bk. 19, L. ed. 1007]. The 25th section of the Judiciary Act of 1789, allowed a writ of error from this court to the highest court of a State, "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such validity." The case referred to was a writ of error to the highest court of a State, and it was contended that that court, in rendering the decision complained of, acted under the authority of the State, and so there was drawn in question an authority exercised under the State, which, in the particular case, impaired the obligation of a contract, and was repugnant to the Constitution of the United States, and the decision was in favor of the validity of such authority. To this view, this court, speaking by *Mr. Justice* Nelson, gave this answer: "The authority conferred on a court to hear and determine cases in a State is not the kind of authority referred to in the 25th section; otherwise, every judgment of the supreme court of a State would be re-examinable under the section."

In the recent case of *Kurtz* v. *Moffitt*, 115 U. S. 487, 498 [Bk. 29, L. ed. 458, 462], it was said by this court, speaking by *Mr. Justice* Gray, as the result of the examination of numerous cases which are there cited, that "A jurisdiction conferred by Congress upon any court of the United States, of suits at law or in equity, in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money." In each of the present cases the pecuniary value involved does not exceed $300, even if the fine

could be called a "matter in dispute," within the statute. As to the deprivation of liberty, whether as a punishment for crime or otherwise, it is settled by a long course of decisions, cited and commented on in *Kurtz* v. *Moffitt, ubi supra*, that no test of money value can be applied to it, to confer jurisdiction.

We conclude, therefore, that we have no jurisdiction of these writs of error, and that they must be dismissed for that reason.

It is urged however, that this court took jurisdiction of the writ of error in *Cannon* v. *U. S.* 116 U. S. 55 [Bk. 29, L. ed. 561], and affirmed the judgment on a conviction under the same section 3 of the Act of 1882. The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits. The question was overlooked by all the members of the court. But, as the case was decided at the present term, and the want of jurisdiction in it is clear, we have decided to vacate our judgment, and recall the mandate, and dismiss the writ of error for want of jurisdiction, in order that the reported decision [355] may not appear to be a precedent for the exercise of jurisdiction by this court in a case of the kind.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[230] GEORGE S. WELLS ET AL., *Plffs. in Err.*,
v.
JOSEPH WILKINS, Sheriff, Etc.

OTTO GOLDSTUCKER ET AL., *Plffs. in Err.*,
v.
SAME.

GEORGE S. WELLS ET AL., *Plffs. in Err.*,
v.
SAME.

GEORGE S. WELLS ET AL., *Plffs. in Err.*,
v.
SAME.

GEORGE S. WELLS ET AL., *Plffs. in Err.*,
v.
SAME.

GEORGE S. WELLS ET AL., *Plffs. in Err.*,
v.
SAME.

(See S. C. Reporter's ed. 230, 231.)

Practice—jurisdiction—amount in controversy.
[Nos. 657-662.]
Submitted April 19, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

Motions to reinstate. *Denied.*

Messrs. **J. D. Thompson, T. De S. Tucker** and **Alex. Porter Morse,** for plaintiffs in error, in support of motions.

Mr. **C. C. Yonge, Sr.,** for defendant in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court: [231

These motions are denied. The additional affidavits which have been filed failed to satisfy us that the value of the matter in dispute is sufficient to give us jurisdiction. While the aggregate of the values in all the suits may exceed five thousand dollars, it is clear to our minds that the value of the property involved in no one of the suits reaches that sum, or anything like it.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES K. JOHNSON, WILLIAM J. CARO, Exr. of E. J. CARO, Deceased, MATILDA C. DUVAL, AND IRENE C. WILLIAMS, *Plffs. in Err.*, [228
v.
JOSEPH WILKINS, Sheriff, and *ex officio* Admr. *de bonis non* of the Estate of JAMES RUSHTON, Deceased.

(See S. C. Reporter's ed. 228, 229.)

A motion to reinstate a case dismissed for want of jurisdiction, denied on the ground of laches.
[No. 254.]
Submitted Apr. 26, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

On motion to reinstate a case dismissed for want of jurisdiction. *Denied.*

The case is sufficiently stated in the opinion.

Mr. **Alexander Porter Morse,** for plaintiffs in error.

No one opposed.

Mr. Chief Justice **Waite** delivered the opinion of the court: [229

This case was submitted under Rule 20, on the 7th of January last, but, on looking into the record, we found nothing from which it could fairly be inferred that the value of the matter in dispute exceeded $5,000, and, consequently, on the 19th of January, entered an order of dismissal, on our own motion, as it rested "on the plaintiffs in error to show our jurisdiction, either from the record or by affidavits," and this had not been done. The present motion was not filed until April 26, and we are not willing at this late day to receive and consider affidavits to supply a defect in the record which has existed since the case was docketed on the 11th of August, 1883, and of which the appellants have neglected to take any

notice until the expiration of more than three months from the time the court acted upon it and entered an order of dismissal on that account. This is one of the class of cases in which the parties are required to act promptly, after they have actual notice of what is required of them, or they will not be heard.

The motion to reinstate is denied.

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

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[321] ELISHA T. LORING AND CHARLES A. WELCH, *Appts.*

v.

CHARLES S. PALMER.

(See S. C. Reporter's ed. 321-346.)

Trusts—Statutes of Michigan—sufficiency of evidence to establish trust—equitable jurisdiction—laches.

1. The Statute of Michigan provides that "Express trusts may be created for any or either of the following purposes: * * * For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to limitations as to time prescribed in this title." Without deciding whether under this statute it is necessary that an express trust be *originally created* by an instrument in writing sufficient in form, the court holds that, in any view of the statute, the correspondence, land contract and deed, shown in the record, between the same parties and relating to the same real estate, were sufficient to establish the trust claimed in the bill.

2. In Michigan, as well as in all States where the common law is in force, where a conveyance of land is made to two or more persons, and the instrument is silent as to the interest which each is to take, the presumption is that their interests are equal.

3. The evidence in the present case shows that the purchase in question was for the parties, individually, and not for a corporation in which they were interested.

4. Where the interest of the *cestui que trust* was not created by the deed to the trustee, but by the original contract of purchase, in connection with certain cotemporaneous correspondence, the legal title did not vest in the *cestui que trust* by virtue of the Statute of Michigan abolishing passive trusts, but he merely took an equitable title; and his remedy, if any, is in a court of equity, and not by ejectment.

5. The *cestui que trust* has not in the present case lost his rights by laches, the evidence showing that the delay was due to the fault and misstatements of the trustee.

[No. 183.]

Argued March 18, 19, 1886. Decided May 10, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **C. I. Walker, Joseph H. Choate** and *Sohier & Welch*, for appellants:

The evidence was not sufficient to establish, under the Statute of Michigan, an express trust in Loring as to the lands in question, for the benefit of the complainant, to the extent of an undivided third or any other portion of the property.

Under the Statute of Michigan, there is no room to indulge in imagination or inference.

From first to last, it is to be borne in mind that if there was any trust in the present case, it was an express trust, and, as claimed by the complainant and found by the court below, must have arisen *eo instanti* upon the execution of the contract by Loring, when the title to the land was acquired by him.

Bispham, Eq. § 80; *Mercer* v. *Stark*, Sm. & M. Ch. (Miss.) 479, 488; *Dunphy* v. *Ryan*, 116 U. S. 491 (Bk. 29, L. ed. 703) *Smith* v. *Burnham*, 3 Sumn. 460.

If there is no trust created at the time of the agreement or purchase, it is well settled that no subsequent act, such as breach of contract, will create a trust.

Kellum v. *Smith*, 33 Pa. 158; *Steere* v. *Steere*, 5 Johns. Ch. 1; *Olcott* v. *Bynum*, 17 Wall. 44 (84 U. S. bk. 21, L. ed. 570).

An express trust must appear with "absolute certainty as to its nature and terms" before the court can undertake to execute it.

Steere v. *Steere, supra; Dillaye* v. *Greenough*, 45 N. Y. 438.

Not only must it be absolutely certain that there is a trust, but it must be just as certain what the trust is, what its nature is.

Slocum v. *Marshall*, 2 Wash. 397; 1 Perry, Trusts, § 83.

It is not sufficient to call a man a "trustee," or to create a trust in so many words. It must appear with certainty what the trust is, its nature, terms, etc.

Smith v. *Matthews*, 3 DeG. F. & J. 139; *Dale* v. *Hamilton*, 2 Phila. 266; *Forster* v. *Hale*, 3 Ves. 707; *Dillaye* v. *Greenough, supra; Cook* v. *Barr*, 44 N. Y. 156; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 273.

The nature and terms of the trust must be clearly and explicitly expressed, and it must in writing clearly and unmistakably appear not only that there is a trust intended, but in whose behalf, for what purpose, and to what extent, as to the proportions of property covered by it. And it must be so clearly expressed that no other intention, no other party, no other terms, can, consistently with the language used, have been intended.

To this general rule is added the special provision of the Michigan Statute: that the trust must be created by the writings which fully express and clearly define it.

Measured by those requirements, the trust which is claimed, and which has been adjudged by the court below, cannot be read in the letters of Palmer of the 18th and 19th of June; assuming them to have been assented to by Loring and acted upon by him, in taking the contract in his own name as trustee, and assuming that he replied to the letters, that he approved of the purchase, and consented to join them therein.

The rule requiring the trust and all its features and details to be "fully expressed and clearly defined upon the face" of the writings, necessarily excludes the reception of or resort to parol testimony to add to the contents of the papers.

This is certainly true under the terms of the Michigan Statute; the trust must there appear "upon the face" of the instruments relied upon. It is equally true on general principles. No resort can be had to the acts of the parties or to parol evidence in general.

Cook v. *Barr, supra; Shafter* v. *Huntington*,

53 Mich. 310; *Jacobs* v. *Miller*, 50 Mich. 126; *Ruth* v. *Oberbrunner*, 40 Wis. 238; *Hurst's Lessee* v. *McNeil*, 1 Wash. 75; *Sturtevant* v. *Sturtevant*, 20 N. Y. 39; *Rasdall* v. *Rasdall*, 9 Wis. 379; 1 Perry, Trusts, § 85.

If the trust alleged and found by the court below could be read as a trust, fully expressed and clearly defined upon the face of the papers creating it, so as otherwise to satisfy the requirements of the fifth subdivision of section 5573 of the Statute of Uses and Trusts of Michigan, still, it would be a naked, passive trust and, as such, unauthorized under the provisions of that statute. Under such a trust no function or title would rest in the trustee; but the statute would have executed the trust immediately in the *cestui que trust*.

Riehl v. *Bingenheimer*, 28 Wis. 84; *White* v. *Fitzgerald*, 19 Wis. 480; *Goodrich* v. *Milwaukee*, 24 Wis. 422; *Ruth* v. *Oberbrunner*, 40 Wis. 263; *Dodge* v. *Williams*, 46 Wis. 100; *Smith* v. *Ford*, 48 Wis. 116.

It is held in Michigan that every passive trust is abolished; and that the statute executes in the beneficiary, immediately upon the conveyance, the legal title to the estate in which such trust is attempted to be created.

Ready v. *Kearsley*, 14 Mich. 215; *Burdeno* v. *Amperse*, 14 Mich. 97; *Steevens* v. *Earles*, 25 Mich. 44; *Thompson* v. *Waters*, 25 Mich. 214; *M. E. Ch. of Newark* v. *Clark*, 41 Mich. 739.

Even where a trust is created, in express terms, simply "to convey" to appointees or beneficiaries, it is held to be a passive trust, and the statute transfers the legal title immediately; no conveyance from the so-called trustee being either necessary or proper.

Matter of Winter, 34 N. Y. 567; *Clark* v. *Davenport*, 1 Bosw. 115.

And it is not pretended that Loring's alleged duties extended even as far as that, "to convey." He was only to hold in trust. So that, if the complainant has succeeded in establishing the case made by his bill, he became the legal owner, by a title actually and completely vested in him, of one third of the lands in controversy, and, being such legal owner, he had a plain, adequate and complete remedy at law in an ejectment suit; and the present action, on the complainant's own theory of the case, is obviously but an ejectment bill in disguise, and one which a court of equity ought not to tolerate or sustain.

Neither does the bill claim, nor the evidence establish, any trust in Loring by implication of law.

There being no resulting trust possible under the Statutes of Michigan in favor of a party paying the consideration for a purchase of lands conveyed to another party, the only other trust that could arise by operation of law, or by implication of law, is by establishing a case of fraud or *mala fides* in the original acquisition of the title.

Lloyd v. *Spillet*, 2 Atk. 150.

Having expressly consented to and requested the acquisition of the title by Loring, Palmer cannot now complain.

Sturtevant v. *Sturtevant*, *supra*; *Hunt* v. *Roberts*, 40 Me. 187.

There is nothing in the case presented but a parol trust; a trust created out of materials from which the law forbids it to be constructed; a promise, it may be called, to hold in trust; a promise to hold for the benefit of another. In other words, it is nothing but an agreement, void under the Statute of Frauds, which, in the eye of the law, is nothing.

Shafter v. *Huntington*, 53 Mich. 310, 315.

The fraud or acts amounting to an abuse of confidence, from which the law will imply a promise, are those committed at the time of the purchase. No subsequent act on the part of the purchaser can be made the foundation of a trust by implication of law.

Kellum v. *Smith*, *supra*; 1 Perry, Trusts, § 133; *Fickett* v. *Durham*, 109 Mass. 419; *Phillips* v. *Hull*, 101 Pa. 567; *Levy* v. *Brush*, 45 N. Y. 589; *Wheeler* v. *Reynolds*, 66 N. Y. 232; *Wood* v. *Rabe*, 96 N. Y. 426; *Smith* v. *Burnham*, 3 Sumn. 435; *Steere* v. *Steere*, *supra*.

It is not sufficient to show by parol that one bought with his own money for the use of another, "because that would be to overturn the Statute of Frauds."

Blair v. *Bass*, 4 Blackf. 545; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Parsons* v. *Phelan*, 134 Mass. 109; *Purcell* v. *Miner*, 4 Wall. 513 (71 U. S. bk. 18, L. ed. 435). See also *Fischli* v. *Dumaresly*, 3 A. K. Marsh, 24; *Randall* v. *Howard*, 2 Black, 589 (67 U. S. bk. 17, L. ed. 269); 2 Reed, Stat. Fr. § 822; *Moots* v. *Scriven*, 33 Mich. 504; *Taylor* v. *Boardman*, 24 Mich. 287.

In view of the long-continued acquiescence of the complainant in Loring's disavowal of all interest on complainant's part in the lands in controversy, and of his gross and unexcused laches in the presentation of his claim, the court, as a court of equity, should have dismissed the bill.

The character of the property, as mining and speculative property, is a leading consideration in respect to the application of the doctrines of acquiescence and laches.

Seymour v. *Freer*, 8 Wall. 216 (75 U. S. bk. 19, L. ed. 306); *Russell* v. *Miller*, 26 Mich. 1; *Pierce* v. *Pierce*, 22 Northwest. Rep. (Mich.) 81; *Clegg* v. *Edmondson*, 8 DeG. M. & G. 787; *Hume* v. *Beale*, 17 Wall. 336 (84 U. S. bk. 21, L. ed. 602); *Nettles* v. *Nettles*, 67 Ala. 599; *Philippi* v. *Philippe*, 115 U. S. 151 (Bk. 29, L. ed. 336); *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806 (Bk. 24, L. ed. 324); *Brown* v. *Co. of Buena Vista*, 95 U. S. 157 (Bk. 24, L. ed. 422); *Godden* v. *Kimmell*, 99 U. S. 201 (Bk. 25, L. ed. 431); *Ger. Am. Seminary* v. *Kiefer*, 43 Mich. 105; *Hayward* v. *Nat. Bank*, 96 U. S. 611 (Bk. 24, L. ed. 855); *Grymes* v. *Sanders*, 93 U. S. 55 (Bk. 23, L. ed. 798); *Pendergast* v. *Turton*, 1 Younge & C. Ch. 110; *Earnest* v. *Vivian*, 3 L. J. Ch. 513; *Evans' Appeal*, 81 Pa. 278; *Pollard* v. *Clayton*, 1 Kay & J. 462; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 585 (Bk. 23, L. ed. 328); *Rule* v. *Jewell*, 18 Ch. Div. 660; *Allen* v. *Allen*, 47 Mich. 74; *Pratt* v. *Cal. Min. Co.* 9 Sawy. 354; *Harlow* v. *Lake S. Iron Co.* 41 Mich. 583; *Haff* v. *Haff*, 54 Mich. 511.

Messrs. **Ashley Pond** and *Hoyt Post*, for appellee:

Railroad Co. v. *Durant*, 95 U. S. 576 (Bk. 24, L. ed. 391) holds: "When a conveyance of real estate is made to the grantee as trustee, without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact." That case came up from Nebraska, but the Nebraska Statute of Frauds at

that time was identical with the Statute of Michigan invoked by the defendants here.

Applying that ruling to this case, and the undisputed oral admissions and declarations made by Loring to Frue and Palmer at the interview in July, 1868, taken with the contract from Mason, running to Loring as trustee, make out a perfect case for complainant.

1 Perry, Trusts, § 82, citing *Cripps* v. *Jee*, 4 Bro. Ch. 472; *Hollingshead* v. *Allen*, 17 Pa. St. 275; *Prevost* v. *Gratz*, 1 Pet. C. C. 364; *Morton* v. *Tewart*, 2 Younge & C. Ch. 67; *Hutchins* v. *Lee*, 1 Atk. 447; *Corse* v. *Leggett*, 25 Barb. 389. See also Browne, Stat. Fr. § 111; *Kingsbury* v. *Burnside*, 58 Ill. 300; *Urann* v. *Coates*, 109 Mass. 581.

The courts have uniformly opposed such a stringent construction of the Statute of Frauds as would encourage its use as a cloak or protection of frauds.

No particular formality is required or necessary in the creation of a trust. It may be by an express declaration, or by any informal memorandum; *Bellamy* v. *Burrow*, Cas. *t.* Talb. 97; *Fisher* v. *Fields*, 10 Johns. 495; *Corse* v. *Leggett* and *Urann* v. *Coates*, *supra;* or by letters, *Forster* v. *Hale*, 3 Ves. Jr. 696; *S. C.* 5 Ves. 308; *Montague* v. *Hayes*, 10 Gray, 609; *Kingsbury* v. *Burnside*, 58 Ill. 310; by a pamphlet, *Barrell* v. *Joy*, 16 Mass. 221; by a receipt, *Faxon* v. *Folvey*, 110 Mass. 392; by a deposition or affidavit, *Pinney* v. *Fellows*, 15 Vt. 525; by a recital in a bond, *Gomez* v. *Tradesmen's Bank*, 4 Sandf. 102; *Bragg* v. *Paulk*, 42 Me. 502; by recital in a deed, *Wright* v. *Douglass*, 7 N. Y. 564; though the deed run to third parties, *Barrell* v. *Joy*, *supra;* or by an answer in chancery, *Patton* v. *Chamberlain*, 44 Mich. 5 and cases cited; *Hutchinson* v. *Tindall*, 2 Green, Ch. 357; *Maccubbin* v. *Cromwell*, 7 Gill & J. 157; *Barron* v. *Barron*, 24 Vt. 375; in short by any writing in which the fiduciary relation between the parties and its terms can be clearly read. 1 Perry, Trusts, § 82; Browne, Stat. of Frauds, §§ 88, 109.

The question has arisen whether the change in the wording of the statute, requiring the trust to be created or declared by an instrument in writing, works any change in the construction to be given to it, and the rulings seem to have been almost uniform that it does not.

Pinnock v. *Clough*, 16 Vt. 508; *Jenkins* v. *Eldredge*, 3 Story, 294; *Urann* v. *Coates*, 109 Mass. 581, 585; *Barrell* v. *Joy* and *Faxon* v. *Folvey*, *supra; Richardson* v. *Woodbury*, 43 Me. 206; *McClellan* v. *McClellan*, 65 Me. 500; *Corse* v. *Leggett*, *Wright* v. *Douglass*, *supra; Cook* v. *Barr*, 44 N. Y. 156; *Patton* v. *Chamberlain*, *supra; White* v. *Fitzgerald*, 19 Wis. 480.

From the foregoing authorities it seems well established that the words "created or declared," mean nothing different from "manifested or proved" and that the words "by deed or conveyance" do not substantially change the construction given to the statute.

Perry, Trusts, sec. 81; Browne, Stat. of Frauds, sec. 104.

But conceding these writings to have been sufficient under the Statute of Frauds to establish an express trust, is the matter affected by the Michigan Statute of Uses and Trusts?

This statute was adopted from New York, and most of its provisions are identical with the New York Statute of 1830.

The object and effect of the statute is fully discussed in Willard's Equity, p. 414 *et seq.*, and Washburn on Real Property, Vol. 2, p. 212.

It was enacted in Michigan in the Revision of 1846, and stands as chapter 63, Rev. Stat. 1846. But a very important modification is made in section 11 of the Act. The New York Statute specifies but four purposes for which an express trust may be created.

The Michigan Statute adds a fifth.

Wisconsin in 1849 enacted the Michigan Statute *verbatim.*

The effect of subdivision five seems never to have been directly passed upon by the Michigan Supreme Court, but in Wisconsin it has been fully discussed in several cases. In *Marvin* v. *Titsworth*, 10 Wis. 320, it was overlooked, and the New York decisions followed. But in *White* v. *Fitzgerald*, *supra*, *Goodrich* v. *Milwaukee*, 24 Wis. 422, and *Riehl* v. *Bingenheimer*, 28 Wis. 84, the cases turned upon the effect to be given to this section.

In *Goodrich* v. *Milwaukee* the case of *Marvin* v. *Titsworth*, *supra*, is expressly overruled, and *White* v. *Fitzgerald* approved and followed. The court holds as to said fifth subdivision as follows:

"The addition of that subdivision to the four which precede it and which are found in the Statute of New York establishes, as it was undoubtedly intended to do, a policy in this State upon the subject of active trusts entirely different from that which prevails in the State of New York. It shows very clearly that no active trusts were intended to be affected or abolished by any provision of the statute, though the language of some of its sections, literally construed, may be broad enough to include them."

Has the trust thus established been since abandoned or abrogated?

Upon this question the burden of proof is upon the trustee, as held in *Seymour* v. *Freer*, 8 Wall. 202, 216 (75 U. S. bk. 19, L. ed. 306, 311). See also *Prevost* v. *Gratz*, 6 Wheat. 481, 497 (19 U. S. bk. 5, L. ed. 311, 315).

To abrogate a trust by denial and tacit acquiescence there must be a definite act of denial, of unmistakable import, and not a mere ambiguous and uncertain declaration of future intent. The act must be of a nature somewhat akin to what is requisite in adverse possession, or to what would amount to an ouster as between tenants in common.

Campau v. *Campau*, 45 Mich. 367.

In the absence of any change in title or surroundings or of any circumstance calling upon the *cestui que trust* to assert his rights or stand estopped, mere tacit acquiescence will not bar a direct express trust where the interest is one in real property, unless continued at least so long as to constitute a bar at law under the Statute of Limitations.

Perry, Trusts, sec. 864; Ang. Lim. sec. 468, note 2; Story, Eq. Jur. sec. 1521 a.

In *Baker* v. *Whiting*, 3 Sumn. 475, 486, *Mr. Justice* Story says: "I apprehend that in the case of a trust of lands, nothing short of the statute period which would bar a legal estate or right of entry would be permitted to operate in equity as a bar to an equitable estate."

See also *Williams* v. *First Presb. Society*, 1 Ohio St. 478; *Kane* v. *Bloodgood*, 7 Johns. Ch.

90; *Robertson* v. *Wood*, 15 Tex. 1; *Hunter* v. *Hubbard*, 26 Tex. 537; *Hubbell* v. *Medbury*, 53 N. Y. 98; *Merriam* v. *Hassam*, 14 Allen, 516; *Compo* v. *Jackson Iron Co.* 49 Mich. 39.

The writings indicate only that the purchase was intended to be a joint purchase on behalf of Palmer, Frue and Loring; but a joint purchase means a purchase in equal interests, if nothing to the contrary appears. Up to the time of the deed from Mason to Loring in trust, February 18, 1869, there was nothing more definite than the clear inference, from the fact that the purchase was a joint one as to what the respective interests were. The case, then, upon the writings as they appear up to that time, stands just as it would if the deed instead of running to Loring in trust, had been to Loring in trust for himself, Frue and Palmer. Then it is clear the interests would have been equal.

White v. *Fitzgerald*, *supra;* Freem. Cotenancy and Partition, sec. 105; *Jarrett* v. *Johnson*, 11 Gratt. 327; *Shiels* v. *Stark*, 14 Ga. 429; *Edwards* v. *Edwards*, 39 Pa. St. 369; *Long* v. *McDougald*, 23 Ala. 413; *Dashiel* v. *Collier*, 4 J. J. Marsh. 602; *Campau* v. *Campau*, 44 Mich. 31; *Eberts* v. *Fisher*, 44 Mich. 551; 1 Washb. Real Prop. 4th ed. 642, sec. 2, 653, sec. 3; *Challefoux* v. *Ducharme*, 8 Wis. 287; *Shove* v. *Dow*, 13 Mass. 529; *Sigourney* v. *Eaton*, 14 Pick. 414; *Durant* v. *Johnson*, 19 Pick. 544; *Northrup* v. *McGill*, 27 Mich. 234; *Hutchinson* v. *Dubois*, 45 Mich. 143; *Shoemaker* v. *Smith*, 11 Humph. 81; *Edwards* v. *Edwards*, 39 Pa. 384; *Buck* v. *Swazey*, 35 Me. 41.

Mr. **Geo. F. Edmunds,** also for appellee:

The trust may be proved by any species of written evidence, and does not require any formal declaration or instrument.

Compo v. *Jackson Iron Co.* 49 Mich. 39. See also notes to Howell's Annotated Statutes of Mich. Vol. 2, p. 1447.

The prior operations of the parties and the fact of the trade with Mason for this land being made by Palmer and Frue, and Loring being asked by letter and telegraph to complete the purchase, and his doing so and taking the contract of Mason to himself as trustee, and his admission in his answer that he did so on this state of written communication, demonstrated that a trust was intended and created in him by writings.

The only point really made by Loring was that Palmer did not furnish his share of the purchase money, and that he (Loring) had, therefore, the right to appropriate the land to himself for this cause alone.

This point was insisted upon before the accounts were taken. Now, an account being taken, it appears that Loring had in his own hands funds of Palmer all the time, subject to his control, more than adequate to satisfy all Palmer's one third of the purchase money. This is now demonstrated by final report of the master, not excepted to.

The contract of Loring, as trustee, with Mason to convey to Loring, in trust, the land, is in itself a full and sufficient declaration of the trust; and parol evidence is admissible to ascertain who the beneficiaries were.

R. R. Co. v. *Durant*, 95 U. S. 576 (Bk. 24, L. ed. 391); *Cowell* v. *Springs Co.* 100 U. S. 55 (Bk. 25, L. ed. 547).

Section 5571, Howell's Statutes of Michigan (subsection 9), declares that:

"The preceding seventh section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."

Now in this case there is no contradiction in the answer or evidence that the purchase was expected and intended to be on joint account of Palmer, Frue and Loring; and in such case it is clear that Loring should have taken the contract from Mason to convey to all three. But without the knowledge of Palmer or Frue, Loring took the contract to himself, as trustee, without naming in the contract the other beneficiaries.

Afterwards, when having money enough of Palmer's to pay more than all of Palmer's share, he took a deed directly to himself without the knowledge or consent of Palmer. In so doing he brought himself directly within section 5571 of Michigan Statutes and became a trustee for Palmer *ex maleficio.*

Whatever may have been the difficulties when the decree was made below, before it appeared, as it now does, that Loring had sufficient funds of Palmer's to pay his share, there can be now none whatever, for there was in the hands of Loring sufficient funds of Palmer's to supply his whole share of the consideration to be paid to Mason for the land, and so there could have been no fault or laches whatever on the part of Palmer. And as is admitted in the answer and proved by the papers, there was at first a lawful trust, duty and obligation on the part of Loring, that trust would continue until Loring could get rid of it by showing a failure of duty or laches by Palmer. This is confessedly negatived by the master's report, showing that all Palmer's funds were in Loring's hands and at his disposal, and that he has in fact, keeping all the accounts himself, more than enough of Palmer's money to pay for Palmer's one third interest in the land so to be acquired.

If Loring, in this state of circumstances, took the actual and legal conveyance from Mason directly to himself personally, and not in trust, (which does not distinctly appear in the papers), then, within the express provision of the Michigan Statute, Loring's conduct was a fraud upon the rights of Palmer, and is capable of being redressed by the method contained in the decree below.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity brought by Charles H. Palmer, the appellee, against Elisha T. Loring and Charles A. Welch, the appellants, to obtain a conveyance of one undivided third part of the N. ½ of the N W. ¼, and of the N. W. ¼ of the S. W. ¼, sec. 23, T. 56, N. R. 33 W., Houghton County, Michigan, containing in all 120 acres, on the ground that the lands were bought from Thomas F. Mason for Loring, Palmer, and William B. Frue, and the title taken by Loring in trust for himself and his associates. The material facts are these: [322]

From the year 1856, and perhaps before, Palmer, Loring and Frue had been engaged in the purchase of lands in the upper peninsula of Michigan, in the formation of mining corporations, and in the purchase and sale of mining stocks. Frue resided at the time in Houghton County, which was in the upper peninsula, Palmer at Pontiac, Michigan, and Loring at Boston, Massachusetts, but Palmer spent much of his time at the peninsula and in its vicinity. During all the time the purchases were generally made and the titles, both of lands and stocks, taken in the name of Loring, as trustee for all the parties in interest. Among other lands purchased in this way were some which were afterwards put into the Ossipee Mining Company, a mining corporation promoted by these parties, with a capital stock consisting of 20,000 shares, of which Loring and Frue each owned 2,250, and Palmer 2,220.

Under these circumstances Palmer and Frue met Thomas F. Mason of New York, at Houghton, and negotiated with him for the purchase of the lands in question. The price was to be $20,000; payable $5,000 down, $7,500 in six months, and $7,500 in eight months, with interest at the rate of 7 per cent per annum on the last two sums. No contract was executed at the time, as Mason preferred a form which he had at home, and the matter was postponed until he got there, with the understanding that Loring should execute the formal contract in New York, and pay the $5,000. A memorandum of the transaction was, however, made at the time and assented to by both parties. This memorandum has been lost, but the testimony shows that it was substantially the same as the contract made with Loring, hereinafter referred to, except that either "Charles H. Palmer and William B. Frue" were named as vendees, or [323] "Charles H. Palmer and his associates."

The same day this occurred Palmer wrote from Michigan to Loring, in Boston, as follows:

"Kearsarge Mining Company,
Calumet, Mich. *June 18th*, 1868.

"E. T. Loring, Esq.,

"Dear Sir: I have this day bought of T. F. Mason the following lands in the Hecla section 23, namely: the north half of the northwest quarter, and the northwest quarter of the southwest quarter, in all 120 acres, for $20,000; $5,000 down, $7,500 in six months, and $7,500 in eight months, with 7 per cent interest on the last two sums. I had the contract drawn up and was ready to pay him the $5,000 down; but as he had just come from Ontonagon and the boat was to leave in two hours, he preferred to return to New York and write such a contract as he had given Hurlburt on his purchase, and have you execute the contract and pay him the $5,000. He will then send you the contract, and I want you to see it carried out in all respects. Mason agrees that if you are away or do not do this, he will send it to me to do, and to carry out as I have agreed to do. Mr. Mason has given me his word, in the presence of Frue, that all this shall be done as he agreed, and that I shall have the land—making his word as good as his deed. There was not time to do this before Mason left, and I want you to treat him in this matter without doubting him at all. I will write you again this evening and send the contract I had drawn up. He has a copy of it, with the terms as I have [324] stated. This matter is very important. The purchase will add to the Ossipee five dollars per share at once in actual value. I do not want anything said of this at all. You will see by this that we shall get a division with the Hecla so as to get what will make a mine out of it by itself. We can make the Calumet vein by this over 3,200 feet in length. The purchase is very important. I send this by the hands of Randall, and will write again to-night by mail. Do not mention this. If you can, I would go to New York and see Mason and close this at once. In no case will this be neglected. It is a fortune to us if well handled. Mason has the contract which I drew up, and will show it to you. But this will tell you what is to be done. I give a sketch of the land. When I present the whole matter you will see how important it is to us. We can take from Hecla from 1,550 to 2,305 feet in length, and still give them out of this purchase double the amount of mining value that we get from them. The fact is, this ground bought is worth more to them than the ground next to Ossipee. It is for this reason that I do not want anything said till we have fully considered this matter together and see how we shall open it to Shaw. This is a rough sketch of the land bought. The vein is nearer to it than I have given the dotted lines, as if made to divide between them. Hecla would be free then to give us 100 acres, 50 of which would carry the vein, and we should give them 100, all of which would carry the vein. You will see the importance of this matter, and that we should not say anything till we consult. The Hecla is rich and we can make the Ossipee as rich.

"Truly Yours, Charles H. Palmer."

The next day he wrote again as follows:

"Kearsarge Mining Company,
Calumet, Mich., *June 19th*, 1868.

"E. T. Loring, Esq.,

"Dear Sir: I have drawn a map of the land bought of Mason. The Hecla owns all in the section, but the 40 and 80. You may say that Shaw will not do anything about it. We can wait as long as he can, as we have enough to mine till the Hecla needs some of this land. The least I would take now would be the 80 next the Ossipee, through which the lode runs, and most likely with the right of mine perpendicular to the vein in the direction of the line A B. I do not think best now to say anything to Shaw about this. I have given on the other side the land in the Calumet section 14, bought by Hurlburt. I could have bought this a year ago last winter for $40,000, including the 120 now bought. If I had done so, we could now have this land in 23 for nothing, as Shaw will have to buy Hurlburt out even at $100,000. Stanton, who now has the Huron, is intending to buy Hurlburt out in 14, and I wish you would see him when he returns, and urge him to do it. Hurlburt bought of Mason some 1,200 acres of land in 14, 15, 11, 22, and 28. If Stanton can [325] get the land in 14, 480 acres, and the land in 22, on the east half, I should like it, as the land in 22 is desirable for us. Hurlburt offered the land in 14 to Stanton for Huron stock. This would be a good thing for Stanton. I shall write Stanton on this subject. This matter is not to be talked about. I had a long talk with

Stanton, and he is inclined to buy it. He has let Hurlburt have money.

"I send the duplicate of the contract I gave Mason. Mason is to write a contract like his contract with Hurlburt, and send to you. Mason talked this matter over with Frue and myself, and says we shall have this land as agreed, and that his word is as good as his deed. I trust nothing will be left undone to carry this out, and you had better go to New York and see it done. We shall get out of Hecla all I have indicated. The land we would exchange is more convenient on surface and underground for them than what they would give us. It will be under their machinery and improvements. This is a great thing for Ossipee. You had better telegraph me as soon as this is done, as I shall be most anxious about it. I wrote to you to-day and sent by Randall, and I write this by mail. I shall put a note on this for Burr to open, in case you should be absent. On the $5,000 to be paid down, pay interest if Mason wants it. If Burr reads this, I wish him to see all is done which he can do. Send the $5,000 in case you are not there to execute the papers, saying that you will execute them and return them as soon as you get home, as they can be sent to you. I do not want anything by which Mason can get out of this. He agreed that if there was any hindrance on your part, to send them to me to execute.

"The S. P. is doing finely, 80 tons a week. To-day 50 tons have been shipped, and by Monday morning there will be at the smelting works 60 tons unsmelted. I think we have a sure thing in the S. P. We must make a family concern of Ossipee, and I would not sell any stock in it. We can make it put on its own importance. This we will do. I see this matter clearly. I write in haste and do not read over.

[326] "Truly Yours, Charles H. Palmer.

"Be particular to say nothing about Stanton's wishes. We need not buy any Hecla unless upon good time and satisfactory prices. We shall have a Hecla of our own. I think the S. P. will improve upon what she is now doing. The 40 acres is less than 350 feet from line of vein. In case you want us to raise $5,000 here, write us or telegraph, and we will use it for the mine."

Enclosed in this was a copy of the memorandum made while Mason was in Michigan. After the receipt of these letters Loring wrote and perhaps telegraphed to Palmer approving the purchase.

On the 25th of June Loring also wrote W Hart Smith, of New York, as follows:

"Office of the South Pewabic Copper Company.
31 Kilby Street,
Boston, *June 25*, 1868.

"W. Hart Smith, Esq., *Treas., New York.*

"Dear Sir: I received letter this morning from Mr. Palmer, who is very desirous I should see Mr. Mason before leaving for the Lake, which I intended doing on Saturday, therefore telegraphed you this morning, requesting to be advised as soon as Mr. Mason returned, which I will thank you to do by telegraph at the earliest date, as this may enable me to leave here on Saturday evening's boat and see Mr. Mason on Monday morning, if not before.

"Truly Yours, E. T. Loring."

Smith was the treasurer of the Quincy Mining Company, of which Mason was president. On the next day, June 26, Mason, in New York, wrote T. Henry Perkins, in Boston, as follows:

"T. Henry Perkins, Esq.

"Dear Sir: I send herewith contract for sale of 120 acres of land, which I wish you to [——] Mr. Loring, and have him execute, either for himself or Mr. Palmer; (I made the trade with Palmer) fill in the name of whichever Mr. L. [327 desires, and deliver over to Mr. Loring upon his paying you $5,000.

"If Mr. Loring is not prepared to comply, you will not press the matter, but return the papers. I was tempted to sell by the offer, but perhaps I made a mistake; probably I might obtain more from the Hecla Company by holding long enough.

"Mr. Palmer requested the transaction kept private for the present, so you will please say nothing about it.

* * * * *

"Truly Yours, Thos. F. Mason."

Between the date of this letter and June 29, Perkins filled the blanks in the contract with the name of Elisha T. Loring, trustee, and Loring signed it as trustee. He also made the down payment of $5,000, which was remitted by Perkins to Mason, so that he got it in New York on the 29th, and on the same day Palmer, in Michigan, received from Loring, in Boston, a telegram dated the 27th, stating that the contract had been closed and that he would start for Lake Superior the same day.

The following is a copy of the contract which was thus executed:

"This agreement made the eighteenth (18) day of June, one thousand eight hundred and sixty-eight, between Thomas F. Mason, of the City, County and State of New York, of the first part, and Elisha T. Loring, trustee, of the City of Boston, County of Suffolk, State of Massachusetts:

"Witnesseth, that said party of the first part, in consideration of the sum of twenty thousand dollars to be paid as hereinafter mentioned, hereby agrees to sell unto the said party of the second part all the following described premises, to wit: situated in the County of Houghton and State of Michigan, the north half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-three, in township fifty-six, north of range thirty-three west; which said premises the said party of the second part hereby agree to purchase and pay for in manner following, to wit: the sum of five thousand dollars on the execu- [328 tion and delivery of this instrument; the sum of seventy-five hundred dollars at the expiration of six months from the date thereof; and the sum of seventy-five hundred dollars to be paid eight months after the date thereof; with interest on the sum of fifteen thousand dollars, at and after the rate of seven per cent per annum, from the date of this instrument till the same shall be paid.

"It is further agreed, between the parties to this instrument, that said Mason, the party of the first part, will receive the said sum of fifteen thousand dollars, or any part thereof, at any time prior to the dates of payment hereinbefore mentioned, and that, upon the payment of the entire sum of fifteen thousand dollars and interest, the party of the first part shall

make, execute, and deliver to the party of the second part, or his assigns, a proper deed for the conveying and assuring to him the fee simple of said premises free from all incumbrances, which deed shall contain a general warranty and the usual full covenants.

"It is further agreed that said party of the second part shall be entitled to immediate possession of said lands and premises herein described, and shall pay all taxes or assessments of every name and nature assessed and imposed on said lands and premises after this date.

"It is further hereby expressly understood and agreed that the said terms of payment mentioned in this contract are hereby made material, and that the failure to pay any of said installments or interest on the days named for the payment thereof, shall render this contract absolutely null and void, and that any installment paid before such failure shall, by such failure, be forfeited, and that, whatever amount may be paid, any failure of payment of any of said installments and interest, as the same shall fall due and become payable, shall make this contract absolutely void, and all rights, interests, or titles under this contract shall be forfeited, and all and every equity and right in the said party of the second part, his heirs or assigns, shall thereby determine and become void. The clause in this contract mentioned, relative to the execution of a deed of the said party of the second part, being, by the agreement of the parties hereto, expressly made subject to the agreement of forfeiture in case of any failure of payment of said installments and interest, as the same shall fall due and become payable. [329]

"It is further understood and agreed that each and every of the stipulations hereinbefore in this contract mentioned shall apply to and bind the heirs, executors, administrators, or assigns of the respective parties.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"Thos. F. Mason,
"E. T Loring, *Trustee.*

"Sealed and delivered in presence of—
"Wm. Hart Smith, as to signature of T. F. Mason.
"H. F. Atwood, as to signature of E. T. Loring, Trustee."

On the 22d of June Palmer telegraphed from Michigan to Loring that he had paid $5,000 for him, Loring, there, and asking that he pay the same amount to Mason and execute the contract. This was Frue's money, and it was afterwards so treated by all the parties. The remainder of the purchase money was paid by Loring when it became due, and as soon as the payments were made in full Mason conveyed the property as called for by the contract.

No moneys were paid by Palmer to Loring with particular instructions to use them in paying for the land, but Loring had for some years been acting as the financial agent of Palmer in Boston, and the accounts as stated by the master show quite a considerable balance of interest in favor of Palmer at the end of the years 1867 and 1868, respectively. At first the credits to Palmer were principally from the sales of stocks, but during the years 1867 and 1868 they were mostly the proceeds of the discounts of Palmer's notes, indorsed by Loring. In the latter part of the year 1868 the credit of both the parties seems to have been somewhat impaired, and there was considerable difficulty in raising money to meet maturing obligations. The first installment on the contract with Mason fell due December 18, 1868, and there were notes of Palmer which had been discounted maturing about the same time to a considerable amount. To raise the means to meet these maturing obligations Palmer, at the request of Loring, sold stocks of his own, from which $15,000 in money was realized. The sale was negotiated before the installment on the contract fell due, but the price was not paid until December 21, $5,000, and December 28, $10,000. All this money was paid over promptly to Loring for Palmer's credit, and the accounts stated by the master show that on the 31st of December there was a balance due from Loring to Palmer of $17,059.25, and that there was a balance of interest account in Palmer's favor for the year of $775.55. In this statement of the account no charge is made against Palmer for any share of the purchase money under the Mason contract. On the 18th of February, 1869, when the last installment to Mason fell due, the accounts show a balance in favor of Palmer of something more than $10,000. Between that time and March 20 this amount was substantially all used in payment of Palmer's maturing notes, but on the last date Palmer sold other stocks, from which $8,000 in money was realized, and put to his credit. After that, in August, other notes were paid, and at the end of the year there was a balance against Palmer of $1,065.18, though the interest account for the year showed a balance in his favor of $302.85. Here the transactions between the parties seem to have stopped, but on the 15th of March, 1872, Loring sold stocks of Palmer which he still held in his hands, from which $12,975 was realized, and afterwards during the year other sales were made, so that on the 31st of December, 1872, the accounts show a balance in favor of Palmer amounting to $15,964.45, which included a balance of interest account in his favor, since the last statement, of $637.96. [330]

In the statement of the accounts to this time, for some reason, no charge was made against Palmer for certain stocks purchased in 1867, the price of which was $6,275, nor for any part of the Mason purchase, but the amount otherwise to his credit with Loring was sufficient to pay these items in full, principal and interest, and still leave a balance due Palmer at the date of the decree amounting to $527.52.

On the 16th of March, 1869, Loring, at the request of Palmer, indorsed on a copy of the contract with Mason a declaration as follows: [331]

"Boston, March 16, 1869.

"Whereas, Thomas F. Mason has deeded to E. T. Loring, in trust, the lands described in the within document, and received therefor in payment the sum mentioned therein, with the interest: *Therefore*, be it known, for value rec'd, I hereby acknowledge that C. H. Palmer, or Wm. B. Frue, one or either of them, jointly or separately, are the owners of the undivided one fourth part of said lands, and I hereby obligate myself, heirs, and executors to account to said Palmer, or his assigns, for one fourth

part rec'd for the lands in question whenever a sale shall be made of the same.

"Elisha T. Loring.

"Witness: James Moore."

This represented the interest paid for with Frue's $5,000, and Palmer obtained it at Frue's request, so that he, Frue, might have something to show for his interest in the land. Afterwards, on the 22d of May, 1869, Loring conveyed to Frue an undivided one fourth of the property, and he claims no further interest.

On the 22d day of February, 1869, Loring wrote Palmer as follows:

"I therefore deem it my duty, and as an act of courtesy towards you, to notify you that whatever additional proportion you wish to secure for yourself in section 23, it will be necessary for you to remit the amount of the cost of such additional portion as you desire prior to the 20th of March; otherwise I shall consider as mine and retain the three fourths interest in section 23 which I have paid for."

In October, 1871, Loring sued Palmer for a balance claimed to be his due on general account, and the bill of particulars showed the amount demanded to be large. Nothing was claimed for payments on account of the Mason purchase. This suit was pending until June, 1874, when it was discontinued, and on the first of July, 1875, Loring conveyed the land to Welch in trust for him, Loring, and his children. This suit was begun December 20, 1875. The circuit court rendered a decree in favor of Palmer, and from that decree this appeal was taken.

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The question which meets us at the outset is whether the trust in favor of Palmer, on which the case depends, has been sufficiently established. A Statute of Michigan provides that "Express trusts may be created for any or either of the following purposes:

* * * * *

"5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title." 2 Howell, Ann. Stat. § 5573, p. 1448.

The trust relied on is an express trust, and it relates to lands in Michigan. Consequently it must be established according to this statute, which it is contended requires proof of the *creation* of the trust by a written instrument that shall clearly express and fully define on its face the rights of the respective parties thereto. It is not enough, as is claimed, to show the existence of the trust by writing. The proof must be that it was originally created by a written instrument sufficient in form. In the view we take of the case it is unnecessary to inquire whether this is the true rule or not, for in our opinion, the evidence is sufficient to meet all these requirements.

We do not understand it to be denied that the letters of Palmer to Loring under date of June 18 and June 19; the memorandum of the agreement made in Michigan at the time of the negotiations by Palmer and Frue with Mason for the purchase, and which was sent by Palmer to Loring in the letter of June 19; the telegram and letter from Loring to Palmer before the contract between Mason and Loring, trustee, was executed; the letter from Loring to Smith, under date of June 25; the letter from Mason to Perkins under date of June 26; and the contract between Mason and Loring, may all be read together as one instrument for the purpose of establishing the trust. If, upon the face of these writings thus read and construed together in the light of the circumstances which surrounded the parties at the time, a trust is fully expressed and clearly defined for the beneficial interest of Palmer, then his case has been made out so far as the creation of the trust is concerned.

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We begin, then, with the fact that Loring, Palmer, and Frue had been operating together for some years in buying mining lands, forming mining corporations, and selling mining stocks. Very generally the titles, both of lands and stocks, had been, during all the time, taken and held in the name of Loring, as trustee for all concerned. Each party paid for his own share of the purchases, but Loring was the principal capitalist, and both Palmer and Frue relied on him to raise money for them to meet their obligations when necessary. This particular purchase was set on foot by Palmer and Frue, and it was of a kind of property in which the parties had been in the habit of dealing. It adjoined or was near to other property in which they were all largely interested at the time, and which they were jointly engaged in advancing in value. The writings are to be read and construed in the light of these facts.

The contract of purchase, as reduced to writing and finally executed, is in the name of Loring, trustee. This on its face implies that it was made by him for the beneficial interest of others besides himself, in whole or in part. Standing alone, it does not "clearly define" the trust which it apparently created, but taken in connection with the correspondence which preceded it, and out of which it confessedly arose, no room is left for doubt that it was made for the benefit of the three persons who had been so long operating together in that kind of property. Palmer, in his letters acquainting Loring with what he and Frue had done in Michigan towards the purchase, says "It is a fortune to us if well handled;" "When I present the whole matter you will see how important it is to us. We can take from Hecla from 1,550 to 2,805 feet in length, and still give them out of this purchase double the amount of mining value that we get from them. The fact is, this ground bought is worth more to them than the ground next to Ossipee. It is for this reason that I do not want anything said till we have fully considered this matter together, and see how we shall open it to Shaw. * * * Hecla would be free then to give us 100 acres, 50 of which would carry the vein, and we should give them 100, all of which would carry the vein. You will see the importance of this matter, and that we should not say anything until we consult. The Hecla is rich, and we can make the Ossipee as rich." And again, "We shall get out of Hecla all I have indicated. The land we would exchange is more convenient on surface and underground for them than what they would give us. It will be under their machinery and improvements. This is a great thing for Ossipee."

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It is said, however, that Frue does not appear to have been included as one of the beneficiaries.

He was one of those who had been operating together, and Palmer, in his letter, speaks of him as having been present when the negotiations were had with Mason in Michigan. The language on this subject, in the letter of June 19, is: "Mason talked this matter over with Frue and myself, and says we shall have this land as agreed, and that his word is as good as his deed;" and besides, in the memorandum of the agreement, made at the time of the negotiation, either Palmer and Frue were named as vendees, or Charles H. Palmer and his associates, which, under the circumstances, would imply the same thing.

Again, it is said that the individual interests of the respective beneficiaries are not stated, and, therefore, that the trust is not sufficiently defined to meet the requirements of the statute; but the rule in Michigan, as well as in all other States where the principles of the common law prevail, is that where a conveyance of lands is made to two or more persons, and the instrument is silent as to the interest which each is to take, the presumption will be that their interests are equal. *Campau* v. *Campau*, 44 Mich. 31; *Eberts* v. *Fisher*, 44 Mich. 553. Under this [342] rule the purchase by Loring, as trustee, was for the equal benefit of the three parties in interest, and the trust, therefore, inured in that way. Without doubt it was expected that each of the parties would pay for his own interest, and that as between themselves neither should be bound for the other; but that is a matter the effect of which need not now be considered, as Palmer has paid for his share in full. There is nothing whatever on the face of the papers to indicate that at the time the contract was made and the trust created it was expected that one should have a greater interest in the purchase than another.

Finally, it is claimed the letters show that the purchase was made for the Ossipee Company, and not for Loring, Palmer and Frue individually. We cannot so read what was written. The Ossipee Company had been promoted by these parties. They had bought the land which was made the basis, in whole or in part, of its organization. They were at the time of the purchase from Mason the three largest stockholders. The Ossipee was a corporation, and it nowhere appears that these parties, or either of them, had ever been authorized to make the purchase on its account. There is no doubt that all the parties expected to handle the property with a view to an enhancement of the value of Ossipee stock, but there is nothing whatever to indicate that the corporation was to be in any way directly interested in the purchase. The land might have been, and undoubtedly was, necessary to the complete success of the company, but it was nevertheless, when bought, the property of the purchasers, who occupied no such trust relations to the company as to make their purchase inure directly to its benefit; and besides, the company is not now seeking to charge them as trustees. Palmer does, indeed, say in his letter to Loring, "The purchase will add to the Ossipee $5 per share at once in actual value," and 'We must make a family concern of Ossipee, and I would not sell any stock in it; we can make it put on its own importance; this we will do; I see this matter clearly;" and "we shall have a Hecla of our own;" but this does not make Ossipee the purchaser, or the direct beneficiary under the trust as thus created and defined. The expectation of an indirect benefit [343] to their investments in Ossipee was undoubtedly great, but nothing occurred to bind the company to the purchasers or the purchasers to the company.

We conclude, therefore, that the original trust in favor of Palmer for a one third interest in the property has been sufficiently established.

It is contended, however, that if the conveyance was made to Loring as trustee for himself and Palmer and Frue, then, under the Statutes of Michigan, the legal title vested at once in the beneficiaries, and the remedy of Palmer is at law and not in equity, because he holds the legal title to his share and not an equitable title merely. The statute referred to is as follows:

"§ 5567. Sec. 5. Every disposition of lands, whether by deed or devise, hereafter made, except as otherwise provided in this chapter, shall be directly to the person in whom the right to the possession and the profits shall be intended to be vested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, in trust for or to the use of another, no estate or interest, legal or equitable, shall vest in the trustee." 2 Howell, Ann. Stat. 1446.

This, it has been held, abolishes all express passive trusts in Michigan, but allows express active trusts when created in accordance with section 5578, cited above. *Burdeno* v. *Amperse*, 14 Mich. 96; *Ready* v. *Kearsley*, 14 Mich. 227; *Stevens* v. *Earles*, 25 Mich. 44; *Thompson* v. *Waters*, 25 Mich. 234; *Goodrich* v. *Milwaukee*, 24 Wis. 480. But here the conveyance under which Loring took the title that he has since conveyed to Welch did not create the trust in favor of Palmer. That was done by the original contract of purchase from Mason, read in connection with the cotemporaneous correspondence between the parties; and the object of this suit is to charge Loring as trustee under that contract, and to compel him and his grantee to perform the trust which was then created. There is nothing on the face of the deed to Loring to show that Palmer is the person for whom Loring took title in trust. The legal title did not, therefore, vest in him by that conveyance. All he has is the equitable title which he acquired under the contract of purchase, and his purpose now is to compel [344] Loring to convey to him the legal title to his share which passed from Mason when the contract was performed and the deed executed to him in accordance with its provisions. This is relief which a court of chancery alone can afford. So far as this record shows, Mason knew nothing of the particulars of the arrangement between Loring, Palmer and Frue as to their respective interests. It is true the contract was made with Loring as trustee, but that is all. The terms of his holding are nowhere explained, and Mason performed his duty towards all who were interested, when he conveyed to Loring in accordance with the terms of the contract. The deed was intended to and did vest in Loring the legal title in trust for whomsoever it might concern. This suit is prose-

cuted to establish the fact that Palmer was one of the persons concerned and to charge Loring accordingly.

The trust having thus been established and the jurisdiction of a court of equity over the subject matter of the suit sustained, it remains only to consider whether the trust, which was originally created, has been abrogated by abandonment or laches. The last payment to Mason was made February 18, 1869, and this suit was not brought until December 20, 1875.

This branch of the case is presented to us very differently from what it was to the court below when the interlocutory decree was rendered, and the cause referred to a master to ascertain how much was due from Palmer to Loring upon the purchase money paid to Mason. It was then supposed that Palmer had no money in the hands of Loring which could be used to pay on the land when the deferred installments fell due. The court then found that no part of the proceeds of the smelting stock or the Hecla stock was applied to such payment, and that all went into Palmer's general account with his consent. It now appears that when each of the installments was paid, or very soon thereafter, Palmer had or ought to have had a balance to his credit much more than sufficient to meet his share of what was due. The testimony shows very clearly that neither of the parties had a correct understanding of the state of their accounts with each other at the time. Palmer kept no books of his own, [345] and those of Loring were not at all reliable. Loring always claimed that Palmer was largely in his debt, and Palmer does not seem to have had then any means of showing the contrary. His own credit was exhausted, and Loring had possession of all his securities. Consequently, when Loring called on him to pay by the 20th of March, he did not abandon his claim, but he sold his Hecla stock and paid the proceeds to his general credit and waited for time to show whether this was enough to preserve his interest or not. He gave no special direction for its application, but, under the circumstances, the law will apply it to the only debt he then owed to Loring, and that was his share of this purchase money. Loring, by keeping the charge for the purchase money out of his accounts, cannot deprive Palmer of his right to the application of his credits. In a couple of years or so Loring began his suit, and this was kept pending until 1874, when it was discontinued. Loring says, in his answer, this was because he had "ascertained that Palmer was utterly irresponsible and worthless." Now it turns out that when the suit was abandoned, he was himself in debt to Palmer, and that all the time he had securities in his hands which were largely in excess of any amount he had paid for Palmer on the land or otherwise. Under these circumstances it is impossible to say that the evidence makes out a case of actual abandonment, or that Palmer has been guilty of such laches as to bar him of the equities which are now so clearly shown to have existed in his favor all the time. His delay in bringing the suit is to be construed in connection with the uncertainty that existed as to the true situation of his accounts. Loring must have known that Palmer relied on him to keep the accounts, and having himself been guilty of such glaring errors in his statements and in his claims, Palmer is not to be charged alone with the fault of delay. The same explanation applies to his failure to respond more definitely to the letter of Loring under date of February 22, if there was in fact any such failure. He did, however, by the sale of his Hecla stock, put Loring in funds to an amount sufficient to meet his entire share of the purchase money, and that too on the very day he was required to do so by this letter of Loring. This renders it unnecessary to consider the conflicting testimony on the subject of the letter. The explanation also applies to the [346] correspondence in reference to the declaration of trust in favor of Frue, under date of March 16, 1869. It is clear that, if Palmer had known the actual condition of the accounts at the time, he would promptly have claimed his rights; and that, to say the least, Loring was as much responsible for this uncertainty as Palmer. If the land had not in fact been paid for by Palmer, the delay in bringing the suit, or otherwise asserting the claim with distinctness, would have been looked upon very differently. As it is, it does not make out a defense by Loring to the enforcement of the trust which has been so clearly established.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

YICK WO, *Plff. in Err.*,
v.
PETER HOPKINS, Sheriff of the CITY AND COUNTY OF SAN FRANCISCO.

WO LEE, *Appt.*, *v.* SAME. [356]

(See S. C. Reporter's ed. 356-374.)

Constitutional law—police power—relation between state and federal courts—regulation of laundry business—municipal orders of the City of San Francisco—Treaty with China—discrimination by board of supervisors.

1. The jurisdiction of this court to review the decision of the supreme court of the State in a *habeas corpus* case is limited to the question, whether the petitioner was denied a right in violation of the Constitution, laws or treaties of the United States.

2. In a similar case brought here from the Circuit Court of the United States, the question of the legality of the imprisonment under the laws and Constitution of the State is open here, as it was in the court below; but judicial propriety is best consulted by accepting the judgment of the state court on that question.

3. These principles, however, do not preclude this court from putting upon the ordinances in question an independent construction for the purpose of deciding whether the proceedings under them are in conflict with the Constitution and laws of the United States.

4. The order of the City and County of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," does not prescribe a rule and conditions for the regulation of the use of laundry property, to which all similarly situated may conform; but it confers a naked arbitrary power upon

the board to give or withhold consent, and makes all engaged in the business the tenants at will as to their means of living, under the board of supervisors.

5. The rights of the petitioners in the present case are not less because they are aliens, and subjects of the Emperor of China.

6. Though a law be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

7. The imprisonment of the petitioners under the order in question is shown by the record to come within these principles, and they are entitled to be discharged.

[Nos. 1280, 1281.]

Submitted Apr. 14, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the State of California.

APPEAL from the Circuit Court of the United States for the District of California. *Reversed.*

Statement of the case by *Mr. Justice* **Matthews:**

These two cases were argued as one and depend upon precisely the same state of facts, the first coming here upon a writ of error to the Supreme Court of the State of California, the second on appeal from the Circuit Court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the Supreme Court of California for the writ of *habeas corpus*, alleging that he was illegally deprived of his personal [357] liberty by the defendant as Sheriff of the City and County of San Francisco.

The Sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the Police Judges' Court, No. 2, of the City and County of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of $10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied, and a commitment in consequence of nonpayment of said fine.

The ordinances for the violation of which he had been found guilty are set out as follows:

Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

"The people of the City and County of San Francisco do ordain as follows:

"Sec. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the City and County of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

"Sec. 2. It shall be unlawful for any person to erect, build or maintain, or cause to be erected, built or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

"Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."

Order No. 1587, passed July 28, 1880; the [358] following section:

"Sec. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The following facts are also admitted on the record: That petitioner is a native of China and came to California in 1861, and is still a subject of the Emperor of China; that he has been engaged in the laundry business in the same premises and building for twenty-two years last past; that he had a license from the board of fire wardens, dated March 3, 1884, from which it appeared "that the above described premises have been inspected by the board of fire wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining 'the fire limits of the City and County of San Francisco and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1670, 'prohibiting the kindling, maintenance and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force and expired October 1, 1885; and that the petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1, 1885, refused said consent." It is also admitted to be true, as alleged in the petition, that, on February 24, 1880, "there were about three hundred and twenty laundries in the City and County of San Francisco, of which about two hundred and forty were owned and conducted by sub- [359] jects of China, and of the whole number, viz: three hundred and twenty, about three hundred and ten were constructed of wood, the same material that constitutes nine tenths of the houses in the City of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars and they paid annually for

rent, license, taxes, gas, and water about one hundred and eighty thousand dollars."

It is alleged in the petition, that "Your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others."

The statement therein contained as to the arrest, etc., is admitted to be true, with the qualification only that the eighty odd laundries referred to are in wooden buildings without scaffolds on the roofs.

It is also admitted "that petitioner and two hundred of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles were granted."

By section 2 of article XI of the Constitution of California it is provided that "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with other general laws."

By section 74 of the Act of April 19, 1856, usually known as the Consolidation Act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; * * * to regulate the sale, storage and use of gunpowder or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

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The Supreme Court of California, in the opinion pronouncing the judgment of this case, said: "The board of supervisors, under the several statutes conferring authority upon it, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety. Clothes washing is certainly not opposed to good morals or subversive of public order or decency, but when conducted in given localities it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and, having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but that they have, as they well might do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc. The process of washing is not prohibited by thus regulating the places at which and the surroundings by which it must be exercised. The order No. 1569 and section 68 of order No. 1587 are not in contravention of common right, or unjust, unequal, partial, or oppressive, in such sense as authorizes us in this proceeding to pronounce them invalid."

After answering the position taken in behalf of the petitioner, that the ordinances in question had been repealed, the court adds: "We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier* v. *Connolly*, 113 U. S. 27 [Bk. 28, L. ed. 923], and *Soon Hing* v. *Crowley*, 113 U. S. 703 [Bk. 28, L. ed. 1145]." The writ was accordingly discharged and the prisoner remanded.

In the other case the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts, shown upon the record, precisely similar to that in the case of Yick Wo. In disposing of the application, the learned *Circuit Judge* Sawyer, in his opinion, 26 Fed. Rep. 471, after quoting the ordinance in question, proceeded at length as follows: [361]

"Thus, in a territory some ten miles wide by fifteen or more miles long, much of it still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated and almost wholly unoccupied Goat Island, the right to carry on this, when properly guarded, harmless and necessary occupation, in a wooden building, is not made to depend upon any prescribed conditions giving a right to anybody complying with them, but upon the consent or arbitrary will of the board of supervisors. In three fourths of the territory covered by the ordinance there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the State. Hitherto the regulation of laundries has been limited to the thickly settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries, after a compulsory removal from their present locations, within practicable reach of the customers or their proprietors? And the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted—thus, in fact making the discriminations, in the administration of the ordinance, which its terms permit. The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed of itself necessarily dangerous. It must be apparent to every well informed mind that a fire, properly guarded, for laundry purposes, in a wooden building, is just as necessary as, and no more dangerous than, a fire for cooking purposes or for warming a house. If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance, in a wooden building, of

a cooking stove heating apparatus, or a restau-
[362] rant, within the boundaries of the City and County of San Francisco, without the consent of that body, arbitrarily given or withheld, as their prejudices or other motives may dictate. If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper and necessary calling within the limits of the city and county, except at its arbitrary and unregulated discretion and special consent—and it can do so if this ordinance is valid—then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property and liberties of the American people. And if, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the City and County of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would be little short of absolute confiscation of the large amount of property shown to be now and to have been for a long time invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result. The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital. If the facts
[363] appearing on the face of the ordinance, on the petition and return, and admitted in the case, and shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the Fourteenth Amendment to the National Constitution, and of the Treaty between the United States and China, in more than one particular? * * * If this means prohibition of the occupation and a destruction of the business and property of the Chinese laundrymen in San Francisco—as it seems to us this must be the effect of executing the ordinance—and not merely the proper regulation of the business, then there is discrimination and a violation of other highly important rights secured by the Fourteenth Amendment and the Treaty. That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must be necessarily known to every intelligent person in the State? See *Ah Kow* v. *Nunan*, 5 Sawy. 560; *Sparrow* v. *Strong*, 3 Wall. 104 [70 U. S. bk. 18, L. ed. 49]; *Brown* v. *Piper*, 91 U. S. 42 [Bk. 23, L. ed. 201]."

But, in deference to the decision of the Supreme Court of California in the case of Yick Wo, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Messrs. **Hall McAllister, L. H. Van Schaick** and **D. L. Smoot,** for plaintiff in error and appellant:

The occupation in question is necessary and harmless; and it is against natural right to make its exercise dependent upon the arbitrary will of the board of supervisors.

The ordinance is a legislative condemnation to heavy pains and penalties of all persons who wash clothes for hire in frame buildings, whether amounting to a nuisance or not; contrary to subdivision 3, section 9, article 1 of the United States Constitution, prohibiting bills of attainder.

See Dill. Mun. Corp. § 374; *Yates* v. *Milwaukee*, 10 Wall. 497 (77 U. S. bk. 19, L. ed. 984).

The immediate effect of the ordinance is to deprive the petitioners, and others similarly situated, of their property and property rights without due process of law.

If it be true that this system amounts to an enlargement of the law of nuisance, and that such a result is *ultra vires* the board of supervisors, then there has been a deprivation of property and property rights without due process of law, because the indispensable fact of nuisance has been ascertained and declared by the board of supervisors instead of the tribunals of the law.

The said ordinance is capable of being and is so operated and enforced as to discriminate against the petitioners and all other subjects of China, similarly conditioned, contrary to section 1 of the Fourteenth Amendment, sections 1977 and 1979 R. S., and articles V and VI of the Treaty of 1868, and articles II and III of the Treaty of 1881 between the United States and China.

The record discloses that of the three hundred and twenty laundries in San Francisco, about three hundred and ten are constructed of wood, and about two hundred and forty of the three hundred and twenty are owned and conducted by subjects of China. The record also shows that the petitioner and about two hundred of his countrymen, similarly situated, applied to the board of supervisors for permission to continue their clothes washing business in the frame buildings which they have been occupying and using for many years.

The record also shows that not a single one of the petitions presented by the eighty who are not subjects of China has been refused. As a frank people, we cannot afford to disguise the fact that this record presents a case of practical discrimination of the rankest character.

No subject of China is permitted to wash clothes for hire in a house not made of brick

or stone, while everyone of the eighty odd who are not subjects of China, are, with one lonely exception, permitted to do this identical thing, and pocket the increased profits thereof.

See *In re Quong Woo*, 13 Fed. Rep. 229; 14 Id. 417; 9 Pac. C. L. J. 819; *In re Tiburcio Parrott*, 6 Sawy. 349; *Henderson* v. *Mayor of N. Y.* 92 U. S. 268 (Bk. 23, L. ed. 543); *Cummings* v. *Mo.* 4 Wall. 320 (71 U. S. bk. 18, L. ed. 356); *Chy Lung* v. *Freeman*, 92 U. S. 279 (Bk. 23, L. ed. 550); *Strauder* v. *West Va.* 100 U. S. 303 (Bk. 25, L. ed. 377); *Ex parte Virginia*, 100 U.S. 339 (Bk. 25, L. ed. 676); *Neale* v. *Delaware*, 103 U. S. 370 (Bk. 26, L. ed.567); *Bush* v. *Kentucky*, 107 U. S. 110 (Bk. 27, L. ed. 328); *Barbier* v. *Connolly*, 113 U.S. 27 (Bk. 28, L. ed. 923): *Soon Hing* v. *Crowley*, 113 U. S. 703 (Bk. 28, L. ed. 1145); *Ex parte Moynier*, 65 Cal. 33; *Mayor of Balt.* v. *Radecke*, 49 Md. 217; *Ex parte Frank*, 52 Cal. 610; *Railroad Commission Cases*, 116 U. S. 307 (Bk. 29, L. ed. 636); *Ex parte Tie Soy*, 9 W. C. Rep. 387.

Messrs. **Alfred Clarke** and **H. G. Sieberst.** for defendant in error and appellee:

There is no admission that the proprietors of the eighty odd non-Chinese laundries applied for permits; and the truth is that only two of them had so applied.

There are about three hundred laundries in San Francisco, managed by Chinese. Some of them, perhaps ten, are in brick buildings, as required by law. The remainder are in wooden buildings, and some of them are circumstanced so favorably as regards location, etc., that they will doubtless receive the consent of the board of supervisors to carry on their business. Others are highly dangerous and a great detriment to the neighborhood in which they are situated.

The board of supervisors of San Francisco, who understand this question, do not desire to suppress this useful business, neither do they desire to exclude it arbitrarily from certain limits, but they desire to get rid of its dangerous features, and to transfer the business from wood to brick buildings in all cases where the wooden building is dangerous to adjacent property. There is no hardship in this change, and it must be enforced, and has been enforced without partiality.

There is a peculiarity connected with these three hundred laundries which invites attention. They have a central government, which is known as the Tung Hing Tong Association. It employs very able attorneys to resist all such regulations as are inconvenient to its members, and this fact explains the many defeats which the city has suffered in the laundry order litigation. All the white laundrymen who have failed to comply with the law are under arrest.

The Tung Hing Tong resisted every laundry order passed by the board of supervisors from 1880 till 1885, and in consequence of this resistance and delay resulting from legal proceedings, the novel spectacle was witnessed in an American city of a colony of foreigners who governed themselves, made and executed their own laws, and successfully resisted the enforcement of the regulations of the municipal government of San Francisco.

Order 1559 was invalidated by the decision in *People* v. *Ah Ling*, May 7, 1881.

Order 1679, passed June 10, 1882, was invalidated by the circuit court, July, 1882, in *Re Quong Woo*, 7 Sawy. 526.

Order 1691, passed October 21, 1882, was taken to the Supreme Court of the United States; *Re Tom Tong*, 108 U. S. 556 (Bk. 27, L. ed. 826); *Re Hung Hang*, 108 U.S. 552 (Bk. 27, L. ed. 811), decided May 7, 1883, and the city, unable to enforce the order, repealed it June 25, 1883, by the passage of Order 1719.

Order 1719 was invalidated by the Supreme Court of Oakland; *Re Woo Yek*, 12 Pac. C. L. J. December 10, 1883.

During all of this protracted and successful resistance, it was impossible to enforce the municipal regulations in regard to laundries.

The tide which set so strongly and so long against the citizens of San Francisco turned at last and flowed the other way.

In re Woo Yeck, November, 1883, by Superior Court of San Francisco, in which Order 1719 was held valid.

Re Moynier, February 8, 1884, by Supreme Court of California, 65 Cal. 33, which holds Order 1719 valid.

Barbier v. *Connolly*, January 5, 1885, by Supreme Court of the United States, 113 U. S. 27 (Bk. 28, L. ed. 923); Order 1767 held valid.

Soon Hing v. *Crowley*, March 16, 1885, by this court, 113 U. S. 703 (Bk. 28, L. ed. 923); Order 1719 held valid.

Re White, June 2, 1885, by Supreme Court of California, 6 W. C. R. 644; Order 1559 held valid.

Re White, July 1, 1885, by Superior Court of San Francisco, municipal reports, 1884-5, 84; Order 1569 held valid.

Re Yick Wo, December 28, 1885, Supreme Court of California, 8 W. C. R. 548; Order 1569 held valid.

Re Wo Lee, January 26, 1886, by Circuit Court of the United States, 9 W. C. R. 81; same result.

Re Li Protti, February 26, 1886, 9 W. C. R. 812.

Re Guerrero, March 16, 1886, 9 W. C. R.

The Fourteenth Amendment does not interfere with the police power of the States.

Kurtz v. *Moffitt*, 115 U. S. 487 (Bk. 29, L. ed. 458).

We claim that the city has power to adopt the section we are examining under article XI., section 11, of the Constitution, "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The police power of the State extends to the regulation of this business by excluding it from certain limits.

Re McClain, 61 Cal. 436; *Re Chin Yan*, 60 Cal. 78; *Re Ah Sing*, 59 Cal. 404; *Slaughter House Cases*, 16 Wall. 62 (83 U. S. bk. 21, L. ed. 394); *Ailstock* v. *Paige*, 77 Va. 386; *Commonwealth* v. *Merriam*, 136 Mass. 433; *Hochstadler* v. *State*, 78 Ala. 24; *Muller* v. *Comrs.* 89 N. C. 171; *State* v. *Mayor*, 44 N. J. L. 114; *Commonwealth* v. *Whelan*, 134 Mass. 206.

Under our State Constitution, the Legislature is prohibited by article IV, section 25, sub. 2, from exercising the local police power; but the power which is denied to the Legislature is vested by article XI, section 11, in the municipal corporations throughout the State.

Re Stuart, 61 Cal. 374; *Re Moynier*, *supra*;

Re Wolters, 65 Cal. 269; *Re Mount*, 66 Cal. 448; *Barbier* v. *Connolly, supra; Soon Hing* v. *Crowley, Re Yick Wo* and *Re Li Protti, supra.*

Admitting for the sake of argument that the laundry of petitioner was not a fully developed common-law nuisance, we say the State has power to regulate it.

Barbier v. *Connolly, supra; Re Delaney*, 43 Cal. 478; *Re Yick Wo, supra.*

"The Supreme Court of the United States cannot pass on the question of the conformity of a municipal ordinance with the State Constitution."

Barbier v. *Connolly, supra.* See also *Claiborne Co.* v. *Brooks*, 111 U. S. 400 (Bk. 28, L. ed. 470).

[365] *Mr. Justice* **Matthews** delivered the opinion of the court:

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State, is not open [366] to us. And although that question might have been considered in the circuit court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in that inquiry.

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their [367] mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier* v. *Connolly*, 113 U. S. 27 [Bk. 28, L. ed. 923], and *Soon Hing* v. *Crowley*, 113 U. S. 703 [Bk. 28, L. ed. 1145]. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the City and County of San Francisco, from ten o'clock at night until six o'clock in the morning of the following day. This provision was held to be purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies; a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

For these reasons, that ordinance was adjudged not to be within the prohibitions of the Fourteenth Amendment to the Constitution of the United States, which, it was said, in the first case cited, "undoubtedly intended not only that there should be no arbitary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. * * * Class legislation, discriminating against some and favoring others, is prohibited, but [368] legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone;

but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China. By the third article of the Treaty between this government and that of China, concluded November 17, 1880, 22 Stat. at L. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, [369] privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment, and, in the alternative, if not so, that they are void by reason of their administration operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances; an unjust and illegal discrimination, it is claimed, which, though not made expressly, by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean [370] to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

In reference to that right, it was declared by the Supreme Judicial Court of Massachusetts, in *Capen* v. *Foster*, 12 Pick. 485, 488, in the words of *Chief Justice* Shaw, "that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of [371] the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of

such right, in a prompt, orderly and convenient manner;" nevertheless, "such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself." It has accordingly been held generally in the States that, whether the particular provisions of an Act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question. See *Daggett* v. *Hudson*, 1 West. Rep. 789, decided by the Supreme Court of Ohio, where many of the cases are collected; *Monroe* v. *Collins*, 17 Ohio St. 666.

The same principle has been more freely extended to the quasi legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Dill. Mun. Corp. 3d ed. § 319, and cases cited in notes. Accordingly, in the case of *State of Ohio, ex rel. etc.* v. *Cincinnati Gas Light & Coke Co.* 18 Ohio St. 262, 300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of its works. And a similar question, very pertinent to the one in the present cases, was decided by the Court of Appeals of Maryland, in the case of *Baltimore* v. *Radecke*, 49 Md. 217. In that case the defendant had erected and used a steam engine, in the prosecution of his business as a carpenter and boxmaker in the City of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was "to be removed after six months' notice to that effect from the mayor." After such notice and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court holding the opinion that "there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority," it proceeds to speak, with regard to the ordinance in question, in relation to the use of steam engines, as follows: "It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property; nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

[372] [373]

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v.

[374]

Mayor, etc. of New York, 92 U. S. 259 [Bk. 23, L. ed. 543]; *Chy Lung* v. *Freeman*, 92 U. S. 275 [Bk. 23, L. ed. 550]; *Ex parte Va.* 100 U. S. 339 [Bk. 25, L. ed. 676]; *Neal* v. *Delaware*, 103 U. S. 370 [Bk. 26, L. ed. 267], and *Soon Hing* v. *Crowley* [*supra*].

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationalty to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged.

To this end, the judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally *reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[375] UNITED STATES, *Plff.*,

v.

KAGAMA, *alias* "PACTAH BILLY," an Indian, AND MAHAWAHA, *alias* "BEN," an Indian.

(See S. C. Reporter's ed. 375-385.)

Constitutional law—criminal jurisdiction of territorial courts over crimes committed by Indians—relations of Indian Tribes to the Federal and State Governments.

*1. The ninth section of the Indian Appropriation Act of March 3, 1885 (Sess. Acts, p. 385), is valid and constitutional in both its branches; namely, that which gives jurisdiction to the courts of the Territories, of the crimes named committed by Indians within the Territories, and that which gives jurisdiction in like cases to the courts of the United States for the same crimes committed on an Indian Reservation within a State of the Union.

2. The crimes mentioned in the Act are murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny.

*Head notes by *Mr. Justice* MILLER.

3. While the Government of the United States has recognized in the Indian Tribes heretofore a state of semi-independence and pupilage, it has the right and authority, instead of controlling them by treaties, to govern them by Acts of Congress, because they are within the geographical limit of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact.

4. The States have no such power over them as long as they maintain their tribal relations. They owe no allegiance to a State within which their reservation may be established, and the State gives them no protection.

[No. 1246.]

Argued March 2, 1886. Decided May 10, 1886.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of California. *Jurisdiction sustained.*

The case is stated by the court.

Messrs. **John Goode**, *Solicitor-Gen.*, and *A. H. Garland, Atty-Gen., for plaintiff.*

Mr. **Joseph D. Redding**, for defendants.

Mr. Justice **Miller** delivered the opinion of the court:

The case is brought here by certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for the District of California.

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian Reservation of Hoopa Valley in the State of California, the person murdered being also an Indian of said Reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows:

"3. Whether the provisions of said section 9 [376] (of the Act of Congress of March 3, 1885), making it a crime for one Indian to commit murder upon another Indian upon an Indian Reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian Reservation 'subject to the same laws' and subject to be 'tried in the same courts and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States."

"6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian Tribe for committing the crime of murder upon another Indian belonging to the same Indian Tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian Reservation made and set apart for the use of the Indian Tribe to which said Indians both belong."

The indictment sets out in two counts that Kagama, *alias* Pactah Billy, an Indian, murdered Iyouse, *alias* Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation; and it charges Mahawaha, *alias* Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian Appropriation Act of that year, and is as follows:

"Sec. 9. That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes; namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described [377] crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian Reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his Tribe, and who commits the offense in the Indian country, or on an Indian Reservation, in exceptional cases; as where the offense was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian Tribes. It is new, because it now proposes to punish these offenses when they are committed by one Indian on the person or property of another.

The second is where the offense is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian Reservation. In this case, of which the State and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian Reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a State and the limits of a Reservation, subjects [378] the offenders to the laws of the United States, passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance as asserting this jurisdiction over the Indians within the limits of the States of the Union.

Although the offense charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the Government which were established by it to the numerous Tribes of Indians within its borders.

In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, *excluding Indians not taxed*, which, of course, excluded nearly all of that race, but which meant that if there were such within a State as were taxed to support the Government they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as Tribes distinct from the ordinary citizens of a State or Territory.

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian Tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their Reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without [379] any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian Tribes. While we are not able to see in either of these clauses of the Constitution and its Amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian Tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign Nations is distinctly stated as submitted to the control of Congress. Were the Indian Tribes foreign Nations? If so, they came within the first of the three clases of commerce mentioned and did not need to be repeated as Indian Tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign Nations and Indian Nations," or, in

the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian Nations." And so in the case of *Cherokee Nation* v. *Georgia*, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the supreme court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit. 5 Pet. 20 [30 U. S. bk. 8, L. ed. 32].

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. [380] What authority the state governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. *Murphy* v. *Ramsey*, 114 U. S. 44 [Bk. 29, L. ed. 47.]

In the case of *American Ins. Co.* v. *Canter*, 1 Pet. 542 [26 U. S. bk. 7, L. ed. 242] in which the condition of the people of Florida, then under a territorial government, was under consideration, [Marshall, *Chief Justice*, said: "Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestionable."

In the case of *U. S.* v. *Rogers*, 4 How. 572 [45 U. S. bk. 11, L. ed. 1107], where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee Tribe, *Chief Justice* Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any State. It is true it is occupied by the Cherokee Indians, but it has been assigned to them and they hold with the assent and under the authority of the United States." After referring to the policy of the European Nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of [381] the Government and not for the judicial. It is our duty to expound and execute the law as we find it; and we think it too firmly and clearly established to admit of dispute that the Indian Tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of these, Congress may by law punish every offense committed there, no matter whether the offender be a white man or an Indian."

The Indian Reservation in the case before us is land bought by the United States from Mexico by the Treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that Treaty to the United States.

The relation of the Indian Tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European Governments in the discovery of America towards the Indians who were found here, the Colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian Tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a Tribe wished to dispose of its land or any part of it, or the State or the United States wished to purchase it, a treaty with the Tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not [382] as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by *Chief Justice* Marshall in the case of the *Cherokee Nation* v. *Georgia*, 5 Pet. 1 [30 U. S. bk. 8, L. ed. 25], and in the case of *Worcester* v. *Georgia*, 6 Pet. 536 [31 U. S. bk. 8, L. ed. 492]. These opinions are exhaustive; and in the separate opinion of *Mr. Justice* Baldwin in the former is a very valuable *résumé* of the treaties and statutes concerning the Indian Tribes previous to and during the confederation.

In the first of the above cases it was held that

these Tribes were neither States nor Nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

In the opinions in these cases they are spoken of as "wards of the Nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes:

"No Indian Nation or Tribe, within the territory of the United States, shall be acknowledged, or recognized as an independent Nation, Tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

The case of *Crow Dog*, 109 U. S. 556 [Bk. 27, L. ed. 1030], in which an agreement with the Sioux Indians, ratified by an Act of Congress, was supposed to extend over them the [383] laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States Courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal section 2146 of the Revised Statutes which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the Act now under consideration was designed to remove that objection, and to go further by including such crimes on Reservations lying within a State.

Is this latter fact a fatal objection to the law? The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offenses relating to matters to which the federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a Reservation set apart within the State for residence of the Tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other Tribe. It does not interfere with the process of the state courts within the Reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some Tribe, of a criminal character, committed within the limits of the Reservation.

It seems to us that this is within the competency of Congress. These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent [384] largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen.

In the case of *Worcester* v. *Georgia*, 6 Pet. 515 [31 U. S. bk. 8, L. ed. 483], it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the Tribes; that the duty and power to compel their removal was in the United States, and the Tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

The same thing was decided in the case of *Fellows* v. *Blacksmith*, 19 How. 366 [60 U. S. bk. 15, L. ed. 684]. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall. 737 [72 U. S. bk. 18, L. ed. 667]; *New York Indians*, 5 Wall. 761 [72 U. S. bk. 18, L. ed. 708].

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws [385] on all the Tribes.

We answer the questions propounded to us, that the 9th section of the Act of March 3, 1885, is a valid law in both its branches, and that the Circuit Court of the United States for the District of California has jurisdiction of the offense charged in the indictment in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[264] PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL., *Appts.*,

v.

AMADOR AND SACRAMENTO CANAL COMPANY.

SAME, *Plff. in Err.*, *v.* SAME.

(See S. C. Reporter's ed. 264-271.)

Removal of causes—separable controversy—burden of proof.

1. Where, upon the face of the complaint, the suit is but a single cause of action for the wrongful pollution of the water of the plaintiff's canal by the united action of all of the defendants working together, the controversy arising is not separable for the purpose of removal, even though the defendants answer separately, setting up separate defenses.

2. Where the petition for removal alleges that certain defendants were wrongfully made defendants for the purpose of preventing the removal, the burden of proof to establish that fact is on the petitioner.

[Nos. 949, 950.]

Submitted April 26, 1886. Decided, May 10, 1886.

APPEAL from and in error to the Circuit Court of the United States for the District of California. *Affirmed.*

The case is stated by the court.

Mr. **John H. Boalt,** for appellants and plaintiffs in error.

Mr. **J. H. McKune,** for appellee and defendant in error.

Mr. Chief Justice **Waite** delivered the opin-
[265] ion of the court.

The Amador and Sacramento Canal Company, a California corporation, brought suit in the Superior Court of Sacramento County, California, against the Plymouth Consolidated Gold Mining Company, a New York corporation, and Alvinza Hayward, E. L. Montgomery, and Walter S. Hobart, citizens of California, to enjoin them from polluting the waters running into the canal of the Amador Company, and to recover $25,000 damages for what had already been done in that way. The material averments in the complaint, as to the alleged wrongful acts of the defendants, are as follows:

"III. That the plaintiff is, and for more than ten years last past has been, the owner in fee and in possession of a certain canal, about 26 miles long, situate partly in the County of Amador, in said State, and partly in said County of Sacramento, called the Amador and Sacramento Canal, extending from a dam across the Cosumnes River, near the southeast corner of section twenty, in township eight north, range nine east, Mount Diablo base and meridian, in said County of Amador, to Sebastopol, in said County of Sacramento, in section sixteen, township seven north, range seven east, Mount Diablo base and meridian; and is also the owner of the water usually flowing through said canal, and has used the said canal and water during all of said period of ten years for mining and agricultural purposes, and selling water for such purposes.

"IV. That the defendant, the Plymouth Consolidated Gold Mining Company, is the owner of two certain mills, situate at Plymouth, in said County of Amador, constructed and used for crushing gold-bearing quartz, and since the 2d day of January, 1882, has been such owner, and the defendants for three years next before the commencement of this action have, at said mills, carried on and conducted the business of crushing gold-bearing quartz rock and extracting and collecting gold therefrom, and have used large quantities of water in and about their business taken from the Moquelumne River.

"V. That from the said mills, the Corporation defendant, extending in a direction a little north of west, has a valley through which runs [266] Little Indian Creek until it intersects the said canal of plaintiff near the southeast corner of section four, in township seven north, range nine east, Mount Diablo base and meridian; and the defendants, since the first day of December, 1881, have used the said creek at their said mills as a dumping place for the tailings, sand, sediment, silt and other *débris* flowing to and formed by the working of said mills.

"VI. That in and about the working and management of said mills the defendants use large quantities of water taken from the Moquelumne River and other streams by them, and which water, mixed, defiled and polluted with said tailings, sand, quartz sand, sediment, silt and other *débris*, has been, during the three years next before the commencement of this action, poured into said creek and carried by said water in said creek to and into the said canal of plaintiff.

"VII. That the said water so mixed, polluted and defiled by the defendants, and discharged by them into the plaintiff's canal as aforesaid, has, during all of said three years, mingled with the pure water flowing in the said canal, and has deposited therein all the said tailings, sand, quartz sand, sediment, silt and other *débris* as aforesaid, and the same has been swept along the said canal of plaintiff by the force of the water flowing therein, and has been distributed and deposited therein, and thereby the bed of the said canal became and was raised, and the canal obstructed and damaged, and filled up and rendered unfit for use, and the water in said canal became loaded with said *débris*, and thereby rendered less useful."

The Plymouth Company answered separately, setting forth that it was a New York corporation whose powers were by law vested in seven trustees, of whom the defendants Hayward and Hobart were two, and that Montgomery was the superintendent of its mines and mills in California. The answer then admitted that the Corporation was the owner of the mills mentioned in the complaint, and that "It has at said mills carried on and conducted the business of crushing gold-bearing quartz rock and extracting and collecting gold therefrom, and used large quantities of water in and about said business, and that some of said water was taken from the Moque- [267] lumne River; but it denies that all of said water was taken therefrom, and it denies that it has during the time alleged in the complaint, or at any other time or at all, carried on or conducted at said mills, or either of them or

elsewhere, the said business, or any business, or has used large quantities of water or any water, in or about said business or otherwise, in connection with the other defendants mentioned in the complaint, or either of them; but, on the contrary, this defendant avers that said business has been carried on and conducted and said water has been used by this defendant exclusively and for its sole use and benefit and without any connection or combination with the other defendants in this action, or either of them, and that this defendant has not had, during any of the times mentioned in the complaint, and does not now have, any connection or relation with the said Hayward or Hobart or Montgomery other than such official relation aforesaid."

After this the separate defense of the Corporation to the action was set forth, to the effect that the Company was operating its mills under a license from the Amador Company, which justified all that had been done for which the suit had been brought. Hayward, Montgomery and Hutchinson filed their separate answer, in which they denied each and every allegation in the complaint against them in connection with the Plymouth Company or otherwise. After the filing of their answer, the Plymouth Company presented to the court a petition for the removal of the suit to the Circuit Court of the United States for the District of California, the material parts of which, aside from a statement of the citizenship of the parties, according to the facts, are as follows:

"But your petitioner avers and shows to the court that in the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit: a controversy between your petitioner and said Amador and Sacramento Canal Company, and that said two Corporations are the sole and only parties interested in said controversy.

"That said defendants, Alvinza Hayward, E. L. Montgomery and Walter S. Hobart, are not, nor is either of them, a necessary or proper party defendant in said action.

"That said defendants, Alvinza Hayward, [268] E. L. Montgomery and Walter S. Hobart, and each of them, are nominal and formal parties defendant to said suit, and they, nor either of them, have any interest in the said controversy, and they, nor either of them, are actual, real or necessary parties defendant, but are sham defendants sued in said action with your petitioner, as it avers on information and belief, with the object, purpose, intent and design of endeavoring thereby to prevent the removal of said cause into the Circuit Court of the United States for the District of California by your petitioner, who is the real defendant therein.

"That said Alvinza Hayward and Walter S. Hobart are stockholders and officers of your petitioner, to wit: two of the members of its board of seven trustees, and they have not, nor has either of them, any interest in the said controversy other than as such officers or stockholders.

"The said defendant E. L. Montgomery, is the superintendent of the mines and mills of your petitioner, and has no interest whatever in said controversy.

"That all the acts and grievances complained of and alleged to have been done by said defendants, if any such were done, were the sole acts of your petitioner.

"And your petitioner avers and shows that the real litigation herein is between said plaintiff and your petitioner, citizens of different States, as aforesaid.

"And your petitioner further shows that it has not carried on or conducted any mining or milling business in connection with said defendants or with either of them.

"And your petitioner further shows that the matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars."

On the presentation of this petition the state court directed the removal of the suit, and proceeded no further. The case was docketed in the circuit court on the 19th of May, and on the 17th of June the Amador Company moved to remand, among others, on the following grounds:

"I. That the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said circuit court. [269]

* * * *

"III. Because the defendants did not all join in said petition for removal.

"IV. Because the defendants are not all residents or citizens of States other than California, and it does not appear that the parties defendants to said suit were or have been wrongfully joined as such.

"V. It does not appear from the record and papers on file in said circuit court that there is a controversy which is wholly between citizens of different States, which can be tried and which can be fully determined between them without involving necessarily a trial of the whole case as to all of the defendants."

In the notice which was given of this motion the following appears:

"On the hearing of said motion we will rely on and read in evidence:

"1. The transcript and record on file in said circuit court in said cause.

"2. Answer of the plaintiff to the petition of the Corporation defendant for a removal, herewith served.

"3. Affidavits of J. H. McKune, W. F. George and Jennie B. Ritter, herewith served; and,

"4. Also offer oral evidence."

None of the affidavits here referred to are found in the transcript, and there is no statement of any oral evidence that was produced.

The court heard the motion on the 27th of July and remanded the suit. From this order an appeal was taken and writ of error brought, and these have been docketed here as separate causes.

It was not necessary to docket the cause twice because it was brought here both by appeal and writ of error. *Hurst* v. *Hollingsworth*, 94 U. S. 111 [Bk. 24, L. ed. 31]. There was but one action in the court below, and there is but one record. The appeal and writ of error bring up but one order or judgment for review, and there is, therefore, but one case here.

Upon the face of the complaint there is in the suit but a single cause of action, and that [270] is the wrongful pollution of the water of the

plaintiff's canal by the united action of all the defendants working together. Such being the case, the controversy was not separable for the purposes of a removal, even though the defendants answered separately, setting up separate defenses. *Pirie* v. *Tvedt*, 115 U. S. 41 [Bk. 29, L. ed. 331]; *Sloane* v. *Anderson*, 117 U. S. 278 [Bk. 29, L. ed. 891].

It is claimed, however, that, as the answers show that the Plymouth Company is the real defendant, and the petition alleges that the others are nominal parties only, and joined with that Company as "sham defendants" to prevent a removal, the suit must be treated as in legal effect against the New York Corporation alone, and, therefore, removable. So far as the complaint goes, all the defendants are necessary and proper parties. A judgment is asked against them all, both for an injunction and for money. Hayward and Hudson are admitted by the answer to be officers of the Corporation, and Montgomery its superintendent. These persons are all citizens of California, and amenable to process in that State. It is not denied that they are all actively engaged in the operations of the Company; and Montgomery, as the superintendent of its mines and mills, must necessarily be himself personally connected with the alleged wrongful acts for which the suit was brought. It is undoubtedly true that if the Company has a good defense to the action, that defense will inure to the benefit of all the other defendants; but it by no means follows that, if the Company is liable, the other defendants may not be equally so, and jointly with the Company. It is possible, also, that the Company may be guilty and the other defendants not guilty, but the plaintiff in its complaint says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself, but until his defense is made out the case stands against him, and the rights of all must be governed accordingly. Under these circumstances the averments in the petition, that the defendants were wrongfully made to avoid a removal can be of no avail in the circuit court upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on [271] the petitioning defendant. That Corporation was the moving party, and was bound to make out its case.

The order remanding the cause is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[241] MARIE P. EVANS AND WILLIAM R. EVANS, *Plffs. in Err.*,

v.

MRS. MARY A. PIKE, Widow of WILLIAM S. PIKE, Deceased, and Natural Tutrix of the Minor, GERTRUDE D. PIKE; JOHN H. PIKE, EMMA C. PIKE, Widow of GRAY DOWSWELL, WILLIAM S. PIKE, JR., AND MARY L. PIKE.

(See S. C. Reporter's ed. 241-250.)

Sale of lands in Louisiana under execution on credit with bond—subsequent sale under execution on bond—action at law by gratuitous donee of first purchaser—remedy.

1. Certain lands were sold under execution in Louisiana on August 3, 1861, on a credit of twelve months, with bond. On September 5, 1861, the purchaser made a gratuitous donation of the lands to the plaintiff, Marie P. Evans, without surrendering possession. The bond not having been paid, on January 6, 1866, the lands were sold under execution issued thereon to William S. Pike, one of the sureties. This suit was brought in 1871 by the plaintiffs, claiming under the donation, against said Pike, to recover the lands. *Held*, that the lands remained, after the first sale, subject to the judgment, and liable to an execution either on such judgment or on the bond; that the donee took the property subject to all charges in the same manner as the donor held it; and that said donee was not entitled to the delay and formalities of the hypothecary action and is bound by the sale under execution on the bond.

2. It seems that the remedy of the plaintiffs, if any, is a bill in equity to redeem.

[No. 252.]

Argued and submitted April 22, 1886. Decided May 10, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **William Grant**, for plaintiffs in error:

Four years prior to the seizure of the property under the writ of *fieri facias* against Ackley Perkins, the latter had transferred the legal title to Mrs. Evans by an act of donation. Pike's title was derived from Perkins through a proceeding against him, four years after he had thus parted with title, and to which Mrs. Evans was not a party.

He had possessed the property under his deed something over five years, when this suit was brought, and the circuit judge held, in effect, and so instructed the jury, that defendants had acquired the property by such possession.

This instruction was based upon an erroneous interpretation of the opinion of *Mr. Justice* Bradley in *Pike* v. *Evans*, and a clear mistake of the law applicable to the case. It may be fairly presumed, when the issue decided in that opinion is considered, that the court intended simply to decide the question presented by the instruction, which was whether the omission of the sheriff to make a tangible seizure of the property was an irregularity cured by the prescription of five years. The circuit judge had instructed the jury that it was not, but this court held that this, as well as all other irregularities, were included in the statute.

It followed, as a logical sequence to the opinion on the main question, that a sheriff's deed thus cured of irregularity might become the basis of the prescription of ten years, by which property is acquired, under the Civil Code of Louisiana, as was said by *Mr. Justice* Bradley. But it is not to be inferred that the court intended to decide that possession of property for a less period than ten years, under a deed, either perfect in form originally, or made so by the lapse of five years, can give a title to lands in Louisiana. The whole purpose of the statute was to prevent anyone disputing the regularity of a judicial sale after the lapse of five years.

But the Code provides under what circum-

stances property may be acquired by possession. Article 3478 provides: "He who acquires an immovable in good faith and by a just title prescribes for it in ten years."

Walden v. *Finley*, 2 Rob. (La.) 466; *Leduf* v. *Bailly*, 3 La. Ann. 8.

But plaintiffs in this case do not, and need not, allege that defendants' title is void, or voidable because there was no tangible seizure of the property. Mrs. Evans was not a party to the judgment, nor to the execution under which her property was sold. As to her the sheriff had no authority to sell, and the prescription of the informalities could not devest her title.

Robert v. *Brown*, 14 La. Ann. 597.

A defect of this character is not a mere irregularity, but an absolute nullity. As it arises *dehors* the record, it is not cured by the prescription of five years.

Jackson v. *Ludeling*, 99 U. S. 538 (Bk. 25. L. ed. 460).

The rule is the same in Louisiana as elsewhere, that the rights of a seizing creditor are no greater than those of his debtor.

Ballio v. *Poisset*, 8 Mart. N. S. 337; *Smith* v. *McMicken*, 3 La. Ann. 319.

A creditor cannot disregard a conveyance made by his debtor, and seize the property without some proceeding against the owner.

Ford v. *Douglas*, 5 How. 143 (46 U. S. bk. 12, L. ed. 89).

Mr. **John A. Campbell,** for defendants in error.

[243] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is a petitory suit brought by Marie P. Evans and her husband, the plaintiffs in error, to recover a plantation of 1,911 acres, called the Richland plantation, situated in the Parish of West Feliciana, near Baton Rouge, in the State of Louisiana. The action was originally commenced against William S. Pike, and is continued against his widow and heirs, the defendants in error. The plaintiffs claim the property under a gratuitous donation made by Ackley Perkins, to his niece, the said Marie P. Evans (then Marie Linton), by act of donation dated September 5, 1861. The title of the defendants is based on a judgment of the Second District Court of West Feliciana, rendered 18th February, 1859, for the sum of $16,890.25, with interest, in favor of one Eliza C. Johnson, against J. & H. Perkins, upon mortgage notes given by them for the purchase of the plantation. An execution was issued on this judgment, and the property failing to bring two thirds of its appraised value, it was sold on the third of August, 1861, on twelve months' credit, pursuant to the Code of Practice of Louisiana; and the said Ackley Perkins, a brother of the mortgagors, became the purchaser, and to secure the payment of the purchase money he gave a twelve months' bond for $30,695.80, with interest at 10 per cent per annum, with two sureties. This bond contained a declaration of mortgage on the property sold, and an acknowledgment that it was to have the force of a final judgment, but it was not recorded. This was about one month prior to the donation made by Ackley Perkins to the plaintiff. The twelve months' bond not being paid, an execution was issued upon it on the 10th of October, 1865, and under this execution the property was sold on the 6th of January, 1866, and William S. Pike, one of the sureties of Perkins on the bond, to protect himself, became the purchaser for the sum of $46,725, received a deed from the sheriff, and took immediate possession of the premises, and continued in possession until the commencement of this suit in October, 1871, a period of five years and nine months; and he and his heirs have been in possession ever since.

The defendant, William S. Pike, amongst other things, interposed the plea of prescription of five years, under article 3543 of the Revised Civil Code, being a re-enactment of the Statute [244] passed March 10, 1834, which declares that "All informalities connected with, or growing out of, any public sale made by any person authorized to sell at public auction shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

At the first trial of the cause, the plaintiff undertook to rebut this plea by showing that the sheriff did not actually seize the property; and the circuit court held that this defect was not one of the informalities cured by the prescription. On writ of error from this court we held otherwise, and reversed the judgment. *Pike* v. *Evans*, 94 U. S. 6 [Bk. 24, L. ed. 40]. Of course, we must have held that the sheriff was authorized to sell the property at public auction, for that is necessary in order to maintain the plea of prescription in such a case.

A second trial has since taken place, and it does not appear by the record that any attempt was made to show a want of seizure by the sheriff. His return to the writ of execution shows that he did seize the property. The plea of prescription, however, was not withdrawn by the defendants, but was still relied on; and the judge, besides charging the jury that if Pike was in possession of the plantation for a period of five years, and purchased the same from a person authorized to sell at public auction, any informality connected with or growing out of the sale was prescribed, went on to charge further, that under the terms of the decision of the supreme court in this case, the prescription of five years, if proved, was decisive of the controversy, operated as a bar to the plaintiffs' action, and gave to the defendants a title by prescription against the plaintiff. To this instruction the plaintiffs excepted, and the substantial ground of their exception was that the prescription of five years only cures defects and informalities in a sale, and not defects in the title itself, which, according to the laws of Louisiana, can only be cured by a prescription of ten years of possession in good faith and under a just title.

But even if this objection were well founded, a question would still arise whether by the [245] sheriff's sale William S. Pike did not acquire a good title as against the plaintiffs. For if he did, prescription, except in reference to informalities of the sale, was not necessary to his defense, and the charge could not injure the plaintiffs. It is necessary, therefore, to examine this question.

The objection made by the plaintiffs to the title conferred by the sheriff's sale is that the plaint-

iff, Marie P. Evans, was not made a party to the proceedings and not served with notice, though donee of the property, and a third possessor.

The situation of the property at the time of the sale was as follows: on the 18th of February, 1859, it became subject to Eliza C. Johnson's judgment for purchase money. On the third of August, 1861, by virtue of an execution on this judgment, it was sold to Ackley Perkins on a credit of twelve months, and Perkins gave a twelve months' bond for the purchase money. This sale was made in pursuance of a law of Louisiana which authorizes a sheriff to sell property on execution at twelve months' credit if unable to sell it for cash at two thirds of its appraised value. Code Prac. art 680, 681. At such sale on credit, the purchaser is required to furnish good and sufficient joint security and special mortgage on the property sold, bearing interest at the same rate as the judgment. Art. 681. The Code further provides that if the bond is not paid at maturity, "The clerk who first issued the order of seizure shall, on the demand of the judgment creditor, or any other person interested, and on the bond being delivered to him, issue an execution for the amount, both against the purchaser and his surety, in the same manner as on a final judgment; and this execution shall be directed to the sheriff, to be carried into effect." Art. 719. "If the amount of the bond, with interest and costs, be not paid to him on demand, it is the duty of the sheriff, under this execution, to seize immediately the property of the purchaser, or of the surety, or both, to the amount of the debt and costs, and to sell it for ready money." Art. 720.

The course thus prescribed was followed in the present case. But the sale thus made on credit was not a satisfaction of the judgment, which still remained in full force; for, if the bond was not paid at maturity (as it was not), [246] execution might be issued, either on the judgment or on the bond, at the option of the judgment creditor. The land still remained subject to the judgment. The execution on the bond had merely this advantage, that it could be levied on the property of the sureties as well as on that of the principal; but the property for which the bond was given remained subject to the debt and to the lien of the judgment. A sale of the land under an execution issued on the judgment, or on the bond, would relate back to the judgment for its force and effect. *Trescott* v. *Lewis*, 11 La. Ann. 184; *Baham* v. *Langfield*, 16 La. Ann. 157; *Union Bank* v. *Stafford*, 12 How. 339, 340 [53 U. S. bk. 13, L. ed. 1008]. As Ackley Perkins paid nothing on his purchase, but merely gave the twelve months' bond, he could do nothing to defeat the continued lien of the judgment. Though a purchaser from him in possession might be entitled to be proceeded against by a hypothecary action, a mere gratuitous donee would take the property subject to all charges in the same manner as the donor held it. Article 1551 of the Civil Code declares: "The property given passes to the donee with all its charges, even those which the donor has imposed between the time of the donation and that of the acceptance;" in other words, the donee takes *cum onere*, and undoubtedly with implied notice. This was manifested in the present case by the conduct of the parties at the time of passing the act of donation, which declares that they "dispensed with the production of a certificate from the recorder of the parish as is required by article 3328 of the Civil Code." This means that the donee accepted the property at her own risk, subject to all charges thereon, and amounted to a voluntary assumption by her of those charges, so far as they were specific and not general liens.

It is the general law, it is true, that a third possessor of hypothecated property must be proceeded against by the hypothecary action, which requires thirty days' demand of the principal debtor, and ten days' subsequent notice to the third possessor to pay the debt or give up the property. Article 68 of the Code of Practice declares that "If the hypothecated property be neither in the possession of his debtor nor of his heirs, but in that of a third [247] person, the creditor has his action against that person, in order to compel him either to give up the property or to pay the amount for which it stands hypothecated." And this is the ordinary rule as to third possessors, whether the hypothecation be by act of mortgage or in any other form. A judgment creditor, whose claim bears against a piece of property transferred to a third party who does not assume to pay the judgment, must proceed by hypothecary action. *Massey* v. *Finch*, 24 La. Ann. 29. But where the vendee assumes the payment of a mortgage as a part of the purchase price, the mortgagee may proceed against the mortgagor without reference to the sale made by him. (*Père* v. *Goldman*, on appeal by Sell, the third possessor, Louque's Dig. 442, pl. 9.) A purchaser of property subject to a mortgage debt, who promises or is personally liable to pay the debt, is held not to be a third possessor entitled to the demand and notice requisite in a hypothecary action. *Duncan* v. *Elam*, 1 Rob. 185; *Boissac* v. *Downs*, 16 La. Ann. 187.

From these authorities we infer the rule to be that a gratuitous donee, even when in possession, being liable for the charges on the land, is not entitled to the delay and formalities of the hypothecary execution. But if this be not true in all cases, we think it must be true in a case like the present, where the party is not in possession and has accepted a donation of land from a person who bought it on credit, the land being still subject to the judgment under which it was sold, and liable to an execution either on such judgment or on the bond given for purchase money.

In this case the plaintiff was not in possession. As we understand the record, no change of possession took place at the time of the donation; but the plaintiff Marie, the donee, went immediately abroad, out of the country, and Ackley Perkins remained in possession until the sale to William S. Pike, in January, 1866, under the execution on the twelve months' bond. Mrs. Johnson, the judgment creditor, not receiving any fruit of her judgment, finds herself, at the close of the war, obliged to resell the property. She finds no one in possession but Ackley Perkins. She follows the directions of the Code, and an execu- [248] tion is issued on the twelve months' bond. William S. Pike is obliged to purchase the

property to protect himself as surety on the bond. Under these circumstances, there is certainly no strong equity in favor of the plaintiff's claim. She never paid a cent for the property; her donor never paid a cent for it; the judgment remains unpaid; the surety is obliged to buy to save himself; and now the plaintiff, after nearly six years have passed away, seeks to deprive Pike of possession, without offering to reimburse him for what he has paid (or bound himself to pay) to relieve the property from the incumbrance resting upon it, and to satisfy the debts of the plaintiff's donor, and of the parties against whom the judgment was originally rendered. There could not well be a case more destitute of equity.

Suppose the plaintiff was entitled to notice of the application for executory process, or to some formality in lieu of notice; does that make the sale so absolutely void that she can recover the property without restoring or offering to restore to Pike or his heirs what he has paid?

In the English system, followed in most of the States, a person having an interest in mortgaged premises sold under a foreclosure, and not made a party to the proceedings, merely retains his equity of redemption; that is, a right to redeem the property by paying the amount due on the mortgage. He cannot turn the purchaser out of possession, without redeeming or offering to redeem the property by paying the mortgage debt. This rule is founded in such manifest justice that we should be surprised not to find it in some form in a system of law drawn from the same source as that of English equity. An examination of the Louisiana decisions shows that we are not mistaken in our anticipations.

In *Dufour* v. *Camfranc*, 11 Mart. 607, the plaintiff claimed title to certain slaves; the defendant pleaded that he had purchased them at sheriff's sale, upon an execution issued on a judgment against the heirs of one Dufour, and that plaintiff was one of those heirs. It was replied, amongst other things, that the judgment was null, because plaintiff was not cited. The court said: "Another question still presents itself. [249] It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit until he repay the money. Nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

In *Donaldson* v *Rouzan*, 8 Mart. N. S. 162, the court said: "The judge below thought the sheriff's deed, without a judgment, did not pass the right of the defendant in execution to the purchaser, and in that opinion we concur. But he thought that, as the purchase money had been applied to the benefit of the estate of the plaintiff's testator, she ought not to recover the lot, without returning the price paid for it. In the view taken by the judge below we also concur;" and the judgment was affirmed.

In *Stockton* v. *Downey*, 6 La. Ann. 581, which was a suit to recover property sold under executory process, the court says: "We do not think that judicial sales ought to be disturbed, unless at the instance of a party who has a right to sue for their rescission or nullity, and who can show an injury resulting to him from the sale, as well as an interest in the result of the suit, and without a previous proffer of full indemnity to the *bona fide* parties, whose interests are to be affected by the judgment." The sale was sustained.

In *Taylor* v. *Huey*, 11 La. Ann. 614, which was a petitory action for a tract of land, the plaintiff claimed under a deed from one Fountain, dated in August, 1846, but not recorded until May, 1847; the defendant claimed under a sheriff's sale made in January, 1847, and deed recorded in February, 1847; the sale being made by virtue of executory process issued upon an act of mortgage executed by Fountain in December, 1845, and recorded November, 1846, after the execution of the deed from Fountain to Taylor. The court concludes its judgment as follows: "But conceding that Taylor could be heard to impeach the title of Huey thus acquired, he has not laid a foundation for doing so by the allegations of his petition. He has made no tender to the defendant of the mortgage debt which burdened the land, and [250] was only discharged by the sale he seeks to treat as a nullity." Judgment for defendant affirmed.

We think that these decisions are applicable to the present case, and govern it, and that the remedy of the plaintiffs, in the United States court, if they have one, is a bill in equity to redeem the property, and not an action at law. Under the law of Louisiana, as we understand it, the possessory title of the defendants cannot be disturbed, without returning to them the amount paid by their ancestor in exoneration of the property and in satisfaction of the original judgment of Mrs. Johnson. For the purposes of the present action, their title is good and valid, and they were entitled to a verdict, irrespective of the question whether they and their predecessor, William S. Pike, could maintain title by prescription or not. The charge of the judge, therefore, even if incorrect, did no injury to the plaintiffs.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY, *Plff. in Err.*, [455]

v.

BOARD OF HEALTH OF THE STATE OF LOUISIANA, AND STATE OF LOUISIANA.

(See S. C. Reporter's ed. 455-467.)

Louisiana quarantine laws—police power of States—regulation of commerce by States in absence of Congressional action—fee for sanitary examination, not a tax within meaning of Constitution—preference of ports of one State over those of another—Constitution, art. 1, sec. 9, a limitation on General Government.

*1. The system of quarantine laws established by Statutes of Louisiana is a rightful exercise of the police power for the protection of health, which is not forbidden by the Constitution of the United States.

2. While some of the rules of that system may amount to regulations of commerce with foreign nations or among the States, though not so designed, they belong to that class which the States may establish until Congress acts in the matter by covering the same ground or forbidding state laws.

3. Congress, so far from doing either of these things, has, by the Act of 1799, chap. 53, Revised Statutes, and previous laws, and by the recent Act of 1878, 20 Stat. at L. 37, adopted the laws of the States on that subject, and forbidden all interference with their enforcement.

4. The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the Constitution concerning tonnage tax imposed by the States.

5. Nor is it liable to constitutional objection as giving a preference for a port of one State over those of another That section (nine) of the first article of the Constitution is a restraint upon powers of the General Government and not of the States, and can have no application to the quarantine laws of Louisiana.

[No. 552.]

Argued Apr. 26, 27, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the State of Louisiana. *Affirmed.*

The case is stated by the court.

Messrs. **Henry J. Leovy** and **Joseph E. McDonald**, for plaintiff in error:

The Acts in question, and principally those of 1882 (p. 89) and 1870 (extra session, p. 84), are null and void because they impose tonnage duties.

We do not contend that the States have no power to establish quarantine regulations; we say that the States are powerless to impose on vessels the cost of a system created for the benefit of a whole community.

Peete v. *Morgan*, 19 Wall. 583 (86 U. S. bk. 22, L. ed. 201); *Port Warden Case*, 6 Wall. 31 (73 U. S. bk. 18, L. ed. 749); "*State Tax Tonnage Cases*," 12 Wall. 218 (79 U. S. bk. 20, L. ed. 370); *The "Cannon" Case*, 20 Wall. 580 (87 U. S. bk. 22, L. ed. 417).

Unless the sum imposed on the vessel is for a direct service to the vessel, proportioned to the amount claimed, it is a reprobated tonnage duty.

See 6 Wall. 31, 12 Wall. 218, 19 Wall. 581 and 20 Wall. 580, *supra;* 92 U. S. 259; 94 U. S. 238; 95 U. S. 80; 100 U. S. 423; 105 U. S. 166.

If it be contended that the tax is for the benefit of commerce, and thus indirectly a service to the vessels for which they should pay, we answer that precisely the same argument was used in defense of the tax for the harbor masters in New York, and also in Louisiana.

Inman Steamship Co. v. *Tinker*, 94 U. S. 243 (Bk. 24, L. ed. 118); 6 Wall. 31.

The statutes named are null and void because they regulate commerce.

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Constitutional law; regulation of commerce; interstate commerce; powers of States; how far congressional action exclusive.*

See Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, p. 156, note; Gibbons v. Ogden, 22 U. S. bk. 6, p. 23, note. Brown v. Maryland, 25 U. S. bk. 6, p. 678, note.

2 Curtis, Hist. Const. p. 370; *Gibbons* v. *Ogden*, 9 Wheat. 205 (22 U. S. bk. 6, L. ed. 23); *Peete* v. *Morgan*, *supra;* *Brown* v. *Maryland*, 12 Wheat. 420 (25 U. S. bk. 6, L. ed. 678).

The only difference between the *Peete Case* and that now before the court is that in the *Peete Case* the charge is by the ton, and the statute states that the fee is for quarantine purposes, without stating specifically that it is for the inspection. As to the tonnage point, this court has frequently decided that there is no difference as to the constitutionality of a statute, whether the tax be measured by the ton, or imposed on the vessel.

6 Wall. 31; 12 Wall. 218; 20 Wall. 580 *supra.*

This court has decided that charges for the following purposes are not only in violation of the tonnage provision of the Constitution, but also of that regulating commerce:

Port Wardens, 6 Wall. 31; *Quarantine*, 19 Wall. 581; 95 U. S. 465; *Harbor Masters*, 94 U. S. 238; *Wharves*, 20 Wall. 580; 95 U. S. 80; 100 U S. 423; 100 U. S. 430; 100 U S. 434; *Passengers*, 9 Wheat. 205; 7 How. 383; 92 U S. 259; 92 U. S. 275; 107 U S. 60; *License Tax on Vessels*, *Tug Boats*, 112 U. S. 69; *Ferry Boats*, 114 U. S. 197; *State Tax on Vessels*, 17 How. 596; 16 Wall. 471.

Finally, on the subject of the power of Congress to regulate commerce, and state interference with it, by the imposition of duties, we ask attention to the recent case of the *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 204 (Bk. 29, L. ed. 158).

See, also, 112 U. S. 69; *Railroad* v. *Husen*, 95 U. S. 465 (Bk. 24, L. ed. 527)

By these Acts, imposing charges exclusively on vessels passing the Mississippi River Quarantine Station, preference is given to vessels from the ports of one State over those of another, and duties imposed on vessels bound from one State to another, in contravention of article 1, sec. 9, par. 6 of the United States Constitution.

Inman Steamship Co. v. *Tinker*, *supra;* *Guy* v. *Baltimore*, 100 U. S. 434 (Bk 25, L. ed. 743)

One of the most important questions presented by this case is, whether the system created by the Louisiana Statutes, by which vessels from the neighboring healthy ports are detained and heavily taxed, is, in any proper sense, a quarantine system at all. Are the regulations created by these statutes, so detrimental to commerce, at all necessary for self-protection; or rather are they not ingenious devices to fill the coffers of a depleted treasury? The Act of 1882 provides for the detention and inspection of all steamers passing the Mississippi River Station, and a charge of $30 on every steamer is imposed for this "service" to the steamer. If the detention be not necessary, it cannot be justified.

Messrs. **Wm. M. Evarts, F C. Zacharie** and *Albert Voorhies*, for defendants in error:

The statutes attacked as violating the commerce and tonnage clauses of the Constitution impose no tax or burden, as such, on any vessel. They ordain and establish a quarantine, provide for the inspection of every vessel, and for fumigation and other precautionary measures when deemed essential. The only charge

authorized to be made is a fee for the service of inspection, and for fumigation when the latter is considered as required. The case, therefore, involves no issue but the validity of the charge for the service of inspection and fumigation when required.

An Act of the State by which it makes a charge for a legal service is neither a regulation of commerce nor a tax on tonnage. The very absence of authority against the proposition is its strongest affirmance. It is not denied that at the time of the adoption of the Constitution of the United States, the Colonial and Confederated Governments had ordained quarantine, had provided for inspection thereunder, and made a charge for the service so rendered. It is equally unquestioned that since the adoption of the Constitution, the quarantine laws of New York and other States have made a charge for inspection.

An adequate charge for the service of quarantine inspection is not a tonnage tax or a regulation of commerce. The source whence comes the power to do the act for which the charge is made seems to have been made the test in *Gibbons* v. *Ogden*, 9 Wheat. 203 (22 U. S. bk. 6, L. ed. 23); *Turner* v. *Maryland*, 107 U. S. 51 (Bk. 27, L. ed. 375).

The right to direct the quarantine inspection arises, not from any assertion of governmental authority to regulate commerce or tax tonnage, but from the power to establish quarantine. Authority flowing from a valid and constitutional exercise of power does not become constitutionally inoperative because by its exercise, as was said in *Gibbons* v. *Ogden*, it "may have a remote and considerable influence on commerce." The power is the test, not the mere indirect effect to come from the exercise of an incident adhering to it by necessary implication.

Cooley v. *Port Wardens*, 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Turner* v. *Maryland*, 107 U. S. 38 (Bk. 27, L. ed. 370); *Transportation Co.* v. *Parkersburg*, 107 U. S. 692 (Bk. 27, L. ed. 585).

But the charge for the service of inspection is so patently not a tax on tonnage, or a regulation of commerce, that, irrespective of the other views, its validity should be upheld.

The record shows that the receipts from quarantine do no more than pay the actual cost of the various stations. What is required beyond comes from the public treasury. It is idle therefore to consider this as a case involving on the part of the State an attempt to raise revenue by indirection. If the State sought within its legal powers by subterfuge and indirection to do so, it may be doubted whether the remedy must not come from Congress.

Turner v. *Maryland*, *supra*; *Transportation Co.* v. *Parkersburg*, 107 U. S. 695 (Bk. 27, L. ed. 585).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Louisiana.

The plaintiff in error was plaintiff in the state court, and in the court of original jurisdiction obtained an injunction against the Board of Health prohibiting it from collecting from the plaintiffs the fee of $30 and other fees allowed by Act 69 of the Legislature of Louisiana of 1882, for the examination which the quarantine laws of the State required in regard to all vessels passing the station. This decree was reversed on appeal by the Supreme Court of the State, and to this judgment of reversal the present writ of error is prosecuted.

The grounds on which it is sought, in this court, to review the final judgment of the Louisiana court are thus stated in an amended petition filed in the cause in the court of first instance: [456]

"The amended petition of plaintiffs respectfully represents:

"That all the Statutes of the State of Louisiana, relied on by defendants for collection of quarantine and fumigation fees are null and void, because they violate the following provisions of the United States Constitution:

"Article first, section 10, paragraph 3, prohibits the States from imposing tonnage duties without the consent of Congress.

"Article first, section 8, paragraph 3, vesting in Congress the power to regulate commerce, which power is exclusively so vested.

"Article first, paragraph 6, section 9, which declares that no preference shall be given by any regulation of commerce to the ports of one State over that of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another."

The statute which authorizes the collection of these fees, approved July 1, 1882, is as follows:

"Sec. 1. *Be it enacted by the General Assembly of the State of Louisiana*, That the resident physician of the quarantine station on the Mississippi River shall require for every inspection and granting certificate the following fees and charges: For every ship, thirty dollars ($30); for every bark, twenty dollars ($20); for every brig, ten dollars ($10); for every schooner, seven dollars and a half ($7.50); for every steamboat (towboats excepted), five dollars ($5); for every steamship, thirty dollars ($30).

"Sec. 2. *Be it further enacted, etc.*, That the Board of Health shall have an especial lien and privilege on the vessels so inspected for the amount of said fees and charges, and may collect the same, if unpaid, by suit before any court of competent jurisdiction, and in aid thereof shall be entitled to the writ of provisional seizure on said vessels.

"Sec. 3. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this Act, are hereby repealed, and all laws and parts of laws on the same subject matter not in conflict or inconsistent herewith are continued in full force and effect."

The services for which these fees are to be collected are parts of a system of quarantine, provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming through the Gulf of Mexico from all parts of the world, and up the Mississippi River to New Orleans. [458]

This system of quarantine differs in no essential respect from similar systems in operation in all important seaports all over the world, where commerce and civilization prevail. The distance from the mouth of the Mississippi River to New Orleans is about a hundred miles. A Statute of Louisiana of 1855, organiz-

ing this system, created a board of health, to whom its administration was mainly confided, [459] and it authorized this board to select and establish a quarantine station on the Mississippi, not less than seventy-five miles below New Orleans. Money was appropriated to buy land, build hospitals, and furnish other necessary appliances for such an establishment. This and other statutes subsequently passed contained regulations for the examination of vessels ascending the river, and of their passengers, for the purpose of ascertaining the places whence these vessels came, their sanitary condition, and the healthy or diseased condition of their passengers. If any of these were such that the safety of the City of New Orleans or its inhabitants required it as a protection against disease, they could be ordered into quarantine by the proper health officer, until the danger was removed, and, if necessary, the vessel might be ordered to undergo fumigation. If, on this examination, there was no danger to be apprehended from vessel or passengers, a certificate of that fact was given by the examining officer, and she was thereby authorized to proceed and land at her destination. If ordered to quarantine, after such detention and cleansing process as the quarantine authorities required, she was given a similar certificate and proceeded on her way. If the condition of any of the passengers was such that they could not be permitted to enter the city, they might be ordered into quarantine while the vessel proceeded without them. Whether these precautions were judicious or not this court cannot inquire. They are a part of and inherent in every system of quarantine.

If there is a city in the United States which has need of quarantine laws it is New Orleans. Although situated over a hundred miles from the Gulf of Mexico, it is the largest city which partakes of its commerce, and more vessels of every character come to and depart from it than any city connected with that commerce. Partaking, as it does, of the liability to diseases of warm climates, and in the same danger as all other seaports of cholera and other contagious and infectious disorders, these are sources of anxiety to its inhabitants, and to all the interior population of the country who may be affected by their spread among them. Whatever may be the truth with regard to the contagious character of yellow fever and cholera, there can be [460] no doubt of the general belief, and very little of the fact, that all the invasions of these epidemics in the great valley of the Mississippi River and its tributaries in times past have been supposed to have spread from New Orleans, and to have been carried by steamboats and other vessels engaged in commerce with that city. And the origin of these diseases is almost invariably attributed to vessels ascending the Mississippi River from the West Indies and South America, where yellow fever is epidemic almost every year, and from European countries whence our invasions of cholera uniformly come.

If there is any merit or success in guarding against these diseases by modes of exclusion, of which the professional opinion of medical men in America is becoming more convinced of late years, the situation of the City of New Orleans for rendering this exclusion effective is one which invites in the strongest manner the effort. Though a seaport in fact, it is situated a hundred miles from the sea, and is only to be reached by vessels from foreign countries by this approach. A quarantine station, located as this one is under the Louisiana laws, with vigilant officers, can make sure of inspecting every vessel which comes to New Orleans from the great ocean in any direction. Safe and ample arrangements can be made for care and treatment of diseased passengers and for the comfort of their companions, as well as the cleansing and disinfecting of the vessels. The system of quarantine has here, therefore, as fair a trial of its efficacy as it could have anywhere, and the need of it is as great.

None of these facts are denied. In all that is important to the present inquiry they cannot be denied.

Nor is it denied that the enactment of quarantine laws is within the province of the States of this Union. Of all the elements of this quarantine system of the State of Louisiana, the only feature which is assailed as unconstitutional is that which requires that the vessels which are examined at the quarantine station, with respect to their sanitary condition and that of their passengers, shall pay the compensation which the law fixes for this service.

This compensation is called a tonnage tax, [461] forbidden by the Constitution of the United States; a regulation of commerce exclusively within the power of Congress; and also a regulation which gives a preference to the Port of New Orleans over ports of other States.

These are grave allegations with regard to the exercise of a power which, in all countries and in all the ports of the United States, has been considered to be a part of, and incident to, the power to establish quarantine.

We must examine into this proposition and see if anything in the Constitution sustains it. Is this requirement, that each vessel shall pay the officer who examines it a fixed compensation for that service, a tax? A tax is defined to be "a contribution imposed by government on individuals for the service of the State." It is argued that a part of these fees go into the treasury of the State or of the city, and it is therefore levied as part of the revenue of the State or city and for that purpose. But an examination of the statute shows that the excess of the fees of this officer over his salary is paid into the city treasury to constitute a fund wholly devoted to quarantine expenses, and that no part of it ever goes to defray the expenses of the state or city government.

That the vessel itself has the primary and deepest interest in this examination it is easy to see. It is obviously to her interest, in the pursuit of her business, that she enter the city and depart from it free from the suspicion which, at certain times, attaches to all vessels coming from the Gulf. This she obtains by the examination and can obtain in no other way. If the law did not make this provision for ascertaining her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel herself when it was found that she had come to the city from an infected port or had brought contagious persons or contagious matter with her; and throwing the responsibility for this on the vessel, the heaviest punishment would be necessary by

fine and imprisonment for any neglect of the duty thus imposed. The State now says you must submit to this examination. If you appear free of objection, you are relieved by the officer's certificate of all responsibility on that [462] subject. If you are in a condition dangerous to the public health, you are quarantined and relieved in this manner. For this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there *is* no danger, yet as you belong to a class from which all this kind of injury comes, you must pay for the examination which distinguishes you from others of that class. It seems to us that this is much more clearly a fair charge against the vessel than that of half pilotage, where the pilot's services are declined, and where all the pilot has done is to offer himself. This latter has been so repeatedly held to be a valid charge, though made under state laws, as to need no citations to sustain it.

In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor*, 92 U. S. 259 [Bk. 23, L. ed. 543]; *Chy Lung* v. *Freeman*, 92 U. S. 275 [Bk. 23, L. ed. 550]; *Cannon* v. *New Orleans*, 20 Wall. 577 [87 U. S. bk. 22, L. ed. 417].

In the case of *Packet Co.* v. *St. Louis*, 100 U. S. 423 [Bk. 25, L. ed. 688], where a city wharfage tax was assailed on the same ground as the fee in the present case, the court said the fee was a fair equivalent for the use of the wharf. "Nor is there any ground whatever to suppose that these wharfage fees were exacted for the purpose of increasing the general revenue of the city beyond what was necessary to meet its outlay, from time to time, in maintaining its wharves in such condition as the immense business of that locality required." So here, there is no reason to suppose that these fees had any other purpose or destination than to keep up and pay the expenses of the quarantine station and system.

But, conceding it to be a tax; in what sense can it be called a tonnage tax? The cases of *State Tonnage Tax*, 12 Wall. 204 [79 U. S. bk. 20, L. ed. 370]; *Peete* v *Morgan*, 19 Wall. 581 [86 U. S. bk. 22, L. ed. 201]; *Cannon* v *New Orleans*, [*supra*]; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 234 [Bk. 24, L. ed. 118], are all cited and relied on to show that this is a tonnage [463] tax. But in all these cases the contribution exacted was measured by the tonnage of the vessel in express terms; and the decision of the court rested on that fact. In the first of them it was admitted that the Statute of Alabama would have been valid as a tax on property within the State, but for the single fact that the amount of it was measured by the tonnage of the vessel.

In *Peete's Case* the tax was for every vessel arriving at a quarantine station, whether any service was rendered or not, $5 for the first hundred tons of her capacity, and one and a half cents for every additional ton; and this mode of measuring the tax was held to make it a tonnage tax.

The same fact was presented in *Cannon* v. *New Orleans*, though it was called a wharfage tax. The court, however, held it to be a tax for the privilege of landing in the port, whether the vessel used a wharf or not, and for this reason, and because the amount of it was measured by the vessel's tonnage, it was held void.

In the case of *Steamship Co.* v. *Port Wardens*, 6 Wall. 31 [73 U. S. bk. 18, L. ed. 749], the court held a fee payable to the port wardens by every vessel which entered the port, whether it received any service or not, to be void as a regulation of commerce and as contravening the policy of the prohibition of a tonnage tax by the States. But in almost all the cases relied on by the appellants there was a reference to the tonnage capacity of the vessel as the measure of the tax, and in all of them there was an absence of any service rendered for which the contribution was a compensation; generally they were held to be imposed for the privilege of entering and anchoring in the port.

In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact, it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel which receives the certificate that declares it free from further quarantine requirements.

Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana, and it [464] may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat. 210 [22 U. S. bk. 6, L. ed. 23]; *Henderson* v. *Mayor*, 92 U. S. 272 [Bk. 23, L. ed. 549]; *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 661 [Bk. 29, L. ed. 520].

But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done

the laws of the State on the subject are valid. This follows from two reasons:

1. The Act of 1799, the main features of which are embodied in Title LVIII of the Revised Statutes, clearly recognizes the quarantine laws of the States, and requires of the officers of the Treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when by the Act of April 29, 1878, 20 Stat. at L. 87, certain powers in this direction were conferred on the surgeon-general of the marine hospital service, and consuls and revenue officers were required to contribute services in preventing the [465] importation of disease, it was provided that "There shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under state laws," showing very clearly the intention of Congress to adopt these laws, or to recognize the power of the States to pass them.

2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York. In this respect the case falls within the principle which governed the cases of *Wilson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245 [27 U. S. bk. 7, L. ed. 412]; *Cooley* v. *Board of Wardens*, 12 How. 299 [53 U. S. bk. 13, L. ed. 996]; *Gilman* v. *Phila.* 3 Wall. 727 [70 U. S. bk. 18, L. ed. 96]; *Pound* v. *Turck*, 95 U. S. 462 [Bk. 24, L. ed. 526]; *Hall* v. *DeCuir*, 95 U. S. 488 [Bk. 24, L. ed. 548]; *Packet Co.* v. *Catlettsburgh*, 105 U. S. 562 [Bk. 26, L. ed. 1170]; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 702 [Bk. 27, L. ed. 588]; *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [Bk. 27, L. ed. 442].

This principle has been so often considered in this court that extended comment on it here is not needed. Quarantine laws are so analogous in most of their features to pilotage laws, in their relation to commerce, that no reason can be seen why the same principle should not apply. In one of the latest of the cases cited above, the Town of Catlettsburgh, on the Ohio River, had enacted that no vessel should, without permission of the wharfmaster, land at any other point on the bank of the river within the town than a space designated by the ordinance. This court said "that if this be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs, also, manifestly to that class of [466] rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules applicable alike to all ports and landing places can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so."

For the period of nearly a century since the government was organized Congress has passed no quarantine law, nor any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad; and yet during the early part of the present century, for many years the cities of the Atlantic Coast, from Boston and New York to Charleston, were devastated by the yellow fever. In later times the cholera has made similar invasions; and the yellow fever has been unchecked in its fearful course in the Southern cities, New Orleans especially, for several generations. During all this time the Congress of the United States never attempted to exercise this or any other power to protect the people from the ravages of these dreadful diseases. No doubt they believed that the power to do this belonged to the States. Or, if it ever occurred to any of its members that Congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of the States who were familiar with the matter.

But to be told now that the requirement of a vessel charged with contagion, or just from an infected city, to submit to examination and pay the cost of it is forbidden by the Constitution because only Congress can do that, is a strong reproach upon the wisdom of a hundred years past, or an overstrained construction of the Constitution.

It is said that the charge to the vessel for the officer's service in examining her is not a necessary part of a quarantine system. It has always been held to be a part in all other countries, and in all quarantine stations in the United States. No reason is perceived for selecting this item from the general system and calling it a regulation of commerce, while the remainder is not. If the arrest of the vessel, the detention of its passengers, the cleansing process it is ordered to go through with, are less important [467] as regulations of commerce than the exaction of the examination fee, it is not easily to be seen.

We think the proposition untenable.

There remains to be considered the objection that the law is forbidden by paragraph 6 of section 9 of the first article of the Constitution, which declares that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It is not readily perceived how this Quarantine Statute of Louisiana, and particularly the fees of the quarantine officers, do give such a preference. Are the ports of Louisiana given a preference over ports of other States? Are the ports of any other State given a preference over those of Louisiana? Or are the ports of other States given a preference as among themselves. Nothing of this is pointed out.

The eighth section of this first article of the Constitution is devoted exclusively to defining the powers conferred on Congress.

The ninth section, including the above paragraph, is in like manner devoted to restraints upon the power of Congress and of the National Government; and the tenth section contains

only restraints upon the powers of the States, by declaring what they shall not do. The most casual inspection shows this, and the clause of the Constitution here relied on is not found among the restrictions of the States, but among those imposed upon the Federal Government. As the matter under discussion is the validity of the Statute of Louisiana, it is unaffected by the constitutional provision alluded to. Woodbury, *Justice*, in *Passenger Cases*, 7 How. 541 [48 U. S. bk. 12, L. ed. 702]; *Wilson* v. *U. S.* 1 Brock. 432; *Butler* v. *Hopper*, 1 Wash. C. C. 499; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.* 18 How. 435 [59 U. S. bk. 15, L. ed. 439]; *Munn* v. *Ill.* 94 U. S. 135 [Bk. 24, L. ed. 86].

We see no error in the judgment of the Supreme Court of Louisiana, and it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[194] DICK E. ARROWSMITH, *Plff. in Errr.*,
v.
AMELIA HARMONING, Admrx., ET AL.

(See S. C. Reporter's ed. 194-196.)

Jurisdiction — depriving of property "without due process of law" — error of judgment of state court.

A State cannot be deemed guilty of violating the constitutional provision against depriving a person of life, liberty or property "without due process of law," because one of its courts, while acting within its jurisdiction, has made an erroneous decision; as in ordering a guardian's sale without first requiring a bond to be filed and approved as a statute of the State required.

[No. 1106.]

Submitted April 26, 1886. Decided May 10, 1886.

IN ERROR to the Supreme Court of the State of Ohio.

On motion to dismiss, with which is united a motion to affirm. *Affirmed.*

The case is stated by the court.

Messrs. **William C. Cochran** and **Henry B. Harris**, for defendants in error, in support of motions.

Messrs. **Henry Newbegin** and **B. B. Kingsbury**, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit brought in the Court of Common Pleas of Defiance County, Ohio, by Dick E. Arrowsmith to recover the possession of the principal part of a certain 640 acres of land, and the judgment turned on the validity of a sale of the land by the guardian of Arrowsmith under an order of a probate court for that purpose. The case was tried without a jury, and from the finding of facts it appears that all the proceedings for the sale of the land were regular and in proper form, save only that the court dispensed with the giving of a bond by the guardian, under a certain requirement of the statute, "for the faithful discharge of his duties, [195] and the faithful payment and accounting for of all moneys arising from such sale according to law." The single question for determination was whether the failure to furnish this bond rendered the sale void. The court of common pleas decided that it did not, and gave judgment accordingly. This judgment was afterwards affirmed by the district court on petition in error. The case was then taken to the supreme court on another petition in error, where, among others, the following error was assigned:

"3d. That by affirming the judgment of the court of common pleas * * * by said district court, this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this State, and deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States."

This is the first time, so far as the record discloses, that even the semblance of a federal right was set up in the case, and even here it is not easy to see on what ground it could be claimed that Arrowsmith had been deprived of his property in violation of the Constitution of the United States. It was for this reason, perhaps, that the supreme court, while affirming the judgment of the district court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied, but the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument. It is not denied that the probate court had full and complete jurisdiction of the proceeding to sell the land. The statute under which the court acted would, if followed, have furnished Arrowsmith all the protection which had been guarantied to him by the Constitution of the United States. The bond in question was matter of procedure only; and if it ought to have been required, the court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the court. The constitutional provision is "Nor shall any *State* deprive any person of life, liberty, or property without due process of law." Certainly a State cannot be [196] deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings.

The motion to dismiss is denied, and that to affirm is granted.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1886.

[557] **WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,** *Plff. in Err.*,

v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 557-596.)

Constitutional law—commerce among the States—transportation between points in different States—Statute of Illinois forbidding discrimination, invalid—review of authorities.

*A Statute of Illinois enacts that if any railroad company shall, within that State, charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination. The defendant in this case made such discrimination in regard to goods transported over the same road or roads from Peoria in Illinois, and from Gilman in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to New York than the latter, this difference being in the length of the line within the State of Illinois.

1. This court follows the Supreme Court of Illinois in holding that the Statute of Illinois must be construed to include a transportation of goods under one contract and by one voyage from the interior of the State of Illinois to New York.

2. This court holds further that such a transportation is "commerce among the States," even as to that part of the voyage which lies within the State of Illinois; while it is not denied that there may be a transportation of goods which is begun and ended within its limits and disconnected with any carriage outside of the State, which is *not* commerce among the States.

3. The latter is subject to regulation by the State, and the Statute of Illinois is valid as applied to it. But the former is national in its character, and its regulation is confided to Congress exclusively, by that clause of the Constitution which empowers it to regulate commerce among the States.

4. The cases of *Munn* v. *Illinois*, *C. B. & Q. R. R. Co.* v. *Iowa*, and *Peik* v. *Chicago & Northwestern R. R. Co.*, all in 94 U. S. [Bk. 24, L. ed.] examined in regard to this question, and held, in view of other cases decided near the same time, not to establish a contrary doctrine.

5. Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages, from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the State.

6. It follows that the Statute of Illinois, as construed by the Supreme Court of the State, and as applied to the transaction under consideration, is forbidden by the Constitution of the United States; and the judgment of that court is reversed.

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Constitutional law; regulation of interstate Commerce; how far the power of Congress is exclusive.* For a full discussion, see Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, p. 158, note.

[No. 11.]

Argued Apr. 14, 15, 1886. Decided Oct. 25, 1886.

IN ERROR to the Supreme Court of the State of Illinois. *Reversed.*

The case and agreed statement of facts appear in the opinion.

Messrs. **H. S. Greene** and **W. C. Goudy,** for plaintiff in error:

Under section 8 of article 1 of the Constitution, a regulation of commerce which is of a purely local character, and does not admit of general application, may be adopted and enforced by local authority. But where the subject of regulation is of national concern, or admits of one uniform plan or system of regulation, it is exclusively within the control of Congress.

Cooley v. *Phila.* 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Gilman* v. *Phila.* 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96); *Passenger Cases*, 7 How. 283 (48 U. S. bk. 12, L. ed. 702); *Thames Bank* v. *Lovell*, 18 Conn. 500; *Lemmon* v. *People*, 20 N. Y. 562; *State Freight Tax Case*, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146); *Henderson* v. *Mayor, etc.* 92 U. S. 259 (Bk. 23, L. ed. 543); *Sherlock* v. *Alling*, 93 U. S. 99 (Bk. 23, L. ed. 819); *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347); *Co. of Mobile* v. *Kimball*, 102 U. S. 691 (Bk. 26, L. ed. 238).

The non-exercise by Congress of its power over matters within its exclusive control, is equivalent to a declaration that commerce as to such matters shall be free from any restriction.

Welton v. *Mo.* and *Co. of Mobile* v. *Kimball*, *supra; Webber* v. *Va.* 103 U. S. 344 (Bk. 26, L. ed. 565); *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 204 (Bk. 29, L. ed. 162); *Brown* v. *Houston*, 114 U. S. 630 (Bk. 29, L. ed. 260).

The statute in question cannot be sustained as an exercise of the police power.

R. R. Co. v. *Husen*, 95 U. S. 469 (Bk. 24, L. ed. 529); *New Orleans Gas Co.* v. *Louisiana Light, etc. Co.* 115 U. S. 660 (Bk. 29, L. ed. 520); *Walling* v. *Mich.* 116 U. S. 460 (Bk. 29, L. ed. 695); *Carton* v. *Ill. Cent. R. R. Co.* 59 Iowa, 150.

Mr. **George Hunt,** *Atty-Gen. of Illinois*, for defendants in error:

The Act in question has for its object, neither directly nor indirectly, the promotion, restraint, or regulation of commerce among the States. It presents no hindrances, burdens, privileges or encouragements to commerce among the

States, and it seeks no revenue, or advantage or disadvantage, to this or any other State.

Not everything which affects commerce is a regulation of it, within the meaning of the Constitution.

State Tax on R. Gross Receipts, 15 Wall. 284 (82 U. S. bk. 21, L. ed. 164); *Munn* v. *Ill.* 94 U. S. 113 (Bk. 24, L. ed. 77); *Gibbons* v. *Ogden*, 9 Wheat. 1 (22 U. S. bk. 6, L. ed. 23); *Passenger Cases*, 7 How. 283 (48 U. S. bk. 12, L. ed. 702); *Slaughter House Cases*, 16 Wall. 36 (83 U. S. bk. 21, L. ed. 394).

The subject matter of this Act is the discrimination in the rates charged for carriage. It neither requires the defendant to carry, nor prevents it from carrying, any freight between this State and other States. It may carry any goods it chooses at any time and in any manner. The Act does not interfere with such commerce. But the defendant being a public servant, it requires it not to injure one citizen of the State by imposing upon him a greater charge than it imposes upon another for a similar service. The charge and collection of exorbitant and discriminating rates constitute a violation of the Act.

The Act in question is not in conflict with any Act of Congress and is within the power of the State to enforce. The grant of commercial power to Congress does not exclude the exercise by the State of authority over its subject matter.

Cooley v. *Port Wardens*, 12 How. 318 (53 U. S. bk. 13, L. ed. 1004).

If this Act amounts to a regulation of interstate commerce, it falls within that class of powers which the States may exercise in the absence of controlling action by Congress.

Houston v. *Moore*, 5 Wheat. 1 (18 U. S. bk. 5, L. ed. 19); *Sturges* v. *Crowninshield*, 4 Wheat. 198 (17 U. S. bk. 4, L. ed. 548); *Willson* v. *Blackbird Creek Co.* 2 Pet. 251 (27 U. S. bk. 7, L. ed. 414); *License Cases*, 5 How. 504 (46 U. S. bk. 12, L. ed. 256); *Cooley* v. *Port Wardens*, 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Gilman* v. *Phila.* 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96).

This case is controlled by the decisions of this court in

Peik v. *Chicago & N. W. R. Co.* 94 U. S. 164 (Bk. 24, L. ed. 97); *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155 (Bk. 24, L. ed. 94); *Munn* v. *Ill. supra; R. R. Co.* v. *Fuller*, 17 Wall. 560 (84 U. S. bk. 21, L. ed. 710).

The law of Wisconsin, sustained in the *Peik Case*, fixed the maximum rate to be charged for the transportation of freight from points within to points outside of the State. In this case the Act authorizes the same thing, and undertakes to prevent discrimination in the rates charged. Only that portion of the Act is in issue which forbids unjust discrimination.

The Act in question is a police regulation. It forbids the making and enforcing, by railroad companies doing business in the State, of contracts which unjustly discriminate against one citizen, or locality, at the expense of another. It is not an attempt to regulate commerce among the States, or to interfere with the authority of Congress in regard thereto. It in no way attempts to tax, hinder, delay, control or regulate interstate commerce, but simply brands a discriminating contract as illegal, and provides a penalty for an illegal act. It merely protects persons within the State against unjust discrimination, the offense which it makes punishable.

Mr. Justice **Miller** delivered the opinion of the court: [560]

This is a writ of error to the Supreme Court of Illinois. It was argued here at the last term of this court.

The case was tried in the court of original jurisdiction on an agreed statement of facts. This agreement is short and is here inserted in full:

"For the purposes of the trial of said cause, and to save the making of proof therein, it is hereby agreed on the part of the defendant that the allegations in the first count of the declaration are true, except that part of said count which avers that the same proportionate discrimination was made in the transportation of said property—oil cake and corn—in the State of Illinois, that was made between Peoria and the City of New York, and Gilman and New York City; which averment is not admitted because defendant claims that it is an inference from the fact that the rates charged in each case of said transportation of oil cake and corn were through rates; but it is admitted that said averment is a proper one." [561]

The first count in the declaration, which is referred to in this memorandum of agreement, charged that the Wabash, St. Louis and Pacific Railway Company had, in violation of a Statute of the State of Illinois, been guilty of an unjust discrimination in its rates or charges of toll and compensation for the transportation of freight. The specific allegation is that the Railroad Company charged Elder & McKinney for transporting twenty-six thousand pounds of goods and chattels from Peoria, in the State of Illinois, to New York City, the sum of $39, being at the rate of fifteen cents per hundred pounds for said carload; and that on the same day it agreed to carry and transport for Isaac Bailey and F. O. Swannell another carload of goods and chattels from Gilman, in the State of Illinois, to said City of New York, for which it charged the sum of $65, being at the rate of twenty-five cents per hundred pounds. And it is alleged that the carload transported for Elder & McKinney was carried eighty-six miles further in the State of Illinois than the other carload of the same weight. This freight being of the same class in both instances, and carried over the same road, except as to the difference in the distance, it is obvious that a discrimination against Bailey & Swannell was made in the charges against them as compared with those against Elder & McKinney; and this is true whether we regard the charge for the whole distance from the terminal points in Illinois to New York City or the proportionate charge for the haul within the State of Illinois.

The language of the statute which is supposed to be violated by this transaction is to be found in chapter 114 of the Revised Statutes of Illinois, section 126. It is there enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the State, the same or a greater amount of toll or compensa-

tion than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of [562] freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination prohibited by the provisions of this Act. The statute further provides a penalty of not over $5,000 for that offense, and also that the party aggrieved shall have a right to recover three times the amount of damages sustained, with costs and attorneys' fees.

To this declaration the Railroad Company demurred. The demurrer was sustained by the lower court in Illinois, and judgment rendered for the defendant. This, however, was reversed by the Supreme Court of that State, and on the case being remanded the demurrer was overruled; and the defendant pleaded, among other things, that the rates of toll charged in the declaration were charged and collected for services rendered under an agreement and undertaking to transport freight from Gilman, in the State of Illinois, to New York City, in the State of New York, and that in such undertaking and agreement the portion of the services rendered or to be rendered within the State of Illinois was not apportioned separate from such entire service; that the action is founded solely upon the supposed authority of an Act of the Legislature of the State of Illinois, approved April 7, 1871; and that said Act does not control or affect or relate to undertakings to transport freight from the State of Illinois to the State of New York, which falls within the operation, and is wholly controlled by the terms of the third clause of section eight of article one of the Constitution of the United States, which the defendant sets up and relies upon as a complete defense and protection in said action. This question of whether the Statute of Illinois, as applied to the case in hand, is in violation of the Constitution of the United States, as set forth in the plea, was also raised on the trial by a request of the defendant, the Railroad Company, that the court should hold certain propositions of law on the same subject, which propositions are as follows:

"The court holds as law, that, as the tolls or [563] rates of compensation charged and collected by the defendant, in the instance in question, were for transportation service rendered in transporting freight from a point in the State of Illinois to a point in the State of New York, under an entire contract or undertaking to transport such freight the whole distance between such points, that the Act of the General Assembly of the State of Illinois, approved May 2, 1873, entitled "An Act to Prevent Extortion and Unjust Discrimination in the Rates Charged for the Transportation of Passengers and Freight on Railroads in This State, and to Punish the Same, and Prescribe a Mode of Procedure and Rules of Evidence in Relation Thereto, and to Repeal an Act Entitled 'An Act to Prevent Unjust Discrimination and Extortion in the Rates to be Charged by the Different Railroads in the State for the Transportation of Freight on Said Roads,' approved April 7, 1871," does not apply to or control such tolls and charges, nor can the defendant be held liable in this action for the penalties prescribed by said Act.

"The court further holds as law that said Act in relation to extortion and unjust discrimination cannot apply to transportation service, rendered partly without the State and consisting of the transportation of freight from within the State of Illinois to the State of New York, and that said Act cannot operate beyond the limits of the State of Illinois.

"The court further holds as matter of law, that the transportation in question falls within the proper description of 'commerce among the States,' and as such can only be regulated by the Congress of the United States under the terms of the third clause of section 8 of article 1 of the Constitution of the United States."

All of these propositions were denied by the court, and judgment rendered against the defendant, which judgment was affirmed by the supreme court on appeal.

The matter thus presented, as to the controlling influence of the Constitution of the United States over this legislation of the State of Illinois, raises the question which confers jurisdiction on this court. Although the precise point presented by this case may not have been heretofore decided by this court, the general subject of the power of the state legislatures to regulate taxes, fares and tolls for passengers, [564] and transportation of freight over railroads within their limits has been very much considered recently; *State Freight Tax Case*, 15 Wall. 232 [82 U. S. bk. 21, L. ed. 146]; *Munn* v. *Illinois*, 94 U. S. 133 [Bk. 24, L. ed. 86]; *C. B. & Q. R. R. Co.* v. *Iowa*, Id. 155 [Bk. 24, L. ed. 94]; *Peik* v. *N. W. R. R. Co.* Id. 164 [Bk. 24, L. ed. 97]; *Stone* v. *Farmers Loan and Trust Co.* 116 U. S. 307 [Bk. 29, L. ed. 636]; *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 204 [Bk. 29, L. ed. 162]; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [Bk. 29, L. ed. 785]; and the question how far such regulations, made by the States and under state authority, are valid or void, as they may affect the transportation of goods through more than one State, in one voyage, is not entirely new here. The Supreme Court of Illinois, in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois Railroad Company was the compensation for the entire transportation from the point of departure in the State of Illinois to the City of New York, holds that while the Statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the State, it is binding and effectual as to so much of the transporation as was within the limits of the State of Illinois; *People* v. *Wabash, St. L. & P. R. R. Co.* 104 Ill. 476; and undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the State of Illinois violate the statute of the State on that subject.

If the Illinois Statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not

seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the [565] States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision; and the distinction between commerce among the States and the other class of commerce, between the citizens of a single State and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 10 Wall. 557 [77 U. S. bk. 19, L. ed. 999]; *Hall* v. *DeCuir*, 95 U. S. 485 [Bk. 24, L. ed. 547]; *Telegraph Co.* v. *Texas*, 105 U. S. 460 [Bk. 26, L. ed. 1067].

It might admit of question whether the Statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the City of New York in the State of New York?

The Supreme Court of Illinois does not place [566] its judgment in the present case on the ground that the transportation and the charge are exclusively state commerce; but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this Statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject; and to this proposition a large part of the argument of the Attorney-General of the State before us is devoted, although he earnestly insists that the Statute of Illinois, which is the foundation of this action, is not a regulation of commerce within the meaning of the Constitution of the United States. In support of its view of the subject the Supreme Court of Illinois cites the cases of *Munn* v. *Illinois*, *C. B. & Q. R. R. Co.* v. *Iowa* and *Peik* v. *Chicago & N. W. R. R. Co.*, above referred to. It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois Court places upon it.

In *Munn* v. *Illinois* [*supra*] the language of this court upon that subject is as follows:

"We come now to consider the effect upon this statute of the power of Congress to regulate commerce. It was very properly said in the case of *State Tax on Railway Gross Receipts*, 15 Wall. 293 [82 U. S. bk. 21, L. ed. 167] that 'it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of [567] government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

In the case of *C. B. & Q. R. R. Co.* v. *Iowa*, [*supra*] which directly related to railroad transportation, the language is as follows:

"The objection that the statute complained of is void, because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn* v. *Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in doing so those without may be indirectly affected."

But the strongest language used by this court in these cases is to be found in *Peik* v. *Chicago & N. W. R. R. Co.* [*supra*], as follows:

"As to the effect of the statute as a regulation of interstate commerce, the law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of

this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

[568] These extracts show that the question of the right of the State to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States, in the absence of any legislation by Congress on the same subject.

By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the various harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territory of half a dozen States, through which they are carried without change of car or breaking bulk.

Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois Court in the present case. It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued [569] at the same time by able counsel, and in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin, and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.

The importance of that question overshadowed all others, and the case of *Munn* v. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by Acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services.

The railroad companies set up another defense, apart from denying the general right of the Legislature to regulate transportation charges, namely: that in their charters from the States they each had a contract, express or implied, that they might regulate and establish their own fares and rates of transportation. These two questions were of primary importance; and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little attention at the hands of the [570] court and was passed over with the remarks in the opinions of the court which have been cited.

The case of the *State Freight Tax* [*supra*] which was decided only four years before these cases, held an Act of the Legislature of Pennsylvania void, as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State, and valid as to all freight the carriage of which was begun and ended within the limits of the State; because the former was a regulation of interstate commerce, and the latter was a commerce solely within the State which it had a right to regulate. And the question now under consideration, whether these statutes were of a class which the Legislatures of the States could enact in the absence of any Act of Congress on the subject, was considered and decided in the negative.

It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and in fact the judgment of the court in the *State Freight Tax Case* rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State. It is also very difficult to

believe that the court consciously intended to overrule the first of these cases without any reference to it in the opinion.

At the very next term of the court, after the delivery of these opinions, the case of *Hall* v. *De Cuir* [*supra*] was decided, in which the same point was considered, in reference to a Statute of the State of Louisiana which attempted to regulate the carriage of passengers upon railroads, steamboats, and other public conveyances, and which provided that no regulations of any companies engaged in that business should make any discrimination on account of race or color. This statute by its terms was limited to persons engaged in that class of [571] business within the State, as is the one now under consideration; and the case presented under the statute was that of a person of color who took passage from New Orleans for Hermitage, both places being within the limits of the State of Louisiana, and was refused accommodations in the general cabin on account of her color. In regard to this, the court declared that "For the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color * * *. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States."

And, speaking in reference to the right of the States in certain classes of interstate commerce to pass laws regulating them, the opinion says:

"The line which separates the powers of the States from this exclusive power of Congress, is not always distinctly marked; and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved. But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in [572] the management of his business throughout his entire voyage. * * * It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments."

The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this Act of the Illinois Legislature, so much as the charge for transportation; and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted."

It cannot be too strongly insisted upon, that [573] the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S. 574 [Bk. 24, L. ed. 1018]; *Brown* v. *Maryland*, 12 Wheat. 446 [25 U. S. bk. 6, L. ed. 688]. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by *Chief Justice* Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 195-6 [22 U. S. bk. 6, L. ed. 70]. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses state lines, and ex-

tends into the States; and the power of Congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is, only as a means of transportation now largely superseded by railroads, he says: "The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian Tribes.' It may, of consequence, pass the jurisdictional line of New York and act upon the very waters (the Hudson River) to which the prohibition now under underconsideration applies." P. 197 [70]. So the same power may pass the line of the State of Illinois and act upon its restriction upon the right of transportation extending over several States, including that one.

In the case of *Telegraph Co.* v. *Texas* [*supra*] the court held that "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods;" and that "both companies are instruments of commerce, and their business is commerce itself." And relying upon the case of the *State Freight Tax* [*supra*] already referred to, the court said that a tax by the State of Texas upon *all* messages carried within its borders was forbidden by the commerce clause of the Constitution, as being a tax upon commerce among the States; and observed that "The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. * * * Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited."

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In the case of *Welton* v. *Missouri*, 91 U. S. 275 [Bk. 23, L. ed. 347], it was said: "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating state legislation."

And in *County of Mobile* v. *Kimball*, 102 U. S. 691 [Bk. 26, L. ed. 238], the same idea is very clearly stated in the following language: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

[575]

In the case of *Gloucester Ferry Co.* v. *Pennsylvania* [*supra*], decided two years ago, the court declared without dissent that: "It needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation." And still later, in the case of *Pickard* v. *Pullman Southern Car Co.* [*supra*], the whole subject is very fully re-examined; and a tax of the State of Tennessee upon sleeping cars of that company, which were used in carrying passengers through the State, and into it and out of it, was held void as a regulation of commerce among the States.

The case of *Stone* v. *Farmers Loan & T. Co.* [*supra*], argued at the same term as the present, while it does not decide the latter, evidently does not support the construction placed by the Supreme Court of Illinois upon the case of *Munn* v. *Illinois*, and the other cases on which the court relies.

We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the City of New York to the City of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois Railroad Company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

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So, also, in the present case; the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to

New York, finds a Railroad Company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the Railroad Company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the Statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the Railroad Company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the Railroad Company, the same rate per mile must be charged from Peoria to the City of New York.

The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to [577] transportation which includes Illinois in a long line of carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois Statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State Legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois Court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley** dissenting:

The **Chief Justice,** *Mr. Justice* **Gray** and myself dissent from the opinion and judgment of the court in this case, and I am authorized to state the reasons upon which our dissent is founded.

The Wabash, St. Louis and Pacific Railway [578] Company, an Illinois corporation, plaintiff in error, was sued by the State of Illinois to recover a penalty for the breach of its laws, passed "to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freight on railroads in the State." The law sued on was originally passed in 1871, and revised in 1873, and the material portions of its most important section are in the following words, to wit:

"If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description, upon its railroad, for any distance, within this State, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation, in the same direction, of any passenger or like quantity of freight, of the same class, over a greater distance of the same railroad; * * * or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, the same or a greater amount of toll or compensation than it at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; * * * all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback or other shift or evasion, shall be deemed and taken, against any such railroad corporation, as *prima facie* evidence of unjust discrimination, prohibited by the provisions of this Act; * * * *Provided, however,* That nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand-mile tickets, as the same are now issued by such corporations."

A penalty of not less than $1,000, and not more than $5,000, for the first offense is imposed for the violation of the law; and it was for this penalty that the Company was sued in the Ford County Circuit Court.

The declaration alleged, in substance, that the Company charged certain parties fifteen [579] cents per hundred pounds for carrying a load of freight from Peoria, in the State of Illinois, to New York, one hundred and nine miles of the distance being in Illinois, whilst at the same time it charged certain other parties twenty-five cents per hundred pounds for carrying a like load of the same class of freight from Gilman, also in the State of Illinois, to New York, twenty-three miles of the distance being in Illinois, both places being on the line of the road. This allegation was substantially admitted, and judgment was finally rendered in favor of the State, and was sustained by the Supreme Court of the State, to which the present writ of error was directed.

The main point insisted on by the Railway Company in its defense was that the law on which the action was founded is unconstitutional in its application to their case, as being a regulation of interstate commerce. They also

contended that a gross charge from Peoria or Gilman to New York was no evidence of any particular charge within the State of Illinois.

The construction given to the law by the Supreme Court of Illinois is to be received by us, on a writ of error brought for the purpose of questioning its constitutionality. That construction is clearly exhibited in the following announcement of the opinion of that court when the case was brought before it a second time. The court says:

"We see no reason to depart from the conclusion reached in this case when it was here before. See *People* v. *W. St. L. & P. Railway Co.* 104 Ill. 476. But to avoid misapprehension, we deem it desirable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other State. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this State, to the City of New York, implies necessarily that that sum is charged proportionately for the carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this State, to the City of New York, implies the same thing; and that, therefore, [580] when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance), than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this State, a *prima facie* case is made out of unjust discrimination, under our statute, occurring within this State. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the state line proportionately with the balance of the line. The judgment is affirmed." *Wabash, St. L. & P. R. Co.* v. *Illinois*, 105 Ill. 236.

We have no doubt that this view of the presumed equal distribution of the charge to every part of the route is correct. If one tenth, or any other proportion, of the whole route of transportation was in Illinois, the clear presumption is, if nothing be shown to the contrary (as nothing was shown), that the like proportion of the whole charge was made for the transportation in that State.

The principal question in this case, therefore, is whether, in the absence of congressional legislation, a State Legislature has the power to regulate the charges made by the railroads of the State for transporting goods and passengers to and from places within the State, when such goods or passengers are brought from, or carried to, points without the State, and are, therefore, in course of transportation from another State, or to another State. It is contended that as such transportation is commerce between or among different States, the power does not exist. The majority of the court so hold. We feel obliged to dissent from that opinion. We think that the State does not lose its power to regulate the charges of its own railroads in its own territory, simply because the goods or persons transported have been brought from or are destined to a point beyond the State in another State.

The case before us is not embarrassed by any allegation of a contract between the State and the Company; it is a question of the power to regulate, pure and simple. The State has never contracted away or attempted to contract away this power.

It is also unembarrassed by any federal legislation on the subject. [581] No one disputes that Congress might, if it saw fit, under its power to regulate commerce among the several States, regulate the matter under consideration; but it has not done so. The question rests solely and entirely upon the power of the State, when unrestrained by any contract, or by any action of the legislative department of the United States. Does it follow, then, that because Congress has the power to regulate this matter, though it has not exercised that power, therefore the State is divested of all power of regulation? That is the question before us.

We had supposed that this question was concluded by the previous decisions of this court; that all local arrangements and regulations respecting highways, turnpikes, railroads, bridges, canals, ferries, dams and wharves, within the State, their construction and repair, and the charges to be made for their use, though materially affecting commerce, both internal and external, and thereby incidentally operating to a certain extent as regulations of interstate commerce, were within the power and jurisdiction of the several States. That is still our opinion.

It is almost a work of supererogation to refer to the cases. They are legion. A few, only, will be selected and referred to:

The first great case on the subject was that of *Wilson* v. *Blackbird Creek Co.* 2 Pet. 245 [27 U. S. bk. 7, L. ed. 412], where the State of Delaware had authorized a dam in a navigable tide water creek of that State, communicating with Delaware Bay; and *Chief Justice* Marshall, delivering the unanimous opinion of the court, said: "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes [582] in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiff in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any Act which bore upon the case, any Act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a state law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Con-

stitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think the Act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This case was, in all things, affirmed by the later case of *Gilman* v. *Philadelphia*, 3 Wall. 713 [70 U. S. bk. 18, L. ed. 96]. The Legislature of Pennsylvania authorized the City of Philadelphia to erect a permanent bridge across the Schuylkill River, a navigable water, at the foot of Chestnut Street. It was sought to restrain the erection of this bridge on the same grounds which had been urged in the *Blackbird Creek Case;* but the Circuit Court of the United States refused to interfere, and dismissed a bill for an injunction. The decision was sustained by this court, which held that it was for Congress to determine when its full power to regulate commerce should be brought into activity, and as to the regulations and sanctions which should be provided; and that, until the dormant power of the Constitution is awakened and made effective by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court.

[583] These principles are reaffirmed in the still more recent case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [Bk. 27, L. ed. 442]. In that case the authorities of Chicago, under the powers conferred upon them by the Legislature of Illinois, regulated the times for opening and closing the draws in the bridges crossing the Chicago River, so as to accommodate the local travel across them at certain times, and to allow the passage of vessels at others. This operated as a regulation of the commerce on the river, including interstate and foreign, as well as domestic commerce. But there being no legislation of Congress to the contrary, this court held that the power was constitutionally exercised. Commerce was affected; commerce was even incidentally regulated; but the jurisdiction of the State, and of the city acting under state authority, was unhesitatingly recognized by the court. *Mr. Justice* Field, delivering the opinion of the court, said: "The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve the free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of the people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. * * * Nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authority of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. * * * But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary."

The doctrines announced in these cases apply not only to dams in, and bridges over, navigable streams, but to all structures and appliances in a State which may incidentally interfere with commerce, or which may be erected [584] or created for the furtherance of commerce, whether by water or by land. It is matter of common knowledge that, from the beginning of the government, the States have exercised almost exclusive control over roads, bridges, ferries, wharves and harbors. No one has doubted their right to do so. It is recognized in the great case of *Gibbons* v. *Ogden*, where *Chief Justice* Marshall, after enumerating some of the powers reserved to the States, says: "They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass." And he adds (what is very pertinent to this discussion): "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose; or is clearly incidental to some power which is expressly given."

The case of *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 [Bk. 27, L. ed. 584], related to wharves. The City of Parkersburg had built certain wharves for the accommodation of vessels, principally steamboats, navigating the Ohio River. The transportation company being the owner of several steamboats plying on that river, complained of the wharfage charges as being extortionate and an unconstitutional interference with the commerce of the Ohio River. It was shown that the charges were imposed by authority derived from the state laws; and we held that until Congress interfered, the charges for wharfage was a matter of state law, and of state jurisdiction. We then said: "Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local state [585] laws. * * * Until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on the subject."

There is a class of subjects, it is true, per-

taining to interstate and foreign commerce, which require general and uniform rules for the whole country, so as to obviate unjust discriminations against any part, and in respect of which local regulations made by the States would be repugnant to the power vested in Congress, and, therefore, unconstitutional; but there are other subjects of local character and interest which not only admit of, but are generally best regulated by state authority. This distinction is pointed out and enforced in the case of *Cooley* v. *Port Wardens of Phila.* 12 How. 299 [53 U. S, bk. 13, L. ed. 996]. In that case it was held that the pilotage regulations of the different ports of the country belong to the latter class, and are susceptible of state regulation. This case has been approved in several subsequent decisions. *Gilman* v. *Philadelphia, ubi supra; Crandall* v. *Nevada,* 6 Wall. 35, 42 [73 U. S. bk. 18, L. ed. 745]; *Ex parte McNiel,* 13 Wall. 236 [80 U. S. bk. 20, L. ed. 624]; *Osborne* v. *Mobile,* 16 Wall. 482 [83 U. S. bk. 21, L. ed. 473]; *R. R. Co.* v. *Fuller,* 17 Wall. 569 [84 U. S. bk. 21, L. ed. 714]; *The Lottawanna,* 21 Wall. 581, 582 [88 U. S. bk. 22, L. ed. 664]; *Packet Co.* v. *Keokuk,* 95 U. S. 88 [Bk. 24, L. ed. 381]; *Pound* v. *Turck,* 95 U. S. 462 [Bk. 24, L. ed. 526]; *Hall* v. *De Cuir,* 95 U. S. 488 [Bk. 24, L. ed. 548]; *Wilson* v. *McNamee,* 102 U. S. 575 [Bk. 26, L. ed. 235]; *Co. of Mobile* v. *Kimball,* 102 U. S. 698 [Bk. 26, L. ed. 240]; *Packet Co.* v. *Catlettsburg,* 105 U. S. 562 [Bk. 26, L. ed. 1170].

It is hardly necessary to argue that, in reference to this rule, railroads, canals, turnpikes, bridges, ferries and wharves belong to the category of local subjects, local means and local aids of commercial intercourse. Congress may establish national roads, canals and bridges, it is true; but we speak of those, hitherto the most part, which are constructed and established under state authority; and in reference to these, it seems to us very clear that, in the absence of congressional legislation to the contrary, they are not only susceptible of state regulation, but properly amenable to it, irrespective of other considerations to which we shall refer. [586]

The highways in a State are the highways of the State. Convenient ways and means of intercommunication are the first evidence of the civilization of a people. The highways of a country are not of private but of public institution and regulation. In modern times, it is true, government is in the habit, in some countries, of letting out the construction of important highways, requiring a large expenditure of capital, to agents, generally corporate bodies created for the purpose, and giving to them the right of taxing those who travel or transport goods thereon, as a means of obtaining compensation for their outlay. But a superintending power over the highways, and the charges imposed upon the public for their use, always remains in the government. This is not only its indefeasible right, but is necessary for the protection of the people against extortion and abuse. These positions we deem to be incontrovertible. Indeed, they are adjudged law in the decisions of this court. Railroads and railroad corporations are in this category.

Now, since every railroad may be, and generally is, a medium of transportation for interstate commerce, and affects that commerce; and since the charges of fare and freight for such transportation affect and incidentally regulate that commerce; and since the railroad could not be built, and the charges upon it could not be exacted, without authority from the State, it follows as a necessary consequence that the State, in the exercise of its undoubted functions and sovereignty, does, in the establishment and regulation of railroads, to a certain and a very material extent, not only do that which affects, but incidentally regulates commerce. It does so by the very Act of authorizing the construction of railroads and the collection of fares and freights thereon. No one doubts its powers to do this. The very being of the plaintiffs in error, the very existence of their railroad, the very power they exercise of charging fares and freights, are all derived from the State. And yet, according to the argument of the plaintiffs in error, pursued to its legitimate consequences, the Act of the State in doing all this ought to be regarded as null and void because it operates as a regulation of commerce among the States. Not only does the right to charge fares and freights at all, come to a railroad company from the grant of the State, but the amount of such charges is also regulated by the state law, either by the charter of the company, or by legislative regulations, or by the general law that the charges shall be reasonable; and that is state law and not United States law. Where else but from the laws of the State does the railroad company get its right to charge any fares or freight at all? And since its being, its franchises, its powers, its road, its right to charge, all come from the State, and are the creation of state law, how can it be contended that the State has no power of regulation over those charges, and over the conduct of the company in the transaction of its business whilst acting within the State and using its railroad lying within the bounds of the State? *Omne majus continet in se minus.* If the State created the Company and its franchises, it surely may make regulations as to the manner of using them. [587]

It is evident from what has been said, that the dealing of a State with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the Constitution. There is not a particle of doubt that it was the right of the State to prescribe the route of the plaintiff's [in error] road—it might be in a direction north and south, or east and west; it might be by one town, or by a different town; it was its right to prescribe how the road should be built, what means of locomotion should be used on it, how fast the trains might run, at what stations they should stop. It was its right to prescribe its charges, and to declare that they should be uniform, or, if not uniform, how otherwise; this certainly was the right of the State at the inception of the charter, and every one of these things would most materially affect commerce, not only internal but external; and yet not one of them would be repugnant to the power of Congress to regulate commerce within the meaning of the Constitution.

[588] Suppose the original charter of the Railroad Company in this case had contained precisely the provision against discriminating charges which is contained in the general law now complained of, could the Company disregard the conditions of its charter, and defy the authority of the State? We think it clear that it could not. But if the State had the power to impose such a condition in the original charter, it must have the same power at any time afterwards; for the exercise of the power in the original grant would be just as repugnant to the Constitution, and no more, as the exercise of it at a subsequent period. The regulation of charges is just as unconstitutional in a charter as in a general law.

To sum up the matter in a word: we hold it to be a sound proposition of law, that the making of railroads and regulating the charges for their use is not such a regulation of commerce as to be in the remotest degree repugnant to any power given to Congress by the Constitution, so long as that power is dormant, and has not been exercised by Congress. They affect commerce; they incidentally regulate it; but they are acts in relation to the subject which the State has a perfect right to do, subject, always, to the controlling power of Congress over the regulation of commerce when Congress sees fit to act.

It is only for the sake of convenience that the State lets out its railroads to private corporations. It might construct them itself. Suppose it had done so in this case; could not the State have instituted such rates of freight and fare as it pleased? Certainly it could. It might have made them uniform, as the present law requires them to be, or it might have made them discriminative between different places, and no one could have called it to account. Instructions in the form of laws, or in the form of orders made by a state board, might have been given to the superintendents of the road, acting in behalf of the State, to adopt the one course or the other. Could the agents of the State, acting under such instructions, have been interfered with by the judicial department, on the ground of unconstitutionality? Certainly not; certainly not, unless discriminations were made to the prejudice of the citizens of other States, or of the products of other States.

[589] The State of New York built and owns the Erie Canal. Did any court ever attempt to control that State in its regulation of tolls on the canal, even though made for the purpose of affecting the relative movement of goods on the canal and the railroads of the State? We presume that no such attempt was ever made, or would be successful if made.

It is true, and this we concede, that if the laws of a State discriminate adversely to the citizens or products of other States, whether the railroads belong to the State or to private corporations, the courts might interfere on the ground of the repugnancy of such regulations to that freedom of commerce which Congress by its nonaction on the subject has indicated shall exist. This has been frequently decided. *Welton* v. *Missouri*, 91 U. S. 282 [Bk. 23, L. ed. 350]; *Brown* v. *Houston*, 114 U. S. 622, 631 [Bk. 29, L. ed. 257, 260], and cases there cited. But no such discrimination is made by the law in question.

We also concede that any taxes, duties or impositions upon interstate commerce (that is, upon the commerce itself) carried on over the railroads of the State, would interfere with the freedom of such commerce, and would be repugnant to the presumed intention of Congress. This has frequently been decided. *Crandall* v. *Nevada* [*supra*]; *State Freight Tax Cases*, 15 Wall. 232 [82 U. S. bk. 21, L. ed. 146]; *Coe* v. *Errol*, 116 U. S. 517 [Bk. 29, L. ed. 715]; and the authorities cited in the latter case. But the present is not a case of that kind, and has no semblance of likeness to it. All such discriminations, taxes, duties and impositions are direct regulations and burdens upon the commerce itself, and come fairly within the exclusive prerogatives of Congress.

The distinction between such burdens and charges for service rendered is well explained in the case of *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196, 217 [Bk. 29, L. ed. 158, 166], where *Mr. Justice* Field, delivering the unanimous opinion of the court, in relation to ferries says: "It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such interstate ferries than the General Government; and that the privilege of [590] keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. * * * That freedom implies exemption from other charges than such as are imposed by way of compensation for the use of the property employed, or for the facilities afforded for its use, or as ordinary taxes upon the value of property."

This subject in many of its aspects was considered by this court in the case of *Baltimore & O. R. R. Co.* v. *Maryland*, 21 Wall. 456 [88 U. S. bk. 22, L. ed. 678]. In that case, in a charter for constructing and operating a railroad from Baltimore to Washington, authority was given to the company to charge $2.50 for each passenger, and it was stipulated that the company should pay to the State one fifth of the whole amount received for the transportation of passengers on the road. The company sued for a return of the sums paid on this account, as being exacted by an unconstitutional law. It was insisted that the reservation was equivalent to

the imposition of a tax on passengers, and, therefore, a restriction of free intercourse and traffic between different States—much of the travel being that of passengers coming from, or going to, other States. The argument that the reservation of one fifth of the passage money necessitated an increased charge upon [591] the passenger was met by this court as follows: "Had the State built the road in question, it might to this day have charged $2.50 for carrying a passenger between Baltimore and Washington. So might the railroad company under authority from the State, if it saw fit to do so. This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare, for transportation on its roads, canals and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled. * * * The exercise of this power on the part of a State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and therefore, requiring the exclusive legislation of Congress. *Crandall* v. *Nevada*, 6 Wall. 42 [73 U. S. bk. 18, L. ed. 746]; *State Freight Tax Cases*, 15 Id. 232, 279 [82 U. S. bk. 21, L. ed. 146, 162]. It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchise enjoyed by the corporation that performs it. * * * The question is practically reduced to this: What amounts to a regulation of commerce between the States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional Acts. It is not within the catagory of such Acts. It may incidentally affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the [592] exercise of an undoubted power."

But it is needless to multiply citations which establish or recognize the principles which govern the present case. The very point in question has been already expressly decided by this court. We refer to the case of *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 [Bk. 24, L. ed. 97]. That was a bill filed by the bondholders of the company to restrain the railroad commissioners of Wisconsin from enforcing a law of that State limiting the rate of charges for transporting passengers and freights on the railroads of the State. The bill, amongst other things, complained that the classes of freight established by section 3 of the Act were different from those established by the laws of Illinois, Iowa, and Minnesota, for the transportation of freight upon the railroads of the same company in those States, and rendered it practically impossible to carry on the business of transporting freight from Wisconsin to either of those States; and that the eighteenth section (limiting the rates) was a regulation of interstate commerce. The Act excepted from its operation the case of freight or passengers carried from one State to another State entirely through or across the State of Wisconsin. It did operate on freight and passengers carried from another State to any point within the State of Wisconsin, or from any such point to another State. The *Chief Justice*, in delivering the opinion of the court, states the precise question to be decided, as follows: "These suits present the single question of the power of the Legislature of Wisconsin to provide by law for a maximum of charge by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without." He then, after disposing of certain other questions relating to the consolidation of the company with an Illinois company, disposes of the main question as follows: "As to the effect of the statute as a regulation of interstate commerce, the law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic [593] concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without." The law was sustained, and the bill of complaint was dismissed.

We do not see how this case can be distinguished from that now under consideration. The fact that in *Peik's Case* there was a classification of freights and a limitation of charges, and in the present case a prohibition of discrimination in the charges, is a distinction without a difference. The opinion is brief, it is true, but all the principles involved in it were so fully discussed in the cases immediately preceding, beginning with that of *Munn* v. *Illinois*, that no extended discussion of *Peik's Case* was deemed necessary. All the justices who concurred in the opinion were entirely satisfied with it. The cases were all argued at the same time, or in reference to each other, and were considered together. But there stands the judgment of the court, and, in our apprehension, the judgment in the present case is directly opposed to it.

We have omitted to cite a number of cases corroborating the views we have expressed. The case of *State Tax on R. Gross Receipts*, 15 Wall. 284 [82 U. S. bk. 21, L. ed. 164], is weighted with arguments and considerations in this direction. We would also refer to the cases of *Osborne* v. *Mobile*, 16 Wall. 479 [83 U. S. bk. 21, L. ed. 470]; *R. R. Co.* v. *Fuller*, 17 Wall. 560 [84 U. S. bk. 21, L. ed. 710]; *R. R. Commission Cases*, 116 U. S. 307, 334, 335 [Bk. 29, L. ed. 636, 645].

It is supposed that the decision in *Hall* v. *De*

Cuir, 95 U. S. 485 [Bk. 24, L. ed. 547], supports the contention of the plaintiffs in error. We think not. What was that case? A Statute of Louisiana, as construed by its courts, prohibited those engaged in the business of carrying passengers, in that State (including those engaged in interstate commerce), from making any discrimination on account of race or color in the use of the accommodations in their conveyances; a direct regulation of commerce, and within the reason of the tax cases before referred to. A steamer which regularly plied between New Orleans and Vicksburg had a cabin spe-
[594] cially set apart for white persons, and De Cuir, a colored person, being refused admission to that cabin, sued for damages. We held that the law (as above suggested) was a direct regulation of commerce and a burden upon it. It compelled the steamboat proprietors to place colored persons traveling from one place to another in Louisiana, in the cabin set apart for white persons, many of whom were bound to another State; and, therefore, in its operation was a regulation of interstate commerce. It was against the rule that, in the absence of action by Congress, commerce must remain free and untrammeled. By that rule the proprietor of the vessel was at liberty to adopt such reasonable rules and regulations for the disposition and comfort of passengers upon his boat, while pursuing its voyage, as seemed to him most for the interest of all concerned. The statute took away from him this power so long as he was within Louisiana. We especially distinguished the case from those of *Munn* v. *Illinois*, *Peik* v. *R. R. Co.*, and the cognate cases, as belonging to a different category, and governed by different consideration; and the difference between them seems to us very apparent.

The *Chief Justice*, in delivering the opinion of the court, said: "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'Legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution.' *Sherlock* v. *Alling*, 93 U. S. 103 [Bk. 23, L. ed. 820]; *State Tax on R. Gross Receipts* [*supra*]. Thus, in *Munn* v. *Illinois*, 94 U. S. 113 [Bk. 24, L. ed. 77], it was decided that a State might regulate the charges of public warehouses, and, in *Chic. B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 [Bk. 24, L. ed. 94], of railroads situate entirely within the State, even though those engaged in commerce among the States might sometimes use the warehouses or the railroads in the prosecution of their business." After referring to the cases of dams and bridges over navigable waters, and of turnpikes and ferries,
[595] the *Chief Justice* continued: "By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in interstate commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the State as it comes within the State." He then added: "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within." The distinction here taken seems to us sound and to distinguish the present case from that of De Cuir. In the *Peik Case*, and others of like character, the State regulated the charges made upon an instrument of commerce (a railroad) situated within the State and under its jurisdiction; such charges being made by virtue of the State's authority; in the *De Cuir Case* it attempted, as the law operated, to regulate the manner of carrying passengers on an instrument of commerce having no fixed location, by plying on navigable waters within and without the State; in other words, it attempted to regulate interstate commerce itself, directly, in a matter in which it had no special prerogative to legislate.

Other cases are referred to by the plaintiff in error in support of their contention; but we think that no case can be found which is not clearly distinguishable from the present on some or one of the grounds already referred to.

The inconveniences which it has been supposed in argument would follow from the execution of the laws of Illinois we think have been greatly exaggerated. But if it should be found to present any real difficulty in the modes of transacting business on through lines, it is always in the power of Congress to make such [596]
reasonable regulations as the interests of interstate commerce may demand, without denuding the States of their just powers over their own roads and their own corporations.

VICKSBURG AND MERIDIAN RAILROAD COMPANY, *Plf. in Err.*, [545]
v.
ISRAEL PUTNAM.

(See S. C. Reporter's ed. 545-557.)

Action against railroad corporation for personal injuries—evidence—instructions to jury—measure of damages—use of life and annuity tables.

1. In an action against a railroad Corporation for personal injuries, there being evidence tending to show that the accident was caused by a worn out rail, it was within the discretion of the court to admit evidence to show the general condition of that portion of the road which included the place where the accident occurred.

2. Reports made by the superintendent of the road to the board of directors, in the course of his official duty, were competent evidence against the Corporation to show the condition of the road.

3. In an action for personal injuries, the plaintiff is entitled to recover compensation for the loss

caused to him by the defendant's wrongful act, including expenses incurred for medical attendance, a reasonable sum for his pain and suffering, and a fair recompense for the loss of what he would otherwise have earned.

4. Standard life and annuity tables are admissible for the purpose of assisting the jury in making an estimate, but the jury are not to be absolutely controlled by them.

5. The instructions of the court below as to the measure of damages, examined and held to be incorrect; (1) because their effect was to permit the jury to take into consideration twice over one element of damage and (2) because they gave the jury to understand that the tables introduced furnished absolute rules to be applied by them in estimating the probable duration of life of the plaintiff and the extent of the injuries which he had suffered.

[No. 17.]

Argued Apr. 22, 1886. Decided Oct. 25, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Georgia. *Reversed.*

The case is stated by the court.

Messrs. Geo. Hoadly, **Edgar M. Johnson** and *Edward Colston*, for plaintiff in error.

Mr. **Hoke Smith**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action against a Railroad Corporation for personal injuries received on September 16, 1881, by a passenger, then forty-nine years of age. The verdict was for the plaintiff in the sum of $16,000, and the defendant tendered a bill of exceptions and sued out this writ of error.

Some of the exceptions relate to rulings and instructions on the question of the defendant's liability, and others to the measure of damages. Those relating to the defendant's liability present no serious difficulty.

There being evidence tending to show that the accident was caused by a worn out rail, it was, to say the least, within the discretion of the court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long been bad, and that the rails had been in use for a great many years. Such evidence had some tendency to prove both that a worn out rail was the cause of the accident, and that the defendant had neglected to repair the defect. The reports made by the superintendent to the board of directors, in the course of his official duty, were competent evidence, as against the Corporation, of the condition of the road.

[553] In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *Carver* v. *Jackson*, 4 Pet. 1, 80 [29 U. S. bk. 7, L. ed. 761, 789]; *Magniac* v. *Thompson*, 7 Pet. 348, 390 [32 U. S. bk. 8, L. ed. 709, 723]; *Mitchell* v. *Harmony*, 13 How. 115, 181 [54 U. S. bk. 14, L. ed. 75, 82]; *Transportation Line* v. *Hope*, 95 U. S. 297, 302 [Bk. 24, L. ed. 477, 479]; Taylor, Ev. 8th ed. § 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts. *Nudd* v. *Burrows*, 91 U. S. 426 [Bk. 23, L. ed. 286]; Code of Georgia, § 3248. The exceptions to [554] so much of the judge's charge as bore upon the liability of the defendant cannot therefore be sustained.

We are then brought to a consideration of the exceptions which relate to the evidence admitted and the instructions given upon the measure of damages.

In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. *Wade* v. *Leroy*, 20 How. 34 [61 U. S. bk. 15, L. ed. 813]; *Nebraska City* v. *Campbell*, 2 Black, 590 [67 U. S. bk. 17, L. ed. 271]; *Ballou* v. *Farnum*, 11 Allen, 73; *New Jersey Exp. Co* v. *Nichols*, 3 Vroom, 166, and 4 Vroom, 434; *Phillips* v. *London & Southwestern R.* 4 Q. B. D. 406, 5 Q. B. D. 78, and 5 C. P. D. 280; *S. C.* 49 L. J. Q. B. 233.

In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. *The D. S. Gregory*, 2 Ben. 226, 239, affirmed in 9 Wall. 513 [76 U. S. bk. 19, L. ed. 787]; *Rowley* v. *London & N. W. R. Co.* L. R. 8 Exch. 221; *Sauter* v. *N. Y. Cent. R. R.* 66 N. Y. 50; *McDonald* v. *Chic. & N. R. R.* 26 Iowa, 124, 140; *Cent. R. R.* v. *Richards*, 62 Ga. 306.

But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much considered case of *Phillips* v. *London & Southwestern Railway*, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable, and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. See especially the opinions of *Lord Justice* Brett and *Lord* [555] *Justice* Cotton as reported in 49 L. J. Q. B. 237, 238, and less fully in 5 C. P. D. 291, 293.

In the present case, it was not suggested by the defendant at the trial that the life tables admitted in evidence were not standard tables, or not duly authenticated. The only ground assigned for the objection to their competency was that "The plaintiff had not shown a case in which such evidence is admissible, the plaintiff not having been killed permanently or disabled"—probably meaning "killed or permanently disabled." It is a sufficient answer to

this objection that there was evidence from which the jury might conclude that the plaintiff's disability was permanent.

But the instructions on the measure of damages, to which exception was taken, cannot be approved.

Those instructions were: (1) that the plaintiff having lost his time, the presumption would be that he lost his salary, and that would be an element of damage which the jury could ascertain with certainty; and (2) that "The Company was bound to give the plaintiff an annuity, of the amount he had been damaged, by the year, for a period equal to the expectation of his life."

As the judge directed the jury to add the worth of such an annuity at the time of the accident to the amount allowed for loss of time, including the loss of salary, it would seem that the jury were permitted, in making up their verdict, to take into consideration twice over the earnings lost by the plaintiff between the time of the accident and the time of the trial.

But the second instruction is open to the more serious objection of requiring the jury, in estimating the loss of future income, to compute the average amount of injury to the plaintiff's capacity each year, even if they should be satisfied, on the evidence before them, that the effect of that injury would vary from year to year, and would be either greater or less as time went on.

[556] A reference to the rest of the charge rather strengthens than removes this objection. At the beginning of that part of the charge which relates to this subject, the judge told the jury: "To find out what he was capable of making, you must find out what he did make, and then how much his capacity to do his former duties was injured; and having ascertained that, find out how old he is; then find out how much he is damaged every year, and then find out from the table which you will have out before you how much one dollar of annuity to the end of his expectation is worth, and multiply the three together." In the last paragraph of the charge, just before the sentence excepted to, the judge told the jury that in arriving at the amount of liability they must "find out what he has been injured, by the year." And finally, after causing the annuity table to be marked opposite forty-nine years of age, he directed the jury "to find a verdict, first, for the pecuniary damage; next, the pain, if he has suffered any; next, the loss per year; multiply by the amount you find in that table, and add the three together."

The natural, if not the necessary, effect of these peremptory instructions, at the beginning and end of dealing with this matter, would be to lead the jury to understand that they must accept the tables as affording the rule for the principal elements of their computation; and to create an impression on their minds, which would not be removed by the incidental observation of the judge, when speaking of the possibility of the plaintiff's getting well, "This is only one mode of arriving at it;" especially, as it was nowhere, throughout the charge, suggested to the jury that they would be at liberty, if they found difficulty in following the mathematical rules prescribed to them, to estimate the loss of income according to their own judgment.

Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of this plaintiff's life, and of the injury to his capacity to earn his livelihood. Upon the evidence before them, it was a controverted question whether that injury would be temporary or permanent. The instruction excepted to, either taken by itself or in connection with the whole charge, tended to mislead the jury, [557] by obliging them to ascertain the average injury to the plaintiff's capacity, by the year; whether the extent of that injury would be constant or varying; and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the plaintiff's life, and the extent of the injury which he had suffered. For this reason the *judgment is reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[608]

NEW YORK ELEVATED RAILROAD COMPANY, *Plff. in Err.*,

v.

FIFTH NATIONAL BANK OF THE CITY OF NEW YORK.

(See S. C. Reporter's ed. 608-610.)

Jurisdiction—amount in dispute, fixed by judgment—waiver of excess.

1. Upon error, in the absence of a partial defense, or a counterclaim, or a set-off, the value of the matter in dispute is fixed by the amount of the judgment.
2. Where the jurisdiction has once attached it cannot be defeated by a waiver or release of the amount in excess of $5,000.

[No. 1055.]

Submitted Oct. 12, 1886. Decided Nov. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss. *Denied.*

Messrs. **William H. Arnoux** and **William F. MacRae**, for defendant in error, in support of motion:

The matter in dispute is the amount of the verdict, and not the interest.

Knapp v. *Banks*, 2 How. 73 (43 U. S. bk. 11, L. ed. 184); *Walker* v. *U. S.* 4 Wall. 163 (71 U. S. bk. 18, L. ed. 319); *Josues* v. *Conner*, 75 N. Y. 156.

The defendant in error having waived the interest, it is not in dispute.

First Nat. Bank v. *Rodick*, 110 U. S. 224 (Bk. 28, L. ed. 124); *Brown* v. *Sigourney*, 72 N. Y. 123.

Messrs. **Henry H. Anderson, Julien T. Davies** and **Howard Townsend**, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss on the ground that the matter in dispute does not exceed the sum or value of $5,000. The suit was brought by the Fifth National Bank of the City of New York against the New York Elevated Railroad Company to recover damages for injuries to real estate. A trial was had which resulted in a verdict against the Railroad Company, on the 9th of June, 1886, for $5,000. At the time of the rendition of the verdict the Railroad Company moved for a new trial. This motion was denied on the 10th of August, and, on the 26th of the same month, a judgment was entered for $5,068.33, that being the amount of the verdict, with interest added to the date of the judgment. The claim now made is that the value of the matter in dispute is to be determined by the verdict without the interest.

The rule is settled that when a writ of error is sued out from this court by the defendant below, and no question is presented growing out of a partial defense to the action, or a counterclaim or a set-off, the value of the matter in dispute is fixed by the amount of the judgment. *Gordon* v. *Ogden*, 3 Pet. 33 [28 U. S. bk. 7, L. ed. 592]; *Hilton* v. *Dickinson*, 108 U. S. 165 [Bk. 27, L. ed. 688]; *Henderson* v. *Wadsworth*, 115 U. S. 276 [Bk. 29, L. ed. 377]. Our jurisdiction cannot be invoked until after a final judgment; and until such a judgment has been rendered the cause remains in the full judicial control of the court in which it is pending. It was because of this that we declined to take jurisdiction in *Thompson* v. *Butler*, 95 U. S. 694 [Bk. 24, L. ed. 540], where the verdict was for more than $5,000, but reduced to that amount, by leave of the court, before the judgment, which was for the reduced sum. It is true that our jurisdiction depends on the amount of the judgment, exclusive of interest thereon; *Knapp* v. *Banks*, 2 How. 73 [43 U. S. bk. 11, L. ed. 184]; *W. U. Tel. Co.* v. *Rogers*, 93 U. S. 566 [Bk. 23, L. ed. 978]; but here the interest accrued before judgment and not after. In *The Patapsco*, 12 Wall. 451 [79 U. S. bk. 20, L. ed. 457], jurisdiction was taken in a case where the decree was for $1,932, "and interest from the date of the report," which made more than $2,000 due at the time of the decree, that being then the jurisdictional limit.

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As the jurisdiction has once attached it cannot be defeated by a waiver or release of the amount in excess of $5,000.

The motion to dismiss is denied.

Mr. Justice **Field** took no part in this decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[634]

JOHN P. DELANO, *Plff. in Err.*

v.

PETER BUTLER, Receiver of the PACIFIC NATIONAL BANK OF BOSTON.

SAME, *Appt.*, *v.* SAME.

(See S. C. Reporter's ed. 634-655.)

National banks—increase of stock—sections 5151 and 5205 R. S.—liability of stockholders—payments to avoid liquidation, not applicable to the satisfaction of individual liability of stockholders under section 5151 R. S.—equity.

1. On September 13, 1881, the directors of the Pacific National Bank of Boston voted to increase its capital stock from $500,000 to $1,000,000. On November 18, 1881, the bank suspended payment, and the Comptroller of the Currency placed an examiner in charge of its assets, who remained in possession until March 18, 1882. On December 13, 1881, the directors voted to fix the stock at $961,300, as $38,700 of the increase had not been taken, and notified the Comptroller of an increase of $461,300. On December 16, 1881, the Comptroller issued a certificate of such increase, and notified the bank (under section 5205 R. S.) to pay the deficiency in its capital stock, which had been lost, by an assessment of 100 per cent upon its stockholders. On January 10, 1882, at a meeting of the stockholders such assessment was voted. Prior to May 20, 1882, the amount of $742,800 was paid in under this assessment. On March 18, 1882, the bank reopened and continued in business until May 20, 1882, when it finally suspended; it having largely reduced its liabilities within this period.

2. Upon error to a judgment in an action at law brought by the receiver to enforce the liability of the plaintiff in error under section 5151 R. S. for $6,000, the amount of his stock, $3,000 of which was a part of the bank's increase, and upon appeal from a decree dismissing a bill to enjoin said action at law, it is held:

a. That the increase in the capital stock of the bank was valid, although part of the proposed increase was not taken.

b. That, if the payment for his shares and the acceptance of his certificate by the plaintiff in error, prior to the final action of the association and the issue of the certificate by the Comptroller, did not amount to a waiver of his right to object to the reduction of the amount of the increase, his subsequent payment of the assessment of January 10, 1882, on his entire stock amounted to a ratification of such reduction, although he was not present at the meeting at which the assessment was made.

c. That payments made under section 5205, R. S., to avoid liquidation, cannot be applied to satisfy the individual responsibility of stockholders secured by section 5151, R. S.

d. That, even if the appellant paid the assessment of January 10, 1882, under the mistaken supposition that it would extinguish his liability under section 5151, R. S. in the event of future failure, and the money so paid was applied to the payment of the indebtedness of the bank, there being nothing to show that it was done ratably, he is not entitled to equitable relief.

[Nos. 820, 789.]

Argued Oct. 12, 13, 1886. Decided Nov. 1, 1886.

IN ERROR to, and appeal from, the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

Statement of the case by *Mr. Justice* **Matthews:**

The first of these cases was an action at law brought in the Circuit Court of the United States for the District of Massachusetts, by Linus M. Price, as Receiver of the Pacific National Bank of Boston, for whom Peter Butler has been substituted, against John P. Delano, a citizen of Bath, Maine, to enforce the personal liability of the defendant, under section 5151 of the Revised Statutes, upon an assessment of 100 per centum of the par value of sixty shares of the capital stock of the Pacific National Bank alleged to be held and owned by said Delano at the time of the insolvency and suspension of said bank.

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[636]

The Pacific National Bank was duly organized and authorized to do business as a national bank under the provisions embraced in Title 62 of the Revised Statutes of the United States, and located in Boston, in October, 1877. Its

capital stock was fixed at $500,000, paid in cash, with a right to increase it to $1,000,000. It continued business on this basis until September 13, 1881, when, as appears by the records of a meeting of the directors held in Boston, it was—

"Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them."

On the same date, a copy of the following notice was sent by the cashier to each stockholder of the bank:

"A. I. BENYON, *President.*
J. M. PETTINGILL, *Cashier.*
PACIFIC NATIONAL BANK, 105 DEVONSHIRE STREET, BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank, held this day, it was—

"'Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.'

"Subscription to the new stock will be payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at 4 per cent per annum.

J. M. PETTINGILL, *Cashier.*"

The whole amount of the increase of capital voted was not taken and paid in, nor was notice ever transmitted to the Comptroller of the Currency that all of such increase had been paid in; nor was that official's certificate of the [637] increase to $1,000,000, with his approval thereof, ever issued. But $461,300 of the proposed increase of $500,000 was actually subscribed for and paid in as capital stock prior to November 18, 1881, and was used in the general business of the bank.

On November 18, 1881, the bank became insolvent, supended payment, and closed its doors. On the same day, Daniel Needham, an examiner of national banks, was placed by the Comptroller of the Currency in charge of the assets of the bank, for the purpose of ascertaining its condition, where he remained until March 18, 1882.

The directors of the bank met on December 13, 1881, during the period of suspension, and passed a vote that, as $38,700 of the increase of capital voted on September 13, 1881, had not been taken and paid in, that amount be canceled and deducted from the capital stock of $1,000,000 and the paid up capital stock fixed at $961,300; and that the Comptroller of the Currency be notified of the increase of $461,300, which had been paid in, and requested to issue a certificate of such increase according to law.

Thereupon the Comptroller of the Currency, under date of December 16, 1881, made and issued the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

"Whereas, satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased in the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

"Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid, has been increased as aforesaid, in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank [638] as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[Seal.] JOHN J. KNOX, *Comptroller.*"

No vote of the stockholders was taken relating to the increase or decrease of the capital stock of the bank.

Under date of December 16, 1881, the Comptroller of the Currency addressed the following letter to the bank:

"WASHINGTON, *December* 16, 1881.

"The Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[Seal.] "JOHN JAY KNOX,
"*Comptroller of the Currency.*"

On January 10, 1882, during the suspension of the bank, the stockholders held their annual meeting (it being the first held since January 11, 1881) pursuant to the following notice duly published in the Boston Daily Advertiser:

"*Pacific National Bank.* [639]

"The annual meeting of the stockholders of this bank, for choice of directors and for any other business that may legally come before them, will be held at their banking rooms, 105 Devonshire Street, on Tuesday, Jan. 10, 1882, at 11 o'clock A. M.

"J. M. PETTINGILL, *Cashier.*"

At this meeting, after discussing the general condition of the affairs of the bank, the foregoing call of the Comptroller of the Currency for an assessment of 100 per centum on the capital stock of the bank was read. Thereupon the following was offered:

"Voted, In accordance with the notice of the Comptroller of the Currency, dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank, of Bos-

ton, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

On the question of the adoption of the above, a stock vote was ordered; the total number of votes cast was 5,549, representing 5,549 shares, of which 5,494 were in the affirmative, and 55 in the negative.

The amount paid in by the stockholders on this assessment was $742,800, prior to May 20, 1882.

The following notice to depositors was issued by the bank on March 16, 1882:

"THE PACIFIC NATIONAL BANK,
BOSTON, *March* 16, 1882.

"To our Depositors:

"By vote of the directors and the approval of the Comptroller of the Currency the bank will reopen for business on Saturday, the 18th. Every effort has been made to put the bank again into a sound and solvent condition; and the stockholders have been called upon to pay an assessment of 100 per cent on their stock, thus making the depositors' balances secure and available. The bank will be run on strict busi-
[640] ness principles and in the interest of its customers and stockholders; and, while thanking you for past favors, we solicit your confidence and support for the future.

"LEWIS COLEMAN, *President.*
"E. C. WHITNEY, *Cashier.*"

Pursuant thereto, the directors resumed active control of the bank and its assets on March 18, 1882, and again conducted a general banking business until May 20, 1882, when the bank ceased business, and the directors voted to go into liquidation. Thereupon Linus M. Price was appointed receiver by the Comptroller of the Currency under section 5234 of the Revised Statutes, and took charge of the assets and records of the bank.

During the period between March 18, 1882, and May 20, 1882, while the bank was carrying on business in its own name, the amount due depositors was reduced from $4,101,365.91 on the former date, to $2,052,957.82 on the latter, $62,693.40 being due to new depositors. The amount of deposits made between the dates named was $2,338,617.21. New liabilities were contracted subsequent to March 18, 1882, amounting to $200,000, including the $62,693.40 due to new depositors.

The plaintiff in error owned thirty shares of stock in said bank prior to the vote of September 13, 1881, to increase the stock to $1,000,000. After that vote he received from the cashier of the bank a printed copy of the notice dated September 13, 1881, at the bottom of which he wrote a subscription for thirty shares of the increase of stock, and returned it to the bank. Three days after the passage of the vote he paid $3,000 for the thirty shares so subscribed, and received a receipt for $3,000 "on account of subscription to new stock," signed by the cashier of the bank. In October he returned the receipt to the bank, and received for it certificate No. 780 for thirty shares of the new stock, dated October 1, 1881.

Plaintiff in error supposed at that time that the whole $500,000 increase of capital had been taken and paid in, and believed that the increase to $1,000,000 had been regularly and legally made. He did not attend the stockholders' meeting of January 10, 1882, and received no [641] other notice thereof than seeing the call published in the Boston Advertiser. On January 12 or 13 he received notice of the assessment of 100 per centum upon the stock of the bank, and, after consultation, was assured by another shareholder and a director of the bank, that if this was paid there could be no further assessment made on his stock; in consequence of which assurances he paid the assessment of $3,000 on January 20 and 23, which were indorsed on the certificates under the dates of payment, being one hundred per centum on sixty shares of the stock.

Upon the trial the intervention of a jury was waived by consent of parties, and the cause, submitted to the court, which found the foregoing facts, and rendered judgment September 8, 1885, in favor of the receiver for the amount claimed.

On June 8, 1885, the appellant, Delano, filed a bill in equity in the Circuit Court of the United States for the District of Massachusetts, against Linus M. Price, Receiver of the Pacific National Bank, the object and prayer of which were to enjoin the further prosecution of the pending action at law, brought by the said receiver against him for the purpose of enforcing the alleged liability of the appellant on account of the assessment upon his said stock, on the ground that upon the facts, as heretofore stated, the voluntary payment made by the appellant of the one hundred per centum assessed to restore the lost capital of $961,300, and which had been applied to the payment of the creditors of the bank, constituted in equity, if not at law, a complete defense to the claim of the Receiver as an extinguishment of his liability upon the assessment sued on.

This cause was heard upon the facts as heretofore stated and a decree rendered dismissing the bill for want of equity, from which the present appeal was taken and is prosecuted.

Messrs. **Benjamin N. Johnson, George F. Hoar** and *A. P. Gould,* for plaintiff in error and appellant:

A reasonable construction of the statute only requires a stockholder of an insolvent bank to contribute a sum equal to the par value of his stock toward a fund for the payment of its debts.

Terry v. *Little,* 101 U. S. 216 (Bk. 25, L. ed. 864).

The payment by the stockholders of such a sum, which was devoted to the payment of the debts of the bank, constituted an equitable performance of their statutory obligation, or an equitable satisfaction of their statutory liability.

2 Pom. Eq. sec. 579. See also Smith, Prin. Eq. 461; *Lechmere* v. *Carlisle,* 3 P. Wms. 227; *Sowden* v. *Sowden,* 1 Brown, Ch. 582; approved in *Lenach* v. *Lenach,* 10 Ves. 516.

The doctrine of equitable performance applies to an obligation imposed by Act of Parliament.

Tubbs v. *Broadwood,* 2 R. & Myl. 487.

Closely allied to the doctrine of equitable performance is the doctrine of equitable satisfaction, where intention either express or implied is required.

2 Story, Eq. secs. 1099, 1104; 1 Pom. Eq. sec. 521.

In this case the creditors have received and retain the benefit of the voluntary payment.

The stockholders having paid their hundred per cent may also invoke the doctrine of equitable set-off.

Raleigh v. *Raleigh*, 35 Ill. 512; *Briggs* v. *Penniman*, 8 Cow. 390; *Tallmadge* v. *Fishkill Iron Co.* 4 Barb. 382; *Jones* v. *Wiltberger*, 42 Ga. 578.

The pivotal inquiry in this case is, whether the payment was made with the intention, express or implied, of satisfying the obligation of the plaintiff in error, or in such a manner as to constitute performance of it.

The statute was intended to impose upon the the shareholder but one liability at any time during the life of the stock.

The money paid was in fact paid for the benefit of creditors and appropriated to the debts of the bank; not to the repair of the stock. The creditors have the full benefit of it, and the stockholders have no consideration for its payment, unless it goes to the liquidation of their statute liability.

Equity relieves against mistakes, and refuses to allow parties to have the benefit of money paid through a misapprehension of the facts.

1 Story, Eq. 140; 2 Pom. Eq. sec. 852.

Under many circumstances relief will be granted where payments have been made under mistake as to the parties' existing legal rights or liabilities.

2 Pom. Eq. sec. 849.

The principal mistake was of fact, concerning the value of the assets, and a court of equity will give relief.

Id.; *Bank of Hindustan* v. *Allison*, L. R. 6 C. P. 54.

The Comptroller was in possession of the bank and was bound to know its condition. The stockholders had a right to rely upon him. It is sufficient that he deceived them—whether intentionally or otherwise is immaterial; and he should not be allowed to proceed with another assessment.

U. S. v. *Knox*, 102 U. S. 422, 425 (Bk. 26, L. ed. 216, 217).

The stockholders were only required to contribute to a fund for the payment of the debts—not to pay them. Under the authority of the Comptroller the officers of the bank received the fund from the examiner, and devoted the whole of it to the payment of debts. The plaintiff in error was not responsible for its proper distribution.

Patterson v. *Lynde*, 106 U. S. 519 (Bk. 27, L. ed. 265); *Smith* v. *Hurd*, 12 Met. 371; Thompson, Liability of Officers and Agents of Corporations, pp. 352, 461.

Equity will not permit double benefits where but one benefit is intended, or impose double burdens where but one obligation is due. The money due from this debtor has reached these creditors, and the substance of his obligation has been fully performed.

Terry v. *Little* and *U. S.* v. *Knox*, *supra*; *Marine Bank* v. *Fulton Bank*, 2 Wall. 256 (69 U. S. bk. 17, L. ed. 787); *Scammon* v. *Kimball*, 92 U. S. 370 (Bk. 23, L. ed. 486); *Nat. Bank* v. *Ins. Co.* 104 U. S. 54 (Bk. 26, L. ed. 693); *Patterson* v. *Lynde* and *Smith* v. *Hurd*, *supra*; 2 Pom. Eq. sec. 579; Smith, Prin. Eq. 461.

Mr. **A. A. Ranney**, for defendant in error and appellee.

Mr. Justice **Matthews** delivered the opinion of the court: [646]

Section 5151 of the Revised Statutes provides that "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The object of the action at law brought by the Receiver of the Pacific National Bank of Boston, in which judgment was rendered against the defendant, the plaintiff in error, was to enforce his liability under that section of the statute. The object of the suit in equity, in which Delano was the complainant, was to restrain the prosecution of the action at law, on the ground that if his legal defenses failed, he had in equity performed and extinguished his obligation.

The questions arising upon the records of these cases in various forms, upon the facts already stated, may be reduced to three, which will be considered and disposed of in their order.

The plaintiff in error in the action at law contends, as grounds for reversing the judgment against him: [647]

1. That he was not, at the time of the appointment of the Receiver, or at any time, the holder of sixty shares of the stock of the Pacific National Bank, but was, in fact and in law, a holder of only thirty shares thereof. He contends that the attempt on the part of the directors and the Comptroller of the Currency, in December, 1881, to fix the capital stock of the bank at $961,300, was contrary to law and void; that the alleged thirty shares of new stock on account of which he is sued never had any legal existence, and that he, by virtue of his subscription in September, 1881, for thirty shares in the then proposed increase of capital from $500,000 to $1,000,000, and by his other acts, never became liable on account of the debts of the Pacific National Bank beyond his liability as the holder of thirty shares of valid stock.

2. That by his contribution in January, 1882, of an amount equal to the par value of all the stock ever held by him towards the fund, which was all used in the payment of the debts of the bank, the bank then being insolvent, he, in law, discharged his liability as a stockholder in said bank, and should therefore have judgment in his favor.

3. As appellant in the suit in equity, Delano alleges, as ground for reversing the decree dismissing his bill, that the contribution made by him on January 23, 1882, of an amount equal to the par value of the stock held by him, towards a fund which was actually used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a satisfaction and extinguishment of his liability as a stockholder for the debts of the bank, if not at law.

It is further contended by him, as an additional ground for equitable relief, that by the

payment of the $3,000 upon the thirty shares of alleged new stock, which he claimed never had any legal existence, and on which therefore he never incurred any liability, he really contributed towards a fund actually used for the payment of the debts of the bank an amount equal to 200 per centum of the stock held by him; which payment, if not available in his favor as a satisfaction of his statutory liability [648] technically at law, nevertheless, must be regarded in equity as a substantial equivalent, exonerating him from further liability.

The first question to be considered is whether there was a valid increase of the capital stock of the Pacific National Bank, of which the plaintiff in error became the owner of thirty shares, so as to be charged with liability thereon as a stockholder. The articles of association of the bank provide that "The capital may be increased according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars."

The 11th section of the by-laws of the bank provides as follows:

"Whenever an increase of stock shall be determined upon, it shall be the duty of the board to notify all the stockholders of the same, and cause a subscription to be opened for such increase; and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

Section 5142 of the Revised Statutes is as follows: "Any association formed under this title may, by its articles of association, provide for an increase of its capital, from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid [649] in as part of the capital of such association."

It is urged on behalf of the plaintiff in error that no increase of the capital stock of the bank was ever proposed by the directors or assented to by the subscribers, except an increase of the full sum of $500,000; that no such increase as that was ever fully paid in, as required by the statute, and that no such increase was approved by the certificate of the Comptroller of the Currency; that his agreement of subscription was to take thirty shares of the new stock out of the whole sum of $500,000; that that agreement has never been carried into effect, and that he has never consented to any modification of it, and that, consequently, whatever effect would be attributable to the acts of the directors or stockholders of the bank, in conjunction with the Comptroller of the Currency, they are *res inter alios acta*, and not binding on him.

On looking at the terms of section 5142 of the Revised Statutes, it appears that three things must concur to constitute a valid increase of the capital stock of a national banking association: (1) that the association, in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; (2) that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and (3) that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment.

In the present case, the association did in fact finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency by his certificate approved of the increase and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question; for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency.

The question, therefore, seems to be converted [650] into this: whether the subscription of the plaintiff in error to a proposed increase of $500,000, and his payment thereof, can be held to be a binding agreement to accept thirty shares out of the reduced amount.

It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did, in legal contemplation, with knowledge of the law, which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors; and such payment and acceptance of certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in. But without insisting upon that point, or deciding it, we think that the subsequent conduct of the plaintiff in error amounts to a ratification on his part of the action of the association, and of the Comptroller of the Currency, in fixing the amount of the increased stock at the less sum.

After he paid his subscription and received his certificates of stock, he was called upon, as a stockholder, alleged to be the owner of sixty shares of the capital, to pay an assessment voluntarily imposed upon themselves by the stockholders at a regular meeting, at which the transaction of such business was not only legitimate, but necessary as a condition on compliance with which, alone, the association was to be permitted to resume and continue its business as a bank. The bank was in a condition of open and noto-

rious insolvency. It was in the actual control of an examiner appointed by the Comptroller of the Currency, so far as lawful, for the express purpose of ascertaining its true condition, in order to determine the question whether it might be permitted, on any conditions, to resume business, or whether it should be required to go into liquidation by the appointment of a receiver to wind up its affairs. These facts were [651] certainly known to the plaintiff in error, or, at any rate, were so notorious that he cannot be permitted to allege ignorance of them. A regular meeting of the stockholders was called by public notice, given in the usual form, for the election of directors and the transaction of any other business that might be brought before them. At this meeting official communication was made that, according to the determination of the association and of the Comptroller of the Currency, the increased and paid up capital stock of the bank had been fixed at $961,300, and that the whole amount of it had been lost; that it was necessary to replace it by an assessment of one hundred per centum on the par value of all the shares in order to enable it to resume and carry on its business, and that otherwise it would be placed in the hands of a receiver and required to go into liquidation.

Section 5205 of the Revised Statutes provides that "Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock by assessment upon the shareholders *pro rata* for the amount of capital stock held by each. * * * If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 5234."

It was in pursuance of these provisions of the law that notice was given by the Comptroller of the Currency to the stockholders of the bank, at this, their regular annual meeting, that they must either assess themselves and pay in the whole amount of 100 per centum upon their capital stock, fixed at the sum of $961,300, or, in the alternative, go into liquidation. In pursuance of this notice, in full view of the facts, and with a presumed knowledge of the law, the stockholders, by a vote that was almost unanimous, assented to the first branch of the alternative, and, as a condition for being permitted to re- [652] sume business, voluntarily voted the required assessment. The plaintiff in error, it is true, was not present at this meeting, but he had notice of its proceedings, and in pursuance of its vote paid the full amount of the assessment imposed upon him as the holder of sixty shares of the capital stock of the company.

In our opinion, it is not open to him now to say that he made this payment in ignorance of the facts, or in ignorance of the legal right which he now seeks to assert to avoid the obligation. His payment was voluntary; it was made either with actual knowledge of the facts, or with such opportunity and means of knowledge as, by the exercise of common diligence, would have made him acquainted with the facts, and the payment made by him in conjunction with his co-stockholders was made upon a distinct consideration, whereby the bank in which he was interested was enabled to undertake anew its regular and active business. Such a course of action on his part must be construed to constitute a complete acquiescence in and ratification of the previous action of the association and the Comptroller of the Currency in reference to the increase of the capital stock; and he cannot be permitted now to deny that he thereby became, and has continued to be, an owner of sixty shares of the capital stock of the bank fixed at the increased sum.

This conclusion is not weakened by the suggestion made in argument, that these proceedings of the bank took place during the period when its affairs were under the supervision of the Comptroller of the Currency, acting through the examiner. Notwithstanding the suspension of its business while under his control, the association continued its corporate existence, and was competent to exercise corporate functions. The increase of its capital, the vote of the assessment for the purpose of restoring what had been lost, and the acceptance of the alternative proposed by the Comptroller of the Currency to avoid going into liquidation, were all exertions of corporate powers, which, under the circumstances, the statute expressly contemplated and authorized. It is, therefore, not at all to the point that its assets and affairs were subject to the supervision of the bank examiner. Nor is the conclusion affected by the other consideration, also urged in ar- [653] gument, that the attempt to revive the business of the bank by means of the assessment proved unsuccessful and abortive. The association, through its directors and stockholders, undertook the task, and entered upon its accomplishment, and in doing so materially changed its relations to its creditors. The failure to prosecute its business successfully certainly cannot have the operation now claimed for it, of making illegal all that was done in the prosecution of the experiment. The hazard of failure must be presumed to have been in the contemplation of the stockholders when they consented to the risk; and the consequences of failure cannot now be shifted from themselves to their creditors.

The second ground of defense to the action at law is, in our opinion, equally untenable. The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under section 5205 of the Revised Statutes, is not the assessment contemplated by section 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts, and engagements of the association. The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors; and in the ordinary course of business certainly would not be applied, as

in cases of liquidation, to the payment of creditors ratably; whereas, under section 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably. If the claim in the present case were allowed, it would follow that in every case payments made by stockholders, for the purpose of restoring the impaired capital, would be considered as credits [654] on the ultimate individual responsibility of shareholders, and the whole efficiency of the provisions of section 5151 for the protection of the creditors of the company at the time of liquidation would be destroyed. The obligations of the shareholders under the two sections are entirely diverse; and payments made under section 5205 cannot be applied to the satisfaction of the individual responsibility secured by section 5151. *Scovill* v. *Thayer*, 105 U. S. 143 [Bk. 26, L. ed. 968].

But, it is said, in the third place, as the ground of relief under the bill in equity, that while this may be the result of a strict application of technical law, there remains to the complainant an equity which entitles him, by some process of substitution, to apply the payment which he has made under section 5205 to extinguish his liability under section 5151. So far as can be gathered from the allegations of the bill, the facts found, and the argument of counsel, this equity is supposed to rest upon the facts that the money paid by the stockholders under the assessment was in fact applied to the satisfaction of the debts of the bank; that such application was intended by the appellant when the assessment was paid; and that he paid it in the belief that it would exonerate him from further liability as a stockholder, induced by representations made to him to that effect by others interested in the affairs of the bank. Whatever hardship there may be in the circumstances of the case, we are unable to discover any ground of equitable relief. If the assessment was applied by the officers of the bank to the satisfaction of its debts, there is nothing to show that it was done ratably, as required by section 5151. The assessment was not paid by the stockholders for the purpose of effecting a liquidation of the affairs of the bank, but was understood to be the price paid for the privilege of continuing its business, in the hope of saving their investment. If it was paid under a mistaken supposition that, in the event of future failure, nothing more could be required of them, there is nothing to show that the shareholders were led into the mistake by any misrepresentations either of fact or of law on the part of the creditors for whose benefit the receiver is now acting. The mistake, if any, is one for which each shareholder is alone responsible.

On the whole, we are constrained to conclude [655] *that the defenses at law and the alleged ground of relief in equity are alike insufficient, and that the judgment and the decree of the Circuit Court must be affirmed, and it is accordingly so ordered.*

Harvey Mills v. Peter Butler, Receiver. (No. 790.)

The Taunton Savings Bank v. Peter Butler, Receiver. (No. 791.)

The Charlestown Five-Cent Savings Bank v. Peter Butler, Receiver. (No. 792.)

Charles E. Morrison v. Peter Butler, Receiver. (No. 793.)

Appeals from the Circuit Court of the United States for the District of Massachusetts.

Harvey Mills v. Peter Butler, Receiver. (No. 821.)

The Taunton Savings Bank v. Peter Butler, Receiver. (No. 822.)

The Charlestown Five-Cent Savings Bank v. Peter Butler, Receiver. (No. 823.)

Charles E. Morrison v. Peter Butler, Receiver. (No. 824.)

In error to the Circuit Court of the United States for the District of Massachusetts.

The cases in which Harvey Mills, The Taunton Savings Bank, The Charlestown Five-Cent Savings Bank, and Charles E. Morrison are respectively appellants and plaintiffs in error, v. Peter Butler, Receiver of the Pacific National Bank of Boston, depend upon the same facts, and are governed by the decisions in the cases wherein John P. Delano is appellant and plaintiff in error against the same defendant.

The judgments and decrees in these cases, respectively, are consequently also affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CAROLINE J. WHITNEY ET AL., EXRS. of LEONARD WHITNEY, Deceased, *Plffs. in Err.*, [655]

v.

PETER BUTLER, Receiver of the PACIFIC NATIONAL BANK OF BOSTON.

(See S. C. Reporter's ed. 655-663.)

National banks—action to enforce the liability of the estate of a shareholder under sections 5157, 5152, R. S. after surrender of certificates with power of attorney—construction of statute—transfer of stock.

Upon a reasonable construction of the statute imposing liability upon shareholders for the debts of national banks, and for all the objects intended to be accomplished by the provision imposing liability of shareholders for the debts of national banks, the responsibility of the defendants ceased upon the surrender of certain stock certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser; although such transfer was not in fact made.

[No. 1065.]

Argued Oct. 13, 1886. Decided Nov. 1, 1886.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **E. R. Hoar**, for plaintiffs in error.

Mr. **A. A. Ranney**, for appellee:

The law seems to be too plain to controverted, that Leonard Whitney, being the actual

owner of the stock at the time of his decease, his estate continued a stockholder as to creditors and for the purposes of this suit.

Irons v. *Mfrs. Nat. Bank*, 27 Fed. Rep. 591; *Bowdell* v. *Nat. Bank*, Brown, Nat. Bank Cas. 146; *Davis* v. *Essex Bap. Soc.* 41 Conn. 582; *Davis* v. *Stevens*, Brown, Nat. Bank Cas. 158; *Adderly* v. *Storm*, 6 Hill, 624; *Anderson* v. *Phila. Warehouse Co.* 111 U. S. 479 [Bk. 28, L. ed. 478]; *Turnbull* v. *Payson*, 95 U. S. 418 [Bk. 24, L. ed. 437]; *Brown* v. *Adams*, 5 Biss. 181; Morawetz, Priv. Corp. 170 *et seq.*, notes.

It was the duty of the vendors to see the transfer completed on the books.

Bowdell v. *Bank*, *supra*.

[657] *Mr. Justice* **Harlan** delivered the opinion of the court:

The plaintiffs in error are the personal representatives of Leonard Whitney, who, at the time of his death, held two certificates for fifty shares each of the capital stock of the Pacific National Bank of Boston. That bank suspended on November 18, 1881, and from that date until March 18, 1882, was in charge of an examiner of national banks. On the day last named, with the permission of the Comptroller of the Currency, it resumed business and so continued until May 20, 1882, when it failed, and was placed by that officer in the hands of a receiver to be wound up. At the time the Receiver took possession, as well as when this action was brought, March 14, 1883, the above shares of stock stood in the name of Whitney on the books of the bank.

This suit was brought against the executors of Whitney, pursuant to the orders of the Comptroller of the Currency. It is based upon those provisions of the statute which declare that the shareholders of national banking associations shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, to the extent or amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and that estates and funds in the hands of executors of persons holding stock shall be liable in like manner and to the same extent as the testator would have been if living. R. S. secs. 5157, 5152. The assessment by the Comptroller upon shareholders to meet the bank's debts was for the full amount authorized by the statute.

The defendants insist that they were not shareholders of the bank, and did not hold, nor were entitled to hold, any certificates of shares of its capital stock, either at the date of its suspension, or when the Receiver was appointed, or when the assessment was made by the Comptroller. This defense was overruled, and the executors of Whitney were adjudged to be liable, the circuit judge observing: "This being a suit brought by the Receiver, who represents the creditors, and it appearing that the stock was not transferred on the books of the company, as provided by the by-laws, we think the defendants liable."

The question before the court is whether, under the statute and the facts specially found, the defendants were liable to be assessed for the contracts, debts and engagements of the bank. The statute declares that the capital stock of a national bank shall be transferable on its books in such manner as may be prescribed in the by-laws or articles of the association; every person becoming a shareholder by such transfer succeeding, in proportion to his shares, to all the rights and liabilities of the prior holder. R. S. sec. 5189. The by-laws of this bank provide [658] that its stock should be assignable only on its books, subject to the restrictions and provisions of the statute; that a transfer book be kept, in which all assignments and transfers of stock should be made; that each certificate should state upon its face that the stock is transferable only on the books of the bank; and that when a transfer is made the certificate shall be returned and canceled, and a new one issued. Whether these by-laws were so far complied with as to release the defendants as executors from the liability imposed by statute, depends upon the effect to be given to certain acts of the executors and of the president of the bank in connection with the sale of the stock standing in Whitney's name.

It appears from the special finding of facts that Abner Coburn, of Maine, desiring to buy two hundred and fifty shares of the stock of this bank, made a special deposit in it of $25,000 to be applied for that purpose. This fact appears from a letter addressed to him by Benyon, the president of the bank, under date of September 21, 1881, in which the latter said: "Yours of 20th received with check $25,000, which we will use pending the purchase of our stock, and will hold on your account, as a special deposit, securities to the same amount, till we succeed in making the purchase. This leaves the amount in your control until invested, and, I trust, will be satisfactory to you." That the stock might be obtained, Benyon secured the services of one Eager who had a deposit account with the bank; and that the latter might have money with which to buy the stock, Benyon placed to his credit, as a temporary loan, out of the funds of the bank, the exact amount required for the purchase.

On November 8, 1881, the defendants—having no reason whatever to believe that the bank was insolvent, or was about to become so; on the contrary, believing it to be solvent, and having no information as to Coburn's order—placed the certificates held by them in the hands of Day & Co., brokers, with directions to sell the stock. They also placed in their hands a power of attorney in the form usually adopted for transfers of stock. It was blank as to the names of the attorney and the purchaser, but was [659] signed by the executors and duly witnessed. It was in these words: "Know all men by these presents, that, for value received, we, the executors of the estate of Leonard Whitney, of Watertown, do hereby make, constitute, and appoint, irrevocably, ——— true and lawful attorney (with power of substitution), for and in our name and our behalf to sell, assign, and transfer unto ——— one hundred shares now standing in the name of L. Whitney, of Watertown, Mass., in the capital stock of the Pacific National Bank; and said attorney is hereby fully empowered to make and pass all necessary acts for the said assignment and transfer. Witness our hands and seals." To that power of attorney was appended the following: "For value received, I appoint, irrevocably, —— as my substitute, with all the powers above given

to me. Witness —— hand and seal, ———, 187-, ——— ———. [Seal.]" The other papers were the two certificates of stock and the certificate from the proper probate court, showing the appointment and qualification of the defendants as executors. Each stock certificate contained the following words: "Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate."

On November 12, 1881, Day & Co. offered the stock for sale at public auction, and the same was, at Benyon's request, bought by Eager at the sum of $10,400. Three days thereafter, November 15, 1881, Eager offered to the brokers in payment for the stock his check on the Pacific National Bank. The bank at which the brokers did business declined to take that check in its deposit account. Benyon, being informed of that fact, substituted for the check of Eager a cashier's check on another bank, which last check being paid, Day & Co., with the knowledge of Eager, delivered to Benyon, the president of the bank, the foregoing certificates of stock, with the power of attorney, the certificate from the probate court, and other papers—he thereafter holding the same "as purporting to be security for and as representing said loan, awaiting the filling of Coburn's order, with the design then to have the stock [660] transferred to him as soon as his order had been filled." On the 16th of November the defendants received from the brokers the proceeds of the sale of the Whitney stock. Benyon obtained only fifty additional shares, for the purpose of filling the order of Coburn. All this happened before the bank suspended on November 18, 1881.

The executors of Whitney did not know by whom the stock was bought at the auction sale, unless the knowledge of the brokers is to be imputed to them. Believing in good faith, and having no reason to doubt that the purchaser had caused the transfer to be made, neither they nor the brokers took steps to ascertain whether it had in fact been done.

They had no knowledge or information until after the appointment of the Receiver as to the purpose for which either Benyon or Eager held the before-mentioned papers or the stock.

While the bank did not purchase nor intend to purchase the stock for itself, its president, in execution of Coburn's order, procured Eager to buy this stock with funds furnished him for that purpose. Coburn did not take it; and the Receiver, after he took possession, found the before-mentioned papers in an envelope purporting to represent a security for a demand loan to Benyon.

We do not think that the question arising upon these facts is concluded by any of the cases cited in the opinion of the circuit judge,* or in those cited in the brief for the Receiver.† In nearly all of them, where the issue was between the receiver, representing the creditors, and the person standing on the register of the bank as a shareholder, it is said, generally, that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements and contracts; that if a person *permits* his name to appear *and remain* in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny [661] that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder, even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is that the deed is considered as recorded from the time of such deposit. 2 Washb. Real Prop. B. 3, chap. 4, par. 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register.

In the case before us the personal presence of the defendants at the bank was not required, in order to secure their release from liability as shareholders. Besides, the certificates of stock authorized them to act by attorney. Through their agents, the brokers, who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank; he receiving them, with knowledge not only that defendants had parted with all title to the stock and had been paid for it, but also that it had been purchased at public auction by [662] Eager. He knew equally well that the surrender of the certificates and the delivery of the power of attorney and the certificate from the probate court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders. The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the

* Davis v. Society of Essex, 44 Conn. 582; Adderly v. Storm, 6 Hill, 624; Anderson v. Phila. Warehouse Co. 111 U. S. 479, 483 [Bk. 28, L. ed. 478, 480]; Johnston v. Laflin, 103 U. S. 800, 804 [Bk. 26, L. ed. 532, 534]; Turnbull v. Payson, 95 U. S. 418 [Bk. 24, L. ed. 487]; Brown v. Adams, 5 Biss. 181.

†Davis v. Stevens, 17 Blatchf. 259; Irons v. Mfrs. Nat. Bk. 27 Fed. Rep. 591; Bowdell v. Nat. Bk., Brown's Nat. Bk. Cases, 146.

necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendants' agents that the transfer would be made at once.

It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. [663] Their conduct was, under all the circumstances, that of careful, prudent business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser.

For the reasons stated, the judgment is reversed, and the cause remanded, with directions to enter a judgment for the defendants. Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[596] SAMUEL W. LITTLE, D. B. ALEXANDER AND MARTHA His Wife, S. G. OWEN, R. H. OAKLEY ET AL. *Appts.*,
v.
EZEKIEL GILES ET AL.

(See S. C. Reporter's ed. 596-606.)

Jurisdiction—removal of causes—defendants charged as co-conspirators—collusion—stipulation.

1. When a bill, filed in a state court, charges the defendants, part of whom resided in the same State with the complainants, as co-conspirators, the cause is not removable to the federal court, although the defendants who resided in another State allege in their petition for removal that they are not jointly interested with the other defendants, and that their controversy with the complainants is a separate one.

2. The evidence examined, and a deed to a defendant, who was a resident of another State than the grantors and the complainants, held to have been collusively made for the purpose of conferring jurisdiction on the federal courts.

3. A stipulation that the decision of an issue in another case should be taken as the decision in the present case, so far as the issue was the same, does not make the decision of the circuit court in accordance with such stipulation binding upon this court.

[No. 352.]

Submitted Oct. 19, 1886. Decided Nov. 1, 1886.

APPEAL from the Circuit Court of the United States for the District of Nebraska. *Reversed.*

The case is stated by the court.

Messrs. **T. M. Marquett, N. S. Harwood, John H. Ames** and **Walter J. Lamb**, for appellants.

Messrs. **L. C. Burr** and **J. M. Woolworth**, for appellees.

Mr. Justice **Bradley** delived the opinion of the court: [597]

The original bill in this case was filed in January, 1882, in the District Court of Lancaster County, in the State of Nebraska, to quiet the title of the complainants, some seventy in number, to certain lots of land in and about the Town of Lincoln in that State, severally owned by them (as they allege) and derived under conveyances in fee from one Edith J. Dawson. The bill alleges that Jacob Dawson died seised of the lands in 1869, and by his will, dated June 15 of that year, gave to his wife, the said Edith, all his real and personal estate, to be and remain hers, with full power, right and authority to dispose of the same as to her should seem meet and proper, so long as she should remain his widow, upon the express condition that if she should marry again, then that all the estate, or whatever might remain, should go to the testator's surviving children, share and share alike, and appointed his wife executrix; that she duly proved the will, and afterwards, in order to raise money to pay the debts of her deceased husband, and advance her children, made the conveyances referred to, pretending to be, and the defendants represented that she was, authorized by the power given her in the will to convey the property in fee. The bill states these conveyances, and alleges that the complainants, or their grantors, had severally erected expensive buildings and made valuable improvements on the lands. The bill further states that the said Edith afterwards, on the 15th of November, 1879, was reputed to have intermarried with one Pickering, and that, upon this marriage, the children and heirs of the said Jacob Dawson, namely: William R. Dawson, Albert L. Dawson, and others named in the bill, claimed to be seised in fee under the said will, and fraudulently conspired with one Highland H. Wheeler and one Lionel C. Burr, attorneys, to cloud and incumber the titles of the complainants by various suits at law, and to extort money from them; and that for this purpose the said [598] heirs, without any consideration, but for the

pretended consideration of $75,000, executed and delivered to said Wheeler and Burr a pretended deed or deeds for said lands, in consideration whereof it was agreed that the latter should pay and deliver to said heirs one fourth part of whatever they could extort from the complainants, and retain the balance for themselves; and that further to carry out this fraudulent scheme, Wheeler and Burr, on the 27th of April, 1880, for the purpose of prosecuting complainants in the United States Courts, and for no other consideration whatever, executed a pretended deed for said lands to one Ezekiel Giles, father-in-law of said Burr, a man of no property or means, who resided in Iowa; and that they have already commenced several vexatious suits in ejectment in said courts against the complainants, and threaten to commence others. The bill makes Giles, Wheeler and Burr and the Dawson heirs defendants, and prays against all of them an injunction, a decree to quiet title, and to cancel the fraudulent conveyances made by Dawson's heirs to Wheeler and Burr, and by Wheeler and Burr to Giles, to establish the complainants' title, and for further relief.

Wheeler and Burr and three of the heirs of Dawson, namely, Albert L. Dawson, M. S. Dawson, and Melita C. D. Tillman, filed a disclaimer of any right, title, or interest in the property; and affidavits were filed by thirty-one of the co-complainants, denying that they had authorized their names to be used in the bill, and repudiating all connection with it.

Giles then, on the 28th of February, 1882, presented a petition to remove the cause, as against him, to the Circuit Court of the United States for the District of Nebraska, alleging that he was and is a citizen of Iowa, and that the complainants (those of them who had not repudiated the proceedings) were citizens of Nebraska and other States; that there were as many different controversies as there were complainants, each claiming a separate parcel of the land, and that the several controversies were wholly between each individual plaintiff and himself, and were capable of being fully determined between them without the others being parties; that the several matters in dispute exceed the value of $500, etc. An order to remove the cause was made accordingly.

[599]

On the first of March, 1882, a motion was made by the complainants in the circuit court to remand the cause, on the ground, amongst other things, that it appeared by the pleadings that Giles is not the real party in interest, but that Wheeler and Burr, and the heirs of Jacob Dawson, are the really interested parties, and that the action is brought in this court (the circuit court) for their benefit; that all these parties are residents of Nebraska, except Giles, who is a mere nominal defendant. The motion to remand was not granted, although no action of the court on the subject at this time appears in the record; but it does appear afterwards, as will be shown hereafter, that the motion to remand was refused.

On the 5th of April, 1882, Giles filed his answer and a cross bill. The answer denies the charge of fraud, but admits that the only consideration of the deed from Dawson's heirs to Wheeler and Burr was $200 and an agreement to pay the heirs one third of the proceeds which Wheeler and Burr might recover; it denies that the deed to Giles was made for the purpose of suing in the courts of the United States. It states the marriage of the widow, Edith, and insists that her deeds conveyed only an estate during her widowhood, and that the title derived by Giles from the heirs of Jacob Dawson is valid. It sets out the proceedings in various suits brought against some of the complainants, particularly one in which the judgment was brought to this court, by which the will of Dawson was construed in favor of Giles and against the title of complainants. *Giles* v. *Little*, 104 U. S. 291 [Bk. 26, L. ed 745].

The cross bill is filed against all the complainants who did not repudiate the suit. It describes the different tracts held by the several complainants, alleges that they took with full knowledge of the will; that they have received large amounts of rents and profits; that their pretensions are a cloud on Giles' title, and prays for a construction of the will, a decree to quiet title, an account of rents and profits, an injunction, a receiver, etc. The complainants answered the cross bill, amongst other things denying that Giles had any real interest, and again raising the question of jurisdiction. It is unnecessary to notice the other pleadings in the cause. The parties went to proofs, and, on the final hearing, the original bill was dismissed in June, 1883, and an account of the improvements erected by the complainants, and of the rents and profits received by them, was ordered to be taken under the cross bill, and in September, 1884, a decree was rendered in favor of Giles, directing a surrender of the property held by the complainants respectively, on payment of the difference, in each case, between the value of the improvements erected and the rents and profits received. An appeal was taken from each of these decrees.

[600]

The first question to be considered is the jurisdiction of the circuit court to hear and determine the case. The complainants contested that jurisdiction from the time of the filing of the petition of removal; and a great deal of evidence was taken in reference to the charge that the deed to Giles was collusively made for the purpose of making a case for the federal courts.

But before examining that matter, there is another aspect of the question which presents itself on the face of the pleadings as they stood when the petition for removal was filed. The bill charged the defendants as co-conspirators in a scheme to raise a cloud on the title of the complainants, and to defraud them of their property. According to the allegations of the bill, the deed to Giles was a link in the chain of fraudulent acts charged. We have repeatedly held that a suit brought against several defendants, some of whom are citizens of the same State with the plaintiff, charging them all as joint contractors or joint trespassers, cannot be removed into the United States Court by those who are citizens of another State, although they allege in their petition for removal that they are not jointly interested or liable with the other defendants, and that their controversy with the plaintiff is a separate one. We think that the present case is one of that kind. The bill, as we have said, charges the defendants jointly. Giles could not, by merely making contrary averments in his petition for

[601] removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States Court. This matter has been fully considered in the following cases: *Louisville & N. R. R. Co.* v. *Ide*, 114 U. S. 52 [Bk. 29, L. ed. 63]; *Farmington* v. *Pillsbury*, 114 U. S. 138 [Bk. 29, L. ed. 114]; *Pirie* v. *Tvedt*, 115 U. S. 41 [Bk. 29, L. ed. 331]; *Crump* v. *Thurber*, 115 U. S. 56 [Bk. 29, L. ed. 328]; *Starin* v. *New York*, 115 U. S. 248 [Bk. 29, L. ed. 388]; *Sloane* v. *Anderson*, 117 U. S. 278 [Bk. 29, L. ed. 899]; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280 [Bk. 29, L. ed. 898]; *Core* v. *Vinal*, 117 U. S. 347 [Bk. 29, L. ed. 912]; *Mining Co* v. *Canal Co.* 118 U. S. 264 [*ante*, 282].

In *Louisville & N. R. R. Co.* v. *Ide*, the suit was originally brought by Ide in the Supreme Court of New York against several railroad companies forming a continuous line, including the plaintiff in error, to recover damages for the loss of cotton shipped at one end of the line and destined to the other. The Louisville and Nashville Company separated in pleading, and denied that the loss had occurred on its road, and removed the case, as to itself, to the Circuit Court of the United States, alleging in the petition for removal that the controversy with it was a separate one. The circuit court remanded the case, and on a writ of error we affirmed the order to remand. In delivering the opinion of the court, the Chief Justice said: "The claim of right to a removal is based entirely on the fact that the Louisville and Nashville Company, the petitioning defendant, has presented a separate defense to the joint action by filing a separate answer tendering separate issues for trial. This, it has been been frequently decided, is not enough to introduce a separate controversy into the suit, within the meaning of the statute. *Hyde* v. *Ruble*, 104 U. S. 407 [Bk. 26, L. ed. 823]; *Ayres* v. *Wiswall*, 112 U. S. 187, 192 [Bk. 28, L. ed. 693, 695]. Separate answers by the several defendants, sued on joint causes of action, may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sumn. 348. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final deter-
[602] mination in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

In *Pirie* v. *Tvedt* [*supra*] the case was one of malicious prosecution, and of course, by the common law, the defendants could be sued jointly or severally. But the plaintiff had elected to sue them jointly, as being jointly concerned in the prosecution complained of. The Chief Justice delivered the opinion of the court, and, after citing and reaffirming the case of *Louisville & N. R. R. Co.* v. *Ide*, he said: "The cause of action is several, as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts any more than it does a joint action on contract."

The present case is clearly within the rule established by these and the other cases referred to.

But we are also satisfied that the other ground is well taken; that the deed to Giles was collusively made for the mere purpose of giving jurisdiction to the courts of the United States; and that for this reason the case should have been remanded to the state court. We have examined the evidence on this subject with some care, and have come to that conclusion. Whether, under the former practice of the court, the deed to Giles, being binding between him and his grantors Wheeler and Burr, would have been deemed sufficient to give jurisdiction to the circuit court, although made for the purpose of such jurisdiction, it is not necessary to inquire. We are satisfied that by the Act of March 3, 1875, chap. 137, sec. 1, 18 Stat. at L. 470, Congress has intended to introduce a rule that shall put a stop to all collusive shifts and contrivances for giving such jurisdiction. The language of the fifth section of that Act is as follows: "That if, in any suit commenced in a circuit court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of the said circuit court, at any time after such suit has been brought or removed thereto, that such suit does [603] not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." Supp. to Rev. Stat. 175. Here the words "really" and "substantially," and the expression "improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable," are very suggestive, and show that, by giving the circuit courts authority to dismiss or remand the cause at once, if these things are made to appear, it was the intent of Congress to prevent and put an end to all collusive arrangements made to give jurisdiction, where the parties really interested are citizens of the same State. Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the circuit court; but when it is simulated and collusive, and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law.

In *Farmington* v. *Pillsbury* [*supra*], where certain bonds of a municipal corporation were declared void by a state court, as issued under an unconstitutional Act, and thereupon the holders of some of the coupons cut them off and transferred them to a citizen of another State, at much less than their face value, and

took his note therefor, with an agreement that he should give them one half of what he might recover, and the transferee then brought suit in the Circuit Court of the United States, we held that this was a collusive transfer, and within the provisions of the fifth section of the Act of 1875. The Chief Justice, in delivering the opinion of the court, after showing that the question of colorable transfers to create a case for the federal courts was formerly presented for the most part in writs for the recovery of real property, and could only be raised by plea in abatement; and that if the transfer was shown [604] to be fictitious and colorable such plea would be sustained, added: "Such was the condition of the law when the Act of 1875 was passed, which allowed suits to be brought by the assignees of promissory notes negotiable by the law merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship existed. This opened a wide door for frauds upon the jurisdiction of the court by collusive transfers, so as to make colorable parties and create cases cognizable by the courts of the United States. To protect the courts as well as parties against such frauds upon their jurisdiction, it was made the duty of a court, at any time when it satisfactorily appeared that a suit did not 'really and substantially involve a dispute or controversy' properly within its jurisdiction, or that the parties had been improperly or collusively made or joined, for the purpose of creating a case cognizable under that Act, 'to proceed no further therein,' but to dismiss the suit, or remand it to the state court from which it had been removed. The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record to be taken by plea in abatement before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of apparent parties. This is a salutary provision which ought not to be neglected. It was intended to promote the ends of justice, and is equivalent to an express enactment by Congress, that the circuit courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the Act."

An examination of the evidence in the present case shows conclusively, as it seems to us, that it is one of the kind referred to by the Chief Justice.

The widow, Edith J. Dawson, was married to her second husband, Pickering, November 15, 1879. Pickering was sworn as a witness, and says that the marriage was delayed some [605] time on the suggestion of Mrs. Dawson that she must first sell her property and give her children a chance to make a contract with Wheeler and Burr. She denies this, it is true, but the facts seem to corroborate Pickering's story. She certainly did dispose of most of the lands before the marriage at prices based upon the supposition that she could convey a fee; and, in evident anticipation of the marriage—for it was on the *tapis* for a considerable time—on the 15th of September, 1879, the heirs conveyed their interest in the property to Wheeler and Burr; and on the 10th of November, only five days before the marriage, Wheeler and Burr executed an agreement with the heirs that whenever they (Wheeler and Burr) should come into possession and be seised in fee simple absolute of the estate, or any part thereof, they would quitclaim to the heirs one undivided third interest, or pay them the value of such third in cash. This agreement was really the whole consideration of the conveyance.

The next thing done was the making of the deed from Wheeler and Burr to Giles, dated April 27, 1880, for the nominal consideration of $75,000, but really for no consideration at all except an agreement between them, of the same date as the deed, by which Wheeler and Burr agreed to prosecute all suits against claimants, at the expense of Giles, for the possession of the premises, and to render or procure all necessary legal assistance for such purpose; and Giles agreed to pay all expenses of such suits, and, in the event of final success of any such suits, to pay Wheeler and Burr the value of one third of the lands recovered, and to assume and discharge all indebtedness arising by reason of the contract of November 10, 1879, made with the Dawson heirs. A little later Giles gave Burr (who was his son-in-law) a full power of attorney to act for him in the matter; to sue, recover possession, sell, lease, mortgage and otherwise dispose of the lands, and execute deeds, and other instruments to that end, and to manage and control the property. But it nowhere appears that Giles ever advanced any money or did anything in the matter.

Now, who was Giles, who entered into this large speculation in real estate in Lincoln, amounting in value to over $75,000, and in the hands of adverse claimants, against whom suits [606] would have to be brought to get possession? He was a poor farmer, living in Clay County, Iowa, two hundred and fifty or three hundred miles from Lincoln. He had never seen the property; he did not know its value; he had never been at Lincoln; and when, some time after the deed was made to him, he was told that the property was worth $75,000, he seemed greatly surprised. He further admitted that he had never had the deed in his possession, and had never seen it. The record has a large mass of evidence on the subject, *pro* and *con*, which it is unnecessary to repeat. The contemporary declarations of Burr are equally suggestive. He is proved to have admitted that the deed was made to Giles in order that suit might be brought in the United States court. In July, 1880, he wrote a long and urgent letter to William R. Dawson, one of the heirs, in which he speaks of the case as his and theirs, and that, if properly managed, it would make all of them rich. Amongst other things, this is what he says:

"Your letter of late date was received, and I want to reply to some things relating to the suit of the *Dawson Heirs* v *Bacon*. I have but very little doubt in my mind but what I shall within four years from to-day win this suit and get you heirs all this property back again, and thereby not only make myself, but all of you heirs, independently rich. Of course it is a long and tiresome and expensive suit, but I expect and know that now, while commencing the same. Yet you heirs are all interested with me, and must help me all you can, as the men I

must fight are rich and numerous, and will do all they can to delay and hurt my prospects to win the case. Galey is already helping them all he can, by saying that he saw the will about one year after it was put in court; that your father at the time of his death was heavily in debt—to the full extent of his property, viz.: $10,000, etc., and that H. S. Jennings drew the will." This evidence might not be admissible against Giles, if it did not appear (as it does) that they were all concerned and implicated together in carrying out the general scheme, Burr being the *alter ego* of Giles, and Giles of Burr.

[627] Much more evidence to the same purport is contained in the record; and although counter-evidence was adduced by the defendants, we think that the weight of it all is decidedly to the effect that Giles really had no interest in the matter, and that the deed to him was made for the sole purpose of giving the circuit court jurisdiction. Being of this opinion, we think that the court was in error in not remanding the case to the state court.

It is contended by the appellees, however, that the decision of the judge in the case at law of Giles against Owens *et al*, upon the plea in abatement in that case, in which the issue was, whether the deed to Giles was collusively made for the purpose of bringing suit in the United States court, concludes the appellants on that point. A stipulation was entered into between the parties in this case that the issue on said plea in abatement should be tried, and that the decision thereon should be taken and entered of record as the decision upon the pleas filed in four other actions at law against other parties, and also of the issues in this suit as far as they are the same.

All that this stipulation amounts to, so far as it affects this case, is, that the trial and decision in the law case should be regarded as the decision in this. It is the same as if an issue had been directed by the circuit court, and a verdict had been rendered. The decision of the judge was adverse to the appellants and in favor of Giles; and, so far as this case is concerned, that decision, by virtue of the stipulation, is to be considered as the decision of the circuit court, and nothing more. But all the evidence taken on that trial is incorporated into this case, and is now before us. If we are satisfied that the whole evidence in the case, taken together, including that before the judge, does not support the decision, we are not bound by it. We have already stated our conclusion.

The stipulation above referred to, and the adoption thereby of the judge's decision in the case at law, as the decision of the circuit court, obviates another objection made by the appellee; to wit, that no decision of the circuit court was ever made on the motion to remand the cause.

The decrees of the Circuit Court are reversed, and the cause remanded, with directions to remand the same to the District Court of Lancaster County, from which it was removed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

[626]

JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 626-630.)

Act of Congress granting land to railroad corporation—construction of provision as to carrying mail—power of Postmaster-General.

1. The appellant was aided in the construction of its road by a grant of land from the United States. The granting Act contained a provision that the mails should be carried over the road at such rates as Congress might direct and, until the price should be so fixed, the Postmaster-General should have power to determine the same. Appellant had a written contract for the carrying of the mails from July 1, 1871 to June 30, 1875, at prescribed rates. After the termination of this contract appellant continued to carry the mails until June 30, 1880. March 21, 1876, the Postmaster-General fixed the compensation at a less rate until June 30, 1876. Further reductions were made under the Acts of July 12, 1876, and June 17, 1878. In each case notice was given the Company, and the service was continued and the reduced price received by it without objection.

2. On a petition filed to recover the difference between the price allowed and the price fixed previous to July 1, 1876, held:

That no implication arose that such was to be the compensation, either from the continuation of the service by the Postmaster-General after June 30, 1876, without objection, or from the fact that, under the regulations of the Department, appellant's road fell within the section in which contracts were to be made for four years from June 30, 1876.

[No. 867.]

Argued Oct. 21, 1886. Decided Nov. 1, 1886.

APPEAL from the Court of Claims. *Affirmed.* The case is stated by the court.

Messrs. **S. F. Phillips, A. J. Willard** and *S. M. Lake*, for appellant.

Mr. **E. M. Watson**, for appellee.

[627] *Mr. Justice* **Field** delivered the opinion of the court:

The petitioner, the Jacksonville, Pensacola and Mobile Railroad Company, was incorporated under the laws of Florida, and aided in the construction of its road by a grant of land from the United States. The Act making the grant contained a clause providing that the mails of the United States should be transported over the road and its branches under the direction of the Postmaster-General, at such price as Congress might, by law, direct; and that until the price should be thus fixed, the Postmaster-General should have power to determine the same. 11 Stat. at L. chap. 31, sec. 5. This provision was a condition attending the grant, with which the Company could not refuse to comply without subjecting itself to a claim for damages on the part of the Government, and possibly to a forfeiture of the grant. As was said in the case of *Chic. & N. W. R. R. Co.* v. *United States*, 104 U. S. 680 [Bk. 26, L. ed. 891], the power thus vested in the Postmaster-General to establish the price includes the power to prescribe the period of its duration. He might, if he thought expedient, and in many cases it would be so, prescribe specially for the service of each day. There may be, under some circumstances, temporary difficulties of transportation which would call for frequent, and, perhaps, daily changes in the prices allowed. When however, a price is agreed upon for a prescribed

service for a designated period, and there are collateral stipulations annexed to the same which could not be exacted by the Government, without the assent of the company, as, for instance, the giving of sureties for the performance of the service in a particular way, then, as held in the case cited, a contract is created which cannot be disregarded by the Government without a breach of good faith. But where no such collateral stipulations are made, and no duration of time is prescribed, but the [628] service is exacted simply from the obligation growing out of the acceptance of the condition of the land grant, it rests in the discretion of the Postmaster-General to change the price, from time to time, as in his judgment the public interests may require. It is not to be presumed that in such matters he will act in an arbitrary or unreasonable manner. For any abuse of his authority there is the security which exists with reference to the action of all heads of the Executive Departments, in their responsibility to their superior, and liability to be called to account by Congress. No abuse of authority, however, is suggested in the present case. An error of construction as to the rights of the petitioner is alone alleged.

It appears from the record that the petitioner had a written contract with the Government for the transportation of the mail between certain designated points, from July 1, 1871, to June 30, 1875, at prescribed rates; that the contract contained various stipulations on the part of the Company as to the manner in which the service should be performed, the free transportation of special agents of the Department, its liability to fine for neglects and omissions of duty, and for the giving of adequate security for the performance of its undertaking. The price for the service was prescribed, and no question is made as to the entire and satisfactory fulfillment of the contract by the Company, or of the payment of the compensation stipulated by the Government. After the termination of this contract the petitioner continued to carry the mail as previously, without any notice from the Postmaster-General that the price to be allowed for the service would be in any respect different, until the 21st of March, 1876, when he fixed the rate of compensation at a less sum for the service until June 30, 1876. The service was performed by the Company, notwithstanding the reduction made, and the reduced price was received without objection.

From the first of July, 1876, until June 30, 1880, the same service was performed by the Company; but further reductions from the compensation previously allowed were made under the Acts of Congress of July 12, 1876, [629] and of June 17, 1878. Notice of them was given to the Company, but the service by it was continued, and the reduced price was received, also, without objection. It is now claimed that the Company is entitled to the difference between the price thus allowed and the price paid previous to July 1, 1876. It is to recover such difference that the petition is filed; the contention being that, by the continuation of the service of the Company after June 30, 1876, without objection from the Postmaster-General, a contract was implied that the same compensation should be subsequently allowed.

At this time, also, by regulation of the Department, the United States were divided into four contract sections. A general letting for one of these sections was to take place every year, and contracts were to be then made for four consecutive years, commencing on the first of July. The road of the petitioner was within the section in which contracts were to end on June 30, 1875, until the regulation was altered, when it came within the section in which contracts were to end on June 30, 1876. From this latter fact, that the road was thus within the section in which contracts were to be made for four years from July 1, 1876, it is further contended that the contract implied from the service afterwards rendered, as mentioned above, was to continue for four years.

The answer to both positions is obvious. By the condition contained in the land grant, the Company, as already stated, was to transport the mail at such price as the Postmaster-General should determine, unless fixed by the law of Congress. No implication could, therefore, arise from the continuance of the service, other than that the Company was carrying out the obligation imposed by its acceptance of the land grant. Without specific stipulations by sureties, there could be no obligation on their part for the Company; nor, without specific stipulations by the Company, could there be any requirement on its part to perform many of the duties specially designated in the written contract. The Postmaster-General may have deemed it expedient for the public interest to change, enlarge, or omit entirely the requirements previously prescribed, and to call for others of a different character. No implication [630] can arise, one way or the other, from his inaction. All that the Company could ask or expect under the law was that he should prescribe a reasonable compensation for its service, and that the service would be continued so long as the public interests should require. No implication of law could extend further than this.

And as to the alleged duration of four years, it is sufficient to say that the regulation of the Department referred to was designed only to further the administration of the postal service, not to impose any obligation on the Postmaster-General; and it would be against all analogies to hold that a continuance of service, after the termination of a written contract for years, creates an obligation of a renewed contract, not merely upon a like compensation, but for the same duration of time. There is no principle that could justify the implication.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Ex parte:

In the Matter of the PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, ET AL., *Petitioners.* [610

(See S. C. Reporter's ed. 610-626.)

Admiralty—jurisdiction of district courts—petition for limitation of liability—writ of prohibition.

1. A District Court of the United States, as a court of admiralty, has no jurisdiction of a suit, either *in rem* or *in personam*, brought by a sufferer from a

fire, alleged to have been set on land by the negligence of a passing vessel, to recover damages from the vessel or her owner.

2. A district court cannot take jurisdiction in admiralty, of a petition for a limitation of liability, where it would not have had cognizance in admiralty originally of the cause of action involved.

3. Where it appears upon the face of the proceedings that a district court has no jurisdiction of an admiralty case, the case is one for a writ of prohibition.

[No. 4, Orig.]

Argued Oct. 12, 1886. Decided Nov. 1, 1886.

PETITION for a writ of prohibition. *Allowed.*

The case is stated by the court.

Mr. **Robert Rae** in support of the petition:

If the Act of 1851 does embrace injuries to real estate on land, a question which we do not here discuss, the District Courts of the United States, neither under the statute nor by the Rules in Admiralty, promulgated by the United States Supreme Court in that proceeding, have jurisdiction to give the petitioner the relief which it seeks, the tort complained of not being a maritime tort, and as such, not within the admiralty and maritime jurisdiction.

That the case is not within the admiralty and maritime jurisdiction is not now an open question.

The Plymouth, 3 Wall. 20 (70 U. S. bk. 18, L. ed. 125); *The Prof. Morse*, 28 Fed. Rep. 803; *The Maud Webster*, 8 Ben. 547; *The Rock Island Bridge Case*, 6 Wall. 213 (73 U. S. bk. 18, L. ed. 753); *The Neil Cochran*, 1 Brown, Adm. 162; *The Ottawa*, 1 Brown, Adm. 356.

The tort complained of, not being a maritime one, and as a consequence the admiralty without jurisdiction, the admiralty court is not competent to herein determine the facts out of which the liability and its limitation grew. It is only in such cases as are within the admiralty jurisdiction that its courts can properly hear and decide the matter in dispute.

Ex parte Hagar, 104 U. S. 520 (Bk. 26, L. ed. 816); *Ex parte Ferry Co.* 104 U. S. 519 (Bk. 26, L. ed. 815); *Ex parte Pa.* 109 U. S. 175 (Bk. 27, L. ed. 894).

The court must rightfully get jurisdiction before it can proceed to do this. The case must be of admiralty cognizance. In the case at bar, the vessel was not seized upon any libel filed; no proceedings were in the registry of the court and no cause was pending in such courts; under such circumstances the court cannot attempt to take jurisdiction and proceed to take cognizance of matters over which it has not admiralty jurisdiction; and when it does so it falls within the duty of this court under the Act of 1789 to issue a writ of prohibition to the district court.

Rev. Stat. 688.

The writ of prohibition has been used time out of mind to restrain the admiralty from taking jurisdiction of things occurring on land.

Godolphin, Adm. Jur. cap. 6, p. 71; *Rex* v. *Broom*, 12 Mod. 134, 15; *Grant* v. *Gould*, 2 H. Bl. 69-100; *Smart* v. *Wolfe*, 3 Term, 347; *Velthasen* v. *Ormsley*, 3 Term, 315; 1 Comyns, 376; *Ross* v. *Walker*, 2 Wils. 264; *King* v. *Casks of Brandy*, 3 Hagg. 280; *The Eleanor Robertson*, 6 C. Rob. 89; *The Public Opinion*, 2 Hagg. 398; *The Eliza Jane*, 3 Hagg. 335.

It is confessed that the district court has no jurisdiction to try the subject matter of the tort in controversy, but it is denied that a mistake in deciding to exercise its jurisdiction will justify a writ of prohibition. The jurisdiction of the admiralty is not general over torts committed on land; it has no jurisdiction whatever and therefore has no power to decide that the wrong doer may escape liability on any terms. It neither can give judgment against the defendant for the tort committed, nor satisfy the judgments of common-law courts. If it attempts it, it is a usurpation of jurisdiction, and not a mere error in the general exercise of its powers within the limits of its legitimate jurisdiction, and this usurpation may be prevented by prohibition.

Bradley v. *Fisher*, 13 Wall. 335 (80 U. S. bk. 20, L. ed. 646); *Ex parte Lange*, 18 Wall. 163 (85 U. S. bk. 21, L. ed. 872).

Messrs. **Geo. G. Greene, Jas. G. Jenkins,** *Jno. J. Fish, Fred. C. Winkler* and *A. A. L. Smith*, for respondent:

The statutory rule of limited liability is a maritime rule or regulation which courts of admiralty and maritime jurisdiction have jurisdiction to enforce.

While federal courts cannot, under the Constitution, be given jurisdiction in admiralty of cases not inherently of admiralty jurisdiction, the maritime law may be changed by Congress.

The Lottawanna, 21 Wall. 558 (88 U. S. bk. 22, L. ed. 654); *Prov. & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 589 (Bk. 27, L. ed. 1042).

And when a case arises under the maritime law as changed or established by Congress it is a maritime case, although it would not have been before the change, jurisdiction of which belongs to the federal courts as courts of admiralty and maritime jurisdiction. The case of the respondent, then, being within the statutory limitation of liability, if that limitation is a maritime rule or regulation, whether the damage by the vessel is on land or water, the enforcement of that regulation by the respondent's proceeding must be a maritime case. The vice of the contention of the other side, that the subject of this proceeding being a tort or the enforcement of liability for a tort not maritime nor of admiralty jurisdiction—*The Plymouth*, 3 Wall. 30 (70 U. S. bk. 18, L. ed. 125)—therefore the proceeding cannot be maintained, consists in the assumption that such is the subject of the proceeding; whereas, that subject is the enforcement of the limitation of such liability—of the commercial regulation of Congress. That regulation being one which Congress could rightfully make, it must have power to provide for its enforcement; and as it is a regulation of a maritime subject—ships and shipping or commerce by water—it is a maritime regulation; jurisdiction of the enforcement of which Congress may repose in the federal courts, under the provision of the Constitution that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. The rule is equally maritime whether it protects against liability for damage done by the ship on water, or on land. It is the thing protected that characterizes the rule, not the thing against which protection is given; and the thing protected being shipping and commerce by water, the rule is maritime.

Prov. & N. Y. S. S. Co. v. *Hill Mfg. Co.* 109 U. S. 593 (Bk. 27, L. ed. 1044); *Norwich Co.* v. *Wright*, 13 Wall. 104 (80 U.S. bk. 20, L. ed. 585).

Error of the district court in sustaining the foregoing positions does not warrant a writ of prohibition; but the mistake, if any, must be corrected on appeal.

The writ of prohibition is an extraordinary legal remedy used to prevent an inferior tribunal from usurping jurisdiction or abusing power. It is never allowed except in cases of usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief. If, therefore, the inferior court has jurisdiction of the subject matter in controversy, a mistaken exercise of the jurisdiction or of its acknowledged powers will not justify its employment.

High, Extra. Legal Rem. §§ 762-765, 767-772; *Kenlock* v. *Harvey*, Harper, 508; *Washburn* v. *Phillips*, 2 Met. 296; *Ex parte Greene*, 29 Ala. 52.

It will be denied in cases of doubt.

Re Birch, 15 C. B. 743; *The Charkieh*, L. R. 8 Q. B. 197; *Washburn* v. *Phillips*, 2 Met. 296-299.

And where there is an adequate remedy by appeal.

High, Extra. Legal Rem. §§ 771-772; *State* v. *Judge*, 21 La. Ann. 123; *People* v. *Circuit Court*, 11 Mich. 393; *People* v. *Marine Court*, 36 Barb. 341; *People* v. *Clute*, 42 How. Pr. 157; *Ex parte Peterson*, 33 Ala. 74; *Ex parte Warmouth*, 17 Wall. 64 (84 U. S. bk. 21, L. ed. 543); *Ex parte Gordon*, 104 U S. 515 (Bk. 26, L. ed. 814); *The Charkieh, supra; Ex parte Smyth*, 2 C. M. & R. 748, 3 A. & E. 719; *State* v. *Dist. Court*, 26 Minn. 233; *Ex parte Roundtree*, 51 Ala. 51.

In this respect it is like *mandamus*.

High, Ext. Legal Rem. §§ 188, 189; *Ex parte Newman*, 14 Wall. 165-168 (81 U. S. bk. 20, L. ed. 879, 880); *State* v. *Braun*, 31 Wis. 600-606; *Ex parte Braudlacht*, 2 Hill 367; *Ex parte Smith*, 34 Ala. 455.

Such being the office of the writ and the limitations of its use, it ought not to be granted on this application.

The district court in deciding the respondent's case within the maritime rule neither usurped or abused power. It did not usurp power, for having general jurisdiction of the enforcement of the rule it of necessity had power to determine its meaning and application. If it erred in the exercise of that power its mistake was not so glaring and indefensible as to amount to an abuse of power.

When a court has jurisdiction of the general subject matter of an action or proceeding it has power to determine whether the facts presented in a particular case make it a "part or instance" of that subject matter.

Hunt v. *Hunt*, 72 N. Y. 217-230; *Lange* v. *Benedict*, 73 N. Y. 12-27; *Ex parte Watkins*, 3 Pet. 203 (28 U. S. bk. 7, L. ed. 653); *Ex parte Parks*, 93 U. S. 18 (Bk. 23, L. ed. 787); *Ex parte Yarbrough*, 110 U. S. 651 (Bk. 28, L. ed. 274); *Bradley* v. *Fisher*, 13 Wall. 335 (80 U. S. bk. 20, L. ed. 646).

The district court has original jurisdiction of the enforcement of the rule of limited liability. In the exercise of that jurisdiction it must have power to decide whether the rule applies to the particular case; for that question is inherent in every case presented.

Ruling wrongly that a specified case is within some general subject of its jurisdiction, it commits error. Attempting to exercise jurisdiction over some subject matter when it has none, it usurps power. The error must be corrected by appeal; the usurpation may be prevented by prohibition.

The distinction is enforced by numerous decisions of this court.

Bradley v. *Fisher*, *Ex parte Watkins*, *Ex parte Parks*, *Ex parte Yarbrough*, and *Ex parte Gordon*, *supra; Ex parte Ferry Co.* 104 U. S. 519 (Bk. 26, L. ed. 815); *Ex parte Hagar*, 104 U. S. 520 (Bk. 26, L. ed. 816); *Ex parte Pa.* 109 U. S. 174 (Bk. 27, L. ed. 894); *Ex parte Slayton*, 105 U. S. 453 (Bk. 26, L. ed. 1067).

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 14th of January, 1886, the Goodrich Transportation Company, a Wisconsin corporation, filed, in the District Court of the United States for the Eastern District of Wisconsin, a petition for a limitation of its liability, as owner of the steamer Oconto, claiming the benefit of the provisions of sections 4283 and 4284 of the Revised Statutes. The substantial matters set forth in the petition are these: The Oconto was on a voyage, from Chicago, Illinois, through Lake Michigan and Green Bay, to the City of Green Bay, in Wisconsin, which she approached by entering the mouth of the Fox River. While she was passing up the river opposite the city, on the 20th of September, 1880, a fire broke out in a planing-mill, which the steamer had passed, and it spread to other buildings, about sixty-seven being destroyed or injured, causing a damage of not less than $100,000 to the buildings and property in them. Such damage exceeds the value of the steamer, and of her freight pending at the time of the fire, that value being about $12,400. There was insurance against fire on some of the buildings and property. The owners and insurers claimed that the fire was negligently communicated to the planing-mill from the steamer, and that the corporation was liable for all the loss and damage occasioned by the fire. Some of the owners sued it in state courts in Wisconsin to recover damages, by six suits, in which the Phenix Insurance Company, as insurer, was joined as a coplaintiff. One of those suits had been disposed of by a judgment in favor of the corporation. In another, a judgment against the corporation for $2,570 and costs was rendered in March 1885. An appeal from it by the corporation to the Supreme Court of Wisconsin is pending. The other four suits are pending. Other persons are threatening to sue the corporation by like suits. It denies its liability for any loss or damage occasioned by the fire, and insists that the fire did not originate from, or was not negligently communicated from, The Oconto, but says that, if it is so liable, the fire originated, and the losses and damages were occasioned, without the privity or knowledge of the corporation; and that it desires as well to contest its liability, and the liability of the vessel, for such losses and damages, as also to claim the benefit of sections 4283 and 4284 of the Revised Statutes, and to limit its liability to the value of the vessel and her freight then pending. It offers to enter into a stipulation with sureties to pay into the court the value of the vessel, and the amount of her pending freight, whenever ordered so to do.

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The prayer of the petition is for a decree that the corporation may have the benefit of such statutory provisions; that the value of the vessel immediately after the fire, and the amount of her freight then pending, be appraised; that the corporation may enter into a stipulation to pay such value and amount into court when required; that a monition issue for the proof of claims; that a commissioner be designated before whom claims shall be presented, and before whom the corporation may appear and contest said claims, and its liability on account of any loss or damage occasioned by the fire; that if it shall appear that the corporation was not liable for any such loss or damage, it may be so finally decreed; or otherwise, that the moneys secured by the stipulation be divided *pro rata* among the claimants; and that the prosecution of all the suits be restrained.

On this petition an order to show cause, returnable February 1, 1886, was made. The Phenix Insurance Company and the other plaintiffs in the five pending suits filed an answer, setting forth that, with the exception of the Insurance Company, they all were, and had been from before the fire, citizens of Wisconsin; that the amount of the insurance the Company had made on the property covered by the five suits was $9,700; and that the value of the property so insured and uninsured, belonging to the respondents, and partly insured in the Insurance Company, amounted to $28,000, with interest from the date of the loss. The answer also contains these statements: the property burned was situated on the shore of Fox River, wholly in the body of the City of Green Bay, and at a great distance from any navigable stream or other waters within the jurisdiction of the United States. The negligence of the owner of the steamer, in not having on her a contrivance to prevent the escape of sparks and fire from her smoke stack, and in starting her from her wharf with the exhaust on the inside of her smoke stack, within the City of Green Bay, caused the fire; the shore being covered with dry wooden buildings, and a heavy wind blowing across the course of the vessel towards the shore, and her [613] smoke stack throwing out large quantities of sparks, which were carried by the wind on to the shore and set fire to a planing-mill, from which the flames spread to the other buildings and property. The suits were all of them brought in the fall of 1880. The answer alleges that the court ought not to take jurisdiction of the petition, because the liability, if any, accrued by reason of a tort committed on the land to real estate in the body of a county and a State, and not on any navigable waters of the United States; and that the matters complained of are purely of common-law cognizance, and of right triable by a jury, and not by a commissioner appointed under the admiralty rules applicable to such proceedings.

The respondents moved to dismiss the petition for want of jurisdiction, which motion was denied, and the court, on March 15, 1886, made an order appointing appraisers to appraise the value of the steamer as it was on September 20, 1880, with the value of her freight earned on the voyage she was on.

The Phenix Insurance Company and the other plaintiffs in the five suits now present to this court a petition for a writ of prohibition to the judge of the district court, prohibiting him from proceeding to give the relief prayed for in the petition of the owner of the vessel.

It is provided by section 688 of the Revised [616] Statutes, that this court "shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction." This provision is taken from section 13 of the Act of September 24, 1789, 1 Stat. at L. 80. The question to be determined is, therefore, whether the district court has jurisdiction to entertain the proceeding in this case for the limitation of liability.

Sections 4283, 4284, and 4285 of the Revised Statutes provide as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of [617] such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

The claim to a limitation of liability in the present case is made under that clause of section 4283 which provides that "the liability of the owner of any vessel" "for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." That section does not purport to confer any jurisdiction upon a district court. Section 4285, in providing for the transfer to a trustee of the interest of the owner in the vessel and freight, provides only that the trustee may "be appointed by any court of competent jurisdiction," leaving the question of such competency to depend on other [618] provisions of law.

Nothing is clearer than that by the express

adjudication of this court, the district court, as a court of admiralty, would have no jurisdiction of a suit either *in rem* or *in personam*, by any one of the sufferers by the fire, to recover damages from the vessel or her owner It was so held in *The Plymouth*, 3 Wall. 20 [70 U. S. bk. 18, L. ed. 125]. In that case a steam vessel, anchored beside a wharf in the Chicago River, in navigable water, took fire through the negligence of those in charge of her. The flames spread to the wharf and buildings upon it. Their owners sued the owners of the steam vessel *in personam*, in the District Court for the Northern District of Illinois, in admiralty, for the damage. That court dismissed the libel for want of jurisdiction, and the circuit court affirmed the decree. On appeal by the libelant this court affirmed the decree of the circuit court. The argument in favor of the jurisdiction is very fully given in the report. It was urged that the vessel was a maritime thing; that the locality was maritime, because the vessel was moored in navigable water; that the principal thing drew after it the incident, although the damage was suffered on land; and that, under the "rule of locality," "that, in cases of tort, the jurisdiction depends on the locality of the act done, and that it must be done on navigable water," the locality of the act "embraced the entire space occupied by the agent and the object, and the spatial distance passed over by the casual influence in accomplishing the effect." But *Mr. Justice* Nelson, delivering the unanimous opinion of this court, said that the true meaning of the rule of locality in cases of marine torts was, that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters, to be within the admiralty jurisdiction. In answer to the argument that the vessel which communicated the fire was a maritime instrument, the court said that the jurisdiction did not depend on the wrong having been committed on board the vessel, but on its having been committed on navigable waters; and that the substantial cause of action, arising out of the wrong, must be complete within the locality on which the jurisdiction depended. It added: "The remedy for the injury belongs to the courts of common law."

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Under this authoritative decision, as the owners of the burned property could not sue originally in the admiralty for their damages, it is impossible to see how, by the present form of proceeding, the owner of the steamer can give to the admiralty court jurisdiction to entertain the suits for the damage, by a practical removal of them into the admiralty court. For the petition of the owner of the vessel says that it desires as well to contest its liability for the damage, as to claim the benefit of a limitation of liability; and it prays that it may be allowed to contest in the admiralty court its liability for the damage, and that, if it is not liable. there may be a decree to that effect.

As there is no foundation in the general admiralty jurisdiction of the district court for its assumption of jurisdiction in this case, and none in the special provisions of the statute for the limitation of liability, it is sought to uphold the jurisdiction under the Rules in Admiralty promulgated by this court in reference to the limitation of liability. The provisions of the Revised Statutes on the subject of the limitation of liability were taken from the Act of March 3, 1851, 9 Stat. at L. 635. There is nothing in that Act, nor in the corresponding enactments in the Revised Statutes, in regard to the promulgation of any rules by this court for procedure in the matter. The rules it has made (Rules 54, 55, 56, 57) are Rules in Admiralty, promulgated May 6, 1872, 13 Wall. XIII [Bk. 20, L. ed. 921]. They were announced as "Supplementary Rules of Practice in Admiralty, under the Act of March 3, 1851, entitled 'An Act to Limit the Liability of Shipowners, and for Other Purposes.'" They are authoritatively embodied in, and numbered as part of, the "Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction on the Instance Side of the Court, in pursuance of the Act of the 23d of August, 1842, chapter 188." The authority given to this court by the Act of 1842 was in section 6, 5 Stat. at L. 518, and was in these words: "The supreme court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the District and Circuit Courts of the United States, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings in suits at common law or in admiralty and equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein." These provisions, as applied to suits in admiralty in the district courts, are to be found now, with some variations. in sections 862 and 917 of the Revised Statutes. In section 862 it is enacted that "the mode of process in causes" "of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided." In section 917 the enactment is that "The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used, in suits in equity or admiralty, by the circuit and district courts." The addition, in section 917, of the words "in any manner not inconsistent with any law of the United States," not found in section 6 of the Act of 1842, is worthy of note, as bearing on the construction of that section, and of rules to be sustained under its provisions, though not implying that any power existed, under the Act of 1842, to make rules inconsistent with a law

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of the United States. So, too, by section 913 of the Revised Statutes it is enacted, that "The forms of mesne process, and the forms and modes of proceeding in suits of equity, and of admiralty and maritime jurisdiction, in the circuit and district courts, shall be according to the principles, rules and usages which belong to courts of equity and admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof, but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States." These words, "not inconsistent with the laws of the United States," are not found in the original statutory provisions from which section 913 was taken. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578, 591-594 [Bk. 27, L. ed. 1038-1044].

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In view of the decision made by this court at December Term, 1865, in the case of *The Plymouth*, it is not to be presumed that the six of the judges upon the bench when it was made, who were also upon the bench when the rules of May 6, 1872, were promulgated, intended that those rules should contain anything in conflict with the decision in the case of *The Plymouth*. Nor are those rules capable of any such construction. They are in these words:

"*Supplementary Rules of Practice in Admiralty, under the Act of March 3, 1851, entitled 'An Act to Limit the Liability of Shipowners, and for Other Purposes.'*

54. When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said Act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said Act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the postoffice, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

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55. Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said Act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said Act of Congress, or both.

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57. The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules."

There is nothing in any of these rules which purports to enlarge the jurisdiction of the District Courts of the United States as to subject matter. On the contrary, they exclude any such construction, and leave that jurisdiction in admiralty within the bounds set for it by the Constitution and statutes and the judicial decisions under them. Rule 54 provides that when a vessel is libeled, or her owner is sued, he may file a libel or petition for a limitation of liability "in the proper District Court of the United States, as hereinafter specified." Rule 56 provides that in the proceeding the owner may contest his liability or that of the vessel, independently of the limitation of liability

claimed, and that the opposing party may contest the right of the owner either to an exemption from liability or to a limitation of liability. What is the "proper district court" referred to in Rule 54 and contemplated by Rule 56? It is the court, and only the court, mentioned in Rule 57; namely, the district court in which the vessel is libeled; or, if she is not libeled, then the [624] district court for any district in which the owner "may be sued in that behalf." There is nothing in these rules which sanctions the taking of jurisdiction by a district court on a petition under the rules, where that court could not have had original cognizance in admiralty of a suit *in rem* or *in personam* to recover for the loss or damage involved.

Nor do we find anything in any of the decisions of this court on the subject of the limitation of liability, which supports the view that a district court can take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved. In *Norwich Co.* v. *Wright*, 13 Wall. 104 [80 U. S. bk. 20, L. ed. 585], the case which furnished the occasion for the making of the rules, and which came before this court again in *The City of Norwich*, 118 U. S. 468 [*ante*, 134], the damage was occasioned by a collision on navigable water between two vessels, and a fire resulting from it on board of one of them. In all the other cases in which this court has upheld proceedings for limitation in a district court, there was original admiralty jurisdiction of the cause of action. In *The Benefactor*, 103 U. S. 239 [Bk. 26, L. ed. 351], the cause of damage was a collision on the high seas, and the petition for limitation was filed in the same district court in which the offending vessel was libeled. In *The Scotland*, 105 U. S. 25 [Bk. 26, L. ed. 1001], and 118 U. S. 507 [*ante*, 153], there was a like cause of action, and the limitation was claimed by an answer to a libel *in personam* in a district court. In *Ex parte Slayton*, 105 U. S. 451 [Bk. 26, L. ed. 1066], the petition for limitation was filed in a district court, by the owner of a vessel which had foundered, to limit his liability for the loss of goods carried, and for damage to another vessel by a prior collision, he not having been first sued. He transferred to a trustee, appointed by the court, his interest in the vessel and in the freight pending. See *The Alpena*, 10 Biss. 436. This court, being applied to for a writ of prohibition, refused to grant it. It held that the owner of a vessel may, before he is sued, institute appropriate proceedings in a court of competent jurisdiction, to obtain a limitation of liability; that the words "any court," in section 4284, mean, "any court of competent jurisdiction;" and that, as the transfer had been made and the freight [625] money paid over to the trustee, the district court had jurisdiction to apportion the fund. But it is to be noted that the causes of action were in fact of admiralty jurisdiction. In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* [*supra*], the cause of action was a loss, by the burning of a vessel, of goods carried by her; and the petition for limitation was filed in the district court of the district where the fire occurred and where the remnants of the vessel remained, and the contract of affreightment was of admiralty cognizance. In *The Great Western*, 118 U. S. 520 [*ante*, 156], the cause of damage was a collision on the high seas, and the claim to limitation was made in the answer in a suit *in personam* in a district court in admiralty to recover for the damage.

We are brought, therefore, to the conclusion that there is nothing in the Admiralty Rules prescribed by this court which warrants the jurisdiction of the district court in the present case.

Our decision against the jurisdiction of the district court is made, without deciding whether or not the statutory limitation of liability extends to the damages sustained by the fire in question, so as to be enforcible in an appropriate court of competent jurisdiction. The decision of that question is unnecessary for the disposition of this case.

It is contended that the mistake of the district court must be corrected by appeal, and that the case is not one for a writ of prohibition. Where the case is within admiralty cognizance, the district court may decide whether the party is entitled to the benefit of the statute, and a writ of prohibition will not lie. But where, as here, the tort is not a maritime tort, there can be no jurisdiction in the admiralty to determine the issue of liability or that of limitation of liability. This court refused a writ of prohibition where a suit *in rem* was brought against a vessel, in admiralty, in a district court, to enforce an alleged lien for wharfage on the ground that a contract for the use of a wharf by a vessel was a maritime contract, and cognizable in the admiralty, and that, as a lien arose in certain cases, the admiralty court was competent to decide in the given case whether there was a lien. *Ex parte Easton*, 95 U. S. 68 [Bk. 24, L. ed. 373]. So, also, a writ of [626] prohibition was refused where a suit in admiralty was brought, in a district court, to recover damages for the loss of life by a collision between two vessels, on the ground that damages from collision were within admiralty jurisdiction, and the admiralty court could, therefore, lawfully decide whether such damages embraced damages for the loss of life. *Ex parte Gordon*, 104 U. S. 515 [Bk. 26, L. ed. 814]. But in the present case the district court is called upon by the petition of the owner of the vessel to first determine the question of any liability, when it has no jurisdiction of the cause of action, and then to determine whether the statute covers the case.

The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings. *U. S.* v. *Peters*, 3 Dall. 121 [3 U. S. bk. 1, L. ed. 535].

A writ of prohibition will issue.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[682] KANSAS CITY, LAWRENCE & SOUTH KANSAS RAILROAD COMPANY, *Appt.*

v.

BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL of the UNITED STATES, For and On Behalf of the UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 682-695.)

Public lands—grants for railroad purposes—construction of statutes—point of junction—action of the officers of the Land Department—how far conclusive.

*1. The Acts of Congress of March 3, 1863, July 1 1864, and July 26, 1866, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho Valley, to the southern line of that State; and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted.

2. The junction of this road with the one from Leavenworth by way of Lawrence in the direction of Galveston Bay, as provided in the Act of 1863, was not required to be on the very crest of the Neosho Valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho River; and as this point has been adopted by the companies building both roads, and accepted by the officers of the land department in selecting indemnity lands, there is no sufficient reason to be found in the point of junction to vacate the certification of these lands to the State for the company which has built the road and received the patents of the State.

3. Nor is there any other sufficient reason found in the record in this case for setting aside the evidences of title to these lands issued to the corporation which built the road within the time required by law, to the approval of the officers of the Government, whose primary duty it was to certify these lands, and who did so within the scope of their powers.

[No. 749.]

Argued Oct. 18, 19, 1886. Decided Nov. 8, 1886.

APPEAL from the Circuit Court of the United States for the District of Kansas. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. T. Britton, John F. Dillon, Geo. W. McCrary,** *James Hagerman* and *A. B. Browne*, for appellant.

Messrs. **Wm. Lawrence, E. M. Watson** and *A. H. Garland, Atty-Gen.*, for appellee.

[685] *Mr. Justice* **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court of the District of Kansas. The suit is brought by [686] B. H. Brewster, Attorney-General of the United States, for and on behalf of the United States. The object of it is to set aside certain instruments in writing, which, if they are valid, are supposed to convey title from the United States for a considerable quantity of land in southeastern Kansas.

An Act of Congress, approved July 26, 1866, granted to the State of Kansas "Every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of the road, and not exceeding in all ten sections per mile: * * * for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near that military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas."

There is the usual clause in this grant providing that if "it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this Act."

This railroad company, for whose benefit the grant was made to the State of Kansas, afterwards changed its name, by a valid procedure, into that of the Missouri, Kansas and Texas [687] Railroad Company. Under this latter name it built the road contemplated by this grant, which was completed in due time, and asserted a claim before the Commissioner of the General Land-Office for the lands now in question as indemnity for others lost by the previous sale, appropriation, or other disposition of them under the clause above cited in the Act of 1866. These lands were, on that demand, certified to the State of Kansas, and by the State patented to the railroad company. The Missouri, Kansas and Texas Railroad Company afterwards, for a valuable consideration, conveyed them to the appellant in the present case, the Kansas City, Lawrence and Southern Kansas Railroad Company.

The object of this suit is to vacate and declare void the certification of the lands by the Secretary of the Interior to the State of Kansas, as well as the patents issued by that State to the railroad company. There is no allegation of fraud, accident, or mistake, except as the alleged want of authority or power in the officers of the United States to certify these lands to that State may be a mistake in law. Unquestionably, if there was no such power, the government has a right by this proceeding to have those instruments declared void and set aside as a cloud upon its title. The authority of the Commissioner of the General Land-Office and the Secretary of the Interior to make this certification of the lands to that State for the benefit of this company depends upon the true construction of this Act of 1866, and of certain other statutes on the same subject.

Since the railroad company has constructed

*Head notes by *Mr. Justice* MILLER.

the road as contemplated by the statute, and has received the patents for the lands found in place along the line of this road, that is to say, every alternate section, of odd numbers, which had not been previously disposed of, and as the officers of the government have certified the lands now in controversy to be properly selected in lieu of such as were not found in place, it would seem to devolve upon the plaintiffs to show some reason why this authority has not been properly exercised, for the statute declares that the Secretary shall *indicate these* indemnity lands. It was his primary duty, and that of the Commissioner of the General Land-Office, to ascertain whether any lands, and, if so, what amount, were not found subject to the Act by reason of previous disposition under the homestead or preemption laws or reservations, and to select the indemnity lands. They have accordingly, both in the bill and in argument, set up the facts which they suppose to show the invalidity of these transfers.

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The first of these, and the most important, is, that by an Act of March 3, 1863, and a supplementary Act of July 1, 1864, these lands became appropriated to the building of another road through the same region of country and through the same lands, the grant being to the State of Kansas for the purpose of building that road. It is argued that these grants, instead of being made by Congress in aid of one and the same road, are different and conflicting grants, and that the earlier grants of 1863 and 1864 prevent the M. K. & T. R. R. Co. from realizing the bounty of Congress on that subject, because there is in the grant to the State for the benefit of the Union Pacific Railroad Company, Southern Branch, an express reservation of any lands granted previously for railroad purposes. The language of the Act of 1866 on this subject is as follows:

"*Provided*, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this Act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

As the lands granted by the prior Acts of 1863 and 1864, had, by the Act of the Legislature of Kansas, been granted to the Atchison, Topeka, and Santa Fé Railroad Company, a then existing corporation of that State, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho River, which might have run through these same lands if it had been built by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the Act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A. T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands, twenty miles in width, that the M. K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, the argument would be almost irresistible.

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If, at the time that the Act of 1866 was passed, the A. T. & S. F. R. R. Co., or any other company than the one to which the grant of 1866 was made, was intending to build a road, or expected to build one, or had any authority from the State of Kansas to build one, under the Acts of 1863 and 1864, the argument would have force. But on the 9th day of March, 1866, which was four months prior to the Act of 1866, the A. T. & S. F. R. R. Co. entered into an agreement with the U. P. R. R. Co., Southern Branch (afterwards known as the M. K. & T. R. R. Co.), by which the latter company assumed all the obligations of the former in regard to building the road which that company had assumed in accepting the grant by the State of Kansas, in consideration of which the A. T. & S. F. R. R. Co. assigned to the U. P. R. R. Co., Southern Branch, all its right, title, and interest in the lands appropriated to the building of that road by the Acts of March 3, 1863, and July 1, 1864, and by the Acts of the Kansas Legislature conferring these lands on that company. So that, with the exception of the ratification of this agreement and assignment by the State of Kansas, and so far as the two railroad companies themselves could make such an assignment, the U. P. R. R. Co., Southern Branch, to which the grant of 1866 was made, had, before the passage of that Act, become possessed of all the rights existing under the Acts of 1863 and 1864 with regard to building a railroad down the Neosho Valley.

It is not to be supposed that Congress was ignorant of this transaction, nor that, if the representatives in Congress of the State of Kansas had been opposed to this transfer, they would have consented to the passage of the Act of 1866. But, as that State did ratify this transfer by the one company to the other within six or eight months after it was made, it is reasonable to suppose that Congress, in legislating upon such an important grant of public lands for public uses, did not intend to have two parallel roads for a long distance within the narrow strip of the Neosho Valley, but did intend by all this legislation to secure one road; and, being aware of the transfer by the A. T. & S. F. R. R. Co. to the U. P. R. R. Co., Southern Branch, and of the willingness of the State of Kansas, when her Legislature could meet, to ratify that transfer, designed by the Act of 1866 to place also in the hands of the latter company the same right and the same grant for the same purposes, and for the one road.

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In support of this view it will be seen that, in the later Act of 1866, Congress, departing from the principle of the former Acts of making the grant directly to the State without prescribing by what means or by what corporations it should construct the road, declares expressly that the grant is made to the State of Kansas for the benefit of the U. P. R. R. Co., Southern Branch; and it did this obviously for the purpose of consolidating all these grants into one grant in the hands of that company, which already had all the rights vested by the other statutes necessary to enable it to build this road down the Neosho Valley.

The history of the legislation of Congress and of the State of Kansas on this subject almost conclusively shows that the several statutes are to be taken and construed as *in pari materia*, and that the only object was the building of one road. By the Act of 1866 there was no grant in aid of any other road but that one. The Act of 1863 made the grant to the State of Kansas for the purpose of aiding in the construction of a road from the City of Atchison, by the way of Topeka, the capital of the State, to the western line of the State, *with a branch from where this road crosses the Neosho*, down the valley of that river to the point where a road from Leavenworth and Lawrence south, for which a grant was made in the same Act, crosses the Neosho Valley. In this Act no [691] corporation is named, but it was left to the State, to which the grant was in terms made, to employ such agency in the way of a corporation, private individuals, or its own officers, for the building of the road, as it might choose. This point of intersection with the Neosho River was some distance south of Fort Riley, through which the main branch of the U. P. R. R., Eastern Division, passed on its way from the Missouri River to the Pacific Coast, and was at or near the Town of Emporia. In 1864 Congress passed an Act making an additional grant of lands to the State for a railroad from Emporia, by way of Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad in said State. Both of these Acts were accepted by the State of Kansas, and both the lands granted and the right to build the roads mentioned in these Acts of Congress were conferred upon the A. T. & S. F. R. R. Co. by the State. These two pieces of road, if ever they were built, would necessarily constitute one continuous road from Fort Riley down the Neosho Valley to the point where the road should cross the line of the Leavenworth, Lawrence and Fort Gibson Railroad, and this is the road built by the M. K. & T. R. R. Co. under the Act of 1866, and under its contract with the A. T. & S. F. R. R. Co and the grants of the State of Kansas.

Now, it is a strained construction of the Act of 1866, in the face of all the probabilities of the case, imputing to Congress, in which that State had two Senators and several members of the House of Representatives, great carelessness, to hold that they intended each one of these separate statutes to stand by itself and the claims to be asserted under them to be distinct grants for different railroads. It is much more reasonable and consonant to all we know of the transaction, and in consideration of the almost certainty that Congress had in view the single purpose of building one road down the Neosho Valley from Fort Riley to the point of intersection with the other road, and that it was aware of the agreement between the A. T. & S. F. R. R. Co. and its grantee in the Act of 1866, to hold that it intended by the later Act to ratify and make good the right which the U. P. R. R. Co., Southern Branch, already had to [692] the same lands for the purpose of building that road.

The fact that the Act of 1866, while in general terms granting these lands to the State of Kansas, declared that that State should hold them for the benefit of the U. P. R. R. Co. Southern Branch, so far from militating against this view of the subject, tends to confirm it. Intending to ratify, to make good, and add to the force of the title of that company, which it had derived from its agreements with the A. T. & S. F. R. R. Co. it did not leave it even in the power of the State of Kansas to confer these lands upon any other company than this one, and thereby prevented all conflict of claims under these several grants. This view of the subject was taken by Mr. Browning, Secretary of the Interior, in a letter addressed to the Commissioner of the General Land-Office, March 25, 1867, directing the withdrawal of the lands along the line of the road from public sale or preemption for the benefit of the U. P. R. R. Co. Southern Branch, and it has been acted upon by the Land Department and by the various Secretaries of the Interior, from that day to this, as the true construction of the statutes.

It is true that when the M. K. & T. R. R. Co. made its application for the lands now in controversy, as indemnity lands, it asserted rights under the Acts of 1863 and 1864 by virtue of the assignment of the A. T. & S. F. R. R. Co., and the ratification of that assignment by the State of Kansas, and also under the Act of 1866 directly to that company; and it is true that the Secretary of the Interior, while acknowledging the claim to have been made under all the Acts, certified the lands to the State of Kansas in accordance with the terms of the Acts of 1863 and 1864, instead of issuing patents directly to the railroad company, as was provided for in the Act of 1866. But since that company had all the rights conferred by all three of these statutes, and by the ratification by the State of Kansas of the transfer from the A. T. & S. F. R. R. Co., and since that State, after these lands were certified to it for the benefit of this company, issued to it patents of the State for those lands, it is obvious that the company thus acquired the real ownership and the equitable interest in the lands which it had [693] earned by building the road, in accordance with the provisions of all the statutes and all the contracts made upon the subject. If there be any informality in the attempt of the Secretary of the Interior and of the State of Kansas to confer upon the railroad company the legal title to these lands, it is for the company to seek relief and to have those informalities corrected, not for the United States to set aside its solemn instruments in which those rights are evidenced, and under which not only the railroad company then interested, but its grantee, the present appellant, holds these lands or has sold them to innocent purchasers. So far, then, as this objection goes, that one of these Acts of Congress nullifies the others, we think it to be untenable.

Another objection strongly insisted upon arises out of the language of the Act of 1863. That Act provided for two roads, with branches to each. The first was a road from the City of Leavenworth, by way of the Town of Lawrence, to the southern line of the State, in the direction of Galveston Bay, in Texas. The second was a road from the City of Atchison, by way of Topeka, to the western line of the State, in the direction of Fort Union and Sante Fé, in New Mexico, with a branch

from where this last named road crosses the Neosho River, down the valley of that river to the point where the said first-named road enters the said Neosho Valley. This branch down the Neosho Valley is the road now under consideration, and the grant of lands of 1863 is to the point on its line where the first-named road, the Leavenworth, Lawrence & Fort Gibson, enters the said Nesoho Valley.

It is said that the road of the M. K. & T. R. R. Co., which we have already held to represent the grant of Congress under this statute, was not constructed to the point where the L. L. & F. G. R. R. entered the Neosho Valley, but that those two roads joined at a point far within the entrance of the L. L. & F. G. R. R. into the valley. The distance is said to be about eight or ten miles, and this is supposed to defeat the right of the company building this road to the lands on each side of it. But we are of opinion that this is too narrow a con-
[694] struction of the language describing the point at which the two roads mentioned in the same statute were expected to meet and cross each other. The construction thus asserted requires that the exact point of the high ground on the north of the Neosho River should be ascertained with great precision where the railroad of the other company, coming from the north, enters the valley. It seems to us, however, that the purpose of Congress was to make a grant of lands along the Neosho Valley to the company which should build it to the most appropriate point, wherever that might be, in this narrow valley at which the two roads might chance to come together; and that, as the road has been built and the lands earned, and the officers of the Federal Government having charge of the matter have accepted this place of junction as the proper one to govern the selection of lands for the company building the road, and since neither of those roads make any objection to this decision, and it is impossible to see how any substantial right of any person can be injured by it, it is the duty of the court to accept the location of the road as a proper location, in accordance with the action of the officers of the Land Department; and that it is not a case for the Government of the United States to interfere to set aside its own action in the matter, under the loose terms employed in the Acts of Congress.

In support of this view of the subject it must appear to any thinking mind, that the grant of lands to the M. K. & T. R. R. Co. would not be defeated if the other road from the north did not build into the valley of the Neosho River at all; and yet, if the strict and literal construction of the phrase, "where that road enters the valley," should be adopted, that would be the effect upon the grant. The purpose of Congress being to have these roads cross within the narrow valley of the Neosho River, and the grant of lands to the M. K. & T. R. R. Co. terminate at the point where it came to a junction with the L. L. & F. G. R. R., the latter being continued on to the south, we do not think this objection sufficient to justify a decree setting aside the action of the officers of the government.

It is to be observed that this objection is raised under the language of the Act of 1863, and that the Act of 1866 contains no such requirement as that with reference to the crossing of the roads, it being declared in the latter Act [695
that the road is to be built down the valley of the Neosho River to the southern line of the State. Of course, if the Act of 1866 is, as we suppose, supplementary to the Acts of 1863 and 1864, the description of the route of the road and its terminus in the later Act is the one which must govern the grant of lands.

Another objection urged to the ownership of the lands by this Company under the patents from the State of Kansas is, that the Company has received more lands than it was entitled to under the grant. We do not think it necessary to enter into the details of the evidence of how much land was granted, how much was found in place, and how much the road was entitled to as indemnity for lands not so found in place. In the first place, we are not at all satisfied by the evidence in the record that the lands received are in excess of the various grants to this Company. In the next place, the issue is not made fairly in the bill; and certainly no particular certificate, nor any particular patent from the State of Kansas is pointed out as being the one which contains the excess over the grant; and it is not possible for the court, under any evidence or any pleading, to ascertain which of these certificates and of these patents, or what particular portions of them, should be held void and what valid. *U. S.* v. *B. & M. R. R. Co.* 98 U. S. 334 [Bk. 25, L. ed. 198].

And, lastly, while we are not disposed to hold the action of the officers of the Land Department of the Government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention and all the means of ascertaining what was right, should be set aside in this case. There are other grounds urged for granting the relief sought by the bill, but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here.

The decree of the Circuit Court is reversed, and the case remanded to it, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PENNSYLVANIA RAILROAD COMPANY ET AL., *Appts.*, [630
v.
ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY, *Appt.*,
v.
INDIANAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Petition for rehearing overruled.

[Nos. 112, 209.]

PETITION for rehearing filed May 10, 1886. Briefs filed September 30, and October 9, 1886. *Overruled November 1, 1886.*

See report of this case on merits, *ante*, 83.

Messrs. **J. E. McDonald, John M. Butler** and **Joseph D. Bedle,** for the St. Louis, Altoh and Terre Haute R. R. Co., in support of the petition for a rehearing—

Cited: *R. R. Co.* v. *Koontz,* 104 U. S. 12 (Bk. 26, L. ed. 645); *R. R. Co.* v. *Harris,* 12 Wall. 83 (79 U. S. bk. 20, L. ed. 358); *Bank of Augusta* v. *Earle,* 13 Pet. 588 (38 U. S. bk. 10, L. ed. 307); *Hill* v. *Nesbet,* 100 Ind. 341; *Ryan* v. *Leavenworth, etc. R. Co.* 21 Kan. 365; *Bridgeport* v. *Housatonic R. R. Co.* 15 Conn. 475; *P. C. & St. L. R. Co.* v. *Kain,* 35 Ind. 291; *C. & M. R. R. Co.* v. *Paskins,* 36 Ind. 380; *P. C. & St. L. R. Co.* v. *Bolner,* 57 Ind. 572; *P. C. & St. L. R. Co.* v. *Hannon,* 60 Ind. 417; *J. M. & I. R. R. Co.* v. *Downey,* 61 Ind. 287; *C. H. & D. R. R. Co.* v. *Bunnell,* 61 Ind. 183; *P. C. & St. L. R. Co.* v. *Currant,* 61 Ind. 38; *P. C. & St. L. R. Co.* v. *Hunt,* 71 Ind. 230; *C. H. & D. R. R. Co.* v. *Leviston,* 97 Ind. 488; *Smead* v. *Indianapolis etc. R. R. Co.* 11 Ind. 111; *State Bd. Agriculture* v. *Citizens St. R. Co.* 47 Ind. 407; *Hitchcock* v. *Galveston,* 96 U. S. 351 (Bk. 24, L. ed. 662); *Zabriskie* v. *C. C. & C. R. R. Co.* 23 How. 381 (64 U. S. bk. 16, L. ed. 488); *Low* v. *Cent. Pac. R. R. Co.* 52 Cal. 60; *Stewart* v. *Erie Trans. Co.* 17 Minn. 372; *Green Bay & Minn. R. R. Co.* v. *Union S. Co.* 107 U. S. 98 (Bk. 27, L. ed. 413); *R. Co.* v. *McCarthy,* 96 U. S. 266 (Bk. 24, L. ed. 695); *San Antonio* v. *Mehaffy,* 96 U. S. 315 (Bk. 24, L. ed. 817); *Daniels* v. *Tearney,* 102 U. S. 420 (Bk. 26, L. ed. 189); *Nat. Bank* v. *Matthews,* 98 U. S. 621 (Bk. 25, L. ed. 188); *Nat. Bank* v. *Whitney,* 103 U. S. 99 (Bk. 26, L. ed. 443); *Fortier* v. *N. O. Bank,* 112 U. S. 440 (Bk. 28, L. ed. 764).

Counsel also specially referred to the recent case of *Camden & Atlantic R. R. Co.* v. *Mays Landing, etc. R. R. Co.* 4 Cent. Rep. 801.

The following statutes were also referred to:

Indiana: Act of Feb. 23, 1853, R. S. 1881, sec. 3971 *et seq.*; Act of March 4, 1853; Act of May 4, 1869, R. S. 1881, sec. 3967 *et seq.*; Act of Jan. 25, 1853, R. S. 1881, sec. 3968 *et seq.*; R. S. Ind. 1881, secs. 3951, 3903; Act of March 3, 1865; Act of March 2, 1875, R. S. 1881, sec. 3556; Act of March 4, 1868, R. S. 1881, sec. 4026 *et seq.*; Act of March 14, 1877, R. S. sec. 4025; Act of March 16, 1877, sec. 4039, R. S. 1881; Act of April 7, 1881, R. S. 4018; Act of Dec. 18, 1865.

Illinois: Act of Feb. 28, 1854; Act of Feb. 12, 1855; Act of March 10, 1869.

[633] *Mr Justice* **Miller** delivered the opinion of the court:

The opinion of the court in this case accompanying its judgment, was delivered very near the close of the last term; and for that reason, among others, a special leave was granted the appellees to file a petition for rehearing at the beginning of the present term.

We have very carefully examined this petition, and while on one of the main points in the case; namely, the statutory authority of the Indianapolis & St. Louis Railroad Company, under the laws of Indiana, to make the lease which was the foundation of the suit, there are some other statutes and some other decisions of the State and the state court cited, we do not [634] think they invalidate the ground on which the decision of this court at the last term rested.

It was said in that opinion that there was no decisive or conclusive expression of opinion on that subject by the Supreme Court of Indiana, and that this court was therefore compelled to exercise its own judgment and to follow it in deciding the case. We are not able to see in the cases cited for the first time in this petition anything which modifies this proposition.

The same may be said of the statutes specially relied on in the petition. There is, in our opinion, no authority found in them for the lease by the defendant company of the entire road, property, franchise, powers and control of the plaintiff's road for ninety-nine years.

The judgment of the plaintiff against the Indianapolis and St. Louis Company remains unaffected by the decision of this court, because there was no appeal by the latter Company, and we see no reason to change our views on the other questions involved in the case.

The petition is therefore overruled.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY O. HARKNESS, *Appt.*, [663]
v.
RUSSELL & COMPANY.

(See S. C. Reporter's ed. 663-682.)

Conditional sales—when title does not pass—whether valid—review of authorities.

1. In the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction.

2. A bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.

[No. 598.]

Submitted Nov. 17, 1885. Decided Nov. 8, 1886.

APPEAL from the Supreme Court of the Territory of Utah. *Affirmed.*

The case is stated by the court.

Messrs. **Parley L. Williams, James N. Kimball** and **Abbot R. Heywood,** for appellant.

Mr. **C. W. Bennett,** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an appeal from the Supreme Court of Utah. The action was brought in the District Court for Weber County, to recover the value of two steam engines and boilers, and a portable saw mill connected with each engine. A jury being waived, the court found the facts and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the 2d of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers and saw mills for the price of $4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to wit:

"SALT LAKE CITY, Oct. 2, 1882.

"On or before the first day of May, 1883, for [664]

value received in one sixteen-horse portable engine, No. 1,026, and one portable sawmill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, $300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with 10 per cent interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership or possession of said engine and sawmill does not pass from the said Russell & Co., until this [665] note and interest shall have been paid in full, and the said Russell & Co. or his agent, has full power to declare this note due and take possession of said engine and sawmill when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof, that if said note is not paid at maturity, that the interest shall be 2 per cent per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said sawmill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may without sale indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt or claim as exempt any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be enacted.

"P. O., Oxford, Oneida County, Idaho Territory.

"$300." "PHELAN & FERGUSON."

Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson, on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The Territory of Idaho has a law relating to chattel mortgages, requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached, that it is *bona fide*, and made without [666] any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson, and of Russell & Co., that the title to the said property should not pass from Russell & Co. until all the notes were paid.

Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional, or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant; and gave judgment for the plaintiff. The Supreme Court of the Territory affirmed this judgment.

The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit and not recorded as required by the law of Idaho. But so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an [667] agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared their intention to be; namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text books and in many adjudged cases. In *Lord* Blackburn's Treatise on the Contract of Sale, published forty years ago, two rules are laid down as established: 1. That where, by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. 2. That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a con-

dition precedent to the transfer of the property. Blackburn, Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled." Blackburn, Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal [668] Property, adds to the two formulated rules of *Lord* Blackburn, a third rule, which is supported by many authorities, to wit: 3. "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, 2d ed. p. 286; 3d ed. § 320. The author cites for this proposition *Bishop* v. *Shillito*, 2 B. & Ald. 329, note a; *Brandt* v *Bowlby*, 2 Barn. & Ad. 932; *Barrow* v. *Coles* (*Lord* Ellenborough), 3 Camp. 92; *Swain* v. *Shepherd* (*Baron* Parke), 1 Mood. & Rob. 223; *Mires* v. *Solebay*, 2 Mod. 243. In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if at the end of that time he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed, the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of *Lamond* v. *Davall*, 9 Q. B. 1030, and many more cases could be cited. In *Crawcour* v. *Robertson*, L. R. 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10 in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid, and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but [669] if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeals held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of *Crawcour* v. *Salter*, L. R. 18 Ch. Div. 30. In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 James I., chap. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to, so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case presents a fair illustration of the English law as based upon the statutes of bankruptcy. In *Horn* v. *Baker*, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demised the same to J. & S. in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term and the apparatus and utensils; with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the Bankrupt Act, as being in their possession, order and disposition, as re- [670] puted owners; and the court held that they did; but that if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in *Holroyd* v. *Gwynne*, 2 Taunt. 176.

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and, hence, in some States in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned, either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and, therefore, there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the par-

ties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in States where no such statute as the English Act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

[671] In *Hussey* v. *Thornton*, 4 Mass. 405, decided in 1808, where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held, *Chief Justice* Parsons delivering the opinion, that the property did not pass, and that the goods could not be attached by the creditors of the vendee. This case was followed in 1822 by that of *Marston* v. *Baldwin*, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay $100 (part of the price), which condition was not performed, though the goods were delivered. Holt had paid $75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained. In *Barrett* v. *Pritchard*, 2 Pick. 512, the court said: "It is impossible to raise a doubt as to the intention of the parties, for it is expressly stipulated that 'the wool before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * * The case from Taunton, *Holroyd* v. *Gwynne*, was a case of a conditional sale; but the condition was void as against the policy of the Statute 21 Jac. 1, chap. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners for the benefit of his creditors. The case of *Horn* v. *Baker* [*supra*] also turned on the same point, and nothing in either of these cases has any bearing on the present question."

In *Coggill* v. *Hartford & N. H. R. R. Co.* 3 Gray, 545, the rights of a *bona fide* purchaser from one in possession under a conditional sale of goods were specifically discussed; and the court held, in an able opinion delivered by *Mr. Justice* Bigelow, that a sale and delivery of [672] goods on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed; and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this Commonwealth that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee; and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a *bona fide* purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

This case was followed in *Sargent* v. *Metcalf*, 5 Gray, 306; *Deshon* v. *Bigelow*, 8 Gray, 159; [673] *Whitney* v. *Eaton*, 15 Gray, 225; *Hirschorn* v. *Canney*, 98 Mass. 149; and *Chase* v. *Ingalls*, 122 Mass. 381, and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of *Chief Justice* Williams, in the case of *Forbes* v. *Marsh*, 15 Conn. 384, decided in 1843, in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of *Hart* v. *Carpenter*, 24 Conn. 427, where the question arose upon the claim of a *bona fide* purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale, and to his creditors; though there has been some diversity of opinion in its application to *bona fide* purchasers from such vendee. As early as 1822, in the case of *Haggerty* v. *Palmer*, 6 Johns. Ch. 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, *Chancellor* Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English Bankrupt Act did not apply here. The chancellor remarked, however, that "If the goods had been fairly sold by P. (the conditional vendee), or if the proceeds had been actually appropriated by the assignees, before notice of this suit and of the injunction, the rem-

edy would have been gone." In *Strong* v. *Taylor*, 2 Hill, 326, Nelson, *Ch. J.*, pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canal boat for a certain sum to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full with interest. Before the money was all paid the boat was seized under an execution against the vendee; and, in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained *in banc*, upon the authority of the Massachusetts case of *Barrett* v. *Pritchard*, [674] [*supra*]. In *Herring* v. *Hoppock*, 15 N. Y. 409, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. Paige, *J.*, said: "Whenever there is a condition precedent attached to a contract of sale, which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition, or the seller waives it." Comstock, *J.*, said that if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage; but he considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of *Smith* v. *Lynes*, 5 N. Y. 41, and *Wait* v. *Green*, 35 Barb. 585; *S. C.* 36 N. Y. 556, it was held that a *bona fide* purchaser, without notice, from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed and, we think, substantially overruled in the subsequent case of *Ballard* v. *Burgett*, 40 N. Y. 314, in which separate elaborate opinions were delivered by *Judges* Grover and Lott. This decision was concurred in by *Chief Judge* Hunt and *Judges* Woodruff, Mason and Daniels, *Judges* James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained [675] Ballard's claim; and subsequent cases in New York are in harmony with this decision. See *Cole* v. *Mann*, 62 N. Y. 1; *Bean* v. *Edge*, 84 N. Y. 510.

We do not perceive that the case of *Dows* v. *Kidder*, 84 N. Y. 121, is adverse to the ruling in *Ballard* v. *Burgett*. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price (which was to be cash, the same day), yet they indorsed and delivered to the purchaser the evidence of title; namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of *Parker* v. *Baxter*, 86 N. Y. 586, was precisely similar to *Dows* v. *Kidder*; and the same principle was involved in *Farwell* v. *Importers & Traders Bank*, 90 N. Y. 488, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself; the legal title passed, and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property bargained and delivered to another shall remain the property of the vendor, shall be valid against third persons without notice. *George* v. *Stubbs*, 26 Me. 243; *Sawyer* v. *Fisher*, 32 Me. 28; *Brown* v. *Haynes*, 52 Me. 578; *Boynton* v. *Libby*, 62 Me. 253; *Rogers* v. *Whitehouse*, 71 Me. 232; *Sargent* v. *Gile*, 8 N. H. 325; *McFarland* v. *Farmer*, 42 N. H. 386; *King* v. *Bates*, 57 N. H. 446; *Hefflin* v. *Bell*, 30 Vt. 134; *Armington* v. *Houston*, 38 Vt. 448; *Fales* v. *Roberts*, 38 Vt. 503; [676] *Duncan* v. *Stone*, 45 Vt. 123; *Moseley* v. *Shattuck*, 43 Iowa, 540; *Thorpe* v. *Fowler*, 57 Iowa, 541.

The same view of the law has been taken in several other States. In New Jersey, in the case of *Cole* v. *Berry*, 13 Vroom, 308, it was held that a contract for the sale of a sewing machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by *Judge* Depue, in the opinion delivered in *Cole* v. *Berry*, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance, property does not pass, as in favor of creditors and purchasers of the bailee, but that, in the latter instance, delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to *bona fide* purchasers. *Chamberlain* v. *Smith*, 44 Pa. 431; *Ross* v. *Story*, 1 Pa. 190; *Martin* v. *Mathiot*, 14 S. & R. 214; *Haak* v. *Linderman*, 64 Pa.

499." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale, and possession under a bailment on the same footing—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent *per se*."

In this connection see the case of *Copland* v. *Bosquet*, 4 Wash. (C. C.) 588, where *Mr. Justice* Washington and *Judge* Peters, the former delivering the opinion of the court, sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a *bona fide* purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought to our attention is that of *Call* v. *Seymour*, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes [677] given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the Separator and Horse-Power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co., until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due and take possession of said Separator and Horse-Power at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities *pro* and *con* duly considered by the court, which sustained the condition expressed in the contract and affirmed the judgment for the plaintiff. See also *Sanders* v. *Keber*, 28 Ohio St. 630.

The same law prevails in Indiana: *Shireman* v. *Jackson*, 14 Ind. 459; *Dunbar* v. *Rawles*, 28 Ind. 225; *Bradshaw* v. *Warner*, 54 Ind. 58; *Hodson* v. *Warner*, 60 Ind. 214; *McGirr* v. *Sell*, 60 Ind. 249.

The same in Michigan: *Whitney* v. *McConnell*, 29 Mich. 12; *Smith* v. *Loso*, 42 Mich. 6; *Marquette Mfg. Co.* v. *Jeffery*, 49 Mich. 288.

The same in Missouri: *Bidgeway* v. *Kennedy*, 52 Mo. 24; *Wangler* v. *Franklin*, 70 Mo. 659; *Sumner* v. *Cottey*, 71 Mo. 121.

The same in Alabama: *Fairbanks* v. *Eureka Co.* 67 Ala. 109; *Sumner* v. *Woods*, 67 Ala. 139.

The same in several other States. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to Benjamin on Sales, 4th ed., section 320, pp. 329-336, and Mr. Free- [678] man's note to *Kanaga* v. *Taylor*, 70 Am. Dec. 62; 7 Ohio St. 134. It is unnecessary to quote further from the decisions; the quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the Bankrupt Law. The doctrine of the Supreme Court of that State is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a *bona fide* purchaser or an execution creditor of the latter is entitled to protection as against the claim of the original vendor. *Brundage* v. *Camp*, 21 Ill. 330; *McCormick* v. *Hadden*, 37 Ill. 370; *Murch* v. *Wright*, 46 Ill. 488: *Mich. Cent. R. R. Co.* v. *Phillips*, 60 Ill. 190; *Lucas* v. *Campbell*, 88 Ill. 447; *Van Duzor* v. *Allen*, 90 Ill. 499. Perhaps the Statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. The statute declares that "No mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such. In the case of *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664 [Bk. 23, L. ed. 1003], where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that if the rent was duly paid the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation [67 of title by the lessors was void as against third persons, unless the agreement was recorded (which it was not in proper time), decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. *Mr. Justice* Davis, delivering the opinion of the court, said: "It was decided by this court in *Green* v. *Van Buskirk*, 5 Wall. 307 [72 U. S. bk. 18, L. ed. 599], and 7 Wall. 139 [74 U. S. bk. 19, L. ed. 109], that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated

from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and, in this way, works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the Chattel Mortgage Act. R. S. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that State on the subject under consideration.

The case of *Hervey* v. *R. I. Locomotive Works* is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion; for it is apparent that the [680] only points decided in that case were: first, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors, after its delivery to the vendees, whereby the latter became the ostensible owner, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other States. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful, as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in *Heryford* v. *Davis*, 102 U. S. 235 [Bk. 26, L. ed. 160], a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of *Hervey* v. *R. I. Locomotive Works*, will be found to support their views. The whole question in *Heryford* v. *Davis*, was as to the construction of the contract. This was in the form of a lease; but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the Statute of Missouri requiring mortgages of personal property to be recorded, in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by *Mr. Justice* Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. *Mr. Justice* Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was [681] a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company."

The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute sale with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a *bona fide* purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a *bona fide* purchaser without notice. The court below finds that at the time of and prior to the sale he knew the purchase price of the property had not been paid, and that Russell & Company claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners. But as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law, where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority; namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to [682] the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.

The judgment of the Supreme Court of the Territory of Utah is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

END OF VOL. 118.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1886.

Vol. 119.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1886.

[99] VICKSBURG AND MERIDIAN RAILROAD COMPANY, *Plff. in Err.*,

v.

MARY E. O'BRIEN AND JOHN J. O'BRIEN.

(See S. C. Reporter's ed. 99-108.)

Action against railroad corporation for personal injuries—evidence.

1. In an action against a railroad corporation to recover damages for personal injuries, a written statement, made by a physician prior to the commencement of the suit, as to the condition of the injured party, and stated by the physician in his deposition to be a correct description of the patient's condition at the times mentioned, was inadmissible under the circumstances of the case as evidence of the facts therein alleged.

2. Where there is error in the record this court will direct a reversal, unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party.

3. Evidence that the engineer having in charge defendant's train at the time of the accident stated, ten to thirty minutes after the accident, that the speed of the train was about eighteen miles an hour, was inadmissible to prove the rate at which the train was moving.

[No. 12.]

Argued Apr. 19, 20, 1886. Decided Nov. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi. *Reversed.*

The case is stated by the court.

Messrs. **Edgar M. Johnson,** *Geo. Hoadly, Edward Colston* and *Wm. L. Nugent,* for plaintiff in error.

Mr. **T. C. Catchings,** for defendants in error.

[100] *Mr. Justice* **Harlan** delivered the opinion of the court:

This action was brought by Mary E. O'Brien and her husband, John J. O'Brien, to recover damages sustained in consequence of personal injuries received by the wife in September, 1881, while a passenger upon the Vicksburg and Meridian Railroad. The declaration alleges that the Company "so carelessly, negligently, and unskillfully constructed and maintained its railroad track, engine and cars, and so carelessly, negligently and unskillfully conducted itself in the management, control and running of the same," that the car in which Mrs. O'Brien was seated as a passenger was thrown from the railroad track and overturned, whereby she was seriously injured. There was a verdict and judgment for $9,000 in favor of the plaintiffs.

1. At the trial the plaintiffs offered to read to the jury the deposition of a physician, and did read the first, second and third interrogatories propounded to him, and the answers thereto. Responding to the first and second interrogatories, he stated, among other things, that his attendance upon Mrs. O'Brien commenced on the 16th of September, 1881; that he found her suffering extreme pain and in a very nervous condition, resulting a few hours before from a railroad accident on defendant's road; that such was the cause of her injuries he knew from her own answers, from the statement of her brother-in-law, and from attending others who [101] were on the train with her. The third interrogatory and answer were as follows:

"3. Look on the accompanying statement, dated November 26, 1881, and state if it was written by you at the date it bears, for what purpose it was written, and to whom it was delivered. Does the statement represent substantially and correctly Mrs. O'Brien's condition, as it appeared when you first saw her, and as it continued up to November 26, 1881?

"Answer: I have looked upon the statement referred to, which was written by myself, at Mr. O'Brien's request, at the date mentioned, when he was about to take his wife away from here to his home in New Orleans, and was intended to convey an idea of how she was when I was called to see her, and what her condition was when she left my charge; and in my opinion I correctly stated her condition at times referred to."

The written statement referred to in the interrogatory was signed by the witness, and attached to his deposition as an exhibit. It was addressed to Mr. O'Brien, and sets forth, with much detail, the nature of the injuries received by the wife, and their effect upon her bodily and mental condition. It also embodied an expression of the witness' opinion as to the probable length of time within which she might recover from her injuries. The plaintiff, before reading the remaining interrogatories and answers, offered to read this statement to the jury as evidence. The Company objected upon these grounds: that it was not made by the witness under oath, and in defendant's presence, or with its knowledge and consent; that

it was hearsay evidence and, therefore, wholly incompetent; and that, in any event, it could only be referred to by the witness to refresh his recollection. The court overruled the objection and permitted the statement to be read in evidence, the defendant taking an exception thereto, which was allowed. The remainder of the deposition was then read to the jury.

We are of opinion that this ruling cannot be [102] sustained, upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him, under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it.

But there are adjudged cases which declare that, unless prepared in the discharge of some public duty, or of some duty arising out of the business relations of the witness with others, or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence.* There are, however, other cases, to the effect that where the witness states, under oath, that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper may be received as the best evidence of which the case admits.†

The present case does not require us to enter upon an examination of the numerous authorities upon this general subject; for, it does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection, there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs were allowed to read the physician's written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous.

[103] It is, however, claimed, in behalf of the plaintiffs, that in his answers to other interrogatories the physician testified, apart from the certificate, to the material facts embodied in it, and that therefore the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason should not be a ground of reversal.

We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury. In estimating the damages to be awarded in view of the extent and character of the injuries received, the jury, for aught that the court can know, may have been largely controlled by its statements. The practice of admitting the unsworn statements of witnesses, prepared in advance of trial, at the request of one party and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence.

While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. *Smith* v. *Shoemaker*, 17 Wall. 630, 639 [84 U. S. bk. 21, L. ed. 717, 719]; *Deery* v. *Cray*, 5 Wall. 795 [72 U. S. bk. 18, L. ed. 653]; *Moores* v. *Nat. Bank*, 104 U. S. 630 [Bk. 26, L. ed. 872]; *Gilmer* v. *Higley*, 110 U. S. 50 [Bk. 28, L. ed. 63].

2. At the trial below plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident, about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or crossties under the broken rail in a decayed condition. His answer to the above question was: "Between ten and thirty minutes after the accident occurred, I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was [104] moving at the rate of eighteen miles an hour." The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and an exception taken. As bearing upon the point here raised it may be stated that, under the evidence it became material—apart from the issue as to the condition of the track—to inquire whether, at the time of the accident (which occurred at a place on the line where the rails in the track were, according to some of the proof, materially defective) the train was being run at a speed exceeding fifteen miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, "being," says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that

*Lightner v. Wike, 4 S. & R. 208; Calvert v. Fitzgerald, Litt. Sel. Cas. 388; Lawrence v. Barker, 5 Wend. 305; Redden v. Spruance, 4 Harr. (Del.) 267-8; Field v. Thompson, 119 Mass. 151.

†Russell v. H. R. R. R. Co. 17 N. Y. 140; Guy v. Mead, 22 N. Y. 465; Merrill v. Ithaca & O. R. R. Co. 16 Wend. 586; Kelsea v. Fletcher, 48 N. H. 268; Haven v. Wendell, 11 N. H. 112; Mims v. Sturdevant, 36 Ala. 640; State v. Rawls, 2 Nott & McC. 331, 334.

the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ* that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act *while he was doing it*." 1 Greenl. Ev. § 113. This court had occasion in *Packet Co.* v. *Clough*, 20 Wall. 540 [87 U. S. bk. 22, L. ed. 408], to consider this question. Referring to the rule [105] as stated by *Mr. Justice* Story in his treatise on Agency (§ 134), that "Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, *if made at the same time, and constituting part of the res gestæ*," the court, speaking by *Mr. Justice* Strong, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."

We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ;* simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engi- [106] neer had been fully exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the Company. And yet the circumstance that it was made between ten and thirty minutes, an appreciable period of time, after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the Company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness; a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States.*

We deem it unnecessary to notice other exceptions taken to the action of the court below.

This case was decided at the last term of this court, and *Mr. Justice* Woods concurred in the order of reversal upon the grounds herein stated.

For the errors indicated the judgment is reversed, and the cause is remanded for a new trial, and for further proceedings consistent with this opinion.

Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** dissenting: [107]

I am not able to give my assent to the judgment of the court in this case.

The statement by the physician as to the condition of the injured party, the admission of which is held to have been error, was proved by his deposition to have been correct. Every material fact also which it contained was established by his independent testimony. It would not be in accordance with the usual action of men, in the ordinary concerns of life to reject as incompetent evidence, a written statement thus made by a physician as to the condition of a patient under his charge, when it is subsequently proved by him to be true in all its details. And it should seem that evidence upon which everyone would act without hesitation in the common affairs of life ought not to be excluded from consideration, except for clear reasons of policy, or long established rules to the contrary, when those affairs are brought into litigation before the courts.

If the recollection of the condition of the patient had passed from the mind of the physician, and he could still have testified that the statement made by him when the patient was under his charge was true, it would have been admissible. It is difficult, therefore, to find any just reason for excluding it, from the fact that, in

*Luby v. H. R. R. R. Co. 17 N. Y. 131; Pa. R. R. Co. v. Books, 57 Pa. 343; Dietrich v. B. & H. S. R. R. Co. 58 Md. 347, 355; Lane v. Bryant, 9 Gray, 245; Chicago, B. & Q. R. R. Co. v. Riddle, 60 Ill. 535; Va. & Tenn. R. R. Co. v. Sayers, 26 Gratt. 351; Chicago & N. W. R. Co. v. Fillmore, 57 Ill. 265; Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 446; Mobile & M. R. R. Co. v. Ashcraft, 48 Ala. 30; Bellefontaine R. Co. v. Hunter, 33 Ind. 354; Adams v. Hannibal & St. J. R. R. Co. 74 Mo. 556; S. C. 7 Am. & Eng. R. R. Cas. 418, and note; K. P. R. Co. v. Pointer, 9 Kan. 620; Roberts v. Burks, Litt. Sel. Cas. 411; Hawker v. B. & O. R. R. Co. 15 W. Va. 636. See also 1 Taylor, Ev. 7th Eng. ed. § 602.

corroboration of its truth, the physician also testified to the facts therein stated.

The admission of the declaration of the engineer, as to the rate of speed of the train at the time of the accident, was, in my judgment, proper as part of the *res gestæ*. The rails and cross-ties of the road were in a bad condition. Some of the rails had been used for over forty years, and some of the cross-ties were decayed, and it appears that the accident was caused by a decayed cross-tie and a broken rail.

As the declaration was made between ten and thirty minutes after the accident, we may well [108] conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. The engineer was the only person from whom the Company could have learned of the exact speed of the train at the time; to him it would have been obliged to apply for information on that point. It would seem, therefore, that his declaration, as that of its agent or servant, should have been received. The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.

The case of the *Hanover R. R. Co.* v. *Coyle*, 55 Pa. 402, is in point. There it appeared that a peddler's wagon was struck by a locomotive and the peddler was injured; and the question was as to the admissibility of the declaration of the engineer that the train was behind time, to show carelessness and negligence. The Supreme Court of Pennsylvania held it admissible. "We cannot say," said the court, "that the declaration of the engineer was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

What time may elapse between the happening of the event in respect to which the declaration is made, and the time of the declaration, and yet the declaration be admissible, must depend upon the character of the transaction itself. An accident happening to a railway train, by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards by persons connected with the train. The admissibility of a declaration, in connection with evidence of the principal fact, as stated by Greenleaf, must be determined by the judge according to the degree of its relation to that [109] fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, he adds, whether the declaration was contemporaneous with the main fact, and so connected with it as to illustrate its character.

But, independently of this consideration, there is another answer to the objection taken to the admissibility of the declaration of the engineer. It was immaterial in any view of the case. The engagement of a railroad company is to carry its passengers safely; and, for any injury arising from a defect in its road, or in the rails or ties, which could have been guarded against by the exercise of proper care, it is liable. Its liability does not depend upon the speed of the train, whether it was one mile or eighteen miles an hour. Though as a carrier of passengers it is not, like a carrier of property, an insurer against all accidents except those caused by the act of God or the public enemy, it is charged with the utmost care and skill in the performance of its duty; and this implies not merely the utmost attention in respect to the movement of the cars, but also to the condition of the road, and of its ties, rails and all other appliances essential to the safety of the train and passengers. For all injuries through negligence, to which the passenger does not contribute by his own acts, it is liable. So it matters not what the speed of the train was in the case at bar, nor what was the declaration of the engineer in that respect.

I am authorized to state that the **Chief Justice**, *Mr. Justice* **Miller** and *Mr. Justice* **Blatchford** concur in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CONSOLIDATED SAFETY-VALVE COMPANY, *Appt.*, [45]
v.
ERASTUS B. KUNKLE.

(See S. C. Reporter's ed. 45-48.)

Patent law—construction of claims—infringement.

In an action for the infringement of two patents for improvements in safety valves, held; that the defendant's valves did not infringe the complainant's patents as previously construed by this court. Bk. 28, 939.

[No. 19.]

Argued, Oct. 27, 28, 1886. Decided, Nov. 15, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The case is stated by the court.

Mr. **Thos. Wm. Clarke**, for appellant.

Mr. **James H. Raymond**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court.

This is an appeal by the plaintiff in a suit in equity to recover for the infringement of two letters patent, from a decree dismissing the bill. The suit was brought in the Circuit Court of the United States for the Northern District of Illinois, by the Consolidated Safety-Valve Company, a Connecticut corporation, against Erastus B. Kunkle, on letters patent No. 58294, granted to George W. Richardson, September 25, 1866, for an improvement in safety valves,

and on other letters patent, No. 86963, granted to the same person, January 19, 1869, for an improvement in safety valves for steam boilers or generators. These are the same two patents which were the subject matter of the litigation involved in the case of *Consolidated Safety-Valve Co.* v. *Crosby Steam-Gauge & Valve Co.*, decided by this court at October [46] Term, 1884 and reported in 113 U. S. 157 [Bk. 28, L. ed. 939]. The specifications and claims and drawings of the two patents are set forth fully in the report of that case. The patents were, both of them, held to be valid and to have been infringed.

The claim of the patent of 1866, "A safety valve, with the circular or annular flange or lip *ce*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described," was construed as covering "a valve in which are combined an initial area, an additional area, a huddling chamber beneath the additional area, and a strictured orifice leading from the huddling chamber to the open air, the orifice being proportioned to the strength of the spring as directed."

The claim of the patent of 1869, "The combination of the surface beyond the seat of the safety valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described," was construed as covering "the combination with the surface of the huddling chamber, and the strictured orifice, of a screw ring to be moved up or down to obstruct such orifice more or less, in the manner described."

The decree in the present case was made in January, 1885, and proceeded, as it states, on the ground that the defendant's valves did not infringe the patents. This also appears from the decision of the circuit court, reported in 14 Fed. Rep. 782. As the defendant's valves have no huddling chamber, and no strictured orifice leading from a huddling chamber to the open air, we are of opinion that they do not infringe either of the patents.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[47] THEODORE T. WHITE, WILLIAM A. GORDON AND EMMET C. PECOR, *Appts.*,

v.

GEORGE H. DUNBAR, FRANCIS B. DUNBAR, AND CHARLOTTE Z. DUNBAR.

(See S. C. Reporter's ed. 47-52.)

Patent law—reissue, held invalid.

Where, in an original patent for a method of preserving shrimps, etc., the claim was for placing a textile fabric between the shrimps and the can in which they were preserved, and in the reissue the claim is for interposing between the metal can and the shrimps an enveloping material for the shrimps, the reissue is invalid; the latter claim being broader than that of the original.

[No. 21.]

Argued Oct. 29, Nov. 1, 1886. Decided Nov. 15, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Reversed.*

The case is stated by the court.

Messrs. **Wm. G. Henderson**, *Joseph P. Hornor*, *F. W. Baker* and *Joyce & Spear*, for appellants.

Messrs. **Melville Church** and *Joseph B. Church*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit on a reissued patent. The appellees obtained a patent dated June 20, 1876, for a method of preserving shrimps and other shell-fish by placing them in a bag or sack made of cotton, muslin or other textile fabric, and then sealing them up in a metallic can, and subjecting them to a boiling process. In their specification they declare that the object of placing the shrimps in the bag is to keep them from coming in direct contact with the can, and thus prevent their discoloration and loss of flavor. They describe the process as follows:

"The shell having been removed from the shrimp in the usual manner, the fish is thrown into salt water of about six degrees, and there remains for an hour, more or less, and from thence to kettles filled with water and brought to a boiling heat, after which they are placed on dippers, and cooled and thoroughly rinsed with fresh cold water, and from which, so soon as thoroughly dripped, in a moist condition, [48] they are placed in the sack B, the same having been previously arranged in the can A, and without the addition of any salted or otherwise prepared liquid. So soon as the sack is filled, the mouth thereof being properly secured, the lid or head *a* is placed in position on the can A and immediately sealed.

"The cans are then subjected to a steam bath, or placed in kettles containing boiling water, and boiled for two hours at the highest temperature attainable, and which completes the process."

The claim is then stated, as follows:

"What we claim as new, and desire to secure by letters patent, is:

"The herein described method of preserving shrimps, etc., preventing their discoloration, which consists in placing textile fabric between the can and its contents, and then sealing the can and subjecting the same to a boiling process, substantially as and for the purpose specified."

In April, 1880, Pecor, one of the appellants, together with one Bartlett, obtained a patent for another method of preserving shrimps, by first lining the inside of the can with a coating of asphaltum cement, and then with paper coated with a solution of paraffine, or kindred substance; the can is then filled with shrimp, sealed up, and subjected to the boiling or steaming process, in the usual manner of canning vegetables and meats.

In April, 1881, the appellees surrendered their original patent, and applied for a reissue thereof, which was granted in December, 1881. In the new specification they described their process to consist in, first, providing the can with a lining to prevent direct contact of the shrimps with the metal, and, second, placing them in

the lined can while they are in a dry or moist condition and devoid of free liquid or gravy, sealing the can without adding any liquid to its contents, and cooking the contents of the can after sealing. They add that "there is nothing arbitrary about the peculiar form and construction of the textile fabric lining, as other forms and arrangements might be substituted therefor;" and again, "B is the lining, constructed preferably of cotton or muslin." [49] The claim of the reissued patent is in the following words:

"What we claim as new, and desire to secure by letters patent, is:

"As an improvement in the art of preserving shrimps in metal cans, the mode of preventing the discoloration of the shrimps, which consists in interposing between the metal can and the shrimps an enveloping material for the shrimps, which is not itself capable of discoloring the shrimps, and then sealing the can and subjecting the same and its contents to a boiling process, substantially as described."

In March, 1882, the appellants commenced the canning of shrimps, and in their answer state that all the business of canning shrimps that they have ever done has been under the authority of the patent granted to Pecor and Bartlett. They further describe the process used by them as follows:

"The common tin cans being ready for packing, three pieces of paper, previously boiled in paraffine wax or coated with same, are cut and placed in the can, so that one piece covers the bottom, another piece the sides, and a third piece the top of the contents when the can is filled; the shrimps are then picked raw, then washed and thoroughly cooked for about twenty minutes, until fit to eat; they are then placed in the cans, which are soldered, and then put into a steam retort without water, which is heated to 240° Fahrenheit, where they remain from two and a half to three hours, which process has the effect of condensing the air and liquids in the can, and exterminating any animal or vegetable life that may remain in the contents of the can, after which they are ready to be labeled and sold."

The process thus used by the appellants is claimed by the appellees to be an infringement of their reissued patent; they also contend that the claim of the reissued patent is no broader than that of the original properly construed.

In the latter proposition we cannot concur. The claim in the original patent was for placing textile fabric between the can and its contents; whilst in the reissue it is for interposing between the metal can and the shrimps an enveloping material for the shrimps. [50] This is certainly, on its face, a very important enlargement of the claim; and we see nothing in the context of the specification in the original patent which could possibly give the claim so broad a construction. The description of the invention, throughout, specifies a textile fabric as the material to be interposed between the shrimp and the metallic can. It is true that the object of the invention is stated to be "to prevent the article to be preserved from coming in direct contact with the surface of the can." But the object of an invention is a very different thing from the invention itself. The object may be accomplished in many ways; the invention shows one way. Again, in describing the nature of the improvement, the patentees say:

"Primarily, our improvement consists in so placing a suitable textile fabric between the fish or other article of food to be preserved as to cause it to intervene as to prevent, under all circumstances, any direct contact between the metallic surface of the can and its contents; and it is the employment of such textile fabric, in connection with the process hereinafter described of treating the fish or other article, both before and after the same is placed in the can and sealed, which constitutes the nature or subject matter of our present invention."

Then, in describing the apparatus used, referring to the figures annexed to the specification (which are not necessary to the understanding of the description), they say:

"In the accompanying drawing is illustrated, at figure 1, a metallic can, such as is ordinarily used for articles of food which are offered to the trade in a canned state. Figure 2 is a textile lining, which we propose usually to make (although there is nothing arbitrary about the form, as other forms may be used) in the form of a cylindrical bag or sack, the diameter of which, when filled, is to be such as will permit of its fitting snugly within the can.

"A is the metallic can; *a*, its lid or cover. B is the bag or sack, constructed of cotton, muslin, or any other suitable textile fabric Material of the cheapest and most inferior quality may be used, as the sole object of its use is to prevent the article to be preserved from coming in direct contact with the surface of the can, and which contact with the metal, in the case of the shrimp, causes, during the process of [51] boiling, and all along thereafter until the can is opened, a profuse precipitation of a black substance, generally believed to be sulphur, and which supposition is based upon the fact that the shrimp is said to possess a much larger proportion of sulphur than other shell-fish. The substance thus precipitated not only discolors the fish (shrimp), but detracts much from the color, freshness, and richness of its flavor. Now, practical experience has fully demonstrated the fact that, by using a textile fabric as described, the precipitation of the substance alluded to is prevented, or at least does not appear either on the fabric or metal; hence, the value and importance of this feature of our invention; *b*, figure 3, is a circular piece cut out of material similar to that of which the bag B is made, and which is inserted within the mouth of the latter after the same is filled with the fish or other article to be preserved.

"Such a can and lining, as herein described, are admirably adapted for the purpose attained by our present invention; but, as before stated, there is nothing arbitrary about the peculiar form or construction of the textile fabric lining, as other forms and arrangements might be substituted therefor without in any manner altering the principle of the invention."

We see nothing in all this to raise the slightest implication that the patentees were the inventors of the process of interposing any and every kind of lining between the cans and their

contents; and when their claim is confined to a lining of textile fabric, it is tantamount to a declaration that they claimed nothing else.

Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory [51] requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further. See *Keystone Bridge Co.* v. *Phœnix Iron Co.* 95 U. S. 274, 278 [Bk. 24, L. ed. 344, 345]; *James* v. *Campbell*, 104 U. S. 356, 370 [Bk. 26, L. ed. 786, 791].

We are clearly of opinion, therefore, that the original patent is not susceptible of the broad construction which the appellees would give to it; and that the reissued patent is a material expansion and enlargement of it. As such expansion appears to be the only object of the reissue, and as the application for the reissue was not made until nearly five years after the original was granted, the case comes within the ruling of *Miller* v. *Brass Co.* 104 U. S. 350 [Bk. 26, L. ed. 783], and subsequent cases to the same purport.

We attach no importance to the fact that between the date of the original patent and the application for the reissue, the patent to Pecor and Bartlett was granted. It is, indeed, quite apparent that the appellees applied for a reissue in consequence of that patent, and in order to prevent the canning of shrimps under it. The circumstance that other improvements and inventions, made after the issue of a patent, are often sought to be suppressed or appropriated by an unauthorized reissue, has sometimes been referred to for the purpose of illustrating the evil consequences of granting such reissues; but it adds nothing to their illegality. That is deduced from general principles of law as applied to the statutes authorizing reissues, and affecting the rights of the government and the public.

In our judgment the reissued patent in this case was unlawfully granted, and the bill should have been dismissed.

The decree of the Circuit Court is therefore reversed and the case remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FRANCIS DAINESE, *Appt.*

v.

JOHN BLAKE KENDALL, Exr and LILLIAN KENDALL RUSSELL and JOHN BLAKE KENDALL, Heirs and Devisees of JOHN E. KENDALL, Deceased, JOHN D. McPHERSON and CHARLES V. GORDON. [53]

(See S. C. Reporter's ed. 53-55.)

Appeal—what, final decree for purposes of.

A decree, to be final for the purposes of an appeal, must leave the case in such a condition that if there be an affirmance by this court, the court below will have nothing to do but to execute the decree it has already entered.

[No. 4.]

Argued Oct. 22, 1886. Decided Nov. 15, 1886.

APPEAL from the Supreme Court of the District of Columbia. *Dismissed.*

The case is stated by the court.

Messrs. **J. W. Douglass** and *Geo. L. Douglass*, for appellant.

Messrs. **Job Barnard** and *James S. Edwards*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

When this case was called for hearing, a motion was made to dismiss because the decree appealed from was not a final decree. The facts are these:

The bill was filed by Dainese, as the holder of one of three notes of Gordon, secured by a deed of trust from Gordon to McPherson, trustee, against the maker of the notes, the trustee, and John E. Kendall, the holder of the other notes, praying:

1. That a sale which had been made of the trust property by McPherson, the trustee acting under the deed of trust, to Kendall, be set aside and a new sale ordered.

2. That Kendall be required to account for rents of the trust property which had been collected by him, while in possession, under a power of attorney from Gordon authorizing him to receive the rents, and, after paying expenses and certain specified demands, apply the proceeds upon the debt secured by the trust; [54] and

3. For an account of what was due to himself and to Kendall upon the notes they severally held, and that the proceeds of the sale which had been made, or if that should be set aside, of any that might thereafter be made, be divided between them in proportion to the amounts due them respectively.

Afterwards, and before any decree, McPherson filed a cross bill praying an account between Dainese and Kendall, and an apportionment of the proceeds of the sale among them, and also an allowance to himself of commissions and counsel fees.

The court at special term set aside the sale, but before anything further was done Kendall appealed to the general term. At the general term the order of the special term was reversed,

NOTE—*What is final judgment or decree for purpose of appeal on writ of error.* See Gibbons v. Ogden, 19 U. S. bk. 5, p. 302, note.

the sale ratified and confirmed, and the cause remanded to the special term "for further proceedings." When the case got back to the special term Kendall moved a reference to an auditor to make distribution of the proceeds of the sale; but while this motion was pending, and before anything else was done, Dainese took this appeal.

From this statement it is apparent that the decree appealed from is not a final decree within the meaning of that term as used in the statute allowing appeals to this court. The litigation of the parties on the merits of the case has not been terminated. An account of the rents collected by Kendall while in possession has not been taken; and the amounts due Dainese and Kendall respectively on the notes which they severally hold have not been ascertained. All this is necessary for the purposes of the relief asked for in the bill, and the cause was sent back from the general term for further proceedings on that account. The authorities are uniform to the effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here, the court below [55] will have nothing to do but to execute the decree it has already entered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [Bk. 27, L. ed. 73]; *Grant* v. *Phœnix Ins. Co.* 106 U. S. 431 [27: 238]; *St. Louis, etc. R. R. Co.* v. *Southern Exp. Co.*, 108 U. S. 28 [27: 639]; *Ex parte Norton*, 108 U. S. 242 [27: 711]; *Mower* v. *Fletcher*, 114 U. S. 127 [Bk. 29, L. ed. 117].

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[1]

CHOCTAW NATION, *Appt.*
v.
UNITED STATES.

UNITED STATES, *Appt.*,
v.
CHOCTAW NATION.

(See S. C. Reporter's ed. 1-44.)

Settlement of all questions of difference between the Choctaw Nation and the United States—construction of treaties and statutes—Senate award under Treaty of 1855.

1. The award made by the Senate of the United States under the Treaty of 1855, between the United States and the Choctaw Nation, was within the submission, and was not invalid for uncertainty or want of proper notice.

2. Under the Act of 1881, conferring jurisdiction upon the court below to review the entire question of differences between the Choctaw Nation and the United States *de novo*, said award, though not conclusive, may be given effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation.

3. In view of the peculiar relations of the parties, and without regard to technical rules, this court holds, upon a review of the questions of difference between them *de novo*, that the principle of settlement adjudged by the Senate in its said award, allowing said Choctaw Nation the net proceeds of its lands in Mississippi ceded by the Treaty of 1830 to the United States, furnishes the nearest approximation to the justice and right of the case that, after this lapse of time, it is practicable for a judicial tribunal to reach.

4. In addition to the amount of said award, less the payment under the Act of March 3, 1861, said Choctaw Nation is entitled to the amount of certain unpaid annuities, and to the value of certain of its lands taken by mistake in fixing the boundary of the State of Arkansas by the Act of March 3, 1875.

[Nos. 848, 850.]

Argued Oct. 19, 20, 21, 1886. Decided Nov. 15, 1886.

APPEALS from the Court of Claims. *Reversed.*

Statement of the case by *Mr. Justice* **Matthews**: [2]

There are two appeals in this case, one by the Choctaw Nation, and the other by the United States, from a judgment rendered by the court of claims in favor of the former for the sum of $408,120.32. Jurisdiction of the cause was conferred upon that court by the provisions of an Act of Congress approved March 3, 1881, 21 Stat. at L. 504, entitled "An Act for the Ascertainment of the Amount Due the Choctaw Nation," as follows:

"That the court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon; power is hereby granted the said court to review the entire question of differences *de novo*, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the Treaty of eighteen hundred and fifty-five; and the Attorney-General is hereby directed to appear in [3] behalf of the Government; and if said court shall decide against the United States, the Attorney-General shall, within thirty days from the rendition of judgment, appeal the cause to the Supreme Court of the United States; and from any judgment that may be rendered the said Choctaw Nation may also appeal to said supreme court: *Provided*, The appeal of said Choctaw Nation shall be taken within sixty days after the rendition of said judgment, and the said courts shall give such cause precedence.

"Sec. 2. Said action shall be commenced by a petition stating the facts on which said Nation claims to recover, and the amount of its claim; and said petition may be verified by either of the authorized delegates of said Nation as to the existence of such facts, and no other statements need be contained in said petition or verification."

In pursuance of this Act, the Choctaw Nation filed its original petition on the 13th of June, 1881, which was subsequently amended by new pleadings filed February 26, 1884. The questions of difference between the United States and the petitioner, it was alleged, resulted from the nonperformance and nonfulfillment by the United States of the obligations assumed by it under various treaties between the United States and the Choctaw Nation, including those of the following dates, to wit: the 18th day of October, 1820, the 20th day of January, 1825, the 27th day of September, 1830, the 22d day of June 1855, and the 28th day of April, 1866.

By the terms of the Treaty of October 18, 1820, 7 Stat. at L. 210, it was provided,

amongst other things, that the Choctaw Nation did cede to the United States all that part of its lands situated in the State of Mississippi described in the first article of the Treaty; in consideration whereof the United States stipulated that in part satisfaction for the said cession the United States ceded to the Choctaw Nation a tract of country west of the Mississippi River, situated between the Arkansas and Red Rivers, the boundaries of which were therein described; and also that the boundaries thereby established [4] between the Choctaw Indians and the United States, east of the Mississippi River, should remain without alteration until the period at which the Nation should become so civilized and enlightened as to be made citizens of the United States. It was agreed that Congress should lay off a limited parcel of land for the benefit of each family or individual in the Nation; that all those who had separate settlements falling within the limits of the land ceded by the Choctaw Nation to the United States, and who desired to remain there, should be secured in a tract or parcel of land one mile square, to include their improvements; and that those preferring to remove within one year from the date of the Treaty should be paid their full value, including the value of any improvements.

It is alleged in the petition that, by the Treaties of January 20, 1825, of September 27, 1830, and of June 22, 1855, the boundary line between the lands of the United States and the Choctaws west of the Mississippi River was established; but that the United States, in fixing and causing to be surveyed the said boundary line, did not pursue the line in accordance with the provisions of the said Treaties, but encroached upon and took from the lands ceded to the Choctaw Nation a quantity of land amounting to 136,204.02 acres, which by the legislation of the United States, in violation of these provisions of the Treaties, became a part of the public domain of the United States, for which the Choctaw Nation are entitled to recover their value, estimated at $167,896.57.

The petition further states that, in the Treaty concluded on the 27th of September, 1830, called the Treaty of Dancing Rabbit Creek, it was provided, among other things, by the third article thereof, 7 Stat. at L. 333, that the Choctaw Nation should and did thereby cede to the United States the entire country they then owned and possessed east of the Mississippi River, and agreed to remove beyond the Mississippi River as early as practicable; and that, in pursuance of this Treaty the Choctaw Nation surrendered to the United States all the remaining lands at that time owned by them in the State of Mississippi, amounting, as is alleged, to 10,423,139 acres, and, in compliance with the [5] Treaty on their part, commenced to remove, and did remove, within the time stipulated therein, or within a reasonable time thereafter, from the said lands to the lands purchased and acquired by them under the terms of the Treaty of October 18, 1820.

By the 14th article of the Treaty of September 27, 1830, it was provided that each Choctaw head of a family, being desirous to remain and become a citizen of the States, should be permitted to do so by signifying his intention to the agent within six months of the ratification of the Treaty, and thereupon should be entitled to a reservation of one section of 640 acres of land, to be bounded by sectional lines of survey; and in like manner should be entitled to one half that quantity for each unmarried child living with him over ten years of age, and a quarter section for each child that might be under ten years of age, to adjoin the location of the parent. If they resided upon such lands, intending to become citizens of the States, for five years after the ratification of the Treaty, a grant in fee simple should issue. Such reservation should include the present improvement of the head of the family, or a portion of it, and the persons who claimed under the article were not to lose the privilege of Choctaw citizenship.

It is alleged in the petition that 1,585 heads of Choctaw families signified their intention to remain on their lands in Mississippi and become citizens under this article of the Treaty; and that, although they substantially complied with all its requirements and conditions, and thereby became entitled to grants of land in fee simple, as specified in the article, yet but 143 such families ever received from the United States their title to the lands guaranteed them by the article, leaving 1,442 of the said Choctaw heads of families entitled to a grant of their lands in fee simple, under the provisions of said article 14, whose claims had not been satisfied.

It is alleged in the petition that the lands to which these families were entitled amounted to 1,672,760 acres, which were reasonably worth, with the improvements, $5.50 an acre, and that the value of the whole was $9,200,180.

It is further alleged in the petition that the United States, having failed to secure to each [6] Choctaw head of a family the reservation secured under article 14 of the Treaty of 1830, subsequently, by an Act of Congress approved August 23, 1842, 5 Stat. at L. 513, attempted to provide compensation for the same by the issue and delivery of certificates or scrip, which authorized those entitled to such reservations, or their assignees, to enter any of the public lands subject to entry at private sale in the States of Mississippi, Alabama, Louisiana, or Arkansas, which certificates or scrip they were required by said Act to receive and accept in full satisfaction of all their claims or demands against the United States under said article 14.

It is further alleged in the petition that 292 of the 1,442 Choctaw heads of families, entitled to grants in fee simple under article 14 of the Treaty of 1830, have never received any such grants in fee simple, or any allowance or compensation whatever for the same. The claims of 1,150 of said 1,442 heads of families were adjudicated and allowed under the Act of August 23, 1842, and certificates or scrip awarded to them under the provisions of said Act, authorizing the entry of 1,399,920 acres of land, of which there were paid and delivered to the persons entitled to receive the same 3,833 certificates or pieces of scrip, authorizing the entry of 700,080 acres of land. The certificates for the residue of said 1,399,920 acres; to wit, for 699,840 acres, were not issued, but were withheld under an Act of Congress approved March 3, 1845, 5 Stat. at L. 777, which provided that they should carry an interest of 5 per cent,

payable to the claimants or their representatives to be estimated upon $1.25 for each acre of land to which they were entitled. The aggregate amount, or principal sum, thus funded, amounting to $872,000, was afterwards, under an Act of Congress approved July 21, 1852, 10 Stat. at L. 19, paid in money to the claimants; which sum of $872,000 was included in the sum of $1,749,900 subsequently charged to the claimants in an account referred to hereafter, being for 1,399,920 acres of scrip, in lieu of reservations, at $1.25 per acre; of which sum of $1,749,900, $872,000 was paid as aforesaid in money, the residue, $877,900, being charged in said account for the certificates or scrip authorizing the entry of 700,080 acres of land, delivered as aforesaid to the said claimants; for which 700,080 acres in scrip the said claimants were charged at the rate of $1.25 per acre, although, by reason of the acts of the United States and its agents in delivering said scrip at places where it could not be used, the whole amount realized by the claimants was $118,400, and no more. So that the amount chargeable against the Choctaw Nation should have been the sum of $980,400, and is all that should be deducted from the $9,200,180, the estimated value of the lands for which they claim the right to recover in this proceeding.

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It is further alleged that, by the sixteenth article of said Treaty, the United States agreed to remove the Choctaws to their new homes; to furnish them with ample corn, beef and pork for twelve months after reaching there; to take all of their cattle at an appraised value, and pay for the same in money; but it is alleged that, between 1834 and 1846, 960 members of the Choctaw Nation emigrated and subsisted for one year without assistance from the United States, for each of which 960 the Choctaw Nation is entitled to recover $54.16⅔ from the United States, making the total amount claimed $51,998.40.

It is further alleged that, under the provisions of article 19 of said Treaty of 1830, four sections of land were reserved to Col. David Folsom, two of which should include his present improvement; two sections each were reserved to eight persons therein named, to include their improvements, and to be bounded by sectional lines, which might be sold with the consent of the President; and for others not otherwise provided for, there was reserved (1) one section to each head of a family, not exceeding forty, who had in actual cultivation fifty acres or more, with a dwelling house thereon; (2) three quarter sections, after the manner aforesaid, to each head of a family, not exceeding 460, who had cultivated between thirty and fifty acres; (3) one half section, as aforesaid, to those, not to exceed 400, who had cultivated from twenty to thirty acres; (4) a quarter section to such, not to exceed 350, as had cultivated from twelve to twenty acres; and half that quantity to such as had cultivated from two to twelve acres, limited to the same number; each class to be so located as to include the improvement containing the dwelling house. These reservations might be sold with the consent of the President of the United States, but should any prefer it, or omit to take such reservation as he might be entitled to, the United States would, upon his removal and arrival at his new home, pay him fifty cents an acre therefor, provided proof of his claim be made before the first of January following.

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It is further alleged that said article 19 intended to provide 458,400 acres for 1,600 cultivators, yet in carrying out the Treaty, land was assigned to but 731, amounting in all to 123,680 acres; that the actual number of cultivators of from two to twelve acres at the date of the Treaty was 1,763, instead of 350; that 1,413, therefore, failed to get any land at all, owing to the limitations of said article 19; that while the Treaty intended to provide reservations for 1,600 cultivators, such reservations were assigned to only 731, although the number of actual cultivators was 2,144; that the 1,413 cultivators thus excluded contended that they were justly entitled to the same measure of compensation for their improvements as was allowed to other cultivators of equal grade; to wit, 80 acres to each, amounting to 113,040 acres, worth at that time $339,120; that of the 731 to whom were assigned lands as aforesaid, 143 had never received any land or other benefit intended to be secured by said article 19; 45 of whom relinquished to the United States 6,400 acres of land and never received compensation therefor, and the remaining 98, to whom 15,520 acres of land were assigned, never had any land set apart for them; that the said 143 cultivators were entitled to 21,920 acres, worth the sum of $65,760.

It is further alleged that article 20 of said Treaty of 1830 provided for each warrior who emigrated, a rifle, molds, and ammunition; that 1,458 warriors became entitled to the benefits of article 20, but they were never received by a large number who emigrated; that such articles were worth at that time $13.50 to each warrior, and that the whole amount claimed, by the failure of the United States to carry out the provision of said article 20, was $19,278.

It is further alleged that the Act of Congress making appropriation for the expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian Tribes, for the year ending June 30, 1846, approved March 3, 1845, 5 Stat. at L. 776, provided as follows:

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"That of the scrip which has been awarded, or which shall be awarded, to Choctaw Indians under the provisions of the law of 23d August, 1842, that portion thereof not deliverable East, by the third section of said law, in these words, 'not more than one half of which shall be delivered to said Indian until after his removal to the Choctaw territory west of the Mississippi,' shall not be issued or delivered in the West, but the amounts awarded for land on which they resided, but which it is impossible for the United States now to give them, shall carry an interest of 5 per cent, which the United States will pay annually to the reservees under the Treaty of 1830, respectively, or to their heirs and legal representatives, forever, estimating the land to which they may be entitled at one dollar and twenty-five cents per acre."

That the Choctaw heads of families and their children became entitled to receive scrip for 697,600 acres of land, valued at $872,000; that said Choctaw heads of families, their heirs and legal representatives, became entitled to interest thereon from March 3, 1845; but the United States refused to pay such interest unless the

person entitled to receive it was at the date of the passage of said Act settled in the Choctaw territory west of the Mississippi River, and also refused to pay such interest on scrip issued subsequent to March 3, 1845, until the beneficiary had removed to the Choctaw territory; that those persons for whose benefit the scrip was funded were entitled to interest on such funded scrip from March 3, 1845, until July 21, 1852, but the United States did not pay the interest on such funded scrip between those dates; and that the amount of such interest due from the United States was $305,551, but only $171,400.34 of interest was paid on such scrip, leaving due thereon $134,150.66.

[10] It is further alleged that the Choctaw Nation, by the fourth article of the Treaty of October 18, 1820, was secured in the right to occupy and enjoy forever the lands retained east of the Mississippi River, which were by the provisions of said article to be set apart to each family or member of the Choctaw Nation, when that Nation should become so civilized and enlightened as to be made citizens of the United States; that the United States agreed, by the seventh article of the Treaty of 1825, not to apportion said lands for the benefit of the Choctaw Nation, but with the consent of that Nation; that the legal effect of said article 4 of the Treaty of 1820, and of article 7 of the Treaty of 1825, was to secure to the heads of families and individual members of the Choctaw Nation a title in fee simple to all lands belonging to that Nation not included in the cession made by the Treaty of 1820, but that the United States having, by the Treaty of 1830, disregarded the obligations of said articles 4 and 7, and having paid for said lands ceded by the Choctaw Nation, under the Treaty of 1830, an inadequate consideration, the Choctaw Nation was entitled to be paid by the United States the whole amount of the proceeds resulting from the sale of said lands so ceded.

It is further alleged that the Choctaw Nation, by its Legislative Assembly, on November 9, 1853, created a delegation to settle all unsettled business with the United States; that on the 22d of June, 1855, the United States entered into a Treaty with the Choctaw Nation to settle and adjudicate all matters of difference, claims or demands of that Nation, or individual members thereof; that subsequent to the ratification of said Treaty by the United States, the Senate of the United States entered upon the examination and adjudication of the questions submitted to it by article 11 of that Treaty; whereupon a statement of the claims and demands of the Choctaw Nation upon the United States, with supporting evidence, was presented to the Senate to enable it to give such claims a just, fair and liberal consideration; that after consideration of such claims, the Senate, on the 9th of March, 1859, passed a resolution to allow the Choctaws the proceeds [11] of the sale of such lands as had been sold by the United States on January 1, 1859, deducting therefrom the cost of survey and sale, and all proper expenditures and payments under the Treaty of 1830, excluding the reservations allowed and secured, and estimating the scrip issued in lieu thereof at $1.25 per acre, and that they be allowed 12½ cents per acre for the residue of said lands.

It is further alleged that, in pursuance of said resolution, the Secretary of the Interior caused an account to be stated between the United States and the Choctaw Nation, showing that the United States were indebted to said Nation, on account of the net proceeds of the lands ceded by the Treaty of September. 1830, in the sum of $2,981,247.30.

It is also alleged that, under the Treaty of June 22, 1855, in consideration of the claims heretofore stated, and of the cession and lease of 15,000,000 acres of land, valued at $2,225,000, the United States agreed that all the rights and claims of the Choctaw Nation, and the individuals thereof, and all matters in dispute, should receive a just, fair and liberal consideration and settlement; that by virtue thereof the Choctaw Nation became entitled to a settlement of and payment for all their pending rights and claims, individual and national, free from all waivers or estoppels which might in equity have been interposed against them; and that, by virtue of article 11 of the Treaty of June, 1855, and of the consideration paid to the United States therefor, the Choctaw Nation became entitled, by virtue of article 18 of the Treaty of 1830, whenever well founded doubts should arise, to have said Treaty construed most favorably toward the Choctaws.

In said petition the Choctaw Nation prays that the award of the Senate of the United States be made final, and that the account stated by the Secretary of the Interior may be restated, in order that the balance due may be determined and the following errors corrected; that the proceeds of the lands sold up to January 1, 1859, and the residue then remaining unsold, at 12½ cents per acre, amounted to $8,413,418.61, instead of $8,078,614.80; that the actual cost of survey and sale was $256,387.74, instead of $1,042,313.96; that the sum of $120,826.76 for reservations to orphans was not deducted, included in or connected with the aggregate fund against which it is charged in said account; that there should not [12] have been deducted from said aggregate fund the payments made to meet contingent expenses of the commissioners appointed to adjust claims under the 14th article of the Treaty of September, 1830, amounting to $51,320.79, nor the expenses growing out of the location and sale of Choctaw reservations, and perfecting titles to the same, amounting to $21,408.36; that the correction of the foregoing errors would show a balance payable to the Choctaw Nation, under the award of the Senate, of $4,295,533.24, instead of $2,981,247.30; for which sum the Choctaw Nation prays judgment, after deducting $250,000 paid on account of said award under the Act of March 2, 1861, and the further sum of $250,000 in bonds appropriated by said Act; and also prays that interest be allowed on this latter sum at 6 per centum per annum from March 2, 1861, until paid.

It is further alleged that, under the Act of Congress approved March 2, 1861, the Choctaw Nation became entitled to receive from the United States $250,000 in bonds bearing interest at 6 per centum per annum, as a payment on

that the said Choctaw heads of families and their children, claimants under the 14th article of the Treaty of September, 1830, were reduced to a helpless condition of want, which rendered it practically impossible for them to contend with the United States in their requirement that the said Choctaw heads of families should accept and receive the scrip provided to be issued to them, in lieu of the reservations, by the Act of 1842; and the said scrip and the money paid to redeem the same were taken and accepted because they were powerless to enforce any demands against, or impose any conditions upon, the United States.

The Choctaw Nation, by its proper authorities, on November 6, 1852, executed and delivered to the United States the following instrument, for the purposes therein specified:

"*Whereas*, by an Act of Congress entitled 'An Act to Supply Deficiencies in the Appropriations for the Service of the Fiscal Year Ending the 30th Day of June, 1852,' all payments of interest on the amount awarded Choctaw claimants under the 14th article of the Treaty of Dancing Rabbit Creek for lands on which they resided, but which it is impossible to give them, shall cease, and that the Secretary of the Interior be directed to pay said claimants the amount of the principal awards in each case respectively, and that an amount necessary for this purpose be appropriated, not exceeding the sum of $872,000; and that final payment and satisfaction of said awards shall be first ratified and approved as a final release of all claims of such parties under the 14th [19] article of said Treaty, by the proper national authority of the Choctaws, in such form as shall be prescribed by the Secretary of the Interior: *Now be it known*, That the said general council of the Choctaw Nation do hereby ratify and approve the final payment and satisfaction of said awards, agreeably to the provisions of the Act aforesaid, as a final release of the claims of such parties under the 14th article of said Treaty."

On the 9th day of November, 1853, the Legislative Council of the Choctaw Nation provided for the appointment of a delegation which should represent said Nation in the settlement of all the unsettled claims and demands of said Nation or individual members thereof against the United States. The preamble to the joint resolution appointing that delegation recites that "The Choctaws were, and ever have been, dissatisfied with the manner in which the Treaty of Dancing Rabbit Creek was made, owing to the many circumstances which were created to force them into it, and owing to the exceeding small and inadequate amount which was given as payment for their country;" and that "a large number of claims on the United States, arising under the 14th and 19th and other articles of the Treaty of 1830, are still remaining unpaid;" and the said delegates were "clothed with full power to settle and dispose of, by treaty or otherwise, all and every claim and interest of the Choctaw People against the Government of the United States, and to adjust and bring to a final close all unsettled business" between said people and the Government of the United States.

This delegation opened negotiations with the United States, through the Commissioner of Indian Affairs, for a new treaty, by means of a communication in writing, dated on the 5th of April, 1854, which contained a general statement or survey of the condition of the relations then existing between the Choctaw Nation and the United States, and set out *seriatim* complaints against the Government, especially for causes of dissatisfaction arising under the Treaty of September 27, 1830, claiming that scarcely one of the stipulations of that Treaty had been carried out by the Government, so as to do justice according to the intent of the Treaty. They especially alleged that the laws [20] passed for the examination of their claims under said Treaty, and the 14th article thereof, prescribed a course of adjudication of so rigid and technical a character as necessarily to exclude many just claims; that many were compelled to remove because of the failure of the Government to give them their rights under the said article, and that the law unjustly cut off such persons from the benefits of it; that the scrip issued under the law was paid in such a manner as to make it of but little value to the Indian; and that those who received anything received but a mere pittance. They contended that many claims existed unadjusted and unpaid under the 19th article; and proposed to make arrangement for final adjustment of all matters, national and individual, in a new treaty, by which the Nation proposed to pay all individual claims under the 14th and 19th articles, and release the Government of the United States from all responsibility on that account, because such claims were not susceptible of proof against the United States, but could be adjusted by the authorities of the Nation, provided the Nation could effect such a settlement with the United States as the Choctaw People desire. They claimed that under the Treaty of September 27, 1830, the Choctaw Nation was entitled to the funds arising from the sale of lands ceded, after deducting the expenses of sale, and the debt mentioned in said Treaty; that the Government of the United States was a trustee for the Choctaw Nation in the sale of the lands ceded by that Treaty, so that, after the payment of the expenses incident to the execution of the trust, the Indians were entitled to the remainder; and they proposed that the payment to the Nation of such remainder should operate in law as a satisfaction of the individual claims under a new treaty.

Upon the basis of this communication, the Commissioner of Indian Affairs instructed the agent of the United States for the Choctaws to make the requisite inquiry and investigation to ascertain the character and extent of their claims, and what arrangement was necessary to accomplish the object in view. The agent of the United States for the Choctaws submitted [21] to the Commissioner of Indian Affairs, in answer to this reference, a paper containing a comparative estimate or approximate statement of the claims then asserted by the Choctaw commissioners, which statement had been furnished by the Choctaw delegation to said agent. The aggregate amount of these claims so stated was $6,599,280, which it was proposed to settle on the principle of allowing the net proceeds of the sales of the lands ceded to the United States by the Choctaw Nation under the Treaty of

September 27, 1830; the whole showing the balance claimed to be due to the Choctaws to be $2,380,701. The agent of the United States, in his communication to the Commissioner of Indian Affairs, referring to said statement, said: "I have examined this statement carefully, and from the most reliable information I am possessed of, obtained in the Choctaw country and here, I am inclined to think that part of it embracing the extent of the obligations under the Treaty is as nearly correct as it could be made at this date."

The amount of the obligations under the Treaty, thus referred to, was placed in said statement at $6,599,230. These negotiations between the Choctaw delegation and the executive authorities of the United States were conducted with reference to the accomplishment of the following objects:

1. That the United States should provide, in a new treaty, for an examination and settlement of all the claims of the Choctaws, whether national or individual, under the Treaty of 1830, as specified in the letter of the Choctaw delegation to the Commissioner of Indian Affairs, dated April 5, 1854.

2. That the Choctaws should adjust their disputes with the Chickasaws; should lease to the United States all that portion of their common territory between the 98th and 100th degree of west longitude, for the permanent settlement of the Wichita and such other bands of Indians as the United States might desire to locate therein; and should absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the 100th degree of west longitude. [22]

These negotiations resulted in the Treaty of 1855, which was ratified by the Senate of the United States on the 21st of February, 1856, and proclaimed by the President on March 4 of the same year. 11 Stat. at L. 611. The preamble to that Treaty recites that "The Choctaws contend that by a just and fair construction of the Treaty of September 27, 1830, they are, of right, entitled to the net proceeds of the lands ceded by them to the United States under said Treaty, and have proposed that the question of their right to the same, together with the whole subject matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said Treaty, shall be referred to the Senate of the United States for final adjudication and adjustment."

By the terms of that Treaty, a division of their common lands was made between the Choctaws and the Chickasaws, and the Choctaws relinquished to the United States all their lands west of the 100th degree of west longitude, and the Choctaws and the Chickasaws together leased to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government of the United States might desire to locate therein. The 11th and 12th articles of said Treaty are as follows:

"Article 11. The Government of the United States, not being prepared to assent to the claim set up under the Treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw People, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States by the Treaty of September the twenty-seventh, eighteen hundred and thirty, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said Treaty; and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected. Or, [23]

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and, if so, how much.

"Article 12. In case the Senate shall award to the Choctaws the net proceeds of the lands ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the Tribe to be equitable and just—the settlement and payment to be made with the advice and under the direction of the United States agent for the Tribe; and so much of the fund awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the Tribe, shall, on their requisition, be paid over to them by the United States. But should the Senate allow a gross sum, in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid, it being expressly understood that the adjudication and decision of the Senate shall be final."

In pursuance of the eleventh article of the Treaty, the questions submitted to the Senate of the United States were answered by a Resolution of the Senate passed on the 9th of March, 1859, as follows:

"*Resolved*, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States on the first day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said Treaty excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1.25 per acre; and further, that they be also allowed twelve and a half cents per acre for the residue of said lands." [24]

In reference to this award of the Senate, the court of claims, in the finding of fact, says: "The consideration which was given by the Senate to the subject matter so submitted to it by the said eleventh article of the said Treaty, and to the evidence which was so presented to,

that the said Choctaw heads of families and their children, claimants under the 14th article of the Treaty of September, 1830, were reduced to a helpless condition of want, which rendered it practically impossible for them to contend with the United States in their requirement that the said Choctaw heads of families should accept and receive the scrip provided to be issued to them, in lieu of the reservations, by the Act of 1842; and the said scrip and the money paid to redeem the same were taken and accepted because they were powerless to enforce any demands against, or impose any conditions upon, the United States.

The Choctaw Nation, by its proper authorities, on November 6, 1852, executed and delivered to the United States the following instrument, for the purposes therein specified:

"*Whereas*, by an Act of Congress entitled 'An Act to Supply Deficiencies in the Appropriations for the Service of the Fiscal Year Ending the 30th Day of June, 1852,' all payments of interest on the amount awarded Choctaw claimants under the 14th article of the Treaty of Dancing Rabbit Creek for lands on which they resided, but which it is impossible to give them, shall cease, and that the Secretary of the Interior be directed to pay said claimants the amount of the principal awards in each case respectively, and that an amount necessary for this purpose be appropriated, not exceeding the sum of $872,000; and that final payment and satisfaction of said awards shall be first ratified and approved as a final release of all claims of such parties under the 14th [19] article of said Treaty, by the proper national authority of the Choctaws, in such form as shall be prescribed by the Secretary of the Interior: *Now be it known*, That the said general council of the Choctaw Nation do hereby ratify and approve the final payment and satisfaction of said awards, agreeably to the provisions of the Act aforesaid, as a final release of the claims of such parties under the 14th article of said Treaty."

On the 9th day of November, 1853, the Legislative Council of the Choctaw Nation provided for the appointment of a delegation which should represent said Nation in the settlement of all the unsettled claims and demands of said Nation or individual members thereof against the United States. The preamble to the joint resolution appointing that delegation recites that "The Choctaws were, and ever have been, dissatisfied with the manner in which the Treaty of Dancing Rabbit Creek was made, owing to the many circumstances which were created to force them into it, and owing to the exceeding small and inadequate amount which was given as payment for their country;" and that "a large number of claims on the United States, arising under the 14th and 19th and other articles of the Treaty of 1830, are still remaining unpaid;" and the said delegates were "clothed with full power to settle and dispose of, by treaty or otherwise, all and every claim and interest of the Choctaw People against the Government of the United States, and to adjust and bring to a final close all unsettled business" between said people and the Government of the United States.

This delegation opened negotiations with the United States, through the Commissioner of Indian Affairs, for a new treaty, by means of a communication in writing, dated on the 5th of April, 1854, which contained a general statement or survey of the condition of the relations then existing between the Choctaw Nation and the United States, and set out *seriatim* complaints against the Government, especially for causes of dissatisfaction arising under the Treaty of September 27, 1830, claiming that scarcely one of the stipulations of that Treaty had been carried out by the Government, so as to do justice according to the intent of the Treaty. They especially alleged that the laws [20] passed for the examination of their claims under said Treaty, and the 14th article thereof, prescribed a course of adjudication of so rigid and technical a character as necessarily to exclude many just claims; that many were compelled to remove because of the failure of the Government to give them their rights under the said article, and that the law unjustly cut off such persons from the benefits of it; that the scrip issued under the law was paid in such a manner as to make it of but little value to the Indian; and that those who received anything received but a mere pittance. They contended that many claims existed unadjusted and unpaid under the 19th article; and proposed to make arrangement for final adjustment of all matters, national and individual, in a new treaty, by which the Nation proposed to pay all individual claims under the 14th and 19th articles, and release the Government of the United States from all responsibility on that account, because such claims were not susceptible of proof against the United States, but could be adjusted by the authorities of the Nation, provided the Nation could effect such a settlement with the United States as the Choctaw People desire. They claimed that under the Treaty of September 27, 1830, the Choctaw Nation was entitled to the funds arising from the sale of lands ceded, after deducting the expenses of sale, and the debt mentioned in said Treaty; that the Government of the United States was a trustee for the Choctaw Nation in the sale of the lands ceded by that Treaty, so that, after the payment of the expenses incident to the execution of the trust, the Indians were entitled to the remainder; and they proposed that the payment to the Nation of such remainder should operate in law as a satisfaction of the individual claims under a new treaty.

Upon the basis of this communication, the Commissioner of Indian Affairs instructed the agent of the United States for the Choctaws to make the requisite inquiry and investigation to ascertain the character and extent of their claims, and what arrangement was necessary to accomplish the object in view. The agent of the United States for the Choctaws submitted [21] to the Commissioner of Indian Affairs, in answer to this reference, a paper containing a comparative estimate or approximate statement of the claims then asserted by the Choctaw commissioners, which statement had been furnished by the Choctaw delegation to said agent. The aggregate amount of these claims so stated was $6,599,230, which it was proposed to settle on the principle of allowing the net proceeds of the sales of the lands ceded to the United States by the Choctaw Nation under the Treaty of

September 27, 1830; the whole showing the balance claimed to be due to the Choctaws to be $2,880,701. The agent of the United States, in his communication to the Commissioner of Indian Affairs, referring to said statement, said: "I have examined this statement carefully, and from the most reliable information I am possessed of, obtained in the Choctaw country and here, I am inclined to think that part of it embracing the extent of the obligations under the Treaty is as nearly correct as it could be made at this date."

The amount of the obligations under the Treaty, thus referred to, was placed in said statement at $6,599,230. These negotiations between the Choctaw delegation and the executive authorities of the United States were conducted with reference to the accomplishment of the following objects:

1. That the United States should provide, in a new treaty, for an examination and settlement of all the claims of the Choctaws, whether national or individual, under the Treaty of 1830, as specified in the letter of the Choctaw delegation to the Commissioner of Indian Affairs, dated April 5, 1854.

2. That the Choctaws should adjust their disputes with the Chickasaws; should lease to the United States all that portion of their common territory between the 98th and 100th degree of west longitude, for the permanent settlement of the Wichita and such other bands of Indians as the United States might desire to locate therein; and should absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the 100th degree of west longitude. [22]

These negotiations resulted in the Treaty of 1855, which was ratified by the Senate of the United States on the 21st of February, 1856, and proclaimed by the President on March 4 of the same year. 11 Stat. at L. 611. The preamble to that Treaty recites that "The Choctaws contend that by a just and fair construction of the Treaty of September 27, 1830, they are, of right, entitled to the net proceeds of the lands ceded by them to the United States under said Treaty, and have proposed that the question of their right to the same, together with the whole subject matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said Treaty, shall be referred to the Senate of the United States for final adjudication and adjustment."

By the terms of that Treaty, a division of their common lands was made between the Choctaws and the Chickasaws, and the Choctaws relinquished to the United States all their lands west of the 100th degree of west longitude, and the Choctaws and the Chickasaws together leased to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government of the United States might desire to locate therein. The 11th and 12th articles of said Treaty are as follows:

"Article 11. The Government of the United States, not being prepared to assent to the claim set up under the Treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw People, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States by the Treaty of September the twenty-seventh, eighteen hundred and thirty, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said Treaty; and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected. Or, [23]

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and, if so, how much.

"Article 12. In case the Senate shall award to the Choctaws the net proceeds of the lands ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the Tribe to be equitable and just—the settlement and payment to be made with the advice and under the direction of the United States agent for the Tribe; and so much of the fund awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the Tribe, shall, on their requisition, be paid over to them by the United States. But should the Senate allow a gross sum, in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid, it being expressly understood that the adjudication and decision of the Senate shall be final."

In pursuance of the eleventh article of the Treaty, the questions submitted to the Senate of the United States were answered by a Resolution of the Senate passed on the 9th of March, 1859, as follows:

"*Resolved*, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States on the first day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said Treaty excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1.25 per acre; and further, that they be also allowed twelve and a half cents per acre for the residue of said lands." [24]

In reference to this award of the Senate, the court of claims, in the finding of fact, says: "The consideration which was given by the Senate to the subject matter so submitted to it by the said eleventh article of the said Treaty, and to the evidence which was so presented to,

and taken and considered by, the Senate, was full, fair and impartial, and its adjudication, as made under the said article, was not influenced or affected by, and was in no way or degree the result of, any fraud, corruption, partiality, and there is no evidence tending to show that it was the result of surprise or mistake on the part of the Senate, or any member thereof."

On the 9th of March, 1859, the Senate of the United States also adopted a Resolution for the purpose of ascertaining the amount due the Choctaw Nation under their award, as follows: "Resolved, That the Secretary of the Interior cause an account to be stated with the Choctaws showing what amount is due them according to the above prescribed principles of settlement, and report the same to Congress." And the Secretary of the Interior, in compliance with the mandate of said Resolution, did, on the 8th of May, 1860, transmit to Congress a statement of account with the Choctaw Nation. The account shows, as the proceeds of the sales of the Choctaw lands up to January 1, 1859, together with the residue of said lands unsold at that date, at 12½ cents per acre, an amount in all of $8,078,614.80, from which was to be deducted the whole amount of charges, equal to $5,097,367.50, leaving a balance due to the Choctaws of $2,981,247.30.

On the 9th day of January, 1861, the Choctaw Nation, by its memorial addressed to Congress, demanded payment from the United States of the amount claimed to be due to it under said award. By the provisions of the Act of March 2, 1861, the Indian Appropriation Act, 12 Stat. at L. 238, there was paid to the Choctaw Nation the sum of $250,000 on account of their claim. The bonds for the additional sum of $250,000, which were by that Act directed to be issued and delivered to said [25] Choctaw Nation on account of said claim, were never issued or delivered to it, although demand for the same was made upon the Secretary of the Treasury by them on the 4th of April, 1861.

Upon the findings of fact, the court of claims found a balance due the Choctaw Nation from the United States of $408,120.32, made up of various claims arising under the Treaty of 1830, and for the value of land taken in fixing the boundary between the State of Arkansas and the Choctaw Nation, deducting the payment made, under the Act of 1861, of $250,000. In reaching this conclusion the court of claims rejected the award of the Senate, under the Treaty of 1855, as having no effect in law, and excluded the consideration of all claims covered by the release executed by the Choctaw Nation on November 6, 1852.

Messrs. **John J. Weed, Samuel Shellabarger, Jeremiah M. Wilson,** *John B. Luce, James W. Denver* and *Fletcher P. Cuppy,* for the Choctaw Nation.

Messrs. **Wm. A. Maury** and **Robert A. Howard,** *Assistant Attys-Gen.,* for the United States.

Mr. Justice **Matthews** delivered the opinion of the court:

The general purpose of this suit is a judicial settlement of all existing controversies between the Choctaw Nation and the United States. The specific claims of the Choctaw Nation are stated in the petition in the alternative. It is claimed, in the first instance, that the award of the Senate, and the amount found due as a balance upon the account between the parties, stated upon the principles of that award, should either be enforced as a finality by the judgment of the court in the present case, or that if not technically enforceable as an award, it still furnishes a rule for an equitable settlement of the differences between the parties. But, in the second place, it is claimed that if the award cannot be considered in either of these lights, then the whole controversy and all questions involved in it, from the beginning, under any of [26] the treaties between the parties, are open for investigation and decision upon their original merits. And under this head the Choctaw Nation claim compensation for various breaches on the part of the United States of the Treaty of September 27, 1830; and, in general, such a failure on its part to comply with its provisions as in substance deprived the Choctaw Nation of all the benefits intended to be conferred by it, for which it is claimed they are entitled to an equitable equivalent as compensation.

In respect to so much of the petitioner's case as rests upon specific failures to comply with the provisions of article 14 of that Treaty, as to those Choctaw heads of families who claimed reservations within its terms and did not receive them, the Government of the United States relies upon the release executed by the Choctaw Nation in pursuance of the requirements of the Act of July 21, 1852, under which a payment of $872,000 was made in satisfaction of the amounts awarded the Choctaw claimants under that article of the Treaty of 1830.

The court of claims, as it appears, declined to give any legal effect whatever to the award made by the Senate under the Treaty of 1855, feeling constrained to that conclusion by the terms of the Act of March 3, 1881, conferring jurisdiction upon it in this suit, and on the other hand, it gave all the effect claimed by the United States for the release under the Act of 1852. Its judgment in favor of the Choctaw Nation was made up as follows:

For claims under the 14th article of the Treaty of 1830, not covered by the release of 1852	$417,656.00
For claims under the 19th article of the Treaty of 1830	42,920.00
For land taken in fixing the boundary of the State of Arkansas and the Choctaw Nation	68,102.00
For transportation and subsistence under the Treaty of 1830	51,993.00
For unpaid annuities	59,449.32
For guns, ammunition, etc	18,000.00
Total	$658,120.32 [27]

And credited the balance thus found due with a payment made under the Act of March 2, 1861, of $250,000.

In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany

that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the Nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign Nation, but of an Indian Tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

As was said by this court recently in the case of the *United States* against *Kagama*, 118 U. S. 375, 383 [*ante*, 228]: "These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen."

It had accordingly been said in the case of *Worcester* v. *Georgia*, 6 Peters, 582 [31 U. S. bk. 8, L. ed. 508]: "The language used in [28] treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the eleventh article of the Treaty of 1855, the Government of the United States expresses itself as being desirous that the rights and claims of the Choctaw People against the United States "shall receive a just, fair and liberal consideration."

The language of the Act of March 3, 1881, [29] conferring jurisdiction in the present case, also requires construction. It confers jurisdiction upon the court of claims to try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon. How far the settlement of these differences is to be affected by the various Acts of Congress referred to in the pleadings and findings of fact made by the court of claims, and which were passed professedly in execution of treaty obligations on the part of the United States, must be determined. These Acts of Congress, in one aspect, have the force of law, because Congress has full power of legislation over the subject; but, in so far as they may have proceeded upon insufficient or incorrect interpretations of the treaty rights of the Choctaw Nation, or in so far as they may have attempted to modify or disregard those rights, they form the very subjects of complaint on the part of the Choctaw Nation, whose allegation is that the United States, by these very statutes, as in other particulars, have broken their treaty obligations. Where, in professed pursuance of treaties, these statutes have conferred valuable benefits upon the Choctaw Nation, which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent, on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances. Under the terms of the Act of March 3, 1881, in exercising the jurisdiction thereby conferred, the court of claims is empowered to review the entire question of differences *de novo*, which may be interpreted to imply that the whole matter was opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of the statutes referred to. The meaning of this clause becomes most important, however, in connection with the question, how the court is authorized to deal with the award made by the Senate of the United States in pursuance of the Treaty of 1855.

It is contended on the part of the Choctaw Nation that that award is final and conclusive; [30] and in support of that contention reference is made to the express provisions of the Treaty of 1855. It is recited in the preamble of that

Treaty that the Choctaws have proposed that their claims against the United States, arising under the various provisions of the Treaty of September 27, 1830, shall be referred to the Senate of the United States for final adjudication and adjustment; and by the terms of the twelfth article of the Treaty it is declared to be "expressly understood that the adjudication and decision of the Senate shall be final;" and the right to insist upon the conclusive nature of this award, it is said, is a treaty right in favor of the Choctaw Nation.

On the other hand, it is declared by the Act of March 3, 1881, that, in the exercise of its jurisdiction to try this case, the court of claims "shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the Treaty of 1855;" and it is insisted, on behalf of the United States, that this language is inconsistent with the idea that the court should give to that award any legal effect whatever. And this construction is supposed to be rendered necessary by the previous clause, which grants power to the court to review the entire question of differences *de novo;* for it is said that the court cannot review the question of differences *de novo*, that is, from the beginning, and as if they were new and had freshly arisen, if it gives any effect to a determination of the Senate, which it is claimed operates as *res judicata*, foreclosing further inquiry into the merits of the very questions to be reviewed.

If the words conferring the power to review the question of differences *de novo* are permitted to have that force, it is difficult to understand how the release made by the Choctaw Nation in pursuance of the Act of Congress of July 21, 1852, should stand in the way of a reconsideration of the claims covered by it. That Act of Congress, it is true, declares that the final payment and satisfaction of the sum thereby appropriated and paid, should, when ratified and approved by the proper national authority of the Choctaws, operate as a final release of all [31] claims of those to whom such payments are made, under the fourteenth article of the Treaty of September 27, 1830. But whether that payment was a just and fair extinguishment of those claims, according to the terms of that Treaty was one of the very questions in dispute. And it is not unreasonable to contend, as it is contended on behalf of the Choctaw Nation, that the effect of that release should be considered in view of the circumstances under which it was executed, and in reference to which the court of claims has found, in the sixteenth finding, that "The claimants under the fourteenth article, the said Choctaw heads of families and their children, were reduced to a helpless condition of want, which rendered it practically impossible for them to contend with the United States in their requirement that the said Choctaw heads of families should accept and receive the scrip provided to be issued to them in lieu of the reservations by the Act of 1842; and the said scrip and the money paid to redeem the same were taken and accepted because they were powerless to enforce any demands against, or impose any conditions upon, the United States."

However this may be, the language of the Act of March 3, 1881, in reference to the award made by the Senate under the Treaty of 1855, does not abrogate it, and does not require, as a condition of the exercise of the jurisdiction conferred by the Act, that the court should entirely disregard it, giving it no effect whatever. It merely says that the court shall not be estopped by any action had or award made by the Senate in pursuance of that Treaty. The plain and literal meaning of this language is fully satisfied by holding that the award, considered as such, shall not, upon its face, be taken to be final and conclusive. There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation, leaving to the representatives of the Government in this litigation the right not only to question the validity of the award, as such, upon any such grounds as might or should invalidate awards ordinarily, either at law or in equity, but also to attack it upon the merits, as a finding unsup- [32] ported by proof, or unjust and unfair in view of all the circumstances, and on that account not to be enforced. In that view, so much effect only would be given to it as to cast the burden of disproving its justice and fairness upon the United States in this suit. In that light and with that view it has been attacked in argument by the counsel for the United States, upon the proof contained in the case.

In the first place, it is objected that the award did not agree with the submission, and under that head it is argued that the first question submitted for adjudication to the Senate was whether the Choctaws were entitled to the proceeds of the sale of the lands ceded by them to the United States by the Treaty of September 27, 1830, and that there was no authority to allow to them such proceeds, unless the Senate should first find that they were entitled to them. And it is said that the Senate not only did not find that, as matter of law, the Choctaws were so entitled under the terms of the Treaty of September 27, 1830, but that, according to the report of the Committee on Indian Affairs, which was adopted by the Senate in the passage of the resolutions which contain the award itself, their title to those proceeds, considered as matter of law, was denied. We do not, however, think that the words of the question submitted to the Senate by the Treaty of 1855 are to be confined to a consideration of the question of a strict title to the proceeds of the sale of the lands, but that they plainly mean, whether the Choctaws, under all the circumstances, as a matter of justice and fair dealing, ought to receive such proceeds, whether as deducible from the terms of the Treaty or as merely a fair compensation to be awarded to them for its breaches by the United States. The language of the question is in the alternative; it is whether the Choctaws are entitled to or *shall be allowed;* and it was sufficient, in our judgment, to satisfy the terms of the submission, for the Senate to declare, as it did, that the Choctaws should be allowed the proceeds of the sale of the lands sold by the United States which had been ceded by the Choctaws under the Treaty of 1830; and we are, therefore, of opinion that the award cannot be avoided on this ground.

Second. It is next insisted that the award is

[33] invalid because it is uncertain, inasmuch as while it determines that the Choctaws shall be allowed the proceeds of the sale of the lands ceded by the Treaty of 1830, and at the rate of 12½ cents an acre for the residue, it does not ascertain what those proceeds and the value of the residue amount to in the aggregate. But the award itself provided the means of reducing this uncertainty by a reference to the Secretary of the Interior, who was directed to cause the account to be stated with the Choctaws, showing what amount was due them according to the principle of settlement embraced in the award. It is not disputed but that the Secretary of the Interior was enabled by the records of his office to state such an account, and that in fact he has stated it. This reference to the Secretary of the Interior for the mere purpose of an account cannot be considered as a delegation of authority by the Senate to adjudicate any of the questions which had been submitted to it by the agreement of the parties. The stating of the account was merely in execution of the judgment; the principle on which it should proceed was fully, clearly and finally adjudged. Whatever exception might be taken to the account when rendered would not be different from such as in the usual course of equity practice might be taken to the report of a master to whom was referred the statement of an account, the principles of which had been previously settled by a decree of the court fixing and establishing the rights of the parties.

Third. It is also said that the award is invalid for lack of proper notice to the United States of the intended action of the arbitrator before proceeding to the adjudication. When it is considered that the Senate of the United States was the arbitrator, constituting, as it does, a branch of the legislative as well as of the treaty-making power of the Government of the United States, it can hardly be contended that the United States had no notice of proceedings taken by the Senate in pursuance of laws or treaties made by the United States.

Whatever force might otherwise be supposed to reside in these objections to the validity of the award are further answered by a reference to the terms of the Indian Appropriation Act [34] of March 2, 1861, 12 Stat. at L. 238, which enacts as follows: "For payment to the Choctaw Nation or Tribe of Indians, on account of their claim under the eleventh and twelfth articles of the Treaty with said Nation or Tribe made the twenty-second of June, 1855, the sum of five hundred thousand dollars; two hundred and fifty thousand dollars of which sum shall be paid in money; and for the residue the Secretary of the Treasury shall cause to be issued to the proper authorities of the Nation or Tribe, on their requisition, bonds of the United States, authorized by law at the present session of Congress: *Provided*, that in the future adjustment of the claim of the Choctaws, under the Treaty aforesaid, the said sum shall be charged against the said Indians."

This appropriation, and the payment which was made under it, would seem to have the effect of confirming the award of the Senate, for it makes an appropriation in part payment of it, and provides for the future adjustment of the claim of the Choctaws under it. It is true, as is insisted in argument, that no express mention is made in this Act of the award, and the claim of the Choctaw Nation is described as one arising under the eleventh and twelfth articles of the Treaty of 1855, but no possible claim could arise under those articles of that Treaty in behalf of the Choctaw Nation, except one to insist upon the arbitration and to enforce the award made, in pursuance of their terms. The whole object and scope of those articles of the Treaty is to provide for the submission to the arbitration of the Senate, and the execution of the award made under it. The future adjustment of the claims of the Choctaws mentioned in the proviso evidently refers to the division of the fund, ascertained by the report of the Secretary of the Interior, by which a portion was to be paid over to the Nation for the satisfaction of individual claimants, and the remainder retained by the United States as a trust fund, according to the 13th article of the Treaty of 1855.

It does not, therefore, give too much effect to the Act of March 2, 1861, to treat it as an Act of Congress confirming the validity of the Senate award. This view is very much strengthened by the terms of the Act of June 23, 1874, from which it appears that at that recent date Congress intended to treat the award of the Senate as valid and binding, and the report of the Secretary of the Interior as to the balance due to be final. The provision of that Act, 18 Stat. at L. 230, is as follows: "That the Secretary of the Treasury is hereby directed to inquire into the amounts of liabilities due from the Choctaw Tribe of Indians to individuals, as referred to in articles 12 and 13 of the [35] Treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Tribes of Indians, and to report the same to the next session of Congress, with a view of ascertaining what amounts, if any, should be deducted from the sum due from the United States to said Choctaw Tribe, for the purpose of enabling the said Tribe to pay its liabilities, and thereby to enable Congress to provide a fund to be held for educational and other purposes for said Tribe, as provided for in article 13 of the Treaty aforesaid."

The only further question, then, which can be claimed to be left open for adjudication in this suit by the terms of the Act of March 3, 1881, is, on the supposition that the award is *prima facie* evidence of the correctness of the claim thereby reduced to judgment, whether upon its merits it was fair, just and equitable, as a settlement between the parties of the matters in controversy, having regard to all the circumstances of the case. As already declared, it is the right of the United States to question its validity by questioning its justice; at the same time, the burden of proof is upon them to establish, by affirmative proof, the considerations which ought to constrain this court, as a matter of justice, altogether to disregard it.

Proceeding, then, to review the whole questions of difference between the parties *de novo* for this purpose, we are led to the conclusion that the principle of settlement adjudged by the Senate in its award, in pursuance of the 11th article of the Treaty of 1855, furnishes the nearest approximation to the justice and right of the case that, after this lapse of time, it is prac-

ticable for a judicial tribunal to reach. Our judgment to this effect is based upon the following considerations:

The situation and circumstances in which the parties were found at the time the Treaty [36] of September 27, 1830, was entered into, were these: By the previous Treaty of 1820, the policy of the United States therein declared, and the agreement between the parties, was "To promote the civilization of the Choctaw Indians, by the establishment of schools amongst them, and to perpetuate them as a Nation by exchanging for a small part of their land here," that is, in Mississippi, "a country beyond the Mississippi River, where all who live by hunting and will not work may be collected and settled together." It was also recited that it was "desirable to the State of Mississippi to obtain a small part of the land belonging to said Nation for the mutual accommodation of the parties." Accordingly, the Choctaws, by the Treaty of 1820, ceded to the United States a portion only of their lands in Mississippi.

By the 2d article of the Treaty it was declared that, "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States," thereby ceded to said Nation a tract of country west of the Mississippi River, the boundaries of which were described. It was also declared by article 4 of that Treaty, that "The boundaries hereby established between the Choctaw Indians and the United States on this side of the Mississippi River shall remain without alteration until the period at which said Nation shall become so civilized and enlightened as to be made citizens of the United States, and Congress shall lay off a limited parcel of land for the benefit of each family or individual in the Nation."

By the Treaty of January 20, 1825, it was further stipulated that the 4th article of the Treaty of October 18, 1820, should be so modified as that Congress should not exercise the power of apportioning the lands for the benefit of each family or individual of the Choctaw Nation, and of bringing them under the laws of the United States, but with the consent of the Choctaw Nation. In the meantime, however, under the pressure of the demand for the settlement of the unoccupied lands of the State of Mississippi by emigrants from other States, the policy of the United States in respect to the Indian Tribes still dwelling within its borders underwent a change, and it became desirable by a new treaty to effect so far as practi- [37] cable the removal of the whole body of the Choctaw Nation, as a tribe, from the limits of the State to the lands which had been ceded to them west of the Mississippi River. To carry out that policy the Treaty of 1830 was negotiated.

By the 3d article of that Treaty the Choctaw Nation of Indians ceded to the United States the entire country they owned and possessed east of the Mississippi River, and agreed to remove beyond the Mississippi River as early as practicable, so that as many as possible of their people, not exceeding one half of the whole number, should depart during the falls of 1831 and 1832, and the residue follow during the succeeding fall of 1833. But, in order to induce the consent of the Choctaw Nation, as such, to the provisions of that Treaty, the United States entered into the obligations already specified and contained in its subsequent articles, particularly articles 14, 15 and 19, by which large reservations of land were made, so that under article 14 the head of every Choctaw family who desired to remain and become a citizen of the United States was entitled to do so, and thereupon became entitled to a reservation of a section of 640 acres of land for himself, and an additional half section for each unmarried child living with him over ten years of age, and an additional quarter section for each child under ten years of age, to adjoin his own location; with the further provision that if they resided upon said lands, intending to become citizens of the States, for five years after the ratification of the Treaty, a grant in fee simple should issue to them. The Choctaws, it appears, were very reluctant to emigrate from their old homes to their new ones, and a very much larger number than was expected manifested an intention to avail themselves of those provisions of the Treaty which entitled them to remain.

It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole Treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in re- [38 gard to their removal. The most noticeable thing, upon a careful consideration of the terms of this Treaty, is that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres. It was not an exchange of lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the Treaty of 1820.

It is true that by the 18th article of the Treaty of 1830 it is provided that, "For the payment of the several amounts secured in this Treaty, the lands hereby ceded are to remain a fund pledged to that purpose, until the debt shall be provided for and arranged. And, further, it is agreed that, in the construction of this Treaty, wherever well founded doubt should arise, it shall be construed most favorably towards the Choctaws." The only money payments secured by the Treaty, over and above the necessary expenditures in removing the Indians, in providing for their subsistence for twelve months after reaching their new homes, and paying for their cattle and their improvements, are: first, an annuity of $20,000 for twenty years, commencing after their removal to the west; and, second, the amount to be expended in the education of forty Choctaw youths for twenty years, and for the support of three teachers of schools for twenty years, together with the cost of erecting some public buildings, and furnishing blacksmiths, weapons and agricultural implements in addition to the several annuities and sums secured under former treaties to the Choctaw Nation and People. It is nowhere expressed in the Treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures

as the Government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. As a consideration for the value of the lands ceded by the Treaty, they must be regarded as a meager pittance.

It is, perhaps, impossible to interpret the language of this instrument, considered as a [39] contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title by the Choctaw Nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw People; and yet it is quite apparent that the only consideration for the transfer of the lands that can be considered as inuring to them is the general advantage which they may be supposed to have derived from the faithful execution of the Treaty on the part of the United States; and when, in that connection, it is considered that the Treaty was not executed on the part of the United States according to its just intent and spirit, with a view to securing to the Choctaw People the very advantages which they had a right to expect would accrue to them under it, it would seem as though it were a case where they had lost their lands without receiving the promised equivalent. In such a case, there is a plain equity to enforce compensation, by requiring the party in default to account for all the pecuniary benefits it has actually derived from the lands themselves. This is the solid ground on which the justice of the award of the Senate of the United States, under the Treaty of 1855 seems to us fairly to stand.

The committee of the Senate which reported the resolutions adopted by that body as the award under the Treaty of 1855 reached their conclusion upon the same premises. Their report discusses at length the various grounds on which the Choctaw Nation rightfully complained of the injurious character of the dealings of the United States with them under the Treaty, and concludes as follows:

"It being thus impossible to ascertain to how much the Choctaws would be entitled, on a fair and liberal settlement, for the damage and loss sustained by them, it seems to the committee that the only practical mode of adjustment is to give them the net proceeds of their lands, not on the ground that the letter of the Treaty entitles them to it, but that it is the only course by which justice can now be done them.

"And while, on the one hand, to award to the Tribe the net proceeds of their lands would surely be no *more* than just to them, because practically no regard is paid to actual value by [40] the United States in the sales of public lands; and undeniably the real market value of these lands which the Indians might have realized, if protected in their possession, was far greater than the price for which they actually sold; on the other hand, the United States would neither have lost, paid, nor expended anything whatever, but would only have refunded to the Choctaws the surplus remaining on hand of the proceeds of their own lands, after having repaid themselves every dollar expended for the benefit of the Choctaws; and that, after having had the use of this surplus for many years without interest, and when, according to the estimates of the General Land-Office, it would really amount to little more than half of what might be recovered in a court of equity, if the case were one between individuals, as will appear by the comparative statement hereto appended.

"The committee accordingly report the following resolutions, and recommend that they be adopted and made the award and judgment of the Senate upon the questions submitted by the Treaty of 1855."

The Secretary of the Interior found to be due to the Choctaw Nation, in his statement of account in conformity with the resolutions and decision of the Senate under the Treaty of 1855, the sum of $2,981,247.30. This balance was reached by crediting them with the proceeds of the sales of the lands ceded by them under the Treaty of September 27, 1830, made up to January 1, 1859, adding for the unsold residue of said lands their estimated value at 12½ cents per acre, amounting to $8,078,614.80 in the aggregate. Against this, deductions were charged, as follows: First, the cost of the survey and sale of the lands at 10 cents an acre; and, second, payments and expenditures under the Treaty; the whole amounting to, $5,097,367.50, resulting in the balance above stated. Some of the items charged as payments and expenditures in this account are objected to on the part of the Choctaw Nation in this suit, and we are asked to restate the account. If, however, we felt at liberty to enter into such an examination of this account, we see nothing in the evidence presented by the record to show that the items objected to were not properly chargeable. The result therefore, is to establish the balance [41] found by the Secretary of the Interior as the true amount due, ascertained according to the principle adjudged by the Senate in its award, and which we have declared to be the equitable rule of settlement between the parties. From this is to be deducted the payment of $250,000 made under the Act of March 2, 1861.

This disposes of all questions of difference involved in this suit arising under treaties prior to that of 1855, except for unpaid annuities, ascertained by the court of claims to amount to the sum of $59,449.32, which is to be included in the judgment.

There is, however, another controversy arising under the Treaty of 1855. The first article of that Treaty fixed definitely the boundary of the territory ceded to the Choctaw Nation by the Treaty of 1820. It is found as a fact by the court of claims, that, in the location of the line which was surveyed under the authority of the United States, and fixed as the permanent boundary between the State of Arkansas and the Indian country by the Act of Congress of March 3, 1875, 18 Stat. at L. 476, the Government made a mistake, whereby they embraced in the territory appropriated by the United States as part of the public lands, 136,204 $\frac{02}{100}$ acres of Indian lands, the value of which, as ascertained by the court of claims, is $68,102. This is a just and valid claim, for which the petitioner is entitled to recover.

The final result is that the Choctaw Nation is entitled to a judgment against the United States for the following sums: First, $2,981,247.30, subject to the deduction of $250,000 paid under the Act of 1861; second, for unpaid annuities, $59,449.32; third, for lands taken in fixing the boundary between the

State of Arkansas and the Choctaw Nation, $68,102.

The judgment of the Court of Claims is therefore reversed and the cause is remanded to that court, with instructions to enter a judgment in conformity with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Chief Justice **Waite** dissenting:

I regret to find myself unable to agree to this judgment. If the United States had authorized suit to be brought against them on the [42] Senate award, I should not have hesitated about giving judgment in favor of the Choctaw Nation, upon the facts now found by the court below, for the full amount due according to the statement of the Secretary of the Interior That award has not, in my opinion, been abrogated by the bringing of this suit. It remains, so far as anything appears in this record, as valid and as binding to-day as it was when made. The United States have neglected to pay the amount awarded, but the Choctaw People have never, so far as this record shows, released them from their obligation to pay. On the contrary, it seems always to have been insisted upon.

This suit is not brought upon the award, but upon the Treaties, and it is to be determined, in my opinion, according to the legal rights of the parties now existing as fixed by the Treaties, without regard to anything that was done by the Senate under the Treaty of 1855. The language of the jurisdictional statute is this: "The court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and render judgment thereon; power is hereby granted the said court to review the entire question of differences *de novo*, and it shall not be estopped by any action or award made by the Senate of the United States in pursuance of the Treaty of 1855." This, as it seems to me, means no more than that the questions of difference are to be tried *de novo*, as far as the award is concerned. A judgment is to be rendered. This implies that the proceeding is to be judicial in its character, and that the judgment is to be in accordance with the principles governing the rights of parties in the administration of justice by a court. The Senate, however, were, by the Treaty of 1855, made arbitrators, and they were invested with power to determine whether the Choctaws were "entitled" legally to the proceeds of their lands, and, if not, whether they ought, under all the circumstances of the case, to be "allowed" such proceeds. The Senate could consider and act upon the moral obligations of the United States; but neither we nor the court of claims can do more than enforce their legal liabilities.

[43] What, then, are the legal obligations of the United States under the Treaties at this time, leaving the Senate award entirely out of view? The jurisdictional statute neither waives nor abrogates the release which was executed under the Act of July 21, 1852. The same is true of the Treaty of 1855. By the Act of 1852 payments were to be made in cash to claimants under the fourteenth article of the Treaty of 1830, for the amount of the scrip which had been awarded under the Act of August 23, 1842, but not delivered, provided "that the final payment and satisfaction of said awards shall be first ratified and approved as a final release of all claims of *such parties* under the fourteenth article." That release was executed on the 6th of November, 1852. The Treaty of 1855 recites that "The Choctaws contend that, by a just and fair construction of the Treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States under said Treaty, and have proposed that the question of their right to the same, together with the whole subject matter of *their unsettled claims*, whether national or individual, against the United States, arising under the various provisions of said Treaty, shall be referred to the Senate of the United States for final adjudication and adjustment." In view of this recital, we are to construe Article XI, of the Treaty, which is in these words:

"The Government of the United States not being prepared to assent to the claim set up under the Treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw People, and being desirous that their rights and claims against the United States shall receive just, fair, and liberal con- [4
sideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States, etc.," or

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of their claims, national and individual, against the United States; and, if so, how much."

Thus the whole matter was referred to the Senate to determine (1) whether the Choctaws were in law entitled to the proceeds of the sale of their lands, and, if not, then, (2) what, under the circumstances, would be a fair and liberal settlement of all the matters of difference, with the right under this branch of the submission to "allow" the Choctaws the proceeds, or a "gross sum" to be ascertained in some other way. The Senate decided that they were not entitled to the proceeds as a matter of right, but that, under all the circumstances, it would be fair and just to settle on that basis. Had the same power been granted to the court of claims, I should not hesitate to affirm a judgment to the full amount of the award if placed on that ground. But, as has been seen, the jurisdictional statute confines the jurisdiction of the courts in this suit to a determination of the legal rights of the parties. Under the Treaty the Senate could do what was fair and just, but we can only adjudge according to law.

This court agrees with the Senate committee in deciding that the Choctaws were not *legally* entitled to the proceeds of the land. In that I concur. The only inquiry, then, is, how much must be paid for the violation of the Treaty of 1830 by the United States. If the release stands,

then there can only be a recovery for the *unsettled* claims of the Choctaws, national and individual. In my opinion, the release has not been invalidated as an instrument binding in law by the findings in the case. The United States may have taken advantage of the necessities of the Indians and exacted a hard bargain, but the bargain was made and both parties promptly carried it out. The Senate, under its powers, might take the hardship of this bargain into account and go behind the release, but, in my judgment, we cannot. All that remains, then, is to ascertain what is legally due from the United States on account of the national and individual claims not included in that settlement; and upon this I am entirely satisfied with what was done by the court of claims. I think the judgment should be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[286] SCHMIDT BROTHERS, a Firm Composed of ALBERT SCHMIDT and TITUS SCHMIDT, *Appts.*,

v.

E. M. COBB.

(See S. C. Reporter's ed. 286-295.)

Place for sale of intoxicating liquors as a beverage, a nuisance—bill to abate—constitutionality of Statute of Iowa—conflict with Civil Rights Statutes, and Fourteenth Amendment to Constitution of United States.

Where a complaint in equity was filed in the District Court of the State of Iowa, under section 1543, Code of that State, as amended by the Twentieth General Assembly, alleging that the defendants (the appellants here), were keeping a place for the sale of intoxicating liquors as a beverage, and sold such liquors for such purpose, contrary to the law of the State, and asking that such place be declared a nuisance and abated, and that a preliminary injunction be issued, and the defendants filed their petition for removal of the cause to the Circuit Court of the United States, upon the ground that the statutes under which the proceedings were had and which the Supreme Court of Iowa had declared valid were in violation of the Civil Rights Law and the Constitution of the United States, especially the Fourteenth Amendment thereof, and such petition was granted, and upon motion of plaintiff in the circuit court, the case was remanded, upon the ground that no federal question was involved; upon appeal from that decree, this court being equally divided in opinion upon a motion made here by appellee, complainant below, to dismiss the appeal, and affirm the decree of the circuit court remanding the cause, such decree stands affirmed.

[No. 855.]

Submitted Oct. 12, 1886. Decided Oct. 25, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Iowa.

Affirmed.

On motion to dismiss.

On the 4th day of September, 1883, complainant, a citizen of Iowa, filed in the District Court of the State of Iowa, in and for Dubuque County, his complaint in equity, alleging that the defendants, who were and are citizens of Iowa, at their place of business in the City of Dubuque, Iowa, have established a saloon and place for the keeping and sale of intoxicating liquors; to wit, whisky, wine, gin and beer, and are keeping said liquors in said saloon, with the intent to sell the same therein as a beverage, contrary to the provisions of section 1542 of the Code of Iowa as amended and substituted by the Act of the Twentieth General Assembly of the State of Iowa, approved April 3, 1884; and further, that in the month of August, 1884, said defendants in their said saloon sold to divers and sundry persons intoxicating liquors, contrary to the provision of section 1540 of the Code of Iowa, as amended by said Twentieth General Assembly; and further, that said defendants at said saloon, have since the 15th day of July, 1884, by themselves, their agents and servants sold and continue from day to day to sell said liquors therein, to be drank as a beverage, contrary to law.

Complainant therefore prays that said saloon may be adjudged and decreed to be a nuisance, and that the same be abated, and said defendant be enjoined by preliminary injunction from further keeping or maintaining said saloon for the illegal sale of intoxicating liquors, and also from selling the same in said saloon, contrary to law; and that upon final hearing said injunction be made perpetual.

This action is brought under the provisions of section 1543 of said Code of Iowa, as amended by said Twentieth General Assembly, which enacts that in cases of the violation of the provision of section 1540, or section 1542 of said Code, prohibiting the selling or keeping for sale intoxicating liquors, contrary to law, the building in which such unlawful selling or keeping with intent to sell, is carried on, is a nuisance; and further provides that any citizen of the county in which such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and enjoin the same.

On the twenty-first day of September, defendants filed in the state court their petition for removal to the Circuit Court of the United States, upon the ground that the statutes aforesaid were in violation of the Civil Rights Law, and the Constitution of the United States, especially the Fourteenth Amendment thereof.

Which petition was allowed and the case removed.

In the circuit court, defendants amended their petition for removal, and averred therein:

1. That they were, and for five years past have been, citizens of Iowa.

2. That long prior to July 4, 1884, they had been engaged in brewing beer and selling the same at wholesale, and have kept upon their premises a room and bar where said beer so manufactured is kept for sale at retail; which is the keeping of a saloon charged in the petition herein.

3. That they invested in said business of brewing and selling beer a large sum of money; to wit, the sum of ten thousand dollars, exclusive of costs, which will be rendered entirely worthless if plaintiff succeeds in this action.

4. That there has been no trial or final hearing of this case.

5. That plaintiff has filed his motion for a temporary injunction to restrain defendants from prosecuting their said business, which if allowed will work an irreparable injury to defendants.

6. That the Twentieth General Assembly of Iowa passed an Act which went into effect July

4, 1884, which renders highly penal the prosecution by defendants of their said business.

7. That under provisions of said Act defendants can be deprived of their property and punished with heavy penalties for being engaged in said business, without the right of a jury trial.

8. That the Supreme Court of Iowa has adjudged said Act valid and in full force.

9. That under said Act and said decision plaintiff is prosecuting this action.

10. That under said law, and especially under section 1526 of said Code as amended, defendants are denied the right to manufacture or sell beer for any purpose whatever, on account of their occupation.

11. That said law and said decision are in derogation of defendants' rights as guaranteed by the Constitution of the United States, and especially by the Fourteenth Amendment thereof, as they are thereby denied the equal protection of the law, and are deprived of liberty and property without due process of law.

13. That by said decision they are denied the equal protection of the laws of Iowa.

14. That said laws are null and void, as contrary to said Amendment, but the Supreme Court of Iowa has refused so to declare.

The plaintiff thereupon moved to remand said cause to the District Court of the State of Iowa.

1. Because the petition for removal fails to state facts showing that defendants were entitled to remove said action from the state court under the provisions of section 641 of the Revised Statutes of the United States.

2. Because said petition fails to state facts sufficient to give the court jurisdiction of said action.

3. Because said petition fails to state facts showing that defendants are denied or cannot enforce in the judicial tribunals of the State of Iowa any rights secured to them by any law providing for the equal, civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, within the provisions and purview of section 641 of the Revised Statutes of the United States

4. Because said action was improperly removed from said state court, as it involves no dispute or controversy within the jurisdiction of this court.

The following order was thereupon entered:

"This day this cause coming on to be heard, upon the motion of complainant to remand the same to the state court, the complainant having by leave of court heretofore made, filed his amendment to his bill of complaint and the defendant, by leave of court heretofore given, having filed his amended petition for removal of said cause into this court, and the court, having read as well the amended pleadings of plaintiff, and the amended petition for removal, of defendant, and having considered the same, and having heard the said parties by their respective counsel, and being fully advised, grants said motion to remand made by said plaintiff, upon the ground that there is no federal question involved in said cause. It is therefore ordered, adjudged and decreed that said cause be remanded to the District Court in and for Dubuque County, Iowa, from which it came, and that the plaintiff recover his costs in this court against defendants; to all of which the defendants, by their counsel, then and there excepted.

And thereupon the defendants in open court filed their petition for appeal to the Supreme Court of the United States from said decree, and present for approval their *supersedeas* bond. The court, after argument by counsel for the respective parties, being fully advised, allows said appeal to the supreme court and approves said *supersedeas* bond, which is done accordingly.

Upon the cause being docketed in this court the appellee moved to dismiss said appeal for the reason that the circuit court had no jurisdiction of the cause; and to affirm the order, judgment and decree of said circuit court, for the reason that the record fails to show that any federal question is involved in said cause; and further, that it is manifest from the record that said appeal was taken for delay only, even in case it be held that this court has jurisdiction, as will appear from the brief statement herewith submitted.

Messrs. **Fouke & Lyon** and **McCeney & O'Donnell**, for appellants:

The only keeping of a saloon, of which the complainant complains, is the selling within the limits and upon the brewery premises, of the beer manufactured in the brewery erected long prior to the passage of the present law, and that the right to manufacture includes a right to dispose of the product of such manufacture; for the petition for removal states that the sale of the beer manufactured upon said premises is the keeping of a saloon alleged in the bill of complaint, and not other or different.

The difference between the facts in the Kansas case and this is simply that the Kansas man was refused a permit after application, while under the Iowa law he is in effect prevented from making application. He belongs to a class of persons to whom permits are absolutely denied.

State v. *Walruff*, 26 Fed. Rep. 178; *Bartemeyer's Case*, 18 Wall. 129 (85 U. S. bk. 21, L. ed. 929); *Munn* v. *Illinois*, 94 U. S. 141 (24: 89); *State* v. *Mugler*, 29 Kan. 252; *Lake View* v. *Rose Hill Cem. Co.* 70 Ill. 192; *Sinnickson* v. *Johnson*, 17 N. J. L. 129; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Davidson* v *N. O.* 96 U. S. 104 (24: 619); *Murray* v. *Hoboken L. & I. Co.* 18 How. 276 (15: 374).

The proposition ought not to be successfully challenged that the Fourteenth Amendment has extended federal jurisdiction, without limitation, over all classes of legislation by the State in which any attempt is made to take from a citizen his life, liberty, or property without due process of law, or which denies to any person within its jurisdiction the equal protection of the law; and even the police power, when it attempts to deprive particular persons and classes of privileges enjoyed by other inhabitants, and inflicts burdens upon them which the public at large does not have to bear, it becomes obnoxious to the amendments of the Federal Constitution.

Matter of Jacobs, 98 N. Y. 98; *People* v. *Otis*, 90 N. Y. 48; *Wynehamer* v. *People*, 13 N. Y. 401; *County of Santa Clara* v. *Southern Pac. R. Co.* 18 Fed. Rep. 385; *Kessinger* v. *Heickhouse*, 27 Fed. Rep. 883; *Mahin* v. *Pfeiffer*, Id. 892.

In the decision of nearly all of the questions arising under this Fourteenth Amendment, the

court itself has almost always been divided. Commencing with the *Slaughter House Cases* (Bk. 21, L. ed. 394), the opinion was delivered by five of the judges, the other four dissenting; and but one concurring judge is left upon the bench.

In *Tennessee* v. *Davis*, *Strauder* v. *West Va.*, *Virginia* v. *Rives*, *Ex parte Virginia*, all reported in 100 U. S. (Bk. 25, L. ed. 648 *et seq.*), there has not been unanimity in the opinions pronounced. It cannot therefore be claimed that there is a fixed and unerring rule of decision upon the construction of this Amendment.

A federal question does not depend upon the validity of the claim set up under the Constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit.

Cohens v. *Va.* 6 Wheat. 264 (19 U.S. bk. 5, L. ed. 257); *Tennessee* v. *Davis*, 100 U. S. 264 (25: 650); *Ames* v. *Kansas*, 111 U. S. 462 (28: 487); *Starin* v. *New York*, 115 U. S. 257 (29: 390); *Southern Pac. R. R. Co.* v. *Cal.* 118 U. S. (*ante*, 103); *Yick Wo* v. *Hopkins*, Id. 220.

Were these cases properly removable under section 641, Rev. Stat.? The facts of the petition must be taken as true, and they show that these petitioners, by the enactments complained of, are denied certain rights as citizens and inhabitants of the United States, residing in Iowa, that they can only maintain in a court of justice.

Yick Wo v. *Hopkins* and *Tennessee* v. *Davis*, *supra*; *Strauder* v. *West Va.* 100 U. S. 310 (25: 666).

Messrs. **S. P. Adams, Jed Lake** and **M. H. Beach**, for appellee:

All that is sought to be done in this proceeding is to compel defendants to close up their saloon, and cease to maintain the nuisance complained of. No punishment or penalty is sought to be inflicted, no property is taken, no liberty is restrained, except the liberty to maintain a nuisance, and that restraint is sought to be accomplished according to the forms of long established judicial proceedings. The only question properly raised by this record is whether the State has the right, under the Constitution of the United States, to prohibit the sale of intoxicating liquors at retail as a beverage. This has been affirmatively decided by this court.

Bartemeyer v. *Iowa*, 18 Wall. 129 (85 U. S. bk. 21, L. ed. 929); *Beer Co.* v. *Mass.* 97 U. S. 25 (24: 989); *Foster* v. *Kansas*, 112 U. S. 205 (28: 630).

Mr. Chief Justice **Waite** announced that the judgment below was *affirmed by a divided court.*

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[296] ARTHUR O'MALLEY, *Appt.*, v. J. P. FARLEY.

(See S. C. Reporter's ed. 296.)

[No. 856.]

Submitted with preceding case and at same time.

APPEAL from the Circuit Court for the Northern District of Iowa.

This case involves the same question presented upon the appeal in *Schmidt* v. *Cobb*, *ante*.

Messrs. **Fouke & Lyon** and **McCeney & O'Donnell**, for appellant.

Messrs. **S. P. Adams, Jed Lake** and **M. H. Beach**, for appellee.

The judgment below in this case was also affirmed by a divided court.

TOWN OF OREGON, *Plff. in Err.*,

ELIZA JENNINGS. [74]

(See S. C. Reporter's ed. 74-95.)

Municipal bonds—Illinois Statute—fraud and circumvention in execution of instruments—no application to fraud in consideration—recitals in bonds—town estopped by, when—filling vacancies in town board—election.

1. Under the Illinois Statute providing that fraud or circumvention used in obtaining the execution of certain instruments may be pleaded in bar to actions brought on such instruments by the guilty party or by an assignee, there must be a trick or device by which one kind of instrument is signed in the belief that it is of another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer. Fraud affecting the consideration is insufficient.

2. Under the Statute of Illinois relating to the appointment of supervisors to fill vacancies, it is competent for the town clerk and one justice to fill a vacancy caused by the resignation of the supervisor, although there had been another justice of the town, such justice having resigned and no successor having been elected.

3. If the supervisor and town clerk, they being named in the statute under which the bonds were issued as the officers to sign the bonds and the "corporate authorities" to act for the town in issuing the bonds, decided, and so certified in the bonds, that the conditions prescribed by the popular vote had been complied with, such compliance being required by the constitutional and statutory provisions of the State, the town is estopped, as against a *bona fide* holder, from asserting that such conditions were not complied with.

4. An election conducted in the manner required for the election of town officers was an election within the meaning of the Illinois Act of March 30, 1869, providing that the election should be "held and conducted and return thereof made as is provided by law, and, in any village or city as is provided by the law under which the same is incorporated."

[No. 1150.]

Submitted Oct. 19, 1886. Decided Nov. 15, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The case is stated by the court.

Mr. **James K. Edsall**, for plaintiff in error:

Amended second plea averred facts which show that the making and execution of the bonds and coupons in question was obtained by fraud and circumvention. This defense is based upon section 11, chap. 78, Rev. Stat. Ill., in force in 1870. The plea shows that the railroad company (knowing that it was not entitled to the bonds), through its attorney, president and directors, entered into a fraudulent conspiracy to confer color of authority as supervisor of the Town on their director Potter, in order to procure him to sign the bonds in behalf of the Town; and that the pretended appointment of Potter as supervisor and the execution of the bonds by him took place at the same time, and as parts of the same transaction

It appears that aside from the question of fraud, Potter's appointment as supervisor was invalid. The statute then in force provided that, in case of a vacancy in any town office, "It shall be lawful for the justice of the peace" of the town, together with the supervisor and the town clerk, "to fill the vacancy by appointment under their hands and seals." William Schultz was one of the justices of the peace of the Town. He had tendered his resignation, but his successor had not been elected and qualified. Under the Constitution and laws of Illinois, a justice of the peace continues in office until his successor is elected and qualified, notwithstanding an attempted resignation.

People v. *Barnett*, 100 Ill. 332; *Badger* v. *U. S. ex rel. Bolles*, 93 U. S. 599 (Bk. 23, L. ed. 991); Const. of 1848, art. IV, § 27; Const. of 1870, art. VI, § 32.

Schultz was therefore still in office, and one of the officers whom the people of the Town had the right to have consulted in respect to the filling of any supposed vacancy in the office of supervisor.

Crocker v. *Crane*, 21 Wend. 211, 218; *Babcock* v. *Lamb and Doty*, 1 Cow. 238; *Louk* v. *Woods*, 15 Ill. 262; *Ex parte Rogers*, 7 Cow. 526 and note; *Williams* v. *School Dist.* 21 Pick. 82; *McCoy* v. *Curtice*, 9 Wend. 17.

The third plea shows that the bonds and coupons in question were issued in violation of section 12, article IX of the State Constitution adopted in 1870, which prohibits municipal corporations from creating indebtedness to exceed 5 per cent on the assessed value of the taxable property therein. It is shown that when the bonds were issued the Town was already indebted in excess of the constitutional limitations, and that the bonds were not issued "in compliance with any vote of the people" of the Town, had prior to the adoption of the Constitution, within the purview of the saving clause of that section. The adoption of the State Constitution containing this section deprives the Town of all power to create any further indebtedness in excess of the constitutional limit, except so far as such power was reserved by the last paragraph of the section.

Buchanan v. *Litchfield*, 102 U. S. 278 (Bk. 26, L. ed. 138); *School Dist.* v. *Stone*, 106 U. S. 183 (Bk. 27, L. ed. 90); *Litchfield* v. *Ballou*, 114 U. S. 190 (Bk. 29, L. ed. 132); *Prince* v. *City of Quincy*, 105 Ill. 138, 215.

By the express terms of the vote the bonds were not to be issued, dated, or delivered, and "said vote and donation of $40,000 to be null and void unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871." It appears that the railroad company wholly failed to comply with the terms of the vote. The question as to whether power exists in a municipality to issue bonds and create indebtedness, may depend on extrinsic facts, not appearing on the face of the law.

Northern Bank v. *Porter Tp.* 110 U. S. 608 (Bk. 28, L. ed. 258); *Dixon Co.* v. *Field*, 111 U. S. 96 (Bk. 28, L. ed. 365); *Merchants Bank* v. *Bergen Co.* 115 U. S. 390 (Bk. 29, L. ed. 431); *Daviess Co.* v. *Dickinson*, 117 U. S. 657 (Bk. 29, L. ed. 1026).

The purchaser was bound to know from the terms of the Constitution itself that there was no power or authority to issue the bonds unless it could be done in compliance with the vote. He was bound to take notice of the terms of the vote which appeard of record.

Daviess Co. v. *Dickinson*, *supra*; *Buchanan* v. *Litchfield*, 102 U. S. 289 (Bk. 26, L. ed. 139); *Dixon Co.* v. *Field*, *supra*.

It was held by the Supreme Court of Illinois at its September Term, 1870, and before the bonds in question were issued, that a railroad corporation was not entitled to bonds of a town voted on conditions, without compliance with the vote.

People v. *Dutcher*, 56 Ill. 149.

This ruling has been constantly adhered to.

People v. *Glann*, 70 Ill. 232; *People* v. *Holden*, 91 Ill. 446; *Middleport* v. *Ætna Life Ins. Co.* 82 Ill. 562; *People* v. *Jackson*, 92 Ill. 451; *Town of Prairie* v. *Lloyd*, 97 Ill. 191; *Wade* v. *LaMoille*, 112 Ill. 79.

The supervisor and town clerk had no implied authority to waive compliance with the conditions prescribed by the vote of the people.

Rev. Stat. Ill. chap. 118, 17; *Town of Eagle* v. *Kohn*, 84 Ill. 292.

As to questions arising under the fourth plea the only vote taken was at a special town meeting, presided over by a moderator, and not at an election presided over by the three judges of election. The established construction of the statutes bearing on the question, in the state court is, that a vote taken at such town meeting is not a vote taken at an election within the meaning of such statutes; and consequently where the statute requires the vote to be taken at an election such vote taken at a town meeting is not a vote "under existing laws" as required by the saving clause to said section.

Chicago & I. R. Co. v. *Mallory*, 101 Ill. 583; *Lippincott* v. *Pana*, 92 Ill. 24.

The Town is not estopped by the recitals contained in the bonds from making the defenses now interposed. The recitals do not purport to show compliance with the vote of the people nor with the constitutional requirement in any respect, and cannot be so enlarged by construction as to embrace the same.

Buchanan v. *Litchfield*, 102 U. S. 292 (Bk. 26, L. ed. 141); *School Dist.* v. *Stone* and *Northern Bank* v. *Porter Township*, *supra*; *Dixon Co.* v. *Field*, 111 U. S. 83 (Bk. 28, L. ed. 360); *Bates* v. *Ind. School Dist.* 25 Fed. Rep. 192; *Liebman* v. *San Francisco*, 24 Fed. Rep. 711.

The supervisor and town clerk issuing the bonds were not authorized to decide, conclusively, the question as to whether these constitutional requirements had been complied with. The vote under which it is claimed the bonds were issued was taken June 23, 1870. If that vote was properly taken at a town meeting, then the moderator who presided at that meeting canvassed the vote and decided all questions pertaining thereto, and the clerk made a record thereof in the town records. If the vote should have been taken at an election, then the election returns, made by the judges thereof, constitute the records of such election. In no contingency was the supervisor or town clerk in office April 3, 1871 (when it is conceded the bonds in question were signed), authorized by law to make any decision as to the result or validity of an election held prior to July 2, 1870.

1 Gross, Stat. of Ill. ed. of 1869, p. 748, §§ 14–22, *Id.* p. 247, §§ 28–32; *Northern Bank* v. *Porter Township*, 110 U. S. 616 (Bk. 28, L. ed. 261); *Dixon Co.* v. *Field*, 111 U. S. 94 (Bk. 28, L. ed. 364); *Davies Co.* v. *Dickinson*, 117 U. S. 657 (Bk. 29, L. ed. 1026).

Mr. **S. W. Packard**, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in the Circuit Court of the United States for the Northern District of Illinois, by Eliza Jennings, against the Town of Oregon, a municipal corporation in the County of Ogle and State of Illinois, to recover $13,510, the amount payable by 193 coupons of $70 each, cut from 24 bonds for $1,000 each, purporting to have been issued by that Town. The following is a copy of one of the bonds, all being alike except as to the number and the time when due. [75]

"UNITED STATES OF AMERICA.

No. 29. $1,000.

State of Illinois, County of Ogle

OREGON TOWN BOND.

Know all men by these presents, That the Town of Oregon, in the County of Ogle and State of Illinois, is indebted to the Ogle and Carroll County Railroad Company in the full and just sum of one thousand dollars, which sum of money said Town agrees and promises to pay on or before the first day of July, 1883, to the said Ogle and Carroll County Railroad Company, or bearer, with interest at the rate of seven per cent per annum, payable annually, on the first day of July, at the office of the Farmers' Loan and Trust Company of New York, in the City of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made, the faith, credit and property of said Town of Oregon are hereby solemnly pledged, under authority of an Act of the General Assembly of the State of Illinois, entitled 'An Act to Amend an Act Entitled An Act to Incorporate the Ogle and Carroll County Railroad Company,' which said Act was approved March 30, 1869. [76]

This bond is one of a series, numbering from 31 to 60, inclusive, for $1,000 each, which bonds, so numbered, together with another series numbered from 1 to 20, inclusive, for $500 each, are the only bonds issued by said Town of Oregon, under and by virtue of said Act.

In witness whereof, the supervisor and town clerk of the said Town of Oregon have hereunto set their hands, this thirty-first day of December, A. D. 1870.

FRED. H. MARSH, *Town Clerk.*

E. S. POTTER, *Supervisor.*"

The date in each bond. "thirty-first day of December, A. D., 1870," is lithographed, like the body of the bond.

On the back of each bond is the following certificate:

"AUDITOR'S OFFICE, Illinois.

SPRINGFIELD, *June* 5, 1871.

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an Act entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns,' in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT, *Auditor, P. A.*"

The coupons are in the following form, varying as to number of bond and date of payment:

"State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers' Loan & Trust Company of New York, in the City of New York, on the first day of July, 1873, on presentation, being one year's interest on bond No. 29. [77]

F. H. MARSH, *Clerk.*

E. S. POTTER, *Supervisor.*"

The action was tried by a jury, which, under the instruction of the court to do so, found a verdict for the plaintiff, for $20,823.68, and a judgment in her favor was rendered for that amount, with costs. The defendant has sued out a writ of error.

On the 30th of March, 1869, the Legislature of Illinois passed an Act (Private L. Ill. 1869, Vol. 3, p. 324), with the title set forth in the bonds, and providing as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the several Acts entitled 'An Act to Incorporate the Ogle and Carroll County Railroad Company,' approved February 18, 1857, and the Act entitled 'An Act to Amend an Act Entitled an Act to Incorporate the Ogle and Carroll County Railroad Company,' approved February 24, 1859, be and they are hereby so amended that the said railroad company shall be authorized and empowered to construct, maintain and operate their said railroad, with such appendages as may be deemed necessary by the directors, in accordance with the following provisions.

Sec. 2. That the first division of said road shall commence on the east bank of Rock River, opposite the Town of Oregon, in said County of Ogle; from thence, on the most eligible route, to a connection with the Chicago and Northwestern Railway, or with any other railroad leading to the City of Chicago; and the second division commencing at said point, opposite the said Town of Oregon and running thence, in a westerly direction, on the most eligible route, to the Mississippi River."

"Sec. 5. That the several towns, villages and cities, organized or incorporated under any laws of this State, along or near the route of said railroad, as authorized to be constructed under the original Act and amendment thereto or under this Act, or that are in anywise interested in having said road or any branch or division thereof constructed, may, in their corporate capacities, subscribe to the stock of said company, or may make donations thereto, or may lend its or their credit to said company, to aid in constructing and equipping said road, or any division or branch thereof; *Provided*, That no such subscription, donation, or loan shall be [78]

made until the same shall be voted for as hereinafter provided.

SEC. 6. That whenever twenty legal voters of any such towns, villages or city shall present to the clerk thereof a written application, requesting that an election shall be held to determine whether such town, village or city shall subscribe to the capital stock of said company, or make a donation thereto, or loan money or bonds or its credit, to aid in the construction of said road, or any branch or division thereof, stating the amount, and whether subscribed, donated, or loaned, and the rate of interest, and the time of payment, such clerk shall receive and file such application, and immediately proceed to post written notices of an election to be held by the legal voters of such town, village or city, which notices shall be posted in ten of the most public places in such town, village or city, for thirty days preceding such election, and shall state fully the object of such election; and such election shall be held and conducted and return thereof made as is provided by law, and, in any village or city, as is provided by the law under which the same is incorporated, and an additional return shall be made to one of the directors of said company. Each elector at such election shall deposit a ballot for said subscription, donation, or loan; and if a majority of the legal voters of such town, village or city, voting at such election, shall vote for such subscription, donation or loan, then such town, village or city shall, by its proper corporate authorities, subscribe to the stock of said company, or donate or loan thereto, as shall be determined at said election; and shall issue to the said railroad company its bonds, in such denominations as said company may designate, not less than one hundred dollars, and bearing interest as may be determined at such election, not to exceed ten per cent per annum, payable annually at such place as such company may designate; which bonds shall be signed by the supervisor and countersigned by the clerk in towns organized under the township organization law, and in incorporated villages or cities, [79] signed by the president of the board of trustees and countersigned by the clerk or by the officers having similar powers and duties in any such village or city, and any such town, village or city, so subscribing, donating, or loaning, as aforesaid, shall by its proper corporate authority, annually thereafter, assess and levy a tax upon the taxable property of said town, village or city, sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as, from time to time, shall become due, which taxes shall be levied and collected in the same manner as other corporation taxes in such town, village or city; *Provided*, That for the payment of the principal thereof such tax shall not exceed two per cent per annum."

The Town of Oregon was and is an incorporated town or township situated on both sides east and west of Rock River, and embracing within its limits a village called Oregon, on the west bank of the river, which village was and is what is called "the Town of Oregon" in the second section of the above Act. The town was such a town as is described in the fifth section of the Act.

On the 24th of May, 1870, more than twenty legal voters of the Town presented to the clerk of the Town the following written application, signed by them in conformity with section 6 of the Act:

"*To the Town Clerk of the Town of Oregon, in the County of Ogle, and State of Illinois:*

The undersigned, legal voters of the said Town of Oregon, in the County and State aforesaid, do hereby make application to you, and request that an election shall be held in said Town, under the provisions of an Act of the General Assembly of the State of Illinois, entitled 'An Act to Amend an Act Entitled An Act to Incorporate the Ogle and Carroll County Railroad Company,' approved March 30, A.D. 1869, to determine whether said Town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company of the sum of forty thousand dollars in the bonds of said Town, in such denominations as said company may designate, not less than one hundred dollars each, payable, at the option of [80] said Town, within twenty years from the date of their issue, bearing interest from date at the rate of seven per cent per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County Railroad; said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern Railway to a point at and within said Town of Oregon, within one half mile of the east bank of Rock River, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said Town for the accommodation of passengers and freight, nor until said company shall have released said Town from all liabilities on account of donations heretofore voted, except a donation of ten thousand dollars voted by said Town on the ninth day of December, A. D. 1869, said vote and donation of forty thousand dollars to be null and void, unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871; but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery.

And we request that immediate notice be given of such election, and that the same be held on the 23d day of June, A. D. 1870."

Dated this 24th day of May, A. D. 1870."

The clerk received and filed the application and gave the notice required by section 6 of the Act, of an election to be held June 28, 1870, the notice being as follows:

"*Election Notice.*

"*Whereas*, more than twenty legal voters of the Town of Oregon, in the County of Ogle, [8 and State of Illinois, have presented to me, clerk of said Town, a written application requesting that an election be held in said Town under the provisions of an Act of the General Assembly of the State of Illinois, entitled 'An

Act to Amend an Act Entitled an Act to Incorporate the Ogle and Carroll County Railroad Company," approved March 30, A. D. 1869, to determine whether said Town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company, of the sum of forty thousand dollars in the bonds of said Town, in such denominations as said company may designate, not less than one hundred dollars each, payable at the option of said Town, within twenty years from the date of issue, bearing interest from date at the rate of seven per cent per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County Railroad; said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern Railway, to a point at and within said Town of Oregon, within one half mile of the east bank of Rock River, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said Town for the accommodation of passengers and freight; nor until said company shall have released said Town from all liability on account of donations heretofore voted, except a donation of ten thousand dollars voted by said Town on the 9th day of December, A. D. 1869; said vote of forty thousand dollars to be null and void unless said first division of said railroad shall be completed and equipped as aforesaid, on or before the first day of January, A. D. 1871; but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon demand of said company, and to bear date of the day of delivery.

The inhabitants, legal voters of the said Town [82] of Oregon, are therefore hereby notified that an election will be held by the legal voters of said Town, at the court house in said Town of Oregon, on Thursday, the 23d day of June, A. D. 1870, at 9 o'clock in the forenoon of said day, for the object and purpose of voting upon and determining the matters and questions hereinbefore and in said written application set forth and contained.

Given under my hand, at my office in said Town of Oregon, this 24th day of May, A. D. 1870.

F. H. MARSH, *Town Clerk of said Town.*"

The election was held on the day, in the manner and with the result stated in the following record on file in the office of the town clerk:

"Pursuant to notice given according to law, the voters of the Town of Oregon, County of Ogle, and State of Illinois, assembled at the court house in Oregon, at 9 o'clock, A. M., on Thursday, the 23d day of June, A. D. 1870. The meeting was called to order by the town clerk and, on motion of W. J. Mix, E. J. Reiman was chosen moderator of said meeting, and was duly sworn by the town clerk. Proclamation was then made of the opening of the polls, which were kept open until 12 o'clock M., when, on motion of O. Wilson, they were closed for one hour, until 1 o'clock, for dinner, by proclamation of the town clerk. At 1 o'clock the polls were again proclaimed open, and were kept open until 6 o'clock, P. M., proclamation being made half hour before the closing of the polls. At the hour of 6, P. M. the moderator proceeded to count out the ballots, until they were all counted, which number equalled the numbers on the poll list. The ballots were then read by the moderator, and resulted as follows: there being for donation, as stated in the notice, one hundred and sixty-three votes; against donation, as stated in the notice, twelve votes. The result being publicly read, the meeting was then closed.

E. J. REIMAN, *Moderator.*

Attest: F. H. MARSH, *Town Clerk.*" [83]

A defense set up to the validity of the bonds, in the amended second plea, is that their execution was obtained by fraud and circumvention. This is founded on the following facts: the first division of the road was not completed or equipped in accordance with the application, and the notice of election, and the vote, on or before the first of January, 1871, but was completed by the first of April, 1871. On the 30th of December, 1870, Mortimer W. Smith, supervisor of the Town, gave to the town clerk of the Town his written resignation of the office of supervisor and it was placed among the records of the town clerk's office. He never afterwards acted as supervisor. The Town had by law one supervisor and two justices of the peace and one town clerk. They were all of them, by statute, town officers. William Schultz was elected one of the justices of the Town April 5, 1870, and duly qualified as such April 9, 1870. He continued to reside in the Town until after April 3, 1871, and during the year 1871, but was absent from the Town, and in the City of New York, from December 26, 1870, until about January 6, 1871. He resigned his office on March 2, 1871, by filing his resignation in the office of the clerk of the county, who entered it of record according to law. After that he did not act as a justice. A successor to Schultz as a justice was elected by the people at the annual town meeting held April 4, 1871, and not before, and such successor qualified April 8, 1871, and was commissioned April 15, 1871. James H. Cartwright was the other justice of the peace. Frederick H. Marsh was the town clerk.

The following statutory provisions were in force in Illinois in 1870 and 1871: "§ 16. Resignations of the office of justice of the peace and constable shall be made to the clerk of the court of the proper county, who shall immediately enter the date of every such resignation in the book above provided for" (that is, a book to be kept by the clerk of the county, in which he was required to enter the name of every justice of the peace and constable sworn into office, together with the date of his commission or certificate, and the time of his being sworn into office); "which book, or a certified copy of an entry in the same, shall be received [84] in evidence in all courts within this State." Gross, Stat. 1869, Vol. 1, 3d ed. chap. 59, p. 394. "1. Whenever any town shall fail to elect the proper number of town officers to

which such town may be entitled by law, or when any person elected to any town office shall fail to qualify as such, or whenever any vacancy shall happen in any town office from death, resignation, removal from the town, or other cause, it shall be lawful for the justices of the peace of the town, together with the supervisor and town clerk, to fill the vacancy or vacancies occasioned or occurring in consequence of either or any of the causes above specified, by appointment by warrant under their hands and seals; and the persons so appointed shall hold their respective offices during the unexpired term of the persons in whose stead they have been appointed, and until others are chosen or appointed in their places, and shall have the same powers and be subject to the same duties and penalties as if they had been duly chosen by the electors. 2. Whenever a vacancy shall occur, from any cause, in any or either of the offices enumerated in the foregoing section, as composing the board of appointment for the appointment of town officers, in case of vacancy, it shall be lawful for the remaining officers of such appointing board to fill any vacancy or vacancies thus occurring, except in cases of vacancy in the office of justice of the peace, which shall be filled only by election. 3. When any appointment shall be made, as provided in the two preceding sections, the officers making the same shall cause the warrant of appointment to be forthwith filed in the office of the town clerk, who shall forthwith give notice to each person appointed." Gross, Stat. 1869, Vol. 1, 3d ed. chap. 103 d, art. 7, pp. 750, 751.

On the 3d of April, 1871, Cartwright (the remaining justice) and Marsh (the town clerk met at the office of the town clerk, and, by a paper then signed by each of them, appointed Elias S. Potter to fill the vacancy in the office of supervisor caused by the resignation of Smith, and ordered the clerk to give the certificate of appointment to Potter. The paper bore date the 31st of December, 1870, and was filed in the office of the town clerk on the 3d of April, 1871. On the same 3d of April, a proper official bond, executed on that day by Potter and two sureties, but bearing date the 31st of December, 1870, was filed in the office of the town clerk, with an oath of office signed and sworn to by Potter before Cartwright on the same 3d of April, but purporting to have been subscribed and sworn to on the 31st of December, 1870. On the same 3d of April Potter, as supervisor, and Marsh, as town clerk, signed the bonds and the coupons, and delivered them to the president of the railroad company. One Dwight was elected supervisor of the Town at the regular annual town meeting, held on April 4, 1871, and assumed the office April 10, 1871, and held it for the ensuing year. It was known to all parties that this town meeting was to be held, and it is alleged that the officers of the railroad company conspired with Cartwright and Marsh to procure the appointment of Potter as supervisor, so that the bonds might be issued before the election by the people of a new supervisor on April 4, 1871.

[85]

The Statute of Illinois as to fraud and circumvention, set up and relied on, is as follows: "11. If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid" (that is, any note, bond, bill or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions) "such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee or assignees of such instrument." Gross, Stat. 1869, Vol. 1, 3d ed. chap. 78, p. 462.

The court refused to submit to the jury, and we think properly, any question as to whether the making or execution of the bonds and coupons was obtained by fraud or circumvention.

Even if the statute applies to town bonds and their coupons, no fraud or imposition was practiced on Potter or Marsh to induce them to sign these bonds and coupons. They knew what they were signing and signed intentionally. The fraud or circumvention intended by the statute, which only embodies a rule of the common law, is not that which goes merely to the consideration of the instrument, but it must go to the execution or making; and there must be a trick or device by which one kind of instrument is signed in the belief that it is of another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer. No different ruling as to the statute has ever been made by the Supreme Court of Illinois, especially in a case where, as here, the holder of the instrument is a *bona fide* holder of it, before maturity, for a valuable consideration, without notice. In *Latham* v. *Smith*, 45 Ill. 25, decided in 1867, in construing this statute, the court said: "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it, when he did not intend to do such an act. Circumvention seems to be nearly if not quite synonymous with fraud. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind that the fraud or covin must relate to the obtaining of the instrument itself, and not to the consideration upon which it is based. It is no fraud which relates to the quality, quantity, value or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character; such as giving a note or other agreement for one sum or thing, when it is for another sum or thing; or as giving a note under the belief that is a receipt." This ruling was followed in *Shipley* v. *Carroll*, 45 Ill. 285; *Elliott* v. *Levings*, 54 Ill. 213; and *Maxcy* v. *Williamson Co.* 72 Ill. 207.

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It is also contended that the appointment of Potter as supervisor was invalid, because Schultz, though he had resigned as justice, legally continued in office till his successor was elected, and yet took no part in the appointment. But it is plain, we think, that, within the language and meaning of the statute, as respects the four members of the appointing board designated by statute, two of them were out of office so far as their acting as such members was concerned. The supervisor and Schultz had resigned, and their offices were vacant, and it was lawful for the remaining two

officers to fill the vacancy in the office of supervisor. No authority to which we are referred holds to the contrary. Where a town is trying to escape the enforcement of its liability to creditors through the resignation of an officer on whom process is to be served, and the failure to supply his place, the resigning officer is rightly held, *quoad* creditors, to continue in office, subject to the service of process, till his successor qualifies. In the present case there was not only a "vacancy" in the office of supervisor, for the purpose of filling it, under section 1, but there was a vacancy in the office which Schultz had held, for the purpose of the action of Cartwright and Marsh alone, as the remaining officers of the appointing board, to appoint a supervisor, under section 2. On any other construction, as, by section 2, a vacancy in the office of justice can be filled only by election, a town would, in case of a vacancy in the office of justice, have to go without a supervisor, in case of a vacancy in his office, till a justice could be elected.

Another defense is set up, under the amended third plea, founded on section 12 of article 9 of the Constitution of Illinois, which went into effect August 8, 1870, and provides as follows: "Sec. 12. No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing [91] indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor."

It appearing that, when the bonds in question in this suit were issued, the debt of the Town was already greater than five per centum on the value of its taxable property, as ascertained by the assessment for 1870, it is contended that the bonds could not be lawfully issued, except in compliance with the vote of June 23, 1870, and in conformity with the conditions imposed by that vote, one of which was the completion and equipment of the first division of the road on or before January 1, 1871, and that that condition was not observed. The question is sought to be made one of power or authority to issue the bonds within the rules laid down by this court as applicable even in the case of bonds in the hands of a *bona fide* holder.

At the time the bonds in question were issued, a statute enacted April 16, 1869, was in force in Illinois, section 7 of which (Gross, Stat. 1869, Vol. 1, 3d ed. p. 556) provided that any town should have the right, "upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with."

The language of this statute was as imperative as is that of the Constitution of 1870 in re- [92] gard to complying with the conditions contained in any vote of the people; and section 6 of the Act of March 30, 1869, before cited, prescribes that the proper corporate authorities of the town shall make the donation or subscription, "as shall be determined at said election."

In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provision of the Constitution or that of a statute, it must equally be regarded as concluded by the recital in the bonds, made by the supervisor and the town clerk. Section 6 of the Act of March 30, 1869, provides that if a majority of the legal voters of the town, voting at the election, vote for the donation, the town shall, by its "corporate authorities," make the donation to the company, "as shall be determined at said election," and shall issue its bonds to the company, "which bonds shall be signed by the supervisor and countersigned by the clerk, in towns organized under the township law." Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bond, the Town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with. They state, in each bond, that the faith, credit and property of the Town are, by the bond, solemnly pledged for the payment of the principal and interest named in it "under authority of" the Act of March 30, 1869, reciting its title, and that the 60 bonds, amounting to $50,000, "are the only bonds issued by said Town of Oregon under and by virtue of said Act." The provision in section 6 of the Act, that the Town shall, by its proper corporate authority, annually assess and levy a tax to pay the interest and principal of the bonds, is a warrant for the pledge made, in the bonds, of the faith, credit and property of the Town. The recitals are within the adjudged cases in this court, as to the effect of [93] recitals in bonds, that they are issued "under authority of" a specified statute, and "under and by virtue of" that statute; and they estop the Town from taking the defense that the first division of the road was not completed by the time specified, as against the plaintiff, as a *bona fide* holder of the bonds.

In *Pana* v. *Bowler*, 107 U. S. 529, 539 [Bk. 27, L. ed. 424, 428], this court upheld the effectiveness of a recital in bonds, in favor of a *bona fide* holder, as against an alleged defect in the mode of conducting an election, held prior to the adoption of this same Constitution of Illinois, the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue should have been

authorized under then existing laws, by a vote of the people prior to the adoption of the Constitution.

The present case is directly within the decision of this court in *Ins. Co.* v. *Bruce*, 105 U. S. 328 [Bk. 26, L. ed. 1121], where it was held that recitals in bonds estopped a town in Illinois, as against a *bona fide* holder, from showing that conditions imposed on its liability by the vote of the people had not been complied with, although the statute declared that the bonds should not be valid and binding until such conditions precedent had been complied with. There are numerous other cases in this court to the same effect.

The provision of section 12 of article 9 of the Constitution of Illinois did not introduce any new rule of evidence in regard to the mode of proving, in favor of a *bona fide* holder, the compliance with the vote of the people, but left the compliance to be conclusively established in such a case by the recital in the bonds, made by the designated official authorities.

We are not referred to any decision of the Supreme Court of Illinois, made prior to the issuing of the bonds in question, which holds to the contrary of the views we have announced. The case of *People* v. *Dutcher*, 56 Ill. 144, decided at September Term, 1870, was a *mandamus* applied for by a railroad company to compel a supervisor to subscribe for stock, where conditions imposed by the vote of the town had not been complied with, and its bonds had not [94] been issued. The *mandamus* was refused. This direct proceeding is, as this court has uniformly held, a very different thing from a suit on the bonds by a *bona fide* holder, the cases not being analogous or governed by the same rules.

A defense is also set up, under the amended fourth plea, founded on the second additional section or article to the Constitution of Illinois, of 1870, which took effect July 2, 1870, and is in these words: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

The bonds in question having been issued after July 2, 1870, and the requirement, to make them valid, being that they must have been authorized, under laws in force before July 2, 1870, by a vote of the people of the Town given before that date, it is contended that they were not so authorized, because the vote of June 28, 1870, was taken at a town meeting held and presided over by a moderator, and not by judges of election. The argument made is, that section 6 of the Act of March 30, 1869, provided that the election should "be held and conducted and return thereof made as is provided by law, and, in any village or city, as is provided by the law under which the same is incorporated;" and that a town meeting, presided over by a moderator, and not held by the supervisor, assessor and collector, as judges of election, was not an "election," within the meaning of the statute, and so was not an election "under existing laws," within the meaning of the Constitution.

The election was in fact conducted in the manner required for the election of town officers, and not in the manner required for general elections. We are of opinion that, under the Act of 1869, the election in a town could properly be conducted in the manner prescribed by law for the election in towns of town officers; namely, by a moderator and the town clerk—the town clerk having given, as required by the Act, the prior notice of the election, and the return [95] of the election being filed in the office of the town clerk, and the two officers being paid by the town The voting for town officers at annual town meetings in the manner prescribed therefor by the Statutes of Illinois, is called in those statutes an "election," and this special voting in the same manner for this town object was an "election," within the meaning of the Act of 1869. The requirement of the Act is that the "election shall be held and conducted and return thereof made as is provided by law," and not "as is provided by law for general elections." If a town, it is the law provided for town elections. If a village or city, and the law of its incorporation has special provisions, those are to be followed; otherwise, any general law as to village or city elections is to be observed. As the proceeding was to originate by an application filed in the town clerk's office, so the same officers who would conduct an ordinary town election were to be concerned with this election, and the town clerk's office was to be the place of deposit of all the papers and of the return of the vote, and two town officers were to issue the bonds. None of the proceedings were to be connected with the county clerk's office, as in the case of a general election. This was the ruling of the Supreme Court of Illinois, in a case decided after June 23, 1870, though before these bonds were issued (*People* v. *Dutcher*, 56 Ill. 144); and it was followed in other cases, in that court, after the bonds were issued, though somewhat modified more recently. We think it was the correct ruling.

The questions above considered cover substantially all the assignments of error. The direction to find a verdict for the plaintiff was proper.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES W. BUTTZ, EXR. of FRANCIS PERONTO, Deceased, *Appt.*, [55]

v.

NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 55-73.)

Grant of Indian lands to railroad company—extinguishment of Indian title, exclusively for the government—relinquishment of title, when took place—upon definite location, when rights of company attached—location of route withdrew from sale or preemption the odd sections for forty miles on each side—when general route considered fixed—construction of section 3 of Act of July 2, 1864.

*1. The grant by the Act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, of lands to which the Indian title had not been extinguished, operated to convey the fee to the Company, subject to the right of occupancy by the Indians.

2. The manner, time and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the government, and could not be interfered with nor put in contest by private parties.

3. The agreement of the Sisseton and Wahpeton bands of Dakota or Sioux Indians for the relinquishment of their title was accepted on the part of the United States when it was approved by the Secretary of the Interior, on the 19th of June, 1873. That agreement stipulating to be binding from its date, May 19, 1873, and the Indians having retired from the lands to their Reservations, the relinquishment of their title, so far as the United States is concerned, held to have then taken place.

4. Upon the definite location of the line of the railroad, on the 26th of May, 1873, the right of the Company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections; and no preemptive right could be initiated to the land, so long as the Indian title was unextinguished.

5. When the general route of the road provided for in section 6 of the Act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or preemption the odd sections to the extent of forty miles on each side thereof; and, by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority.

6. The general route may be considered as fixed, when its general course and direction are determined, after an actual examination of the country or from a knowledge of it, and it is designated by a line on a map, showing the general features of the adjacent country and the places through or by which it will pass.

7. That part of section 3 of said Act, which excepts from the grant lands reserved, sold, granted or otherwise appropriated, and to which a preemption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims;" nor does it include preemptions where the sixth section declares that the land shall not be subject to preemption.

[No. 18.]

Argued Oct. 26, 27, 1886. Decided Nov. 15, 1886.

APPEAL from the Supreme Court of the Territory of Dakota. *Affirmed.*

[56] Statement of the case by *Mr. Justice* **Field:**

This was an action for the possession of a tract of land in the Territory of Dakota. The plaintiff below, the Northern Pacific Railroad Company, asserted title to the premises under a grant made by the Act of Congress of July 2, 1864. The defendant, Peronto, asserted a right to preempt the premises by virtue of his settlement upon them under the preemption law of September 4, 1841, and that his right thereto was superior to that of the Railroad Company.

The action was brought in the District Court of the Territory. The complaint was in the usual form in such cases, alleging the incorporation of the plaintiff, its ownership in fee of the premises (which are described), and its right to their immediate possession, and that they are withheld by the defendant; with a prayer for judgment for their possession, and damages for the withholding.

The answer of the defendant admits the incorporation of the plaintiff, and that he is in possession of the premises, but denies the other allegations of the complaint. It then sets up as a further defense that he settled upon the premises on October 5, 1871, and resided thereon, and the several steps taken by him to perfect a right of preemption to them, and that he possessed the qualifications of a preemptor under the laws of the United States. It concludes with a prayer that the title of the plaintiff be declared void, and that the plaintiff be enjoined from enforcing or attempting to enforce it; that the title be declared to be in the defendant, and that such other and further relief be granted as may be necessary to protect and preserve his rights.

The plaintiff replied, traversing the allegations of the answer; and the issues, by consent [57] of the parties, were tried by the court, without a jury. The court found for the plaintiff, and gave judgment in its favor for the possession of the premises, with costs. On appeal to the Supreme Court of the Territory the judgment was affirmed and, by appeal from the latter judgment, the case was brought to this court. Since it was docketed here, the defendant, who was the appellant, died, and by leave of the court his executor, the devisee of his estate, has been substituted as appellant in his place.

The Act of Congress of July 2, 1864, is entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route." 13 Stat. at L. 365.

By the first section, the Northern Pacific Railroad Company was incorporated and authorized to equip and maintain the railroad and telegraph line mentioned, and was vested with all the powers and privileges necessary to carry into effect the purposes of the Act.

By the third section, a grant of land was made to the Company. Its language is: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land-Office."

By the sixth section, it was enacted "That the President of the United States shall cause the lands to be surveyed for forty miles in [58] width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preemption before or after they are surveyed except by said Company, as provided

*Head notes by *Mr. Justice* FIELD.

in this Act; but the provisions of the Act of September, 1841, granting preemption rights, and the Acts amendatory thereof, and of the Act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said Company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

At the time this Act was passed, the land in controversy, and other lands covered by the grant were in the occupation of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians; and the second section provided that the United States should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands "falling under the operation of this Act and acquired in the donation to the road."

On the 19th of February, 1867, a Treaty was concluded between the United States and these Bands, which was ratified on the 15th of April and proclaimed on the second of May of that year (15 Stat. at L. 505), in the second article of which the Bands ceded "to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require, over and across the lands claimed by said Bands (including their Reservation as hereinafter designated), any route or routes that may be selected by authority of the government, said lands so claimed being bounded on the south and east by the treaty line of 1851 and the Red River of the North to the mouth of Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's Lake to the Chief's Bluff at the head of James River; and on the west by the James River to the mouth of the Mocasin River, and thence to Kampeska Lake." By articles III and IV certain lands were set apart as permanent reservations for the Indians—one of which was known as Lake Travers Reservation, and the other as Devil's Lake Reservation, so called because their boundary lines commenced respectively at those lakes.

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On the 7th of June, 1872, Congress passed an Act "to quiet the title to certain lands in Dakota Territory," which provided that it should be the duty of the Secretary of the Interior to examine and report to Congress what title or interest the Sisseton and Wahpeton Bands of Sioux Indians had to any portion of the land mentioned and described in the second article of that Treaty, except the Reservations named; and whether any and if any what, compensation ought, in justice and equity, to be made to said Bands for the extinguishment of whatever title they might have to said lands. 17 Stat. at L. 281.

Under this Act, the Secretary of the Interior appointed three persons as commissioners to treat with the Indians for the relinquishment of their title to the land. On the 20th of September, 1872, they made an agreement or treaty with the Bands for such relinquishment. This agreement recited the conclusion of the Treaty of 1867, and the cession by it to the United States, of certain privileges and rights supposed to belong to said Bands in the territory described in the second article of the Treaty; and that it was desirable that all the Territory, except that portion comprised in certain Reservations described in articles III and IV of the Treaty, should be ceded absolutely to the United States, upon such considerations as in justice and equity should be paid therefor; and that the lands were no longer available to the Indians for the purposes of the chase, and their value or consideration was essentially necessary to enable them to cultivate portions of the permanent Reservations, and become self-supporting by the cultivation of the soil and other pursuits of husbandry. "Therefore," the agreement continues, "the said Bands represented in said Treaty, and parties thereto, by their chiefs and head men, now assembled in council, do propose to M. N. Adams, William H. Forbes, and James Smith, Jr., Commissioners on behalf of the United States, as follows:

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"First. To sell, cede and relinquish to the United States all their right, title, and interest in and to all lands and territory particularly described in article II of said Treaty, as well as all lands in the Territory of Dakota to which they have title or interest, excepting the said tracts particularly described and bounded in articles III and IV of said Treaty, which last named tracts and territory are expressly reserved as permanent reservation for occupancy and cultivation, as contemplated by articles VIII, IX and X of said Treaty."

"Second. That, in consideration of said cession and relinquishment, the United States should advance and pay annually, for the term of ten years from and after the acceptance by the United States of the propositions herein submitted, eighty thousand ($80,000) dollars, to be expended, under the direction of the President of the United States, on the plan and in accordance with the provisions of the Treaty aforesaid, dated February 19, 1867, for goods and provisions, for the erection of manual labor and public schools, and to the erection of mills, blacksmith shops, and other workshops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen and milk cows, and such other beneficial objects as may be deemed most conducive to the prosperity and happiness of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, entitled thereto, according to the said Treaty of February 19, 1867."

This agreement contained seven other articles, some of which had provisions of great value to the Indians. It does not appear that it was ever presented to the Senate of the United States for ratification, but it was communicated to Congress by the Secretary of the Interior; and in the Indian Appropriation Act of February 14, 1873, an amount was conditionally appropriated to meet the first installment of the sum provided by the second article—$80,000. The condition was that the amount should not be expended until that agreement, amended by the exclusion of all the articles except the first two, should be ratified by the Indians. The agreement, exclusive of those articles, was confirmed by Congress. 17 Stat. at L. 456.

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The ratification of the agreement, as amended, was obtained from the Indians at the two Res-

ervations; from those on one Reservation, on May 2, 1873, and from those on the other Reservation on the 19th of the same month. This ratification was accepted and approved by the Secretary of the Interior on the 19th of June, 1873, and the expenditure of the appropriation made was authorized. No approval of the agreement was had by Congress until the passage of the Indian Appropriation Act of June 22, 1874, by which it was confirmed and an appropriation made to meet the second installment of the consideration stipulated.

It appears by the findings of the court that some time in the fall of 1871, under the Act of Congress mentioned, and other Acts and Resolutions relating to the same subject, the Railroad Company commenced work on that part of its line of road beginning on the westerly bank of the Red River of the North (which was the eastern boundary of Dakota), and extending westerly through and across what was afterwards shown by the public surveys to be the section of land of which the premises in controversy form a part, namely, section 7 in township 139 and range 48. It also caused all that part of its line of road thus located to be graded and prepared for its superstructure; and in June following the superstructure and the iron rails were laid, and that part of the road was completed which crossed the section named, and ever since the road has been maintained and operated.

On the 21st of February, 1872, the Company filed in the office of the Secretary of the Interior a map showing that part of the general route of the road beginning at the westerly bank of the Red River of the North, and extending westerly to James River, in Dakota Territory. On the 30th of March following, the acting Commissioner of the General Land-Office forwarded to the register and receiver of the Pembina land-office, within the limits of which the tract of land in controversy was situated, a description of the designated route, [62] and, by order of the Secretary of the Interior, directed them to withhold from sale or location, preemption, or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on the map, and stated that this order would take effect from the date of its receipt by them.

The order with the diagram was received by them April 20, 1872. The diagram represented the route of the road as passing over and across the section of land in question. The order of withdrawal thus given was never afterwards revoked.

On May 26, 1873, the Company filed in the office of the Commissioner of the General Land-Office a map, showing the definite location of that part of its line of road extending from the Red River of the North to the Missouri River in Dakota Territory. All that portion of this definite location, from the Red River to the west line of the section named, was the same as that made in 1871. On the 11th of June, 1873, the acting Commissioner of the General Land-Office addressed a letter to the local register and receiver, informing them of the filing of this map of definite location, and transmitted to them a diagram showing the limits of the land grant along said line, and also the limits of the withdrawal ordered on March 30, 1872, upon a designated line; and directed them to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits. This letter, with the diagram referred to, was received at the Pembina land-office on June 24, 1873.

Soon after the execution of the amended agreement with the Indians, mentioned above, which was approved by the Secretary of the Interior on the 19th of June, 1873, the government land surveys of the region embraced in it were completed, and plats thereof were filed in the local land-office. Those surveys show that the premises in controversy constitute a portion of the odd section number seven, which was granted to the Railway Company.

The defendant, Peronto, settled, as already stated, upon that section on October 5, 1871. It is found by the court that he had all the qualifications of a preemptor, and entered upon the land with the intention of securing a preemption right to it under the laws of the United States, and built a house upon it, in which he resided. On the 11th of August, 1873, he presented his declaratory statement to the register and receiver of the local land-office, stating his intention to claim a preemption right to a portion of the section (describing it) and his settlement thereon in October, 1871. This declaratory statement was presented with- [63] in three months after the township plats, showing the government surveys, had been filed in the local land-office. The register and receiver refused to file it, for the alleged reason that the land therein described was the land of the Railroad Company, as shown by its diagram filed in the Department of the Interior February 21, 1872, and that his alleged prior settlement was illegal, the lands not being subject to preemption settlement by reason of the Indian Treaty. The defendant thereupon appealed from this ruling to the Commissioner of the General Land-Office, by whom, on the 14th of February, 1874, it was approved and confirmed. The defendant then appealed to the Secretary of the Interior, and he approved the decision of the Commissioner.

Messrs. **Albert G. Riddle, Henry E. Davis** and *James E. Padgett*, for appellant:

Unless provided otherwise by statute, or treaty, all the country described by the first section of the Act of June 30, 1864, as Indian country remains such as long as the Indians retain their title to the soil.

Leavenworth, L. & G. R. R. Co. v. *U.S.* 92 U. S. 733 (Bk. 23, L. ed. 634); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 188 (Bk. 23, L. ed. 846); *Bates* v. *Clark*, 95 U. S. 204 (Bk. 24, L. ed. 471).

The right until extinguished by voluntary cession is in the Indians.

Cherokee Nation v. *Ga.* 5 Pet. 1 (30 U. S. bk. 8, L. ed. 25); *U. S.* v. *Cook*, 19 Wall. 591 (86 U. S. bk. 22, L. ed. 210).

When land has once been legally appropriated, it becomes severed from the mass of public lands, and subsequent law or proclamation or sale will not be construed to embrace it.

Wilcox v. *Jackson*, 13 Pet. 498 (38 U. S. bk. 10, L. ed. 264); *Polk's Lessee* v. *Wendall*, 9

Cranch, 87 (13 U. S. bk. 3, L. ed. 665); *Tr. Vincennes University* v. *Indiana*, 14 How. 268 (55 U. S. bk. 14, L. ed. 416).

This principle "applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms."

Leavenworth, L. & G. R. R. Co. v. *U. S. supra; U. S.* v. *Payne*, 2 McCrary, 289; *Dubuque, etc. R. R. Co.* v. *DesMoines, etc. R. R. Co.* 109 U. S. 334 (Bk. 27, L. ed. 954).

Lands forming part of an Indian reservation at the date of a grant are excepted from the grant.

Leavenworth, L. & G. R. R. Co. v. *U. S. ubi supra; Clark* v. *Smith*, 13 Pet. 195 (38 U. S. bk. 10, L. ed. 123); *Kansas Pac. R. R. Co.* v. *Atchison, T. & S. F. R. R. Co.* 112 U. S. 422 (Bk. 28, L. ed. 797).

No attempt has ever been made to include lands reserved to the United States within a prior grant, where the reservation afterwards ceased to exist. Nor where lands had been otherwise disposed of did their reversion to the government bring them within a previous grant.

Leavenworth, L. & G. R. R. Co. v. *U. S. ubi supra; Newhall* v. *Sanger*, 92 U. S. 761 (Bk. 23, L. ed. 769); *Wolcott* v. *DesMoines Nav. & R. R. Co.* 5 Wall. 681 (72 U. S. bk. 18, L. ed. 689); *Ex parte Flint & M. R. R. Co.* Copps, L. L. 385; *Central Pac. R. R. Co.* v. *Nevada, Id.* 424; *Phelps* v. *N.P. R.R. Co.* 1 Law Dec. (Dept. Int.) 384.

It is the Act, and not its denomination, that definitely fixes the line of the road; and the criterion is, has the act done, terminated the volition of the Company in respect to changing that line? if so, the line is "definitely fixed."

Van Wyck v. *Knevals*, 106 U. S. 366 (Bk. 27, L. ed. 203); *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 634 (Bk. 28, L. ed. 1123); *Walden* v. *Knevals*, 114 U. S. 374 (Bk. 29, L. ed. 167).

Upon construction, all that could be done had been to cause the grant to attach; and on payment by the Company of the costs and receipt of the patents, its title would relate back to the Act causing attachment of the grant.

Stark v. *Starrs*, 6 Wall. 418 (73 U. S. bk. 18, L. ed. 929); *Northern Pac. R. R. Co.* v. *Traill Co.* 115 U. S. 600 (Bk. 29, L. ed. 477).

When the routes were definitely fixed, and it appeared that lands within these limits had been sold at private entry, and taken up by preemptors, or reserved by the United States, an equivalent was provided.

Leavenworth, L. & G. R. R. Co. v. *U. S. supra.*

Thus, settlements on the public lands were encouraged, without the aid intended for the construction of the roads being thereby impaired.

R. R. Co. v. *Baldwin*, 103 U. S. 429 (Bk. 26, L. ed. 579); *Winona, etc. R. R. Co.* v. *Barney*, 113 U. S. 625 (Bk. 28, L. ed. 1112).

The right of a settler to enter the lands could not be prejudiced by the refusal of the legal officers to receive his declaratory statement duly presented.

Frisbie v. *Whitney*, 9 Wall. 195 (76 U. S. bk. 19, L. ed. 671); *Shepley* v. *Cowan*, 91 U. S. 338 (Bk. 23, L. ed. 427).

If the action of the land officers, by erroneously construing the law, deprived the settler of a substantial right, his remedy in equity is undoubted.

Minnesota v. *Bachelder*, 1 Wall. 109 (68 U.S. bk. 17, L. ed. 551); *Sampson* v. *Smiley*, 13 Wall. 91 (80 U. S. bk. 20, L. ed. 489); *Ferguson* v. *McLaughlin*, 96 U. S. 174 (Bk. 24, L. ed. 624); *Moore* v. *Robbins*, 96 U. S. 530 (Bk. 24, L. ed. 848).

In the clear language of the statute must be found all that is conveyed by the grant, and where doubt arises, the statute must be construed most strictly against the grantee.

Dec. Dept. Int. 243; *Rice* v. *R. R. Co.* 1 Black, 380 (66 U. S. bk. 17, L. ed. 154); *Leavenworth L. & G. R. R. Co.* v. *U. S.* 92 U. S. 740 (Bk. 23, L. ed. 637); *Rice* v. *Sioux City, etc R. R. Co.* 110 U. S. 698 (Bk. 28, L. ed. 290).

Mr. **W. P. Clough**, for appellee:

Upon the filing of the map of general route, the Commissioner of the General Land-Office, under instructions of the Secretary of the Interior, made an express withdrawal from entry by any mode, for the benefit of the railroad, of all odd-numbered sections of land within the distance of forty miles upon either side of the line of general route; which was never vacated. This withdrawal was effective.

Wolcott v. *DesMoines Nav. & R. R. Co.* 5 Wall. 681 (72 U. S. bk. 18, L. ed. 689); *Williams* v. *Baker*, 17 Wall. 144 (84 U. S. bk. 21, L. ed. 561); *Homestead Company* v. *Nav. & R. R. Co.* 17 Wall. 153 (84 U. S. bk. 21, L. ed. 622); *Wolsey* v. *Chapman*, 101 U. S. 755 (Bk. 25, L. ed. 915); *Dubuque, etc. R. R. Co.* v. *DesMoines, etc. R. R. Co.* 109 U. S. 329 (Bk. 27, L. ed. 952).

Mr. Justice **Field** delivered the opinion of the court: [66]

The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the Act of July 2, 1864, was passed, the title of the Indian Tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in *Beecher* v. *Wetherby*, 95 U. S. 517 [Bk. 27, L. ed. 440]: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of

governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from [67] the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." In support of this doctrine several authorities were cited in that case.

In *Johnson* v. *McIntosh*, 8 Wheat. 575 [21 U. S. bk. 5, L. ed. 689], which was here in 1823, the court, speaking by *Chief Justice* Marshall, stated the origin of this doctrine of the ultimate title and dominion in the United States. It was this: that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it. It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The chief justice remarked that "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence." Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The chief justice adds that the history of America, from its discovery to the present day, proves the universal recognition of this principle.

In *Clark* v. *Smith*, 13 Pet. 195 [38 U. S. bk. 10, L. ed. 125], which was here in 1839, the patent under which the complainant became the owner in fee of certain lands was issued by the Commonwealth of Kentucky in 1795, when the lands were in possession of the Chickasaw Indians, whose title was not extinguished until 1819. It was objected that the patent was void because it was issued for lands within a country claimed by Indians; but the court re- [68] plied "That the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the Revolution, were made for lands within the Indian hunting grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the Revolutionary War by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but by others. The ultimate fee (encumbered with the Indian right of occupancy) was in the Crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee. So this court, and the state courts, have uniformly and often holden." 13 Pet. 201 [126].

In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians.

In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads, and telegraph lines across their lands, and to make such other improvements upon them as the interests of the government might require, and afterwards to obtain a cession of their entire title.

The right to construct railroads and telegraph lines across their lands was secured by the Treaty concluded on the 19th of February, 1867, ratified on the 15th of April, and proclaimed on the second of May of that year. The right was in terms ceded to the United States, but the cession must be construed to authorize any one deriving title from the United States to exercise the same right. 15 Stat. at L. 505.

For the relinquishment of the entire title of the Indians to the lands, an agreement was made by commissioners appointed by the Secretary of the Interior, under the Act of Congress of June 7, 1872. That agreement in form was merely a proposition by the Indians to cede their title, upon certain money considerations to be paid, and certain acts to be per- [69] formed by the United States. Congress declined to approve of it in its entirety, but expressed an approval of it so far as it related to the cession of the title of the Indians upon the money considerations named. It refused, however, to allow an appropriation made to meet the first installment of the money consideration to be expended, except upon the condition that the Indians should abandon the other provisions and ratify the agreement thus modified. The Indians on the different Reservations accepted the condition and ratified the agreement as modified; those on one Reservation on May 2, 1873, and those on the other on the 19th of the same month.

The agreement, thus ratified, was forwarded to the Secretary of the Interior, and was approved by him on the 19th of June following, and on June 22, 1874, Congress approved it in the Indian Appropriation Act of that year, when it also provided for the payment of the second installment of the money consideration.

This modified agreement must be considered as accepted, on the part of the United States, when it was approved by the Secretary of the Interior. Some official recognition was necessary to satisfy those who might be interested as to the good faith of the alleged consent of the Indians; whether the parties acting nominally in their behalf really represented them, and whether their assent was freely given after full knowledge of the import of the legislation of Congress. Proof of these facts was not to rest in the recollection of witnesses, but in the official action

of the officers of the government, or in the legislation of Congress. The agreement, however, on the part of the Indians was only to cede their title; it was not a cession in terms by them. The officers of the Land Department, however, treated it as an actual cession of title from its date. The Indians had then retired to the Reservation set apart for them by the Treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus [70] made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned, and full consideration for it being afterwards paid, it could not be resumed. The agreement in terms provided that it should be binding from its ratification. So, therefore, considered in connection with the actual retirement of the Indians from the land, it may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned. The definite location of the line of railroad was subsequently made by the company, and a map of it filed with the Secretary of the Interior. The right of the Company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections, a portion of one of which constitutes the premises in controversy. The defendant could not initiate any preemptive right to the land so long as the Indian title remained unextinguished. The Act of Congress excludes lands in that condition from preemption. R. S. § 2257.

If we are mistaken in this view, and the relinquishment of the right of occupancy by the Indians is not to be deemed effected until the agreement was ratified by Congress in June, 1874, notwithstanding their actual retirement from the lands, the result would not be changed. The right of the Company to the odd sections within the limits of its grant, covered by the Indian claim, did not depend upon the extinguishment of that claim before the definite location of the line of the road was made, and a map thereof filed with the Commissioner of the General Land-Office. The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater portion of the lands along the entire route to Puget Sound, on which the road of the Company was to be constructed, was subject to this right of occupancy by the Indians. With knowledge of their title and its impediment to the use of the lands by the Company, Congress made the [71] grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the Act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the Act of Congress, that they would extinguish the title as rapidly as might be "consistent with public policy and the welfare of said Indians." Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the Company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy.

Assuming that the extinguishment of the Indian title to the lands in controversy may, so far as any claim to them against the United States is concerned, be held to have taken place at the date of the amended agreement—taking the last date, when the Indians on the second Reservation ratified it—the defendant did not acquire any right of preemption by his continued settlement afterwards. The Act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land-Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preemption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third section declares that after the general route shall be fixed, the President shall [72] cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption, before or after they are surveyed, except by the Company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the Company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land-Office, or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the Company to which, in aid of the construction of the road, it is granted. Although the Act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases, to formally withdraw them. It cannot be otherwise than the exer-

cise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which preemption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace [73] sales and preemptions in cases where the sixth section declares that the land shall not be subject to sale or preemption. The two sections must be so construed as to give effect to both, if that be practicable.

In the present case, the general route of the road was indicated by the map filed in the office of the Secretary of the Interior on the 21st of February, 1872. It does not appear that any objection was made to the sufficiency of the map, or to the route designated, in any particular. Accordingly, on the 30th of March, 1872, the Commissioner of the General Land-Office transmitted a diagram or map, showing this route, to the officers of the local land-office in Dakota, and by direction of the Secretary ordered them to withhold from sale, location, preemption, or homestead entry all surveyed and unsurveyed odd-numbered sections of public land falling within the limits of forty miles, as designated on the map.

This notification did not add to the force of the Act itself, but it gave notice to all parties seeking to make a preemption settlement that lands within certain defined limits might be appropriated for the road. At that time the lands were subject to the Indian title. The defendant could not, therefore, as already stated, have then initiated any preemption right by his settlement; and the law cut him off from any subsequent preemption. The withdrawal of the odd sections mentioned from sale or preemption, by the sixth section of the Act, after the general route of the road was fixed, in the manner stated, was never annulled.

It follows that the defendant could never afterwards acquire any rights against the Company by his settlement.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[148] JOHN J. SHIPMAN, *Appt.*,

v.

DISTRICT OF COLUMBIA.

DISTRICT OF COLUMBIA, *Appt.*,

v.

JOHN J. SHIPMAN.

(See S. C. Reporter's ed. 148.)

Board Public Works, District Columbia—contract to repair roads—"board rates"—commissioners—variance from specifications—casus omissus—bonds made equal to cash—allowances by engineer.

1. Where in the autumn of 1871, the claimant offered to put the canal road, between Aqueduct and Chain Bridges in the District of Columbia, in order, and his terms were not accepted, but a year later the board of public works ordered that a contract should be awarded him for this work, and that he should be notified of its action, and the secretary of the board, instead of notifying him of such action, informed him that a contract had been awarded him at "board rates" and the claimant proceeded to perform the work, being paid therefor at "board rates"—except as to masonry, for which he received $5 per cubic yard, while the "board rates" were $6.50 per perch—and he was paid nothing for haul, and subsequently a contract was drawn at the rates he had been paid and antedated, the court refused to correct the contract, under the claimant's theory that the price fixed for masonry per cubic yard, and the omission to pay for haul was through mistake; "board rates" being claimed.

2. Where, after the commissioners had succeeded the board of public works, the claimant varied from the plans and specifications, by constructing a wall wider than called for, giving his reasons for these changes to the assistant engineer of the District and to the commissioners, who assented thereto, and measurements and payments were made with the knowledge of the assistant engineers and commissioners, after final settlement it was held that a claim by the District of Columbia to recover back the amount paid in excess of the original specifications could not be maintained.

3. Where the instrument extending the contract made no provision for excavation in places where there was no previous wall, a provision in the original contract for "excavations and refilling, 40 cts. per cubic yard, to be measured in excavation only;" and "grading, 30 cts. for each and every cubic yard of earth, sand or gravel, excavated and hauled," will not include such excavation.

4. Where in the contract there is a *casus omissus*, and the claimant has done the work, and the District has received the benefit of it, the court will examine the findings, and ascertain whether they furnish the means for fixing its value.

5. Where there was a misunderstanding between the parties, as to whether by "an extra compensation of 40 cts. per foot," was intended 40 cts. per square foot, or 40 cts. per lineal foot, a compromise, by fixing upon a rate of 74 and 1-2 cts. a running foot, will be regarded by the court as a settlement of the disputed item, and will not be disturbed.

6. Where, in an emergency, the engineer in chief wrote to the contractor "to repair the roads and culverts, in the vicinity of the work now being performed by you along the Little Falls Road, which have been damaged by the late storms, as extra work, under your contract number 561, with the late board of public works," and the work was performed, the payment called for was in cash; and it was illegal for the commissioners to direct a bill to be made out and certified to at rates which produced an aggregate that would make the payment in certificates equivalent to a payment of the bill rendered, in cash. The amount paid in certificates, will be treated as a cash payment to that amount, although the commissioners had no cash at the time applicable to such payment.

7. Allowances by the engineer in chief, made after the controversy arose, in excess of the contract price for masonry and an allowance for haul, will not be disturbed; the court assuming there may have been good reason for allowing the haul, and the masonry may have been of a different quality from the rubble cement, for which the contract fixes the price at $5.

[Nos. 25, 157.]

Argued Nov. 3, 1886. Decided Nov. 15, 1886.

CROSS APPEALS from the Court of Claims. *Affirmed.*

This case arose upon a petition filed in the court below by the appellant, John J. Shipman, to recover a large amount claimed to be due the petitioner under a contract with the defendant for the repair of what is known as the Canal Road, located in the District of Columbia.

The facts are stated in the opinion of the court of claims adopted by this court, which was delivered by DAVIS, *J.*, as follows:

The items in the claimant's bill of particulars depend, in some measure, upon the force to be given to a contract known as contract No. 561.

In the autumn of 1871 the claimant offered to put the canal road between Aqueduct and Chain Bridges in order. Apparently his terms were not acceptable, for no notice was taken of them. A year later the board ordered that a contract should be awarded him for this work, and directed that he be notified of its action. An attempt was made to connect this act with the claimant's acts of the previous year; but the findings show no such connection, and in our opinion there was none.

The secretary of the board at once wrote to the claimant, but instead of notifying him of the real doings of the board, he notified him that a contract had been awarded him "at board rates," which had not been alluded to by the board in their action. The claimant, before commencing work, saw the defendant's officers in relation to the work and the contract, but what took place can only be inferred from subsequent acts of both parties.

The claimant did work to the amount of a few thousand dollars in the autumn of 1872, for which he was paid in part. In the spring of 1873 he resumed work and continued at it until the autumn, when a final measurement was had of the work done to that time. For all this work he was paid at board rates with two exceptions: (1) he was paid for stone masonry at $5 per cubic yard, while the board rate was $6.50 per perch; (2) he was paid nothing for haul. So far as we can gather from the findings, his bills were rendered at the rates at which they were paid, and the payments were received without any intimation that the amounts allowed were too small.

During the progress of the work the claimant had put macadam on the road by direction of one of the board of public works. This was formally recognized as a part of his contract in November, 1873, and in December, 1873, the contract, No. 561, under which all the work was supposed to have been done, was formally executed.

The findings show that both parties intended to embody in this formal instrument, and supposed they had embodied in it, all the agreements under which the one had been doing work and the other had been paying money. The instrument was antedated for the purpose, as the findings further show, of making it operative during the whole period of the work.

The claimant now, however, makes two objections to this instrument: In the first place it was signed on behalf of the board of public works by Henry D. Cooke, Alexander R. Shepherd, and James A. Magruder. Cooke was a member of the board in October, 1872, when the contract with the claimant was actually made, but he had ceased to be a member in December, 1873, when the formal evidence of it was actually signed. Shepherd and Magruder were members throughout. The total number of the board was five. The claimant maintains that the instrument, not having been signed by a majority of the board, is invalid.

It is unnecessary for us to decide whether he is correct in this contention, for the findings show that the claimant signed that paper for the purpose of showing what his own understanding of the contract was. If, notwithstanding the written instrument, the contract still rested in parol, the court could have no stronger evidence to show what the claimant intended it to be. If, on the other hand, the written contract is valid, the practical result on the issues in this suit is the same.

In the second place the claimant maintains that he engaged to do the work at board rates; that when the written contract varied from board rates by excluding haul, and paying for masonry at only $5 a cubic yard, it was a variation made without his knowledge, and against the intent of both parties; and that, these provisions of the contract having been inserted by mistake, the court should reform the contract by restoring board rates as the measure of compensation. This theory rests for its support upon (1) the letter of the secretary informing the claimant that a contract had been awarded him at board rates; (2) the testimony of the claimant that he supposed the rates stated in the written instrument were board rates.

We have already seen that the letter of the secretary was not justified or authorized by the action of the board. The claimant's contention therefore rests mainly upon his own unsupported testimony. On the other hand, it is contradicted by his own consistent conduct, from October, 1872, when he began work under the original contract, to January, 1876, when he finished under the last extension of the contract. During all this time he rendered accounts and received pay for masonry at $5, and for grading, without claiming haul. We cannot shut our eyes to these practical acts of construction. We think that before he began work he must have known that the secretary had made a mistake. We are also of opinion that when he signed the contract, in December, 1873, he knew what its purport was, and that it expresses the agreement as he understood it.

Having disposed of this general question, we will take up the items of the claim and counterclaim in detail. * * *

The defendant asks judgment for a large sum for alleged overpayment. The facts are briefly these:

The wall was some three miles in length, and in some places as much as ten feet high. In the very outset the claimant varied from the plans and specifications by constructing it wider than they called for. He gave his reasons for these changes to the assistant engineers of the District and to the commissioners, and they assented to the change. From time to time during the work, measurements were taken and returned to the chief engineer, and passed upon by him and payments made in accordance with them; and all these measurements included the variations thus made. The commissioners knew of it and the reasons for it, and consented to it; the assistant engineers knew of it, and the engineer in chief might have known of it if he had paid personal attention to it. There was no attempt at concealment or fraud. When the final payment was made, which is now sought to be recovered back, it was done with

the knowledge of the commissioners, and by personal direction of one of them, and with the knowledge and consent of Assistant Engineer Oertly, who was acting as chief in the absence of Mr. Hoxie. The ground of the defendant's claim for repayment is that the engineer-in-chief did not assent to the changes which involved the construction of 4,091.83 yards of masonry beyond his plans. We think this claim cannot be maintained. * * *

The foundation for the wall:—The terms of the contract must govern our decision. It required the claimant to:

"Construct a stone retaining or parapet wall on the south side of the Little Falls Road, between the Aqueduct and Chain Bridges, or at such points along said road as may be authorized by the commissioners, at $5 per cubic yard. * * * The present retaining walls to be removed to such depth from the top as may be directed, and the foundation inspected and approved by the engineer of the District of Columbia before relaying the wall, which is to be done in cement mortar."

A portion of the new wall was constructed in places where there was no old wall. It is admitted that the contract gives the claimant no claim for the labor in getting ready for the foundations in places where there was a previous wall. The claim is confined to excavation in places where there was no previous wall. The instrument extending the contract makes no other provision for payment except that already quoted. We are of opinion that it requires the claimant to do all the work necessary for the finished masonry at the agreed price of $5, unless there is something in the old instrument which gives him further pay for excavation.

Turning to that we find these provisions only: "Excavations and refilling, forty (40) cents per cubic yard, to be measured in excavation only," and "grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled."

It is plain that the provision in regard to grading does not apply to this case. We think it equally clear that the other does not. This is not a case of excavation and refilling, like a sewer trench; and the rate of payment agreed upon for such double work is not applicable to this. There being nothing in the old contract to control the plain language of the extension we must decide against the claimant on this item.

The lining back of the wall for drainage:—The specifications called for "a lining of coarse gravel twelve (12) inches in thickness carried up in rear of the retaining wall," and the plans showed this in detail. There was no gravel along the line of the road, and it was mutually agreed, during the construction of the work, that macadam material should be substituted for the gravel. The contract is silent as to the rate of pay for this work, which has been satisfactorily performed. The defendant maintains that it was intended to be paid for by the price allowed for the masonry in the wall.

The claimant contends that he is entitled to compensation (1) for the labor in excavating the place for the reception of the lining, at the rate allowed by the old contract for excavations and refilling; (2) for the lining to be measured as masonry.

It is plain that this work of graveling in the rear of the wall, as contemplated by the contract, was a work of considerable labor and expense. We cannot think that either party intended it to be paid for in computing the masonry. In our opinion it is a *casus omissus.* The parties have accidentally neglected to fix a price for this work. The claimant has done the work; the District has received the benefit of it; and it only remains for the court to examine the findings and ascertain whether they furnish the means for fixing its value. * * *

The coping on the wall:—The contract called for a—

"Coping to consist of selected stones six to ten inches thick, jointed; in length of not less than two feet, and must project over the parapet wall not less than two nor more than four inches on each side, and must be so disposed along the line of the wall that no two in juxtaposition shall vary in thickness nor in width more than three quarters of an inch."

After laying about a thousand feet of this coping the claimant wrote to the commissioners that it was expensive, arduous and unsatisfactory work to make such coping, and made a proposition in the following language: "That I be allowed to use for the coping North River or other suitable coping stone, for which I will be allowed an extra compensation of forty (40) cents per foot. This stone will cost me, delivered on the ground, nearly (1) dollar per foot, but I am willing to bear more than one half the expense, only asking the District Government to assume the proportion I have named."

To this proposition Mr. Hoxie, on behalf of the District, made the following reply: "You are requested to call at this office to execute the necessary papers for an extension to your contract, No. 561, with the late board of public works, to include the finishing of the parapet wall along the Little Falls Road with the North River coping, at forty cents per lineal foot, payable in 3.65 bonds at par.

The claimant did not call and execute the proposed extension, but instead thereof went on with the proposed change, and the court is now called upon from this correspondence and the acts of the parties to decide what their agreements really were.

Assuming the average thickness of the coping called for by the contract to be 8 inches, and its average width to be 30 inches, the contract price for it; viz., $5.00 per cubic yard, would amount to 30.8 cents per running foot. The diminution in the size caused by using North River blue stone, taking Hoxie's measurements in finding XXVIII, reduced the contract price for it, measured as masonry, to about 15.4 cents per running foot. As some compensation for this reduction, as well as the increased cost of the proposed change (estimated by the claimant at nearly $1.00 per foot), the claimant proposed that he should be allowed an extra compensation of 40 cents per foot. He did not indicate whether he meant 40 cents per square foot or 40 cents per lineal foot. He now says that he intended square feet and argues that the engineer must have so understood him, because any other construction would be inconsistent with the prices of blue stone.

Lieutenant Hoxie's answer may be construed

in two ways: (1) either as an acceptance of the claimant's proposition, defining the undefined term in it to be a lineal and not a square foot; or, (2) as a counter proposal of 40 cents a running foot as the entire compensation. We think the first construction the one most consistent with the facts in the case, and the one which gives force to the whole correspondence. It is also the only one consistent with the action of Lieutenant Hoxie at a subsequent stage, when he sanctioned a measurement of the work which contemplated an allowance to the claimant for the coping as masonry, and an additional payment by the foot.

When the parties came to settle, after the work was done, both agreed that the claimant was entitled to be paid for the coping as masonry (which we have seen to be about 15.4 cents per running foot), and at as high a rate as 40 cents extra per lineal foot, or an aggregate of about 55.4 cents per running foot. The claimant contended that he was entitled to a gross allowance of 40 cents per square foot, which, allowing the coping to be 2 feet wide, would be 40 cents a running foot additional, or about 95.4 cents per running foot. The parties compromised by fixing upon a rate of 74½ cents a running foot. We cannot say that this payment was made in mistake of fact. We think that it was made and received as a settlement of a disputed item. Regarding it in this light, we can neither on the one hand set aside the payments already made to enable the defendant to recover on its counterclaim nor can we on the other hand award to the claimant the contract price for the coping as masonry; since the claim for it, however well founded it may have been originally, entered into the settlement by which both parties accepted a rate of compensation which neither contemplated when the work was done. * * *

The next items in consecutive order relate to what is known as the New Cut Road, a road near to and connected with the Canal (or Little Falls) Road, on which the claimant was at work in August, 1875.

It appears that this New Cut road was badly damaged by storms in that month. The three years' experience which the District authorities had had at that time with the claimant as a contractor appears to have inspired confidence, and in the emergency Mr. Hoxie addressed the following letter, on the 31st of August, to the claimant: "You are authorized to repair the roads and culverts in the vicinity of the work now being performed by you along the Little Falls road which have been damaged by the late storms, as extra work under your contract No. 561 with the late Board of Public Works. You will present this order with your bill for the work, which will be done under the direction of Mr. Cunningham and Mr. Carroll, overseers."

No answer was made to this communication, but as the claimant at once went on with the work he must be presumed to have accepted the proposal.

In December he rendered an itemized bill, amounting in the aggregate to over $15,000, and asked for measurement and payment under his contract. This contract called for payment in cash. The defendant had no cash. Under directions of the commissioners a bill was made out and certified to at rates which produced an aggregate that would make a payment in certificates equivalent to a payment of the bill rendered in cash, and the claimant was so paid in certificates.

We do not apprehend that there was anything immoral or intrinsically dishonest in this transaction. The parties assumed what was a manifest fact: that work to be paid for in depreciated securities was nominally worth higher rates than work to be paid for in cash. But the act was clearly illegal. The defendant having agreed to pay cash was legally bound to pay cash; but when it found itself unable to do so, the law forbade it from parting with its securities to a creditor at less than par. It is too clear for argument that what it did was an attempt to do indirectly what the law forbade it to do directly, which a familiar rule of law makes an impossibility.

This payment in certificates to the amount of $22,182.92 must therefore be taken to be a cash payment to that amount on account of the work done on the New Cut Road. It is the only payment that has been made on that account. Our labors in this respect are, therefore, now reduced to ascertaining the amount of the work done by the claimant on that road.

On the 14th December, 1876, Lieutenant Hoxie addressed to the commissioners a letter in which he said: "I transmit herewith final measurement of work done on New Cut Road by J. J. Shipman, under contract No. 561 of the late board of public works, amounting to $24,352.29." The measurements inclosed in this letter show the following apparent variations from contract rates: an allowance of $6.50 for masonry, and an allowance for haul. The counsel for the defendant ask us to strike these items from the measurement. These measurements were made after the present controversy arose, and undoubtedly express Lieutenant Hoxie's well-considered judgment as to the claimant's rights. There may have been good reason for allowing the haul, and the masonry may have been of a different quality from the rubble cement, for which the contract fixes the price at $5. We are not disposed to assume the responsibility of changing these items.

Among the items included in this measurement were 1,090.8 perches of dry wall. The contract fixes no price for such labor and material. Lieutenant Hoxie estimates it to be worth $2.50 per perch, and allows that rate. The claimant contends that it is worth more than that, and introduced considerable proof to sustain his contention. We have reached the conclusion that the rate allowed by Lieutenant Hoxie is below the prices paid for such wall at the time of its construction, and have found that it was worth $3.50 per perch instead of $2.50, as allowed.

As the result of this we disallow the counterclaim on account of the work on the New Cut Road, and allow the claimant as follows:

Work done as by Hoxie's estimate	$24,352 50
1,098.8 perches dry wall, $1 per perch additional	1,098 80
	25,451 30
Less payments in certificates at par	22,182 92
	$3,268 38

Mr. **W. Willoughby**, for Shipman:

The letter signed by the secretary of the board, whether in fact authorized by the board or not, could not affect the rights of this claimant.

Bronson's Exr. v. *Campbell*, 12 Wall. 683 (79 U. S. bk. 20, L. ed. 437); *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 30.

The difference between a cash and credit basis is recognized in all business transactions. Payment of a debt before due, in a smaller amount than the same owing, is a valid consideration for full satisfaction.

Very v. *Levy*, 13 How. 363 (54 U. S. bk. 14, L. ed. 180).

The law refuses to interfere in the case of an illegal contract, if executed by both parties *in pari delicto*.

2 Pars. Cont. 2d ed. 254, and cases cited.

This was not what can properly be called an overpayment. Appellant did not receive more in cash than he would be entitled to on the basis of cash. An action ought not to be sustained to recover such alleged overpayment, commenced some seven or eight years after the transaction is finally closed.

Hitchcock v. *Galveston*, 96 U S. 341 (Bk. 24, L. ed. 659).

The commissioners have a general power to adjust, compromise and settle in cases of indefinite claims, and it will be going beyond any reported case, to call such a transaction an overpayment, and recover back from the payee.

1 Dill. Mun. Corp. § 478.

If there be any doubt about the construction of the contract, the surrounding circumstances may be considered.

Noonan v. *Bradley*, 9 Wall. 497 (76 U. S. bk. 19, L. ed. 761).

The finding of the court is conclusive as to the surrounding circumstances being such as to sustain its construction.

Bradley v. *Washington, A. & G. St. Packet Co.* 13 Pet. 89 (38 U. S. bk. 10, L. ed. 72); 9 Clark & F. 566; 15 East, 501; *Smith* v. *Bell*, 6 Pet. 75 (30 U. S. bk. 8, L. ed. 325); 1 Greenl. Ev. §§ 298, 292, 293.

The lining was not in accordance with the contract, but was a variation from it by mutual agreement, and is to be paid for independent of the contract.

Dale v. *U. S.* 14 Ct. Cl. 514; *Dermott* v. *Jones*, 2 Wall. 9 (69 U. S. bk. 17, L. ed. 764).

The measurements made by the engineer designated are binding upon the parties, and cannot be corrected except by the same engineer.

Kihlberg v. *U. S.* 97 U. S. 398 (Bk. 24, L. ed. 1106).

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for the District of Columbia.

The knowledge and consent of commissioners individually would not affect a written contract made by the board.

Wachob v. *School Dist.* 8 Phila. 568; *Turnpike Board* v. *Cramer*, 45 Pa. 386; *School Dist.* v. *Paxton*, 89 Pa. 395.

In order that a payment by the board, for the work, should be construed as a ratification, claimant must show that the board had knowledge that the excess was included in the estimate paid.

Owings v. *Hull*, 9 Pet. 629 (34 U. S. bk. 9, L. ed. 254); *Burrow* v. *O'Brien*, 4 Russ. 395.

Mr. **W. Willoughby**, for Shipman, in reply:

The court of claims had equitable as well as legal jurisdiction in cases under this Act, and there was no difficulty in following the rule laid down in the following cases:

Dermott v. *Jones*, 2 Wall. 9 (69 U. S. bk. 17, L. ed. 764); *Dale* v. *U. S.* 14 Ct. Cl. 514, 517; *McKinney* v. *Springer*, 3 Ind. 59; *S. C.* 54 Am. Dec. 470; *Hayward* v. *Leonard*, 7 Pick. 181; *S. C.* 19 Am. Dec. 268.

The finding of the court does not show such a mistake as would vitiate an award. If it did, the contractors are not to be bound by the award, nor by a settlement in pursuance of it if the award be set aside.

Burchell v. *Marsh*, 17 How. 344 (58 U. S. bk. 15, L. ed. 96).

As showing that the letter of the secretary was binding upon the board of public works as to payments at "board rates" we call attention to *Supervisors* v. *Schenck*, 5 Wall. 772 (72 U. S. bk. 18, L. ed. 556).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed. No disputed questions of law are involved, and our views of the facts are so well expressed in the carefully prepared opinion of the court of claims, found in *Shipman* v. *Dist. Col.* 18 Ct. Cl. 291, that we deem it unnecessary to do more than to refer to that opinion for the reasons of our decision.

Affirmed.

NELSON STORY, *Plff. in Err.*, [235]

v.

MADISON M. BLACK ET AL.

(See S. C. Reporter's ed. 235-237.)

Practice—jurisdiction.

Writ of error to the Supreme Court of Montana to bring up for review a judgment in which there was not a trial by jury, dismissed, the statute requiring an appeal in such cases.

[No. 39.]

Submitted Nov. 11, 1886. Decided Nov. 15, 1886.

IN ERROR to the Supreme Court of the Territory of Montana. *Dismissed.*

The case is sufficiently stated by the court.

Messrs. **J. Hubley Ashton** and **Nathaniel Wilson**, for plaintiff in error.

Messrs. **Edwin W. Toole** and **Joseph K. Toole**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [236]

This is a writ of error to the Supreme Court of the Territory of Montana to bring up for review the judgment in a suit where there was not a trial by jury. Under the Act of April 7, 1874, chap. 80, sec. 2, 18 Stat. at L. part 3, page 27, the case should have been brought up by appeal, and *the writ of error is therefore dismissed.* [237] *Hecht* v. *Boughton*, 105 U.S. 235 [Bk. 26, L. ed. 1018]; *U. S.* v. *R. R. Co.* 105 U. S. 263 [26: 1021]; *Woolf* v. *Hamilton*, 108 U.

S. 15 [Bk. 27, L. ed. 685]. The question is no longer open in this court. The statutory rule is jurisdictional.

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[210] FIRE ASSOCIATION OF PHILADELPHIA, *Plff. in Err.*,

v.

PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 110-129.)

Jurisdiction—writ of error to state court—opinion of state court—constitutional law—taxation of foreign corporation by State—State may exclude or impose conditions—when corporation is within jurisdiction of State.

1. Upon a writ of error to review a judgment entered in the Supreme Court of New York in accordance with a decision of the Court of Appeals of that State, this court can examine the opinion of the Court of Appeals, a copy of which, duly authenticated, is transmitted here with the record.

2. It appearing from that opinion that the state court decided against a claim set up by the plaintiff in error under the Constitution of the United States, and that such decision was necessary to the decision of the case, this court has jurisdiction to review that decision.

3. The Statute of the State of New York, providing that when the laws of other States imposed upon insurance companies incorporated under the laws of New York, as a condition to their doing business in such States, greater burdens than were imposed by the laws of New York upon similar companies of such other States doing business in New York, then the same burdens should be imposed upon the companies of such other States doing business in New York as were by the laws of such States imposed upon New York companies, is not contrary to the Fourteenth Amendment to the Constitution of the United States providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

4. A foreign corporation is not within the jurisdiction of the State of New York until it has complied with the laws of that State as to payment of license fees, taxes and the deposit of securities, etc. A corporation having complied with the law and received a license for a year is within the State for that year; but it is within the power of the State to change the conditions of admission at any time as to the future, and if it makes such a change for the future the foreign corporation is not within the State after the expiration of the year for which it was licensed, until it has complied with such changed conditions.

[No. 15.]

Argued Oct. 26, 1886. Decided Nov. 15, 1886.

IN ERROR to the Supreme Court of the State of New York. *Affirmed.*

The case is stated by the court.

Mr. **Joseph H. Choate,** for plaintiff in error:

That a corporation like the plaintiff in error is a "person" within the meaning of the Fourteenth Amendment, seems no longer debatable since the announcement made by the learned chief justice, in the case of *Santa Clara Co.* v. *Southern Pac. R. R. Co.* 118 U. S. 396 (Bk. 30, L. ed. 119), that all the members of the court were of the opinion that the corporations in that case, being railroad companies, were properly within the terms of that description.

See also *San Mateo Case*, 18 Fed. Rep. 722, 746-748, 758-762; *Co. of Santa Clara Case*, 18 Fed. Rep. 385, 397-404; *Kentucky R. R. Tax Cases*, 115 U. S. 321 (Bk. 29, L. ed. 414); *Chinese Laundry Cases*, 113 U. S. 27, 703 (Bk. 28, L. ed. 923, 1145); 118 U. S. 356 (Bk. 30, L. ed. 220).

The plaintiff in error was, in 1881, unquestionably, if a person at all, a person within the jurisdiction of the State of New York. It is a part of the agreed statement of facts that the plaintiff in error had, by direct authority from the State, uniformly maintained its agency within the State from 1872 down to the present time. It transacted its business there under the authority, implied and express, of the State, and under the usual certificate of authority from the State granted in such cases upon compliance with the prescribed conditions. It contributed yearly its quota, by taxation, to the revenues of the State, and was in all respects, and to every intent and purpose, within the jurisdiction of the State of New York. Thus it had, as a Corporation, a legal and actual existence within the State by virtue of the legislative authority of New York, and not by virtue of its Pennsylvania charter. While it is true that a corporation cannot migrate, that is, change its legal residence or citizenship, it is just as true that, in all other respects, in the transaction of its business it can, through the medium of its agents, move about with perfect freedom and, with the consent of the sovereign power, go "within the jurisdiction" of any State. It is possible for a foreign corporation to come "within the jurisdiction" of the State. If this be so, certainly there can be no better or higher evidence of the fact that such a corporation is actually within the jurisdiction than the certificate which it, or its agents, receives from the State, authorizing it to transact business therein, and at the same time subjecting it to the jurisdiction of the state and federal courts of that locality. Indeed, such a certificate is, under the Statutes of New York, the only evidence that a foreign corporation is legally within the State. Such a certificate the plaintiff in error has received from year to year since 1872.

See *Lafayette Ins. Co.* v. *French*, 18 How. 404 (59 U. S. bk. 15, L. ed. 451); *Ex parte Schollenberger*, 96 U. S. 369 (Bk. 24, L. ed. 853); *R. R. Co.* v. *Koontz*, 104 U. S. 5, 10-18 (Bk. 26, L. ed. 643-645); *St. Clair* v. *Cox*, 106 U. S. 350, 355 (Bk. 27, L. ed. 222, 224).

The question here presented is not as to the right of the State of New York to admit or exclude any or all foreign corporations, or even the particular Corporation here litigating. The State has not undertaken to exclude the plaintiff in error; it has admitted and recognized this Corporation as a part of its own business community, but now, after having got the Company within its territory and in its grasp, seeks to impose upon it an unequal tax, penalty, burden or condition, which is, as we claim, repugnant to the Constitution of the United States, and therefore a tax, penalty, burden or condition which is not within the power of the State to impose. It is on this point, we submit, that the learned judge who delivered the opinion in the court of appeals is clearly in error; that is, in contending that the plaintiff in error was not, at the time of the imposition of this unequal tax and burden, a person "within" the jurisdiction of the State. He says that the Fourteenth Amendment "relates wholly to persons within the jurisdiction, already there

in fact and of right, and their treatment thereafter; and not at all to the terms and conditions on which alone they can come in."

People v. *Fire Assn. of Phila.* 92 N. Y. 311, at p. 326.

But the plaintiff in error was already within the jurisdiction of the State of New York; already there in fact and of right, by permission of the State, from 1872 to 1881; and it is the "treatment thereafter" of which we complain. The State did not meet it at the threshold and seek to exclude it, but admitted it on certain conditions, the legality of which was not disputed, and is not now; and afterwards, to wit, after the passage by the State of Pennsylvania, in 1878, of its Act aimed at foreign corporations, the State of New York sought to impose upon the plaintiff in error, already there in fact and of right, the unequal, and therefore unlawful, burden which it did not impose upon any insurance companies within its limits from other States than Pennsylvania.

The plaintiff in error came into the State of New York in the year 1872, and complied with all the conditions then in force therein. Although the Law of 1865 was then upon the statute books, yet it did not really create or provide for any tax or condition, as to this Pennsylvania Corporation, for the contingency, the happening of which alone gave life and force to that law, as against Pennsylvania corporations; namely, the passage of a law by the State of Pennsylvania imposing a tax upon foreign corporations greater than that imposed upon such companies by the laws of New York did not come to pass until 1878. On April 4, 1878, the State of Pennsylvania passed such an Act. On that day, therefore, and not before, the Act of 1865 sprang into existence as against the plaintiff in error. When it came into the State there was not, so far as it was concerned, any such condition or tax in existence. It had been "within" the jurisdiction of the State an entire year, 1872–1873, before this tax was imposed. Not only so, but if the Act of 1865 is unconstitutional and void, it never was a law of the State of New York, and under no circumstances was the plaintiff in error obliged to recognize it as such. "An unconstitutional law is void, and is as no law."

Ex parte Siebold, 100 U. S. 376 (Bk. 25, L. ed. 719).

Mr. **Denis O'Brien**, *Atty-Gen. of New York*, for defendants in error:

The tax imposed upon the plaintiff in error under the Act of 1865 is in the nature of a license fee. It is within the scope of the power of the Legislature of the State of New York to impose upon foreign corporations a tax as the price of the privilege of doing business within the State. It is well settled that the State can prohibit a foreign corporation from coming within its jurisdiction, or it may admit it on such terms as the Legislature shall see fit to impose; and a corporation availing itself of the privilege to do business here must comply with the conditions exacted. Corporations have no legal existence beyond the territorial limits of the sovereignty by which they were created. They are, it is true, ordinarily permitted to make contracts and transact business in other sovereignties, but this provision is due entirely to the comity of States and not to any absolute right. It is a mere privilege that they may be permitted to enjoy on such terms as the legislative power may prescribe, and which may, in the discretion of the Legislature, be absolutely withheld.

Bank of Augusta v. *Earle*, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274); *Paul* v. *Va.* 8 Wall. 168 (75 U. S. bk. 19, L. ed. 357); *Liverpool Ins. Co.* v. *Mass.* 10 Wall. 566 (77 U. S. bk. 19, L. ed. 1029); *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 (Bk. 28, L. ed. 1137).

Nor can the rule that it is within the scope of legislative power to impose a tax upon foreign corporations, as the price of the privilege of doing business within the State, be weakened by the attempted distinction between the cases of corporations desiring to enter a State to do business and those already carrying on business therein at the time of the imposition of an increased tax. No such distinction exists in the law. The power to impose a license tax exists, and has always existed, whether exercised or not. The State waived no right by the fact that the agents of the Corporation were not actually met on the border by an agent of the State with a schedule of conditions. When the Corporation crossed the boundary lines it was chargeable with knowledge of the existence of power and the possibility and probability of its future exercise. The State, as a State, could not take cognizance of the unimportant fact that the plaintiff in error had come within its jurisdiction to carry on the business of making insurances. To say that the State cannot now exercise its inherent and inalienable power, after the Corporation has set up its business, is tantamount to saying that by its coming into the State, the Corporation deprived the State of a portion of its sovereign powers. The State can not only prevent foreign corporations from coming into its jurisdiction, but it has also the power to drive them therefrom after they have come in and established a business therein. The Wisconsin cases, arising upon the statute requiring foreign corporations to stipulate not to transfer suits to the federal courts, are illustrative in the present case. The State Supreme Court held such stipulation binding and constitutional.

Morse v *Home Ins. Co.* 30 Wis. 496.

The Supreme Court of the United States reversed the decision of the state court and denied the constitutionality of the Act and the binding force of the stipulation.

See 20 Wall. 445 (87 U. S. bk. 22, L. ed. 365).

Thereupon a citizen of Wisconsin applied for a *mandamus* against the Secretary of State, to compel him to annul the leave granted the company to do business. A writ was awarded by the Supreme Court of Wisconsin, the late *Chief Justice* Ryan, in a very able opinion, holding the stipulation valid and that *mandamus* must issue, even though the United States Supreme Court had awarded an injunction against the Secretary of State to prohibit such an act.

State, ex rel. Drake, v. *Doyle*, 40 Wis. 175.

A *mandamus* compelling the license was denied.

State, ex rel. Continental Co. v. *Doyle*, 40 Wis. 220.

The contention came again before the Supreme Court of the United States on appeal from a judgment of the United States Circuit

Court directing an injunction against the Secretary of State, to prevent him from revoking the license. The supreme court reaffirmed the unconstitutionality of the act, on the ground that the jurisdiction of the Courts of the United States could not be impaired even by stipulation, but that the State of Wisconsin might enforce the penalty by exclusion, and reversed the judgment.

Doyle v. *Continental Ins. Co.* 94 U. S. 535 (Bk. 24, L. ed 148).

And this court, in pronouncing that judgment, said: "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable." The Act of 1865 and the tax imposed upon the plaintiff in error, thereunder, are not repugnant to the first section of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

The plaintiff in error is not to be regarded as a person within the jurisdiction of the State of New York, within the meaning of the Amendment. A corporation can have no legal existence out of the sovereignty by which it was created. It must dwell in the place of its creation and cannot migrate to another sovereignty.

Bank of Augusta v. *Earle, supra; Runyan* v. *Coster's Lessee*, 14 Pet. 122 (39 U. S. bk. 10, L. ed. 382); *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 233 (61 U. S. bk. 15, L. ed. 898).

They are the creatures of local law and have not even the right of recognition in other States, except through comity. They cannot make a valid contract outside the State of their origin without the sanction of the foreign State, expressed or implied. Cases cited last above.

Paul v. *Va. supra; R. R. Co.* v. *Koontz*, 104 U. S. 5, 11 (Bk. 26, L. ed. 643, 644)

Only within the State of their origin, and there only in a restricted sense, are they to be regarded as citizens; and that restricted sense does not include them within the meaning of that clause of the Constitution which declares that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Liverpool Ins. Co. v. *Mass.* and *Paul* v. *Va. supra.*

The franchise of a corporation cannot be taxed outside of the State which granted such franchise; nor can any State tax the property of a foreign corporation, except such portion thereof as is actually within its jurisdiction.

McCulloch v. *Maryland*, 4 Wheat. 430 (17 U. S. bk. 4, L. ed. 697); *State Tax on Foreign Held Bonds*, 15 Wall. 300 (82 U. S. bk. 21, L. ed. 179).

These cases cited, both in direct declaration and by clear implication, unmistakably establish the doctrine that in the estimation of the law a corporation cannot leave the State under whose laws it was organized. The business of the plaintiff in error carried on in the State of New York was done solely through insurance agents. Can it be said that a man who sends his money for investment to an agent in another State comes within the jurisdiction of that State, and by virtue of his investments there can claim to be a "person within the jurisdiction" of that State, within the meaning of the Fourteenth Amendment? Yet such is the relation which a corporation, through its agencies, assumes to the jurisdiction and laws of States other than that in which it is organized, except that the privileges of a corporation are special and limited to the objects named in its charter, while the individual is the possessor, by inherent and inalienable rights, of the power and privilege to do everything which lies within the scope of his volition, subject only to the restraints of general and universal law.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of New York. Under the provisions of section 1279 of the Code of Civil Procedure of New York, the People of the State of New York and the Fire Association of Philadelphia, a Pennsylvania corporation, being parties to a [111] question in difference which might be the subject of an action, agreed upon a case containing a statement of the facts on which the controversy depended, and presented a written submission of it to the Supreme Court of New York, so that the controversy became an action. The material facts set forth in the case are these:

"The defendant, the Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the State of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the City of Philadelphia. In the year 1872 it established an agency in the State of New York, which it has ever since maintained. No question is here raised but that it has uniformly complied with all the requirements and conditions imposed by the laws of this State upon fire insurance companies from other States establishing and maintaining agencies in this State—except the payment of the tax now in dispute, upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy—and has received from year to year certificates of authority from the Superintendent of the Insurance Department of this State, as provided to be issued under the Act, chapter 466 of the Laws of 1853, and the subsequent Acts amendatory thereof.

The Act of the People of the State of New York, passed May 11, 1865, three fifths being present, being chapter 694 of the Laws of 1865, entitled 'An Act in Relation to the Deposits Required to Be Made, and the Taxes, Fines, Fees, and Other Charges Payable by Insurance Companies of Sister States,' as amended by the Act of 1875, chapter 60, provides as follows, viz.: 'Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required [112] for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all com-

panies of such States establishing, or having heretofore established, an agency or agencies in the State shall be and are hereby required to make the same deposit for a like purpose in the Insurance Department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; and the Superintendent of the Insurance Department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this Act; *Provided*, however, that no discrimination shall be made in favor of one company over any other from the same State.'

The State of Pennsylvania, by an Act passed April 4, 1873, and ever since in force, enacted as follows, viz.: 'Section 10. No person shall act as agent or solicitor in this State of any insurance company of another State, or foreign government, in any manner whatever relating to risks, until the provisions of this Act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said preminms were received in money or in the form of notes, credits or any other substitute for money, [113] and pay into the state treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury.'"

In the year 1881, the defendant, through its authorized agents in the State of New York, received for insurance against loss or injury by fire, upon property located within the State of New York, premiums to the aggregate amount of $196,170.22. The Superintendent of the Insurance Department of New York claimed that the defendant ought to pay, as a tax, for the year 1881, $1,848.45 with proper interest, being the amount arrived at by deducting from $5,885.10 (which would be a tax of three per cent on $196,170.22.), the sum of $4,036.65, which the defendant as a Pennsylvania Corporation had paid as a tax on premiums, during 1881, under laws of New York in force in 1881, other than the Act of 1865, as amended by the Act of 1875. The case then states that "The controversy between the parties is as to whether the defendant is liable to pay any tax to the Superintendent of the Insurance Department of the State, upon the said premiums received by it in the year 1881, and if any what amount;" that "The defendant claims that it is not liable to the plaintiffs for any amount, insisting, first, that the said Act of 1865, as amended by the Act of 1875, is unconstitutional and void, and not a legitimate exercise of legislative power," and making further claims as to the amount due from it if the Act in question is valid; that "The question submitted to the court for decision upon the foregoing statement of facts is whether the defendant is liable to pay to the plaintiffs, or to the superintendent, the whole, or any, and if any what, part of the" $1,848.45; and that judgment is to be entered according to its decision.

The agreed case having been heard by the supreme court in general term, as required by law, it rendered a judgment to the effect that the defendant was not liable to pay any part of such amount claimed by the superintendent. Two of the three judges holding the court concurred in that judgment. The third dissented. [114] The opinions of the majority and minority accompany the record. The majority held that the Statutes of New York in question were void because in conflict with the Constitution of New York, and did not discuss any question arising under the Constitution of the United States. The dissenting judge differed with the majority as to the question adjudged by them, and further said: "Nor can I agree with the claim that this statute is contrary to the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs having appealed to the Court of Appeals of New York, that court reversed the judgment of the supreme court, and rendered judgment for the plaintiffs for $1,848.45, with interest and costs, and remitted the record to the supreme court, where a judgment to that effect was entered, to review which the defendant has brought a writ of error. The court of appeals, in its decision (92 N. Y. 311), after overruling the view taken by the majority of the judges of the supreme court as to the validity of the statute under the Constitution of New York, proceeds to consider its constitutionality under that clause of the Fourteenth Amendment to the Federal Constitution which commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It holds that that clause has no application to the rights of the defendant, because being a foreign Corporation, it was not within the jurisdiction of New York, until it was admitted by the State, upon a compliance with the conditions of admission which the State imposed and had the right to impose.

The defendant claims here the benefit of the Fourteenth Amendment; and a question has occurred as to whether the record presents that point for our review. There being no pleadings, [115] the obvious place to look for the claim would be the agreed statement of facts. But all that is there said is that the defendant insists that the statute is "unconstitutional and void and [116] not a legitimate exercise of legislative power." The question was considered in both the supreme court and the court of appeals, as to the validity of the statute, under the Constitution of New York, as being a law made to depend for its operation on the legislation of a foreign State, and thus an illegitimate exercise of legislative power. This contention is fairly within the words of the agreed statement, and if it

depended wholly on that statement to determine whether the record raises a federal question, some doubt might exist. But in view of what was said in *Murdock* v. *Memphis*, 20 Wall. 590,633 [87 U. S. bk. 22, L. ed. 429, 443], in *Gross* v. *U. S. Mortgage Co.* 108 U. S. 477 [Bk. 27, L. ed. 795], and in *Adams Co.* v. *Burlington & Mo. R. R. Co.* 112 U. S. 123 [Bk. 28, L. ed. 678], we think that we are at liberty to look into the opinion of the court of appeals, a copy of which, duly authenticated by the proper officer, is transmitted to us with the record, in compliance with our Eighth Rule, for the purpose of aiding in determining what was decided by that court. From that opinion it appears that the court not only decided against the defendant all the questions other than federal which were raised, including two under the Constitution of New York, but also decided against it the federal question referred to. If the court had decided in its favor any one of the other questions which went to the whole cause of action, there would have been no necessity for considering the federal question. But as it was, the decision of that question became necessary to the disposition of the case, and was fully considered, not *sua sponte*, but as a point presented by the defendant.

The provision of the Fourteenth Amendment, which went into effect in July, 1868, is that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The first question which arises is whether this Corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the Amendment.

The defendant, on the assumption that if it was within the jurisdiction of the State of New York, it was, though a foreign Corporation, a [117] "person," and so entitled to the benefit of the Amendment, contends that it was within such jurisdiction. The argument is, that it established an agency within the State in 1872, which it had ever since maintained; that it complied, from year to year, with all the requirements and conditions imposed by the laws of the State on foreign fire insurance companies doing business in the State; that it received from year to year certificates of authority from the Superintendent of the Insurance Department, as provided by statute; that, under those circumstances, it was legally within the State and within its jurisdiction; that, being in the State, by permission of the State, continuously from 1872 to 1882, the State imposed on it, while there, in 1882, an unequal and unlawful burden; and that the New York Act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania Act of 1873 was passed, at which time the defendant had already been a year in the State.

But we are unable to take that view of the case. In *Paul* v. *Virginia*, 8 Wall. 168 [75 U. S. bk. 19, L. ed. 357], at December Term, 1868, a Statute of Virginia required that every insurance company not incorporated by Virginia, should, as a condition of carrying on business in Virginia, deposit securities with the state treasurer, and afterwards obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia, without such license. A person having acted as such agent without a license, and been convicted and fined under the statute, this court held that there had been no violation of that clause of article 4, section 2, of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" nor any violation of the clause in article 1, section 8, giving power to Congress "To regulate commerce with foreign nations and among the several States." The view announced was that corporations are not citizens within the clause first cited, on the ground that the privileges and immunities secured to the citizens of each State in the several States are those which are common to the citizens of of the latter States, under their Constitutions and laws, by virtue of their being citizens; and [118] that, as a corporation created by a State is a mere creation of local law, even the recognition of its existence by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers is "prejudicial to their interests or repugnant to their policy." And the court, speaking by *Mr. Justice* Field, said: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." As to the power of Congress to regulate commerce among the several States, the court said that, while the power conferred included commerce carried on by corporations as well as that carried on by individuals, "issuing a policy of insurance is not a transaction of commerce." This decision only followed the principles laid down in the earlier cases of *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588 [38 U. S. bk. 10, L. ed. 274, 307], and *Lafayette Ins. Co.* v. *French*, 18 How. 404 [59 U. S. bk. 15, L. ed. 451].

The same rulings were followed in *Ducat* v. *Chicago*, 10 Wall. 410 [77 U S. bk. 19, L. ed. 972], where it was said that the power of a State to discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction being clearly established, it belonged to the State to determine as to the nature or degree of discrimination, "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

Other cases to the same effect are *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566 [77 U. S. bk. 19, L. ed. 1029]; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535 [Bk. 24, L. ed. 148], and *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 [Bk. 28, L. ed. 1137].

As early as 1853, the State of New York, by [11 a statute (chap. 466), required of every fire insurance company incorporated by any other

State or any foreign government, as a prerequisite to doing business in the State, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required the renewal from year to year of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the provisions was made a penal offense. This Act, with immaterial amendments, is still in force.

This Pennsylvania Corporation came into the State of New York to do business, by the consent of the State, under this Act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The Act of 1865 had been passed when the Corporation first established an agency in the State. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore the Corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own State might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisite as a [120] condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the new provisions; and such consent could not be given until the tax, as a license fee for the future, should be paid.

It is not to be implied, from anything we have said, that the power of a State to exclude a foreign corporation from doing business within its limits is to be regarded as extending to an interference with the transaction of commerce between that State and other States by a corporation created by one of such other States.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, dissenting:

Under the decision just rendered, the State of New York is permitted to subject a corporation of another State, within her limits by her consent, to higher taxes in respect to its business than is imposed there upon similar corporations of other States.

At the last term of this court, when counsel were about to enter upon the argument of the case of *Santa Clara Co.* v. *Southern Pac. R. R. Co.* 118 U. S. 396 [Bk. 30, L. ed. 119], involving the validity of a system devised by one of the States for the taxation of railroad corporations of a certain class—the chief justice observed: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." This, it is true, was said in regard to corporations of the particular State whose legislation was assailed as unconstitutional; but it is equally clear that a corporation of one State, doing business in another State by her consent, is to be deemed, at least in respect to that business, a "person" within the jurisdiction of the latter State, in the meaning of the Fourteenth Amendment.

The denial of the equal protection of the laws may occur in various ways. It will most often [121] occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community. So, a corporation is denied that protection when its property is subjected by the State, under whose laws it is organized, to more burdensome taxation than is imposed upon other domestic corporations of the same class. So, also, a corporation of one State doing business by its agents in another State by the latter's consent, is denied the equal protection of the laws, if its business there is subjected to higher taxation than is imposed upon the business of like corporations from other States. These propositions seem to me to be indisputable. They are necessarily involved in the concession that corporations, like individuals, are entitled to the equal protection of the laws.

The plaintiff in error is a Corporation of Pennsylvania. In 1872 it established and has ever since maintained an agency in the State of New York. It had its agents there when the taxes for 1881, here in question, were assessed.

The laws of New York prescribe certain conditions precedent to the right of a fire insurance company from another State to transact business there. It must possess a certain amount of actual capital; appoint an attorney in the State, service of process upon whom is to be "deemed a valid personal service upon the corporation" in any action "upon a policy or liability issued or contracted while such corporation transacted business" there; file in the insurance department a certified copy of its charter, together with a statement, verified by the oath of its chief officer and secretary, showing the name of the company, place where located, amount of its capital and assets, the extent to which its real estate is incumbered, the par and market value of all shares of stock held by it, the estimated value of its bonds, mortgages and other securities, the extent of its indebtedness, the amount of its losses, adjusted and unpaid, or incurred and in process of adjustment, the losses disputed, and the claims existing against it. It is also provided that no

business shall be transacted in the State by the agent of any company from another State, while [122] its capital is impaired to the extent of 20 per cent. It further requires from such companies an annual statement, showing in detail the items making up their capital, and the deductions to be made therefrom. It was made the duty, first of the State Comptroller, and subsequently of the Superintendent of Insurance—these requirements of the statute being first complied with—to issue to the company, thus seeking admission into the State, a certificate showing its lawful right to transact business within her limits. Laws, N.Y. 1853, chap. 466; Laws, 1862, chap. 6, § 1, and chap. 367, § 5; 1871, chap. 888; Laws, 1874, chap. 331, § 1; Laws, 1875, chap. 555, § 1.

That the plaintiff in error conformed to these statutory provisions, and was admitted into New York for the transaction of business is shown by the agreed case, from which it appears that it "has uniformly complied with all the requirements and conditions imposed by the laws of this State upon fire insurance companies from other States establishing and maintaining agencies in this State, except the payment of the tax now in dispute upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy; and has received from year to year *certificates of authority from the Superintendent of the Insurance Department of this State, as provided to be issued under the Act, chapter 466 of the Laws of 1853, and the subsequent Acts amendatory thereof.*"

In view of these admitted facts, how can it be said that this Pennsylvania Corporation was not, in respect to its corporate business, within the jurisdiction of New York during the year when the tax in dispute accrued? That a corporation of one State, doing business in another State by the latter's consent, evidenced by the official certificate given by her insurance department in conformity with her laws, and liable, precisely as domestic corporations are, to be brought into her courts through service of process upon its duly appointed attorney or agent, in reference to any business transacted or liability incurred by it there, is to be deemed within the jurisdiction of that State, seems to me entirely clear. In *Ex parte Schollenberger*, 96 U. S. 374 [Bk. 24, L. ed. 854], it was decided that a for- [123] eign insurance company, doing business in Pennsylvania, under the authority of a statute of that Commonwealth requiring, as a condition precedent to its being there, an agreement that judicial process served upon its agent should have the same effect as if served upon the corporation, was, within the meaning of the Act of Congress of 1875, "found" in that State so as to give jurisdiction to the Courts of the United States, sitting in that State, of suits brought there against such company, accompanied by service of process upon its agent. The subject was again considered in *St. Clair* v. *Cox*, 106 U. S. 357 [Bk. 27, L. ed. 225], where it was said that there was no sound reason why, in the case of an insurance company doing business in another State, by an agent, under statutes such as those referred to, it should not be deemed to be represented in the latter by such agent, and held responsible for its obligations and liabilities there incurred. See also *R. R. Co.* v. *Harris*, 12 Wall. 65 [79 U. S. bk. 20, L. ed. 354]; *R. Co.* v. *Whitton*, 13 Wall. 285 [80 U. S. bk 20, L. ed. 576].

It was said in argument that the plaintiff in error entered New York with the knowledge, derived from the Act of 1865, that if Pennsylvania thereafter subjected New York insurance companies to higher taxes than the latter State imposed upon Pennsylvania corporations of the same class doing business in New York, the taxes levied upon it would be correspondingly increased; therefore, it is argued, the entrance of the plaintiff in error into New York was subject to the reserved right of that State thus to increase the taxes upon its business. The same idea is embodied in the suggestion that New York made it a prerequisite, from and after 1865, to the right of a fire insurance corporation of another State to transact business in New York, that it should pay such increased taxes, however much they might be in excess of the taxes imposed there upon corporations of the same class from the remaining States. Now, it is submitted: 1. That no such obligation was imposed by the statute upon the plaintiff in error as a prerequisite to its right to enter New York and transact business there. The agreed case shows not only that the Insurance Department of New York has certified its right to do business in that State, but that the certificate was made as provided in the Act of 1853 and the Acts amendatory thereof. Besides, there is no clause in the statute directing that department to withhold or to revoke a certificate upon the failure or refusal of the company to pay these increased taxes. The regularity and validity of that certificate was not questioned in argument, is not now disputed, and there is not a word in the statute to the effect that the *payment* of these increased taxes is a *prerequisite* to the right of the Company to remain in the State and transact business. Indeed, it is evident that the State purposely avoided establishing any such prerequisite to the right to enter her limits. She only seeks, after admitting the plaintiff in error and certifying its right to do business, to subject it to the taxation in question. 2. The power of New York to impose this increased tax surely cannot depend upon the fact that she gave notice of what she would do in the contingency expressed in the Act of 1865. Such notice neither creates a power to do that which the State could not otherwise constitutionally do, nor makes it the duty of the plaintiff in error to submit to an illegal exaction. At last, the real question presented is, whether Pennsylvania corporations can be subjected to higher taxes in New York than are imposed there upon corporations of the same class from other States.

It is said that a State may exclude altogether from its borders a corporation of another State or may admit it upon such terms or conditions as she may elect to prescribe. It is quite true that general language to that effect was employed in *Paul* v. *Virginia*, 8 Wall. 168 [75 U. S. bk. 19, L. ed. 357], where the only question necessary to be determined was as to the validity of a Statute of Virginia providing that before an insurance company, not incorporated by that State, should carry on business there, it must obtain a license therefor, and deposit with the state treasurer, as security for its engagements, bonds of a specified character and

amount. In the course of the opinion which disposed of that question, it was said that a corporation of one State, "having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent [125] may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. But I submit that it is the settled doctrine of this court that the terms and conditions so prescribed must not be repugnant to the Constitution of the United States, or inconsistent with any right granted or secured by that instrument. In *Ducat* v. *Chicago*, 10 Wall. 415 [77 U. S. bk. 19, L. ed. 978], it was said by *Mr. Justice* Nelson, speaking for the court, that, in respect to the nature or degree of discrimination which a State may make between her own corporations and those of other States, "It belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." It was so decided in *Ins. Co.* v. *Morse*, 20 Wall. 445, 455-6 [87 U.S. bk. 22, L. ed. 365, 369], where the question was as to the validity of a Statute of Wisconsin relating to the admission into that State of fire insurance companies incorporated by other States. Besides the condition that they should designate some attorney in Wisconsin upon whom process against the company could be served, it imposed the further one that it should file in the proper office an agreement stipulating that it would not remove to the courts of the United States any suit brought against it in the local courts. An insurance company of New York established an agency in Wisconsin, and complied in all respects with these conditions; it filed the required agreement. In support of the validity of those conditions, the State relied upon the very language above quoted from *Paul* v. *Virginia*. But the court was careful to say that that language must be understood with reference to the facts in the case and to the question to be decided, which was stated to be simply "whether the State might require a foreign insurance company to take a license for the transaction of its business, giving security for the payment of its debts." Care was taken to further announce that the general language employed in *Paul* v. *Virginia* was not intended [126] to impair the language in *Lafayette Ins. Co.* v. *French*, 18 How. 407 [59 U. S. bk. 15, L. ed. 458], where the court, speaking by *Mr. Justice* Curtis, said: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court; *Provided*, They are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment of all others, or that principle of natural justice which forbids condemnation without opportunity for defense." Upon these grounds it was held, in *Insurance Co.* v. *Morse*, that the Wisconsin Statute, so far as it required insurance companies of other States to stipulate that they would not exercise the right to have suits against them removed to the national courts, was void, equally because it created an obstruction to the exercise of a privilege granted by the Constitution and laws of the United States, and tended to oust the courts of the Union of a jurisdiction conferred upon them. Much that was said in that case is pertinent to the present one. After observing that the courts would not enforce an agreement between a citizen of New York and a citizen of Wisconsin, that the former would, in no event, resort to the federal courts sitting in Wisconsin for the protection of his rights of property, or an agreement between the same parties, upon whatever consideration, that the citizen of New York would, in no case, when called into the courts, either of Wisconsin or of the federal courts sitting in that State, demand a jury to determine his rights of property, but would submit such rights to arbitration or to the decision of a single judge, the court said: "We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford." The court further said that the right of the insurance company to remove the suit was "denied to it by the state court on the ground that it had made the agreement referred to, and that the statute of the State authorized and re- [127] quired the making of the agreement. We are not able to distinguish this agreement and this requisition, on principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior, in this respect, to that of a corporation. The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect."

The only difference between *Insurance Co.* v. *Morse* and the present case is that in the former the New York corporation expressly agreed, in writing, that it would not exercise its constitutional privilege of removing suits against it into the courts of the Union, while the Pennsylvania Corporation received an official certificate of its right to transact business in New York with notice derived from the Act of 1865, that that State would, after 1878—the date of the Pennsylvania Statute—claim from it higher taxes than she imposed upon like corporations from the remaining States doing business

in her limits by her consent. If the plaintiff in error, by merely maintaining its agencies in New York, is to be held to have impliedly agreed to submit to such increased taxation, is that anything more than an implied agreement that it would not assert a right secured to it by the Constitution of the United States? Can it be that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a State which has enacted a statute denying such protection to it and to like corporations from the same State? Is the right to that protection any less valuable or fundamental than [128] the right to remove a suit into the courts of the Union for trial? Will it be held that an express agreement by a corporation not to exercise the latter right is void and not enforcible, but that a local statute denying the equal protection of the laws to a corporation will be upheld, simply because that corporation came within the jurisdiction of the State which assumed to make such denial, and received from her officers, acting in conformity with her laws, a certificate of its right to transact business there? Will effect be given in one case to what (erroneously, I think) is called an implied agreement to surrender a constitutional right, while an express agreement in the other to surrender a constitutional right is held to be invalid?

Even if it were conceded that a State, which provides for the organization, under her own laws, of corporations for the transaction of every kind of business, could arbitrarily exclude from her limits similar corporations from the remaining States, and declare all contracts made within her jurisdiction with corporations from other States, to be void—concessions to be made only for the purposes of this case—it would not follow that she could subject corporations of other States, doing business within her limits under a license from the proper department, to higher taxes than she imposes upon other corporations of the same class from the remaining States. The plaintiff in error, having been in 1881 lawfully within New York by its agents, cannot be denied there the equal protection of the laws because the State which created it may have adopted a system of taxation different from that devised by New York. The case, in its legal aspects, is precisely the same as if Pennsylvania had never passed the Statute of 1873, but New York had, in that year, imposed upon fire insurance companies from Pennsylvania higher taxes than she imposed upon similar corporations from other States.

It would seem to be the result of the decision in this case, that New York may prescribe such varying rates of taxation upon insurance corporations of the remaining thirty-seven States, within her jurisdiction, as she chooses; the rate for corporations from each State differing from the rate established for corporations of the [129] same class from all other States, and the rate in respect to corporations of other States being higher than she imposes upon her own corporations of the same class. Such legislation would be a species of commercial warfare by one State against the others, and would be hostile to the whole spirit of the Constitution, particularly the Fourteenth Amendment, securing to all persons within the jurisdiction of the respective States the equal protection of the laws.

For the reasons which have been stated, I feel obliged to withhold my assent to the opinion and judgment of the court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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*HOME INSURANCE COMPANY OF NEW YORK, *Plf. in Err.*, [129]
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 129-148.)

Corporations—state tax on franchise or business—percentum on capital stock on declared dividends of 6 per cent or more.

During the year 1881 the Home Insurance Company paid dividends at the rate of 10 per cent upon its entire capital stock of $3,000,000, of which sum $1,940,000 was, on the first day of November, 1881, invested in United States bonds. The Statute of New York imposed a tax, as a tax upon its corporate franchise or business, to be computed as follows: if the dividend amount to 6 or more per centum, then at the rate of one quarter mill upon the capital stock for each 1 per cent of dividend. The Company claimed that it was taxable by this Act only upon the part of its capital stock not invested in bonds of the United States. The State asserted that the tax was upon the basis of the Company's entire capital. The question was whether the tax in question was in fact levied upon the franchises of the Company, or upon the property of the Corporation invested in the securities of the United States. Upon an agreed case submitted by the parties to the Supreme Court of New York, the tax upon the basis of the Company's entire capital was sustained. This judgment was affirmed by the court of appeals of that State. This court being equally divided in opinion, the judgment of the court below stands affirmed.

[No. 14.]

Argued Oct. 25, 26, 1886. †Decided Nov. 15, 1886.

IN ERROR to the Supreme Court of New York. *Affirmed.*

The plaintiff in error (defendant below) is an Insurance Company of the State of New York. The action was brought to enforce a tax claimed to be due the State under chapter 542, section 3, of the laws of that State for 1880, as amended by chapter 361, section 3, of the laws of 1881, which, after describing the corporations subject to its provisions, continues as follows: "Shall be subject to and pay a tax upon its corporate franchise or business, into the treasury of the State annually, to be computed as follows: if the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to 6, or more than 6, per centum upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per centum of dividends so made and declared." When the dividends are under 6 per cent another method of computation is provided, which it is not here essential to describe.

By section 5 of the same Act a further tax, eight tenths of 1 per centum upon the gross amount of their receipts for premiums, also a tax upon their corporate franchise and business,

* See S. C. in N. Y. Court of Appeals, 92 N. Y. 328.
†Petition for reargument granted Feb. 3, 1887.

was required to be paid by fire and marine insurance companies annually into the state treasury. The Act further provides that such corporations shall be exempted from all further taxation for state purposes, except upon their real property. In case of the intentional neglect or refusal of the corporations bound, to report their condition or pay the taxes as therein required, it was provided that an action to recover the tax might be brought by the Attorney-General, and also their respective charter and corporate privileges should be forfeited and terminated.

An agreed case under the Code of Civil Procedure section 1279, stating the facts, was submitted by the parties to the Supreme Court of New York, which shows the total capital stock of the plaintiff in error to be $3,000,000, of which the sum of $1,940,000 was, on the first day of November, 1881, invested in United States bonds. The annual dividends declared by the Corporation for the year preceding that date was 10 per cent upon its entire capital stock. The tax imposed under these Acts, computed upon such dividend, aggregated $7,500. The question presented by the agreed case was whether the tax in question was in fact levied upon the franchises of the defendant, or upon the property of the Corporation invested in the securities of the General Government. Judgment was rendered in favor of the State. This the court of appeals affirmed, and a final judgment upon the *remittitur* was entered in the supreme court. To that judgment defendant sued out this writ of error, upon the ground that "there was drawn in question the validity of a statute of the State, and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity." It is here assigned as error that the judgment was erroneous in holding that the defendant was liable for a tax computed upon the basis of its entire capital, when it should have been held that the defendant was liable only for a tax upon that part of its capital not invested in United States bonds.

Messrs. **Benjamin H. Bristow** and *David Willcox*, for plaintiff in error:

No tax can be imposed upon that part of defendant's capital invested in United States bonds. A State cannot burden the operations of the national government by taxing its bonds without its consent.

M'Culloch v. *Md.* 4 Wheat. 316, 436 (17 U. S. bk. 4, L. ed. 579, 608); *Weston* v. *Charleston*, 2 Pet. 449 (27 U. S bk. 7, L. ed. 481); *Banks* v. *Mayor*, 7 Wall. 16 (74 U. S. bk. 19, L. ed. 57); *People* v. *Commissioners*, 90 N. Y. 63.

A tax upon the capital of a corporation is a tax upon the property in which the capital is invested. No part of the capital invested in United States bonds therefore is taxable.

Bank of Commerce v. *N. Y.* 2 Black, 620 (67 U. S. bk. 17, L. ed. 451); *Bank Tax Case*, 2 Wall. 200 (17:793).

Whether or not this is a tax upon capital is to be determined, not by the form of the statute, but by its effect. When the statute was first enacted the Legislature merely imposed the tax. The following year it inserted the definition thereof; "as a tax upon corporate franchise or business." But if the tax is, in its nature and effect, a tax upon capital, it is none the less so because of this amendment declaring it to be a tax upon franchise or business. The question is whether or not the tax is such as the Legislature can impose. This obviously must be decided by the courts, irrespective of any declaration as to the character of the tax by the Legislature itself.

Brown v *Md.* 12 Wheat. 419 (25 U. S. bk. 6, L. ed. 678); *Ward* v. *Md.* 12 Wall. 418 (79 U. S. bk. 20, L. ed. 449); *Welton* v. *Mo.* 91 U. S. 275 (23:347); *Webber* v. *Va.* 103 U. S. 344 (26:565); *Walling* v. *Mich.* 116 U. S. 446 (29:691).

In *Smith* v. *Turner*, "*Passenger Cases*," 7 How. 283 (48 U. S. bk. 12, L. ed. 702), a state statute provided that the health officer of the Port of New York should collect from the masters of vessels a certain sum for each passenger. The moneys were to be used in supporting the Marine Hospital. Yet this was held to be a regulation of commerce.

In *Henderson* v. *Mayor*, 92 U. S. 259 (Bk. 23, L. ed. 543), a state statute provided that the owners of steamers bringing passengers from foreign ports should give a bond for each passenger against his becoming a public charge, or at their option make a cash payment. It was claimed that as the object of the provision was not taxation, but protection against pauperism, it was valid as within the police power. But the court, Miller, *J.*, held otherwise.

To the same effect is *Chy Lung* v. *Freeman*, 92 U. S. 275 (Bk. 23, L. ed. 550); *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238 (24:118); *Cook* v. *Pa.* 97 U. S. 566 (24:1015); *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 (27:584); *Matter of Jacobs*, 98 N. Y. 98; *Almy* v. *Cal.* 24 How. 169 (65 U. S. bk. 16, L. ed. 644); *Bank Tax Cases*, *supra*; *Cummings* v. *Mo.* 4 Wall. 277, 325 (71 U. S. bk. 18, L. ed. 356, 363); *Crandall* v. *Nevada*, 6 Wall. 35 (18:745); *State Freight Tax*, 15 Wall. 232 (21:146); *Hannibal, etc. R. R. Co.* v. *Husen*, 95 U. S. 465 (24:527); *Telegraph Co.* v. *Texas*, 105 U. S. 460 (26:1067); *Moran* v. *New Orleans*, 112 U. S. 69 (28:653); *Kentucky R. R. Tax Cases*, 115 U. S. 321, 337 (29:414, 418); *Pullman S. C. Co.* v. *Nolan*, 22 Fed. Rep. 276, 281; *People* v. *Allen*, 42 N. Y. 404, 413; *Matter of Deansville Cem. Asso.* 66 N. Y. 569.

Clearly therefore the declaration by the Legislature that this is a tax on franchise or business is not controlling. "The name of this imposition is immaterial; it is the substance we are to consider."

Inman Co. v. *Tinker*, *supra*.

The statute has not the effect of imposing a [135] tax upon franchise or business. The modes in which the franchise of a corporation can be taxed are clearly defined. It may be done by imposing a fixed sum or "a graded contribution proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise."

State Tax on R. Gross Receipts, 15 Wall. 284 (82 U. S. bk. 21, L. ed. 164); *Delaware R. R. Tax*, 18 Wall. 206, 231 (21:888, 896).

These provisions of the Act do not impose a fixed sum; nor do they impose a contribution proportioned to the extent of the exercise of the franchise—to the amount of business done. That species of tax is imposed by section 5 of the same Act. But these provisions do not refer

to the amount of the business in any way. Is this then, "a contribution proportioned to the value or results of the privileges granted?" The franchise is "the right to use the tangible property in a special manner for the purposes of gain."

State R. R. Tax Cases, 92 U. S. 575 (Bk. 23, L. ed. 663).

It is itself a part of the property of the Corporation, but quite distinct and separate from its tangible property.

Gordon v. *Appeal Tax Court*, 3 How. 133, 150 (44 U. S. bk. 11, L. ed. 529, 537); *Wilmington R. R. Co* v. *Reid*, 13 Wall. 264, 265 (80 U. S. bk. 20, L. ed. 568).

It is a thing "capable of appraisal and ascertainable by evidence, and is frequently made the subject of taxation by the sovereign power. It is a right separate and distinct from the capital and moneyed assets of a corporation, and as to the value of which they furnish no evidence."

Conaughty v. *Saratoga Co. Bank*, 92 N. Y. 401. See to same effect *Veazie Bank* v. *Fenno*, 8 Wall. 533 (75 U. S. bk. 19, L. ed. 482); *Monroe Co. Sav. Bank* v. *Rochester*, 37 N. Y. 365; *Porter* v. *Rockford etc. R. R. Co.* 76 Ill. 561.

Its value is readily ascertained. It is determined by subtracting from the total actual value of the capital stock the total value of all items of property other than franchise. The remainder is, of course, the value of the franchise; the value of the right to use the tangible property in a special manner for the purpose of gain. This method has the approval of this court.

State R. R. Tax Cases, supra.

It is approved elsewhere as well.

Spring Valley Water Works v. *Schottler*, 62 Cal. 69; *People* v. *Badlam*, 57 Cal. 594; *San Jose Company* v. *January*, Id. 614.

But here neither the value of this part of the property of the Corporation, nor the results of its use, are in any way ascertained. It is claimed that this is a tax upon the franchise or its results, upon the ground that the tax is measured by the profits resulting from the use of the franchise—by the capacity of the Company to declare dividends. This is clearly erroneous. The tax is a percentage upon that part of defendant's income which it has distributed in dividends—its net income of profits—without discrimination as to the source thereof. This, of course, is a tax upon the property from which the income arises.

Bank of Ky. v. *Commonwealth*, 9 Bush, 46; *Opinions of Justices*, 53 N. H. 634; *People* v. *Commissioners*, 90 N. Y. 63; *Weston* v. *Charleston*, 2 Pet. 472 (27 U. S. bk. 7, L. ed. 489).

But the franchise is only one part of defendant's property. It is only in part the source of the dividends or net profits. They are the product of all the property. And as the tax includes property not taxable it cannot be sustained as a tax on the franchise.

Santa Clara Co. v. *Southern Pac. R. R. Co.* 118 U. S. 394 (*ante*, 118).

But the State claims that this court is already committed to the view that this is a tax upon franchise. And the court below placed its decision chiefly upon this ground.

Society for Savings v. *Coite*, 6 Wall. 594 (73 U. S. bk. 18, L. ed. 897); *Provident Inst.* v. *Mass.* 6 Wall. 611 (18:907).

These cases were decided upon two grounds: 1. It was held that a tax consisting of a percentage upon the deposits made with a savings bank is a tax upon its franchise or business, and not a tax upon the property in which deposits may be invested after they are received. 2. It was held, further, that the decision of the state court, although criticised in one of the cases as "founded in unsubstantial distinctions," was binding upon this court. Whatever may be thought of the soundness of this, *Louisville Co.* v. *Palmes*, 109 U. S. 244 (Bk. 27, L. ed. 922), it has no present application. For it is not sought to sustain the present tax by any decision of the courts of the State construing the statute by which it is imposed. [137]

The former ground, it has been claimed, controls the present case. Clearly this cannot be so. The question now involved is entirely different. There the tax was a percentage upon the deposits, "simply the sums received, wholly irrespective of the disposition made of the same." [138]

Prov. Inst. v. *Mass. supra*, 627 (912).

The liability arose by reason of the receipt of the deposit. It was quite immaterial what became of the money after it was received, whether or how it was invested, or what profit was realized from it.

But in the present case the tax is not measured by the moneys received by defendant—by the volume of its business, the extent to which it has exercised its franchise. The tax is a percentage compounded of two factors, the capital and the dividends. That is to say, it is measured by defendant's permanent investment in the business, and the net profits realized from its entire property.

In the cases in 6 Wallace then, the tax was independent of the tangible property of the corporation or any profits therefrom. There the burden of the tax rested upon the franchise. But here, clearly, the ultimate burden rests upon the property of defendant invested in part in United States securities. That therefore is the subject of the tax.

State Freight Tax Cases, supra.

In case of corporations paying less than 6 per cent, the Act provides that there shall be a tax upon the "actual value" of their capital. It is settled that a tax in that form is a tax upon the property in which the capital is invested, and that corporations upon which it is imposed are entitled to deduct their United States bonds from the amount of the assessment.

Bank of Commerce v. *New York*, and *Bank Tax Case, supra.*

But if the tax upon corporations paying 6 per cent or more be a franchise tax, such corporations will not be entitled to the deduction of their United States bonds to which those paying less than 6 per cent are entitled. Still further, where a corporation has paid less than 6 per cent upon its common stock, it will be entitled to exemption, as to its common stock, for the amount of its capital invested in United States bonds, but not as to its preferred stock, although all its capital may be so invested.

If, then, this be a tax upon capital, the statute establishes a comprehensive system which bears equally upon all corporations which it affects. If it be a franchise tax, the statute is utterly incongruous and bears unequally both

upon different corporations, and also upon different property of the same corporation. This the court below meets by saying that the Legislature has power to impose unequal taxes. This may be so. But the same court had already laid down the rule that in matters of taxation "it is a sacred duty to impose the burdens equally, and to enforce the maxim of law and ethics, that equality is equity."

People v. *Commissioners*, 76 N. Y. 64.

"Equality of taxation is a fundamental principle of our government which no legislation, in the absence of the most explicit provisions, will be presumed to have intended to violate."

People v. *Supervisors*, 20 Barb. 81; affd. in *People* v. *Supervisors*, 16 N. Y. 424.

That, doubtless, is the principle of construction to be followed here. The statute, indeed, admits of no construction other than that which will produce this result. The tax is a percentage upon the capital. The amount of this percentage varies, but the subject matter taxed remains the same.

Oswego Starch Factory v. *Dolloway*, 21 N.Y. 449; *Commonwealth* v. *R. R. Co.* 29 Pa. 370; *Lehigh Co.* v. *Commonwealth*, 55 Pa. 448.

The provisions of this Act have been judicially construed in accordance with these views. They were copied literally from a Statute of Pennsylvania, Laws of 1879, p. 114, section 4. and have long existed there in the same substantial form.

Laws of 1844, p. 498, § 33; 1859, p. 529; 1868, p. 109, § 4.

It is well settled there that they impose a tax upon the property of the corporation (*Westchester Co.* v. *County of Chester*, 30 Pa. 232; *Lackawanna, I. & C. Co.* v. *Luzerne Co.* 42 Pa. 424; *Phœnix Iron Co.* v. *Commonwealth*, 59 Pa. 104; *Commonwealth* v. *Pittsburg, etc. R. Co.* 74 Pa. 83; *Catawissa R. R. Co.'s Appeal*, 78 Pa. 59; *Coatesville Gas Co.* v. *County of Chester*, 97 Pa. 476), and that "the dividend of profit earned by the stock is but a means of ascertaining its value."

Lehigh Co. v. *Commonwealth, supra; Commonwealth* v. *Standard Oil Co.* 101 Pa. 119.

The Pennsylvania Statute too, was before this court in *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196 (Bk. 29, L. ed. 158), and was then regarded as imposing "a tax upon the capital" of corporations affected.

If, however, defendant be taxable upon the basis of its entire capital, including the bonds, the tax is repugnant to the Fourteenth Amendment of the Constitution of the United States. The defendant is a person within the meaning of this provision.

County of Santa Clara v. *Southern Pac. R. R. Co. supra; County of San Mateo* v. *Southern Pac. R. Co.* 13 Fed. Rep. 722.

Inequality of taxation is a denial of equal protection.

Strauder v. *West Va.* 100 U. S. 303 (Bk. 25, L. ed. 664); *County of San Mateo* v. *Southern Pac. R. Co. supra; Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1; *People* v. *Weaver*, 100 U. S. 539 (25: 705); *Supervisors* v. *Stanley*, 105 U. S. 305 (26: 1044); *Evansville Bank* v. *Britton*, 105 U. S. 322 (26: 1053); *County of Santa Clara* v. *Southern Pac. R. R. Co. supra.*

The present application of these principles is manifest. The tax upon corporations declaring less than 6 per cent is a tax upon their property, and they are entitled to deduct from the assessment the amount of their United States bonds.

Bank Tax Case, supra.

Unless, then, those declaring over 6 per cent are allowed the same deduction—are relieved from taxation to the extent of their United States bonds—the tax is unequal, and therefore unconstitutional.

No doubt the Legislature may divide corporations into as many classes as the different pursuits followed by them may require.

Railroad Tax Cases, supra.

But there can be no classification by arbitrary rules among those engaged in the same business in the same locality.

San Mateo Co. v. *Southern Pac. R. Co. supra; Gilman* v. *Sheboygan*, 2 Black, 510 (67 U. S. bk. 17, L. ed. 305); *Albany City Nat. Bank* v. *Maher*, 9 Fed. Rep. 884; *County of Santa Clara* v. *Southern Pac. R. Co.* 18 Fed. Rep. 385; *Dundee etc. Co.* v. *School Dist.* 19 Fed. Rep. 359; *Oliver* v. *Washington Mills*, 11 Allen, 283: *Stuart* v. *Palmer*, 74 N. Y. 183; *State* v. *Township*, 36 N. J. L. 66; *City* v. *McQuillan*, 9 Dana 513; *Howell* v. *Bristol*, 8 Bush, 493; *Atty-Gen.* v. *Winnebago etc. Plank R. Co.* 11 Wis. 35; *New Orleans* v. *Home Ins. Co.* 23 La. Ann. 449; Re *Ah Fong*, 3 Sawy. 144; *Parrott's Case*, 6 Sawy. 349; *Louisville & N. R. Co.* v. *R. R. Commission*, 19 Fed. Rep. 679.

Upon principle the rule in regard to uniformity of taxation upon franchises must be the same as in regard to taxes upon any other property. There can be no more reason why arbitrary distinction should be made between persons owning that species of property, than between the owners of property of any other kind. And it is so held.

County of San Mateo v. *Southern Pac. R. Co. supra; Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Sav. Bank*, 5 Allen, 428; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Parish of Orleans* v. *Cochran*, 20 La. Ann. 373; *State* v. *Merchants Ins. Co.* 12 La. Ann. 302; *East St. Louis* v. *Wehrung*, 46 Ill. 392.

If, then, the tax upon this dividend be a tax upon the franchise, the statute is unconstitutional; for it subjects defendant to assessment and taxation upon its franchises at a higher rate than that imposed upon others in precisely the same situation. It therefore denies to defendant equal protection of the laws.

Mr. **Denis O'Brien,** *Atty-Gen. of New York*, for defendants in error:

The decision of the court of appeals on the construction of the Constitution and Statutes of New York will be followed by this court.

Township of Elmwood v. *Marcy*, 92 U. S. 289 (Bk. 23, L. ed. 710); *Fairfield* v. *Gallatin Co.* 100 U. S. 47 (25 : 544).

Questions not decided in the state court, because not raised and presented by the complaining party, will not be re-examined in this court upon a writ of error.

Hamilton Co. v. *Mass*, 6 Wall. 632 (73 U. S. bk. 18, L. ed. 904); *Railway Co.* v. *Guthard*, 114 U. S. 133 (29 : 118).

The tax imposed upon the plaintiff in error was a tax upon its franchises, and not upon its property or capital stock.

Prior to the passage of this Act corporations

were assessed and taxed upon their capital stock, under the provisions of the Revised Statutes of the State of New York, by the local officials for both local and state purposes.

A comparison of those provisions (2 N. Y. R. S. 7th ed. 1036 *et seq.*) with those of the Act in question, shows radical differences in the method of assessment and collection of the taxes imposed upon these bodies, and clearly discloses the intention of the Legislature, in the enactment of the Statutes of 1880 and 1881, to formulate a new and distinct scheme of taxation for all the corporate, associate or joint-stock bodies included within the terms of its provisions.

The law distinctly states that the plaintiff in error shall pay a tax, as a tax upon its corporate franchises or business, into the treasury of the State annually, and then provides the method of computation.

Franchises are special privileges conferred by government upon individuals; no franchise can be held which is not derived from a law of the State.

Bank of Augusta v. *Earle*, 13 Pet. 595 (38 U. S. bk. 10, L. ed. 311).

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

Delaware R. R. Tax Case, 18 Wall. 206 (85 U. S. bk. 21, L. ed. 888).

Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation may be taxed by a State for the support of a state government. Authority to that effect resides in the State independent of the Federal Government.

Society for Savings v. *Coite*, 6 Wall. 594 (73 U.S. bk. 18, L. ed. 897). See also *State R. R. Tax Cases*, 92 U. S. 575 (23 : 663).

This tax, therefore, being a tax upon the franchise of the plaintiff, it matters not how his capital stock or property may be invested, whether in United States securities or otherwise.

People v *Commissioners*, 4 Wall. 244 (71 U S. bk. 18, L. ed. 344); *Nat. Bank* v. *Commonwealth*, 9 Wall. 353 (19 : 701); *Van Allen* v. *Assessors*; 8 Wall. 573 (18 : 229); *Society for Savings* v. *Coite, supra; Provident Inst.* v. *Mass.* 6 Wall. 612 (18 : 907); *Hamilton Co.* v. *Mass, supra.*

The Bank Tax Case of New York, expressly distinguishes between a property and a franchise tax.

Bank Tax Case, 2 Wall. 209 (69 U S. bk. 17, L. ed. 795).

The tax in question being upon the franchises of the plaintiff in error, the first section of the Fourteenth Amendment to the United States Constitution has no application. There is nothing in this case showing an unequal exaction; in proportion to their earning capacity, and the value of their franchises, they are taxed. Even were it not so a franchise tax is not within the rule of uniformity.

Ducat v. *Chicago*, 10 Wall. 410 (77 U. S. bk. 19, L. ed. 972).

It is respectfully urged that this contention is based almost entirely upon a recent decision rendered in the case of the *County of San Mateo* v. *Southern Pacific R. R. Co.* 13 Fed. Rep. 722.

It is respectfully insisted that the broad scope given to the first section of the Fourteenth Amendment by this decision is not sustainable on principle or reason; that it was intended simply and solely to prevent discrimination against the negroes.

Slaughter House Cases, 16 Wall. 36, 81 (83 U. S. bk. 21, L. ed. 394, 410).

The Statutes of New York simply aggregate certain corporations into one class of taxpayers, and impose upon them a tax which is uniform as to the whole class. It is sufficient that the tax imposed be uniform and equal, as to the class upon which it operates.

State R. R. Tax Cases, supra; Kentucky R. R. Tax Cases, 115 U. S. 322 (Bk. 29, L. ed. 414).

But the *San Mateo Case* is a direct authority for the imposition of the tax in this case. There the tax was one on property, here one on franchises. "Taxation on business in the form of licenses may vary according to the calling or occupation licensed, and the extent of business transacted."

San Mateo County Case and *Provident Inst.* v. *Mass supra.*

The first section of the Fourteenth Amendment having no application, the Legislature, in the exercise of a taxing power, is supreme, unless limited by the Constitution of the State. Our court of last resort has decided the statutes in question to be constitutional and valid.

People v. *Home Ins. Co.* 92 N. Y. 328.

Its decision is final and there is no question before this court.

Mr. Chief Justice **Waite** *announced the affirmance of the judgment of the Supreme Court of the State of New York by a divided court.*

CUNARD STEAMSHIP COMPANY, Limited, *Plff. in Err.*, [24

v.

PATRICK CAREY.

(See S. C. Reporter's ed. 245-259.)

Steamship Co —injury to employee—negligence of fellow-servant—contributory negligence.

While a longshoreman, employed for two years previous by a steamship company, was assisting in shifting coal from the hold of the steamship Batavia to the steerage deck above, by hooking a loaded tub to the hoisting apparatus and unhooking the empty bucket when it descended, two falls being used on the hoisting apparatus, each operating a tub, one of which ascended, while the other descended, only one being in his charge, he was injured by the loaded tub falling upon him, caused by the drawing of a splice from the untwisting of the rope. He brought suit against the steamship company to recover damages, alleging that the rope forming a part of the hoisting apparatus, by reason of its defectiveness broke, whereby the coal tub attached thereto fell upon the plaintiff without any fault on his part. There was a finding for the plaintiff for $15,000 and judgment was rendered thereon. Error was assigned by the defendant, on the grounds that the court refused to direct a verdict for the defendant, because (1) the evidence proved that the plaintiff was guilty of contributory negligence; and because (2) the evidence failed to establish negligence on the part of the defendant; and because (3) the injury was occasioned through the negligence of a fellow servant, for which defendant was not liable; and because (4) the court

ered in its charge to the jury, as well as in refusing to charge as requested by the defendant's counsel. This court being equally divided, the judgment of the court below stands affirmed.

[No. 29.]

Argued Nov. 8, 1886. Decided Nov. 16, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

This was an action by an employee to recover for personal injuries received while in the service of the plaintiff in error.

The action was commenced in the Superior Court of the City of New York, and was removed to the United States Circuit Court on petition of the defendant, a foreign corporation.

Patrick Carey had been in the employ of the Steamship Company for two years as longshoreman, and on the evening of November 8, 1880, was sent, with others, into the hold of the steamer Batavia to assist in shifting coal from that place to the steerage deck above. The particular work assigned to him was that of hooking full tubs to the hoisting apparatus, and of unhooking empty tubs when they descended; and his duty required him to be stationed at the edge of the hatch, on the in-shore side of the ship, where the coal was which the men were engaged in shifting.

Two falls were in use on the hoisting apparatus, each operating a tub, one of which ascended while the other descended, and a man named Henretty was stationed in the hold, on the side of the hatch opposite to Carey, whose duties were similar to those of Carey. Each attended to the tub ascending and descending on his side of the hatch.

Each fall was rigged to a block on a gaff or boom over the hatch, and ran from thence through a block or davit at the side of the ship, from thence through a block on the end of a scow alongside the ship, and from thence to a drum inside the house on the scow The drums were turned by an engine on the scow, and the drum which operated the particular fall in question was in charge of one O'Brien. The other drum was in charge of one Higgins, and the engine on the scow was in charge of one Redmond.

The superintendent of the dock, having general authority over all matters connected therewith, was named Storey. Under him was a foreman stevedore, Craven, who had charge of loading and unloading the ships, who hired and discharged all the longshoremen, set them to work, and exercised supervision over all things connected with that work. Under Craven were bosses of different gangs, and among them was Christopher Gerraghty, the boss of the coal gang, who had charge of the men, to see that they did their duty. The care and repair of the apparatus used by the men were in charge of the storekeeper, David Smith. The placing of the apparatus in position for work was in charge of the rigger, Graham.

On the evening in question, Craven directed Graham to rig the falls for the purpose of hoisting out the coal. He went to the storehouse and selected a fall, *i. e.*, a rope, from among others; told Short, another rigger, to place it in position and superintend that job. It was a spliced rope, such as are commonly used for that purpose.

Craven sent ten men into the hold to get out the coal, and stationed one on each side of the hatch in the hold, and one on each side of the hatch on the steerage deck. The men commenced work between six and seven o'clock and worked until about half past ten. At that time Carey had hooked his tub loaded with coal to the fall, and it had ascended nearly to the steerage deck. He then stepped out from under the deck at the edge of the hatch, and across the hatch, directly under the loaded tub, in order to reach the empty tub descending on the opposite side of the hatch. While in this position the full tub which he had sent up fell upon him.

Craven had remained upon the deck attending to his duties until about nine o'clock, when he went home, leaving Gerraghty in charge of the men. Down to the time Craven left no notice had been given to him by anyone, as to the condition of any of the apparatus.

Some time after eight o'clock, O'Brien, before whom a considerable portion of the rope was constantly in sight, first noticed that something was the matter with the rope which he was operating. It was his duty to watch the rope, to work it carefully, to take care of it if the turns or twists came out of it; viz., to retwist it, and to report its condition if unfit for work for any reason. He did nothing—neither stopped his drum, attended to the rope himself, nor reported its condition—until Gerraghty, who had been notified by someone concerning the rope, came down upon the scow some time afterwards. O Brien then spoke to Gerraghty concerning the rope. Gerraghty took the rope off the drum, and put back the turns or twists which had come out, dipped the rope in the water and put it back on the drum, and when he left the scow directed O'Brien to look out for the rope and, if the turns came out again, to take it off and put them in. O'Brien continued to operate the rope, and saw that it was getting worse, but did nothing himself to correct its condition; he neither stopped the drum nor attended to the rope, nor gave notice. O'Brien says that he spoke to Gerraghty a second time about the condition of the rope, but does not say what was done or said by Gerraghty at that time. He does not remember whether Gerraghty's action with regard to the rope was on the first or second occasion of his speaking to him, except that he does say that Gerraghty directed him to put the turns in the rope if they came out again. This, however, O'Brien failed to do. He continued to hoist with the rope, and some time afterwards the splice drew, by reason of the rope untwisting, and the disaster followed.

It is customary to use spliced ropes for the purpose of hoisting, and the splice in and of itself, constitutes no defect, and in no manner weakens the rope for use. It is also usual for the turns or twists to come out of the rope while being operated single, by reason of the motion of the drum or the revolving of the articles hoisted, which necessitates watchfulness and care on the part of those operating the falls, to see that the turns do not come out to the detriment of the rope. The rope in question was good and sufficient for the purpose, when the work commenced that evening.

The plaintiff had been directed not to go un-

der the open hatch when a load was ascending, and had also been repeatedly warned against doing the same thing. The tub fell by reason of the drawing of the splice, caused by the untwisting of the rope.

The court refused to direct a verdict for the defendant, but left the jury to decide upon uncontradicted testimony: first, whether or not the plaintiff was guilty of contributory negligence; and second, whether or not Gerraghty was a fellow workman with the plaintiff, or the representative of the defendant, for whose negligence the defendant would be liable. To this ruling the defendant excepted.

The court further charged the jury that the rope was a spliced rope; that the injury occurred by the untwisting and drawing apart of the portion that was spliced; that the important duty of the hour was to see that the rope did not untwist; and that if the rope was in good condition when it went upon the fall, and thereafter became in bad condition, which Gerraghty knew, and should have attended to himself and did not, and the accident happened in consequence, the defendant was liable. The defendant excepted.

Messrs. **Frank D. Sturges, R. D. Benedict** and *Owen & Gray*, for plaintiff in error:

The law is well settled that if a party has by his own acts contributed to his injury he cannot recover. Prudence is imposed as a continual duty.

Baltimore and P. R. R. Co. v. *Jones*, 95 U. S. 439 (Bk. 24, L. ed. 506); *Kresanowski* v. *Northern Pac. R. Co.* 18 Fed. Rep. 235; *English* v. *Chicago etc. R. Co.* 24 Fed. Rep. 910; *Cunningham* v. *Chicago etc. R. Co.* 5 McCrary, 472.

That the plaintiff was guilty of a breach of legal duty which contributed to his injury should have been decided as a matter of law by the court.

Schofield v. *Chicago, M. and St. P. R. Co.* 114 U. S. 615 (Bk. 29 L. ed. 224); *Pleasants* v. *Fant*, 22 Wall. 116 (22: 780); *Randall* v. *Balt. and O. R. R. Co.* 109 U. S. 478 (27: 1003).

When a servant disobeys a reasonable regulation established for his safety, and suffers, he cannot recover.

2 Thomp. Neg. 1018; *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Memphis etc. R. R. Co.* v. *Thomas*, 51 Miss. 637; *Lyon* v. *Detroit, etc. R. R. Co.* 31 Mich. 429; *Brown* v. *Byroads*, 47 Ind. 435.

The defendant is not responsible for the consequences resulting from an unauthorized order.

Wood, Master and Serv. p. 889; *Felch* v. *Allen*, 98 Mass. 572; *Baltimore and P. R. R. Co.* v. *Jones*, *supra*.

No presumption arose from the happening of the injury. The burden was on the plaintiff to show a breach of duty towards him.

Shearm. and Redf. Neg. §§ 12, 99; Whart. Neg. 2d ed. §§ 421-428.

The master's duty is discharged when the company's agents exercise due care in providing and maintaining appliances reasonably safe for use.

Hough v. *R. Co.* 100 U. S. 213 (Bk. 25, L. ed. 612); *Baker* v. *Allegheny etc. R. R. Co.* 95 Pa. 211; *Marsh* v. *Chickering*, 101 N. Y. 400.

This obligation does not require the master to keep the apparatus in a safe condition at every moment of work, so far as such safety depends upon the due performance of that work by the servants, and their fellows:

Armour v. *Hahn*, 111 U. S. 313 (Bk. 28, L. ed. 440.

The injury being occasioned through the negligence of a fellow servant, when all were working in the same department, and under the same general directions, the court should have directed a verdict for the defendant.

Chicago, M. and St. P. R. Co. v. *Ross*, 112 U. S. 377 (Bk. 28, L. ed. 787); *Buckley* v. *Gould and Curry Silver Min. Co.* 14 Fed. Rep. 833 and notes; *Wood* v. *New Bedford Coal Co.* 121 Mass. 252.

Gerraghty was a mere co-boss. The duty of supplying or maintaining the apparatus was not incumbent upon him. Even the power to hire and discharge men did not change his relation of fellow servant to the plaintiff.

Brown v. *Winona etc. R. R. Co.* 27 Minn. 162; *Hoth* v. *Peters*, 55 Wis. 405; *Keystone Bridge Co.* v. *Newberry*, 96 Pa. 246; *McDermott* v. *Boston*, 133 Mass. 349; *McDonald* v. *The Eagle etc. Co.* 67 Ga. 761; *Yager* v. *Atlantic etc. R. R. Co.* 4 Hughes, 192; *Quinn* v. *N. J. Lighterage Co.* 23 Fed. Rep. 363; *Hough* v. *Railway Co. supra; Gallagher* v. *Piper*, 111 Eng. Com. Law, 669; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Peterson* v. *White B. Coal Co.* 50 Iowa, 673; *Mullen* v. *Steamship Co.* 9 Phila. 16; *Lawler* v. *Androscoggin R. R. Co.* 62 Me. 463; *Collier* v. *Steinhart*, 51 Cal. 116, *Marshall* v. *Schricker*, 63 Mo. 308; *Hamilton* v *Iron Mountain Co.* 4 Mo. App. 564.

The master's liability depends only upon failing to perform his duty toward his employees, not failing to perform the employees' duty.

R. Co. v. *Ross*, *Hough* v. *R. R. Co. Crispin* v. *Babbitt*, and *Quinn* v. *N. J. Lighterage Co. supra*.

The servant represents the master only in respect to such duties as the law imposes on the master. "None of the better class of cases go beyond this rule."

Wood, Master and Serv. 890; *Chicago, M. & St. P. R. Co.* v. *Ross*, *supra*.

The court should not have refused correct instructions, where those given did not cover the entire case, nor submit it properly to the jury.

Laber v. *Cooper*, 7 Wall. 565 (74 U. S. bk. 19, L. ed. 151).

The court refused an instruction discriminating between a duty devolving upon the master, for breach of which he would be liable, and one devolving upon a servant, for breach of which the master would not be liable. No proof having been made showing a liability of the master, the court should have directed a verdict for defendant.

Albro v. *Agawam Canal Co.* 11 Irish C. L. 353; Wood, Master and Serv. § 438; *Crispin* v. *Babbitt*, *supra*.

A question should not be submitted to the jury upon a mere scintilla of evidence.

Improvement Co. v. *Munson*, 14 Wall. 442 (81 U. S. bk. 20, L. ed. 867).

Messrs. **Hermon H. Shook** and *William C. Trull*, for defendant in error:

This court has held contributory negligence to be a question of fact for the jury.

Hough v. *R. Co.* 100 U. S. 213 (Bk. 25, L. ed. 612); *Baltimore & P. R. R. Co.* v. *Jones*, 95 U. S. 439, 441 (24: 506).

Nor can it be claimed that the doctrine of constructive negligence should be applied.

Hough v. *R. R. Co. supra.*

Here was evidence of an unsafe rope being used by the defendant, evidence that it broke, evidence that the plaintiff was injured thereby. This established at least presumptively the negligence of the defendant.

Stokes v. *Saltonstall*, 13 Pet. 181 (38 U. S. bk. 10, L. ed. 115); *Trans. Co.* v. *Downer*, 11 Wall. 130 (78 U. S. bk. 20, L. ed. 160).

The defendant's duty was discharged when, but only when, its agents, whose duty it was to supply the instrumentalities, had exercised due care, as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.

Hough v. *R. Co supra; Wabash R. Co.* v *McDaniels*, 107 U. S. 454 (Bk. 27, L. ed. 605).

Here was actual notice to the agent, to whom the defendant had delegated its duty of maintaining secure apparatus for the use of the servants.

Hough v. *R. Co. supra; Pantzar* v. *Mining Co.* 99 N. Y. 368; *Corcoran* v. *Holbrook*, 59 N. Y. 517.

Where the master furnishes defective or inadequate machinery for use in the prosecution of his business, he is not excused by the negligence of a servant in using the machinery, from liability to a co-servant, which could not have happened had the machinery been suitable for the use to which it was applied.

Grand Trunk R. Co. v. *Cummings*, 106 U. S 700 (Bk. 27, L. ed. 236); *Cone* v. *Del. etc. R. R. Co.* 81 N. Y. 206; *Ellis* v. *N. Y. etc. R. R. Co.* 95 N. Y. 546; *Stringham* v. *Stewart*, 100 N. Y. 516.

On the question of contributory negligence the defendant's witnesses corroborated the plaintiff's. They all agreed that it was a necessary duty for Carey to step out into the hatch in order to grasp a descending tub. His act, therefore, did not relieve the Company.

Goodfellow v. *Bost. etc. R. R. Co.* 106 Mass. 461; *Quirk* v. *Holt*, 99 Mass. 164; *Hackett* v. *Middlesex Mfg. Co.* 101 Mass. 101; *Mayo* v. *Bost. etc. R. R.* 104 Mass. 137; *Wheelock* v. *Bost. etc. R. R. Co.* 105 Mass. 203; *Marshall* v. *Stewart*, 2 Macq. H. L. Cas. 30, *S. C.* 33 Eng. Law & Eq. 1; *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 656 (Bk. 29, L. ed. 761); *Locke* v. *S. C. & P. R. R. Co.* 46 Iowa, 109; *Gates* v. *B. C. R. & M. R. Co.* 39 Iowa, 45; *Cone* v. *Del. L. & W. R. R. Co.* 81 N. Y. 206.

The rule is well settled that the very nature of an accident may of itself, and through the presumptions it carries, supply the requisite proof of negligence.

Whart. Neg. § 441; Shearm. and Redf. Neg. § 13; *Stokes* v. *Saltonstall* and *Transportation Co.* v. *Downer, supra; Russell Mfg. Co.* v. *Steamboat Co.* 50 N. Y. 127; *Wyckoff* v. *Ferry Co.* 52 N. Y. 32; *Platt* v. *Hibbard*, 7 Cow. 498; *Mullen* v. *St. John*, 57 N. Y. 567; *Byrne* v. *Boadle*, 2 Hurl. & Colt. 722; *Scott* v. *Dock Co.* 3 Id. 596; *Fietal* v. *Mid. etc. R. R. Co.* 109 Mass. 398; *McMahon* v. *Davidson*, 12 Minn. 357; *Bridges* v. *N. Lon. R. Co.* L. R. 6 Q. B. 377; *Atchison, etc. R. R. Co.* v. *Bales*, 16 Kan. 252; *Kendall* v. *Boston*, 118 Mass. 234; *McKee* v. *Bidwell*, 74 Pa. 218; *Toledo etc. R. R. Co.* v. *O'Connor*, 77 Ill. 391; *Devlin* v. *Gallagher*, 6 Daly, 494; *Correll* v. *B. C. K. etc. R. R. Co.* 38 Iowa, 120.

As corporations can only act through superintending officers, the negligence of those officers, with respect to other servants is the negligence of the corporation.

Whart. Neg. § 232; *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642 (Bk. 29, L. ed. 755); *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Fuller* v. *Jewett*, 80 N. Y. 46; *Sheehan* v. *N. Y. etc. R. R. Co.* 91 N. Y. 334.

Where subsequent corroborative testimony was admitted without objection, the plaintiff in error could not have been prejudiced by the admission of the original evidence.

Railway Co. v. *Ross*, 112 U. S. 383 (Bk. 28, L. ed. 789); *Brobst* v. *Brock*, 10 Wall. 519 (19: 1002); *Mobile etc. R. Co.* v. *Jurey*, 111 U. S. 585 (28: 527); *Bank* v. *Bank*, 21 Wall. 294 (22: 560).

Notice to the defendant, a corporation, could be proved by showing notice given either to its officer or agent, who was at the time acting for the Corporation in the matter in question, and within the range of his authority or supervision; or to one whose duty it was to receive and communicate such information to his principal.

Abbott, Trial Ev. p. 45, § 53; *Hough* v. *R. Co. Pantzar* v. *Mining Co.* and *Corcoran* v. *Holbrook, supra.*

It is upon subjects on which the jury are not as well able to judge for themselves as the witness, that an expert, as such, is expected to testify.

Transportation Line v. *Hope*, 95 U. S. 298 (Bk. 24, L. ed. 477); *Walsh* v. *Washington Ins. Co.* 32 N Y. 427.

A prayer for instructions, consisting of a number of propositions presented as a whole, may be refused if any of them should not be given.

Worthington v. *Mason*, 101 U. S. 149 (Bk. 25, L. ed. 848); *Beaver* v. *Taylor*, 93 U. S. 46 (23: 797); *U. S.* v. *Hough*, 103 U. S. 71 (26:305); *Harvey* v. *Tyler*, 2 Wall. 328 (17:871); *Lincoln* v. *Claflin*, 7 Wall. 132 (19:106).

It is within the province of a court in the exercise of its discretion to sum up the facts in the case to the jury, and submit them with the inferences of law deducible therefrom to the free judgment of the jury, exercising care to separate the law from the facts.

Ins. Co. v. *Trefz*, 104 U. S. 197 (Bk. 26, L. ed. 708); *Tracy* v. *Swartwout*, 10 Pet. 80 (35 U. S. bk. 9, L. ed. 354); *Games* v. *Stiles*, 14 Pet. 322 (10:476).

The instruction was properly refused which overlooked facts in evidence.

Lucas v. *Brooks*, 18 Wall. 436 (85 U. S. bk. 21, L. ed. 779); *Orleans* v. *Platt*, 99 U. S. 676 (25:404).

The court should not instruct the jury that certain evidence in the case does not warrant them in finding negligence. The question should be left to the jury upon the whole evidence.

Smith v. *Condry*, 1 How. 28 (42 U. S. bk. 11, L ed. 35).

Instructions to the jury should not be given in such form as to supersede an inquiry by them into the facts of the case.

Canal Co. v. *Knapp*, 9 Pet. 541 (84 U S. bk. 9, L. ed. 222).

The main charge of the judge covered the entire case and properly submitted it to the jury. Further instructions were, therefore, properly refused.

R. R. Co. v. *Horst*, 93 U. S. 291 (Bk. 23, L. ed. 898).

The judge was not bound to give instructions in the terms required by the defendant below. It was sufficient if so much thereof was given as was applicable to the evidence before the jury, and the merits of the case as presented by the parties.

Clymer v. *Dawkins*, 3 How. 674 (44 U. S. bk. 11, L. ed. 778); *Kelly* v. *Jackson*, 6 Pet. 622 (Bk. 8. 523); *R. Co.* v. *McCarthy*, 96 U. S. 258 (24:693).

Even if, in twenty-three exceptions, there should be discovered a few technical errors, it plainly appears on the face of the record that the judgment below was right, and this court has repeatedly refused to reverse judgments on errors committed on trials, which worked no injury to plaintiffs in error, and which could not have affected the verdict.

Railway Co. v. *Ross*, *Brobst* v. *Brock*, *M. & M. R. R. Co.* v. *Jurey*, and *Bank* v. *Bank*, *supra*.

Mr. Chief Justice **Waite** *announced that the judgment of the court below stands affirmed by a divided court.*

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[199] THE STEAMER HARRISBURG, EDWIN M. LEWIS ET AL., Receivers of the PHILADELPHIA AND READING RAILROAD COMPANY, Owners of Said Steamer, *Appts.*,

v.

EMMA S. RICKARDS ET AL.

(See S. C. Reporter's ed. 199-214.)

Admiralty — suit in, cannot be maintained for death caused by negligence—suit in rem *for—must be brought when, if maintainable.*

1. A suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an Act of Congress, or a statute of a State, giving a right of action therefor.

2. If a suit *in rem* can be maintained in admiralty against an offending vessel for the recovery of such damages when an action at law has been given therefor in the State where the wrong was done, or where the vessel belonged (as to which the court expresses no opinion), the action must be brought within the time provided by the statute which gives the right of action.

[No. 9.]

Argued April 7, 1886. Decided Nov. 15, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The case is stated by the court.

Mr. **Thomas Hart, Jr.**, for appellants.

Mr. **Henry Flanders**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit *in rem* begun in the District Court of the United States for the Eastern District of Pennsylvania, on the 25th of February, 1882, against the steamer Harrisburg, by the widow and child of Silas E. Rickards, deceased, to recover damages for his death caused by the negligence of the steamer in a collision with the schooner Marietta Tilton, on the 16th of May, 1877, about one hundred yards from the Cross Rip Light Ship, in a sound of the sea embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The steamer was engaged at the time of the collision in the coasting trade, and belonged to the Port of Philadelphia, where she was duly enrolled according to the laws of the United States. The deceased was first officer of the schooner, and a resident of Delaware, where his widow and child also resided when the suit was begun.

The Statutes of Pennsylvania in force at the time of the collision provided that "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life," "the husband, widow, children or parents of the deceased, and no other relative," "may maintain an action for and recover damages for the death thus occasioned." "The action shall be brought within one year after the death, and not thereafter." Brightly, Purd. Dig. 11th ed. 1267, §§ 3, 4, 5; Act of April 15, 1851, § 18; Act of April 6, 1855, §§ 1, 2.

By a Statute of Massachusetts relating to railroad corporations, it was provided that "If, by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence of its servants or agents while engaged in its business, the life of any person, being in the exercise of due diligence, * * * is lost, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children." * * * "Indictments against corporations for loss of life shall be prosecuted within one year from the injury causing the death." Gen. Stat. Mass. 1860, chap. 63, §§ 97-99; Stat. 1874, chap. 372, § 168.

No innocent parties had acquired rights to or in the steamer between the date of the collision and the bringing of the suit.

Upon this state of facts the circuit court gave judgment against the steamer in the sum of $5,100, for the following reasons:

"1. In the admiralty courts of the United States the death of a human being upon the high seas or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law.

"2. The right of the libelants does not depend upon the statute law of either the States of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those States does not bar this proceeding.

"3. Although an action in the state courts of either Massachusetts or Pennsylvania would be barred by the limitation expressed in the statutes of those States, the admiralty is not bound thereby, and in this case will not follow the period of limitation therein provided and prescribed. The drowning complained of was

caused by the improper navigation, negligence and fault of the said steamer, producing the collision aforesaid, and the libelants are entitled to recover.

"4. As there are no innocent rights to be affected by the present proceedings, and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libelants' laches." *The Harrisburg*, 15 Fed. Rep. 610.

From that decree this appeal was taken, and the question to be decided presents itself in three aspects, which may be stated as follows:

1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an Act of Congress, or a statute of a State, giving a right of action therefor?

2. If not, can a suit *in rem* be maintained in admiralty against an offending vessel for the recovery of such damages when an action at law has been given therefor by statute in the State where the wrong was done, or where the vessel belonged?

3. If it can, will the admiralty courts permit such a recovery in a suit begun nearly five years after the death, when the statute which gives the right of action provides that the suit shall be brought within one year?

It was held by this court, on full consideration, in *Ins. Co.* v. *Brame*, 95 U. S. 756 [Bk. 24, L. ed. 582], "that by the common law no civil action lies for an injury which results in death." See also *Dennick* v. *R. R. Co.* 103 U. S. 11, 21 [Bk. 26, L. ed. 439, 442]. Such also is the judgment of the English courts, where an action of the kind could not be maintained until *Lord* Campbell's Act, 9 and 10 Vic. chap. 93. It was so recited in that Act, and so said by *Lord* Blackburn in *The Vera Cruz*, 10 App. Cas. 59, decided by the House of Lords in 1884. Many of the cases bearing on this question are cited in the opinion in *Ins. Co.* v. *Brame*. Others will be found referred to in an elaborate note to *Carey* v. *Berkshire R. R. Co.* 48 Am. Dec. 633. The only American cases in the common-law courts against the rule to which our attention has been called are *Cross* v. *Guthery*, 2 Root, 90; *Ford* v. *Monroe*, 20 Wend. 210; *James* v. [205] *Christy*, 18 Mo. 162; and *Sullivan* v. *Union Pac. R. R. Co.* 3 Dill. 384. *Cross* v. *Guthery*, a Connecticut case, was decided in 1794, and cannot be reconciled with *Goodsell* v. *Hartford etc. R. R. Co.* 33 Conn. 55, where it is said: "It is a singular fact that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy." *Ford* v. *Monroe*, a New York case, was substantially overruled by the Court of Appeals of that State in *Green* v. *Hudson R. R. R. Co.* 2 Keyes, 294; and *Sullivan* v. *Union Pac. R. R. Co.* decided in 1874 by the Circuit Court of the United States for the District of Nebraska, is directly in conflict with *Insurance Co.* v. *Brame*, decided here in 1878.

We know of no English case in which it has been authoritatively decided that the rule in admiralty differs at all in this particular from that at common law. Indeed, in *The Vera Cruz*, *supra*, it was decided that even since *Lord* Campbell's Act a suit *in rem* could not be maintained for such a wrong. Opinions were delivered in that case by the Lord Chancellor (Selborne), *Lord* Blackburn and *Lord* Watson. In each of these opinions it was assumed that no such action would lie without the statute, and the only question discussed was whether the statute had changed the rule.

In view, then, of the fact that in England (the source of our system of law, and from a very early period one of the principal maritime nations of the world) no suit in admiralty can be maintained for the redress of such a wrong, we proceed to inquire whether, under the general maritime law as administered in the courts of the United States, a contrary rule has been or ought to be established.

In *Plummer* v. *Webb*, 1 Ware, 75, decided in 1835, *Judge* Ware held, in the District Court of the United States for the District of Maine, in an admiralty suit *in personam*, that "the ancient doctrine of the common law, founded on the principles of the feudal system, that a private wrong is merged in a felony, is not applicable to the civil polity of this country, and has not been adopted in this State" (Maine), and that "a libel may be maintained by a father, in the admiralty, for consequential damages re- [206] sulting from an assault and battery of his minor child," "after the death of the child, though the death was occasioned by the severity of the battery;" but the suit was dismissed, because upon the evidence it did not appear that the father had in fact been damaged. The case was afterwards before *Mr. Justice* Story on appeal, and is reported in 4 Mas. 380, but the question now involved was not considered, as the court found that the cause of action set forth in the libel and proved was not maritime in its nature.

We find no other reported case in which this subject was at all discussed until *Cutting* v. *Seabury*, 1 Sprague, 522, decided by *Judge* Sprague in the Massachusetts District in 1860. In that case, which was *in personam*, the judge said that "The weight of authority in the common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it," and that he could not consider it "as settled that no action can be maintained for the death of a human being." The libel was dismissed, however, because on the facts it appeared that no cause of action existed even if in a proper case a recovery could be had. The same eminent judge had, however, held as early as 1849, in *Crapo* v. *Allen*, 1 Sprague, 185, that rights of action in admiralty for mere personal torts did not survive the death of the person injured.

Next followed the case of *The Sea Gull*, Chase's Dec. 145, decided by *Chief Justice* Chase in the Maryland District in 1867. That was a suit *in rem* by a husband to recover damages for the death of his wife caused by the negligence of the steamer in a collision in the Chesapeake Bay, and a recovery was had, the chief justice remarking that "There are cases, indeed, in which it has been held that in a suit at law no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject.

traceable to the feudal system and its forfeitures," and "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." [207] In his opinion he refers to the leading English case of *Baker* v. *Bolton*, 1 Camp. 493, where the common-law rule was recognized and followed by *Lord* Ellenborough in 1808, and to *Carey* v. *Berkshire R. R. Co.* 1 Cush. 475, to the same effect, decided by the Supreme Court of Massachusetts in 1848, and then says that "In other States the English precedent has not been followed." For this he cites as authority *Ford* v. *Monroe*, *supra*, decided in 1838, but which, as we have seen, had been overruled by *Green* v. *Hudson R. R. R. Co.* in 1866, only a short time before the opinion of the chief justice was delivered, and *James* v. *Christy*, *supra*, decided by the Supreme Court of Missouri in 1853. The case of *The Highland Light*, Chase's Dec. 150, was before *Chief Justice* Chase in Maryland about the same time with *The Sea Gull*, and while adhering to his ruling in that case, and remarking that "the admiralty may be styled, not improperly, that human providence that watches over the rights and interests of those 'who go down to the sea in ships and do their business on the great waters,'" he referred to a Maryland Statute giving a right of action in such cases, and then dismissed the libel because on the facts no liability was established against the vessel as an offending thing.

Afterwards, in 1873, *Mr. Justice* Blatchford, then the Judge of the District Court for the Southern District of New York, sustained a libel by an administrator of an infant child who took passage on the steamer City of Brussels with his mother at Liverpool, to be carried to New York, and while on the voyage was poisoned by the carelessness of the officers of the vessel and died on board. *The City of Brussels*, 6 Ben. 370. The decision was placed on the ground of a breach of the contract of carriage.

The next case in which this jurisdiction was considered is that of *The Towanda*, 34 Legal Int. (Phil.) 394; *S. C.* 5 Cent. L. J. 418, decided by *Judge* McKennan in the Circuit Court for the Eastern District of Pennsylvania in 1877, and [208] before the judgment of this court in *Ins. Co.* v. *Brame*, *supra*. In that case the ruling of *Chief Justice* Chase in *The Sea Gull* was approved, and the same authorities were cited with the addition of *Sullivan* v. *Union Pac. R. R. Co.* *supra*.

In *The Chas. Morgan*, 2 Flip. 274, before *Judge* Swing, in the Southern District of Ohio, on the 24th of October, 1878, the subject was again considered. That was a suit *in rem*, by the wife of a passenger on a vessel, to recover damages for the death of her husband; and in deciding upon the sufficiency of a plea to the jurisdiction, the judge, after quoting a remark of *Mr. Justice* Clifford in *Steamboat Co.* v. *Chase*, 16 Wall. 532 [83 U. S. bk. 21, L. ed. 372], that "Difficulties, it must be conceded, will attend the solution of this question, but it is not necessary to decide it in this case," retained the libel because, "as the case at bar will probably go to the Supreme Court of the United States, it will be better for all parties that the appeal should be taken after a trial upon its merits." Our decision in *Ins. Co.* v. *Brame* was announced on the 21st of January, 1878, but was evidently not brought to the attention of the judge, because, while citing quite a number of cases to show that the weight of authority was in favor of the English rule, he makes no reference to it. Indeed, it is probable that the volume of the reports in which it appears had not been generally distributed when his opinion was filed.

It thus appears that prior to the decision in *Ins. Co.* v. *Brame* the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisprudence of this country. Since that decision the question has been several times before the circuit and district courts for consideration. In *The David Reeves*, 5 Hughes, 89, *Judge* Morris, of the Maryland District, considering himself bound by the authority of *The Sea Gull*, which arose in his district, and had been decided by the chief justice in the circuit court, maintained jurisdiction of a suit *in rem* by a mother for the death of her son in a collision that occurred in the Chesapeake Bay. He conceded, however, that this was contrary to the common law and to [209] the admiralty decisions in England; but, as the question had never been passed on in this court, he yielded to the authority of the circuit court decision in his own district.

The case of *Holmes* v. *Oregon & Cal. R. R. Co.* 6 Sawy. 262; *S. C.* 5 Fed. Rep. 75, was decided by *Judge* Deady, in the Oregon District, on the 28th of February, 1880; and he held that a suit *in personam* could be prosecuted in admiralty against the owner of a ferry boat engaged in carrying passengers across the Willamette River, between East Portland and Portland, for the death of a passenger caused by the negligence of the owner. He conceded that no such action would lie at common law, but, as in his opinion the civil law was different, he would not admit that in admiralty, "which is not governed by the rules of the common law," the suit could not be maintained. His decision was, however, actually put on the Oregon Statute, which gave an action at law for damages in such a case, and the death occurred within the jurisdiction of the State. *Judge* Sawyer had previously decided, in *Armstrong* v. *Beadle*, 5 Sawy. 484, in the Circuit Court for the District of California, that an action at law under a similar Statute of California would not lie for a death which occurred on the high seas and outside of the territorial limits of the State. In *The Clatsop Chief*, 7 Sawy. 274, *S. C.* 8 Fed. Rep. 163, *Judge* Deady sustained an action *in rem* against an offending vessel for a death caused by negligence in the Columbia River and within the State of Oregon.

In *Re Long Island etc. Trans. Co.* 5 Fed. Rep. 599, which was a suit for the benefit of the Act of Congress limiting the liability of the owners of vessels, *Judge* Choate, of the Southern District of New York, decided that in New York, where there is a statute giving a right of action in cases of death caused by negligence, claims for damages of that character might be included among the liabilities of the owner of the offending vessel. In that case the injury which caused the death occurred within the

limits of the State. In the opinion it is said (p. 608): "It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies [210] with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. *The Sea Gull*, 2 L. T. R. 15; *S. C.* Chase's Dec. 145; *Cutting* v. *Seabury*, 1 Sprague, 522; *The Guldfaxe*, 19 L. T. R. 748; *S. C.* L. R. 2 Adm. & Eccl. 325; *The Epsilon*, 6 Ben. 381. But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives, or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction *in personam* over marine torts, should not recognize and enforce the right so given." This case was decided on the 12th of February, 1881, and on the 21st of the same month *Judge* Brown, of the Eastern District of Michigan, in *The Garland*, 5 Fed. Rep. 924, held that a suit *in rem* could be maintained by a father for the loss of the services of his two sons, killed in a collision in the Detroit River. In his opinion he said: "Were this an original question, * * * I should feel compelled to hold that this libel could not be maintained. But other courts of admiralty in this country have furnished so many precedents for a contrary ruling, I do not feel at liberty to disregard them, although I am at loss to understand why a rule of liability differing from that of the common law should obtain in these courts." His decision was, however, finally put on a Statute of Michigan which gave an action at law for such damages.

In *The Sylvan Glen*, 9 Fed. Rep. 335, *Judge* Benedict, of the Eastern District of New York, dismissed a suit *in rem* on the ground that the Statute of New York giving an action for damages in such cases created no maritime lien. This case was decided on the 4th of October, 1881. At November Term, 1882, of the Circuit Court for the Eastern District of Louisiana, *Judge* Billings decided, in *The E. B. Ward, Jr.* 4 Woods, 145, *S. C.* 16 Fed. Rep. 255, that a suit *in rem* could not be maintained for damages for the death of a person in a collision [211] on the high seas through the fault of a vessel having its home port in New Orleans, as the Statute of Louisiana did not apply to cases where the wrongful act which caused the death occurred outside of the State. Afterwards, in June, 1883, *Judge* Pardee of the circuit court for the same district decided otherwise. *The E. B. Ward, Jr.* 17 Fed. Rep. 456. In his opinion he said (p. 459): "Upon the whole case, considering the natural equity and reason of the matter, and the weight of authority as determined by the late adjudicated cases in the admiralty courts of the United States, I am inclined to hold that the ancient common-law rule, '*Actio personalis moritur cum persona*,' if it ever prevailed in the admiralty law of this country, has been so modified by the statutory enactments of the various States and the progress of the age, that now the admiralty courts 'are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another,' and enforce an adequate remedy. At all events, as the question is an open one, it is best to resolve the doubts in favor of what all the judges consider to be 'natural equity and justice.'" He also was of opinion that, as the offending vessel was wholly owned by citizens of Louisiana, and the Port of New Orleans was her home port, the Louisiana Statute applied to her, and that the court of admiralty could enforce such a right of action in a proceeding *in rem*. See also *The E. B. Ward, Jr.* 23 Fed. Rep. 900.

The case of *The Manhasset*, 18 Fed. Rep. 918, was decided by *Judge* Hughes, of the Eastern Virginia District, in January, 1884; and in that it was held that a suit *in rem* could not be maintained by the administratrix against a vessel, under the Statute of Virginia which gave an action for damages caused by the death of a person, even though the tortious act was committed within the territorial limits of the State, but that the widow and child of the deceased man had a right of action, by a libel *in rem*, under the general maritime law, which they could maintain in their own names and for their own benefit. In so deciding the judge said: "The decision of *Chief Justice* Chase in the case of *The Sea Gull*, *supra*, establishes the validity of such a libel in this circuit. I would [212] maintain its validity independently of that precedent. Such a right of action is a maritime right, conferred by the general maritime law (Domat, Civil Law, pt. 1, bk. 2, tit. 8, § 1, art. 4; Grotius, lib. 2, c. 17, § 13; Ruth. Inst. 206; Bell, Prin. Sc. Laws, p. 748, § 2029; Ersk. Inst. bk. 4, tit. 4, § 105) and is not limited as to time by the twelve months' limitation of the state statute."

The last American case to which our attention has been called is that of *The Columbia*, 27 Fed. Rep. 704, decided by *Judge* Brown, of the Southern District of New York, during the present year. In giving his opinion, after referring to the fact that, as he understood, the question was then pending in this court, the judge said: "Awaiting the result of the determination of that court, and without referring to the common-law authorities, I shall hold in this case, as seems to me most consonant with equity and justice, that the pecuniary loss sustained by persons who have a legal right to support from the deceased, furnishes a ground of reclamation against the wrong doer which should be recognized and compensated in admiralty."

In *Monaghan* v. *Horn*, *in Re The Garland*, 7 Can. Sup. Ct. Rep. 410, the Supreme Court of Canada held that a mother could not sue in her own name in admiralty for the loss of the life of her son, on the ground that no such action would lie without the aid of a statute; and the Statute of the Province of Ontario, where the wrong was done, and which was substantially the same as *Lord* Campbell's Act, provided that the action should be brought in the name of the administrator of the deceased person. No authoritative judgment was given as to the right of an administrator to sue in admiralty under that Act. This was in 1882, before *The Vera Cruz*, *supra*, in the House of Lords.

Such being the state of judicial decisions, we come now to consider the question on principle.

It is no doubt true that the Scotch law "takes cognizance of the loss and suffering of the family of a person killed," and gives a right of action therefor under some circumstances. Bell's Prin. Laws, Scot. 7th ed. p. 934, § 2029; *Cadell* v. *Black*, 5 Paton, 567; *Weems* v. *Mathieson*, 4 Macq. 215. Such also is the law of [213] France. 28 Merlin's R. 442, *verbo* Reparation Civile, § IV; *Rolland* v. *Gosse*, 19 Sirey, 269. It is said also that such was the civil law, but this is denied by the Supreme Court of Louisiana in *Hubgh* v. *N. O. & C. R. R. Co.* 6 La. Ann. 495, where *Chief Justice* Eustis considers the subject in an elaborate opinion after full argument. A reargument of the same question was allowed in *Hermann* v. *N. O. & C. R. R. Co.* 11 La. Ann. 5, and the same conclusion reached after another full argument. See also Grueber's Lex Aquilia, 17. But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx., nor in the Marine Ordinance of Louis XIV., 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute giving a remedy at law for the wrong. Ben. Adm. 2d ed. § 309; 2 Pars. Ship. & Adm. 350; Henry, Adm. Jur. 74. The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to "natural equity and the general principles of law." Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in [214] this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule.

This brings us to the second branch of the question, which is, whether, with the Statutes of Massachusetts and Pennsylvania above referred to in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel if brought in time. About this we express no opinion, as we are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and that the suit was not brought until February, 1882, while the law required it to be brought within a year.

The decree of the Circuit Court is reversed and the cause remanded, with instructions to dismiss the libel.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ACALUS L. PALMER, *Plff. in Err.*, [96]
v.
ERWIN A. HUSSEY.

(See S. C. Reporter's ed. 96-99.)

Bankruptcy—claim of immunity under section 5117 R. S.—adverse decision by state court—this court has jurisdiction—certificate under section 5119 R. S., conclusive of fact and regularity of discharge—fraud—trust.

1. This court has jurisdiction of a writ of error to review the judgment of a state court against a claim of immunity, under section 5117, R. S., from the operation of a discharge in bankruptcy, because of the fraudulent and fiduciary character of the debt.

2. Under section 5119 R. S., the certificate of discharge in bankruptcy is conclusive evidence "of the fact and regularity of such discharge."

3. Upon the facts disclosed by the record this court holds, under its ruling in *Hennequin* v. *Clews*, Bk. 28, that there was no such fraud, or trust, in respect to the debt in question, as to bar the operation of the discharge.

[No. 445.]

Submitted Nov. 1, 1886. Decided Nov. 15, 1886.

IN ERROR to the Supreme Court of the State of New York.

On motion to dismiss, (*denied*), with which is united a motion to affirm. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Archibald W. Speir,** for plaintiff in error.

Mr. **Samuel W. Bower,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This record shows that on the 18th of April, 1874, Acalus L. Palmer recovered a judgment in the Supreme Court of New York against

Erwin A. Hussey for $32,128.57 on account of certain bonds of the United States which had been placed in his hands by Palmer, and for which he bound himself by a writing, the material part of which is as follows:

"These bonds we hold subject to the order of A. L. Palmer, at ten days' notice, agreeing to collect the coupons for his account, free of charge, and to allow him two per cent per annum interest on the par value of said bonds, said interest to commence and count June 1, 1866; interest on the 7-30 bonds payable June and December 15; on 5-20 May and November 1.

"E. A. HUSSEY & Co."

[97] In the complaint it was alleged that the bonds "were received by the defendant from the plaintiff as his agent and broker, in a fiduciary capacity, upon the arrangement and agreement as contained" in the foregoing paper; "that the said defendant, without the authority or permission of the plaintiff, has fraudulently and willfully sold, disposed of, and misapplied the said bonds, and has refused to deliver up the same to the said plaintiff, who has frequently demanded the same from him, and given the notice so to do as required by the agreement." This was denied in the answer. The suit was begun September 7, 1868.

On the 20th of January, 1868, Hussey filed his petition in bankruptcy, and was duly adjudicated a bankrupt January 24. On the 17th of May, 1880, he received his final discharge. The record does not show when his application for a discharge was made to the bankrupt court. On the 12th of June, 1880, he moved the supreme court to perpetually enjoin the collection of the judgment in favor of Palmer because of his discharge. In his affidavit in support of this motion, and which presents the grounds of the relief asked, it is stated:

"That, among other grounds of objection to my discharge in bankruptcy made by the plaintiff, it was charged that I have been guilty of improper and undue delay in said proceedings. That that question was presented to the court and fully explained, and the court decided that I was not guilty of laches, and was entitled to my discharge."

In opposition to the motion the counsel of Palmer filed a counter affidavit setting forth the grounds of defense, and, among others, that the judgment was an adjudication that "The bonds were received in a fiduciary capacity," and were "fraudulently and willfully sold, disposed of, and misapplied by Hussey."

The supreme court, both at special and general term, denied the motion on the ground that the judgment on its face showed that the debt was created by fraud, and while Hussey was acting in such a fiduciary capacity as to prevent the discharge in bankruptcy from operating as a release. This order was reversed by [98] the court of appeals, and the execution of the judgment perpetually enjoined, because the fraud and trust established by the findings were not of a character to bar the effect of the discharge. To reverse that judgment this writ of error was brought, which Hussey now moves to dismiss because no federal question was raised or decided, and with this motion he has united a motion to affirm under Rule 6, section 5.

The motion to dismiss is denied. Palmer in his affidavit, which in this case takes the place of technical pleading, specially set up and claimed an immunity under section 5117 of the Revised Statutes from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him. This gives us jurisdiction, since the exemption depends on the construction and effect of section 5117, which provides that "No debt created by the fraud * * * of the bankrupt, or * * * while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." As the affidavit of Hussey set forth the date of the adjudication in bankruptcy and the date of discharge, the question of delay in making an application, and the construction and effect of section 5108 may also, perhaps, have been raised on the record. The opinion of the court of appeals shows that both of these questions were actually presented to and decided by that court. *Palmer* v. *Hussey*, 87 N. Y. 303.

Upon the facts set forth in the affidavit of Hussey, which are not denied in the counter affidavit of the attorney of Palmer, and upon the facts as they appear in the record of the judgment to be enjoined, it is clear that, under the ruling of this court in *Hennequin* v. *Clews*, 111 U. S. 677 [Bk. 28, L. ed. 566], there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the bonds by Hussey, as to bar the operation of the discharge.

By section 5119 of the Revised Statutes, the certificate of discharge is made conclusive evidence in favor of the bankrupt, "of the fact and regularity of such discharge." We must presume, therefore, that the application was made within the time required by section 5108, or, if not, that any delay there may have been was satisfactorily explained before the discharge was granted. The certificate is conclusive on this question. [99]

As these are the only federal questions presented, and one has been already settled by our decision in *Hennequin* v. *Clews*, and the other needs no further argument, *the motion to affirm is granted.*

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, *Appt.* [296]

v.

TOM NICKALS ET AL

(See S. C. Reporter's ed. 296-311.)

Railroad corporations—"plan and agreement" for reorganization of the Erie Railway Company—directors may devote profits to improvements instead of dividends.

1. The provision of the "plan and agreement" for the reorganization of the Erie Railway Company (which was also contained in the articles of association of the new Company), that certain preferred stock should be issued "entitling the holders to noncumulative dividends, at the rate of 6 per cent per annum in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors," did not operate to deprive

the directors of the discretion with which managing agents of corporations are usually invested when distributing the earnings of property committed to their hands.

2. The words "as declared by the board of directors" in this passage refer to "dividends," and not to "profits." The directors therefore had the power to devote the profits of any given year to improvements of the property to the exclusion of any dividend to the preferred stockholders.

3. The fact that the report of the directors to the shareholders and bondholders for the year 1880 showed "a net profit from the operations of the year of $1,790,620.71," does not enable the preferred stockholders to maintain an action against the Company for a dividend.

[No. 22.]

Argued Nov. 1, 2, 1886. Decided Nov. 29, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Reversed.*

The case is stated by the court.

Messrs. **William D. Shipman, B. H. Bristow** and *David Willcox*, for appellant:

In no aspect can these preferred stockholders be deemed, either in law or equity, to be creditors or quasi creditors of the Company. Their relation to the Company is, pure and simple, that of stockholders. On this point the authorities are not only decisive, but in their scope and effect go further, and hold that where a party subscribes for and takes preferred stock, the payment for which is substantially a loan or advance of money to the company, he is still a stockholder and not a creditor. This has been repeatedly held where the stock was not only preferred, but dividends thereon at a given annual rate guarantied by the company issuing it.

Williston v. *Mich. S. & N. I. R. R. Co.* 13 Allen, 400; *Taft* v. *Hart. Prov. & F. R. R. Co.* 8 R. I. 310.

The phraseology of the thirteenth section of the plan and agreement is consistent with no other view. It places the holders of preferred stock in the same category as the holders of common stock, with only one qualification. It uses the words "dividends" and "dividend" in the same sense, and as equally applicable to both. The words, "as declared by the board of directors," are clearly used in the ordinary sense, and refer to the setting apart net profits for distribution through the declaration of a dividend. There is no such thing known in our law, or in the practice of our corporations, as a "declaration of profits," as distinguished from a declaration of dividends. The words, "as declared by the board of directors," refer to a formal, official and final act of the board on the subject matter. "Profits" are not in any official or legal sense "declared." As they may appear on the books, they are the result of the particular account of which they are the outcome. The account is made up by the bookkeeper or auditor and speaks for itself. A certification or repetition of the account, or its result, in a report does not change its status or quality, or the relation of the stockholders to the fund. In any other view the words, "as declared by the board of directors," have no meaning and perform no office.

See *St. John* v. *Erie R. Co.* 22 Wall. 136–148 (89 U. S. bk. 22, L. ed. 743–746); *Warren* v. *King*, 108 U. S. 389 (27: 769); *St. John* v. *Erie R. Co.* 10 Blatchf. 271, 279.

The complainants, therefore, being preferred stockholders entitled to dividends, and not creditors entitled to the payment of a debt, what are their rights in the eye of the law under the thirteenth section? The answer is that they have a right to be preferred to the common stockholders in the distribution of the profits. In other words, if the directors consider it proper, in view of the affairs of the Company as a whole, to declare any dividend, they must first declare one at the rate of 6 per cent, payable to the preferred stockholders. In administering the affairs of a corporation the directors have many implied powers, one of which is to determine whether a dividend should be declared or not, and at what rate. The law invests them with a discretion in this particular. If they deem it wise and prudent to accumulate a portion of the surplus earnings to meet future contingencies, or to apply them to the improvement of the property for its more efficient and profitable working and the better security of all concerned, including the bondholders and other creditors, the stockholders and the public, so far as their duty to the public is concerned, they have the right and power to do so. To this every stockholder, preferred as well as common, assents when he becomes an owner of shares.

Clearwater v. *Meredith*, 1 Wall. 25, 40 (68 U. S. bk. 17, L. ed. 604, 608); Morawetz, Private Corp. p. 351, § 348; *Union Pac. R. R. Co.* v. *U. S.* 99 U. S. 402 (25: 274).

This discretionary power of the directors must be exercised *bona fide* and in a reasonable manner, and within these limits the courts regard their action as final and do not disturb it.

Barnard v. *Vermont & Mass. R. R. Co.* 7 Allen, 521; *Karnes* v. *Rochester & Gen. Val. R. R. Co.* 4 Abb. Pr. N. S. 107; *Culver* v. *Reno Real Est. Co.* 91 Pa. 367; *Richardson* v. *Vermont etc. R. R. Co.* 44 Vt. 622; *Stevens* v. *South Devon R. Co.* 9 Hare, 313, 326.

Still further; the directors' report shows that the surplus over and above operating expenses and fixed charges has been expended upon improvements absolutely necessary to fully develop the business and economically operate the road. There are therefore no surplus profits arising from the business of the Corporation; for expenses such as these are a part of its business and are chargeable against the earnings before any dividends can be paid. They are liabilities which the directors are authorized to incur. According to well established rules, therefore, they must be discharged before anything is payable in dividends.

Mumma v. *Potomac Co.* 8 Pet. 281, 286 (33 U. S. bk. 8, L. ed. 945, 947), *Curran* v. *State*, 51 How. 304 (56 U. S. 14: 705); *R. R. Co.* v. *Howard*, 7 Wall. 392 (74 U. S. 19: 117).

Mr. **C. E. Tracy**, for appellees:

The special contract of the articles of association overrides any discretionary power the directors might otherwise have.

Bates v. *Androscoggin & Ken. R. R. Co.* 49 Me. 491; *Boardman* v. *L. S. & M. S. R. R. Co.* 84 N. Y. 157.

Were it not for the expressions "noncumulative dividends," and "dependent on the profits of each particular year," the dividends in ar-

rears would have to be made up before dividends could be paid on the common stock.

Prouty v. *M. S. & N. I. R. R. Co.* 1 Hun, 655; 85 N. Y. 272; *Boardman* v. *L. S. & M. S. R. R. Co. supra;* *Henry* v. *G. N. R. Co.* 4 Kay & J. 1; *Matthews* v. *Same*, 5 Jur. N. S. part 1, 284; *Allen* v. *L. & E. R. R. Co.* 25 Weekly R. 524; *Dent* v. *London Tramway Co* Eng. L. R. 16 Ch. Div. p. 358.

Such a provision or contract necessarily abrogates any discretionary power of the directors.

Barnard v. *V. & M. R. R. Co.* 7 Allen, 521; *Richardson* v. *Same*, 44 Vt. 613; *West Chester etc. Co.* v. *Jackson*, 77 Pa. 321; *Scott* v. *Eagle Fire Ins. Co.* 7 Paige, 198.

In the case at bar, there were certainly profits of the particular year, and the profits as such had been declared by the board of directors in their report to the stockholders. Every requirement of the contract had been thus complied with, for by no possible construction can the words "as declared by the board of directors," be held to relate to other than the "profits of each particular year." Similar language is used respecting the payment of interest on the "noncumulative income bonds," provided for in paragraph 19 of the articles of association; it is made dependent upon "the net earnings of" the Company for that year, as declared by the board of directors.

The reported cases upon the preferred stock of the appellant's predecessor company (*Thompson* v. *E. R. R. Co.* 42 How. Pr. 68, and *St. John* v. *Same*, 10 Blatchf. 271; *S. C.* 22 Wall. 136 (89 U. S. bk. 22, L. ed. 743) turn upon the intendment of the special clause or contract there appearing. They demonstrate, however, the proposition that preferred stock represents a contract, the extent and legal effect whereof depend upon the terms and conditions of the contract itself, as interpreted under the ordinary rules of law.

[298] *Mr. Justice* **Harlan** delivered the opinion of the court:

By the decree below it was adjudged, in accordance with the prayer of the bill, that the New York, Lake Erie and Western Railroad Company was required by its articles of association to declare a dividend of 6 per cent upon its preferred stock, for the year ending September 30, 1880, payable out of the net profits accruing that year from the use of its property, after meeting operating expenses, interest on funded debt, rentals of leased lines and other fixed charges. A judgment was rendered against it for $20,280—the amount which the plaintiffs would have received if a dividend had been made—with interest thereon from January 15, 1881, to the date of the decree, and also for their costs and disbursements. The cause was referred to a special commissioner to ascertain the names of all other parties entitled to receive similar dividends.

The case made by the pleadings, exhibits, and proofs is substantially as will now be stated.

The Farmers' Loan and Trust Company having commenced an action in the Supreme Court of New York for the foreclosure of two mortgages executed by the Erie Railway Company upon its line of railway, property, rights, privileges and franchises—one of September 1, 1870, to secure its obligations known as first consolidated mortgage bonds and sterling loan bonds, and the other of February 4, 1874, to secure its obligations known as second consolidated mortgage bonds and gold convertible bonds—and having also brought ancillary suits for the fore- [299] closure of the same mortgages in the States of New Jersey and Pennsylvania, certain parties, on the 14th of December, 1877, entered into a plan and agreement for the readjustment of their rights in the mortgaged premises upon an equitable basis. Those constituting in that agreement the parties of the first part were holders of common and preferred stock of the Erie Railway Company, of coupons of the first consolidated mortgage and sterling loan bonds, and of bonds and coupons both of the second consolidated mortgage and gold convertible series. The parties of the second part, Edwin D. Morgan, John Lowber Welsh, and David A. Wells, were purchasing trustees. The agreement provided for co-operation in all proceedings for final foreclosures and sales in the respective States under the mortgage of February 4, 1874; for the purchase of the mortgaged premises and franchises by the trustees with bonds and coupons and other means to be placed at their disposal for that purpose by the parties of the first part; and for the organization by such trustees, in conformity with the laws of New York, of a new corporation, with an amount of stock not exceeding the then amount of the stock of the Erie Railway Company, and which should hold the property, rights and franchises so purchased, subject to six prior mortgages then resting upon the premises or upon part of them, including the first consolidated mortgage of September 1, 1870. The new Corporation was required, as the consideration for the property, rights and franchises purchased, to deliver to the parties of the first part its funded coupon bonds, bearing interest at 7 per cent in gold, to an amount equal in the aggregate to the coupons of the first consolidated mortgage to be funded by those parties; mortgage bonds, bearing 6 per cent interest in gold, to an amount equal to the principal of the second consolidated and gold convertible bonds held by the parties and secured by the mortgage of February 4, 1874—the back interest to be represented by funded coupon bonds. In reference to the sterling loan bonds, the agreement provided that they should be regarded as having been exchanged for the first consolidated mortgage [300] bonds on the first of September, 1875, the coupons due on that day being funded at the rate of 6 per cent per annum as it stood previous to such assumed exchange.

The provisions of the plan and agreement which bear more or less upon the question before the court, are as follows:

"13. Preferred stock, to an amount equal to the preferred stock of the Erie Railway Company now outstanding, to wit: eighty-five thousand three hundred and sixty-nine (85,369) shares, of the nominal amount of one hundred dollars each, entitling the holders to noncumulative dividends, at the rate of six per cent per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors.

"14. Common stock, to an amount equal to

the amount of the common stock of the said company now outstanding; to wit, seven hundred and eighty thousand shares, of the nominal amount of one hundred dollars each."

"18. Preferred stock of the old company, in respect of which three dollars gold for each share has been or may be paid, and common stock of the old company, in respect of which six dollars gold per share has been paid or may be paid, may be exchanged for the new stock, in paragraphs 13 and 14 mentioned, share per share, preferred for preferred, and common for common, without any liability to make any further payment in respect of such new stock: *Provided, however*, That such new stock, whether common or preferred, shall be issued and held in conformity with and subject to the trust for voting hereinafter mentioned.

"19. In addition to the new common and preferred stock, the parties of the first part shall also receive for the amount of such payments, as mentioned in the last preceding paragraph, noncumulative income bonds, without mortgage security, payable in gold, in London and New York, on the first day of June, 1977, and bearing interest from December 1, 1879, also payable in gold, in London and New York, at the rate of six per cent per annum, or at such lesser rate for any fiscal year as the net earnings of the company for that year, as declared by the board of directors and applicable for the purpose, shall be sufficient to satisfy; these bonds to have yearly coupons attached.

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"20. Preferred stock, in respect of which two dollars gold per share has been paid or may be paid, and common stock, in respect of which four dollars gold per share has been or may be paid, may be exchanged share for share, but in conformity with and subject to the said trust for voting, for new stock of like class, without any liability to make any further payment in respect of such new stock; but no income bonds or other obligation or security shall be issued or delivered in respect of such reduced payments.

"21. * * *; and all payments made or to be made in respect of old, preferred or common stock shall be deemed to be in consideration of the concessions and agreements made by the holders of the said first and second consolidated mortgage and gold-convertible bonds, the available funds resulting from such concessions being used for the improvement or increase of the property of the new Company.

"22. The stock of the new Company, both common and preferred, not required for exchange as above provided, may, with the consent of the parties of the first part, but not otherwise, be issued and disposed of by the Company for its own benefit, at such rates and upon such terms as to the said Company may seem proper. All moneys which have been or may hereafter be paid in respect of stock as above set forth, and which shall not be required for the purpose of carrying into execution this plan and agreement, shall be expended for the benefit of said new Company, or in the improvement or increase of its property, under the direction of the parties of the first part, and any balance not so expended shall be paid over to the said new Company."

The property and franchises in question were sold under decrees of foreclosure on the 24th of April, 1878, and were purchased by the trustees, subject to the before mentioned six mortgages. Immediately thereafter, on April 26, 1878, the purchasing committee and their associates organized the New York, Lake Erie and Western Railroad Company, in conformity with statutes providing for the reorganization of railroads sold under mortgage, and for the formation in such cases of new companies. Laws, N.Y. 1874, chap. 430; *Id.* 1876, chap. 446. The provisions of the before mentioned plan and agreement were set out in the articles of association. On the 9th of December, 1880, the board of directors submitted to shareholders and bondholders a report of the operations of the new Company for the fiscal year ending September 30, 1880, from which it appears that the gross earnings for that year were $18,698,108.86, while operating expenses were $11,643,925.35, leaving $7,049,183.51 as "net earnings from traffic." To this sum the report adds $783,956.65 "as earnings from other sources," making $7,833,140.16 as the total earnings for the year in question. From the last sum, $6,042,519.45 were deducted for "interest on funded debt, rentals of leased lines and other charges," leaving, in the language of the report, "a net profit from the operations of the year of $1,790,620.71." Referring to the latter sum, the report continues: "This amount, together with $787,119.34 received during the year from the assessments paid on the stock of the Erie Railway Company, has been applied to the building of double track, erection of buildings, providing additional equipment, acquiring and constructing docks at Buffalo and Jersey City, and to the addition of other improvements to the road and property."

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The theory of the present suit is that the sum of $1,790,620.71—ascertained to be the "net profit" derived from the operations of the Company for the fiscal year ending September 30, 1880, after paying operating expenses and fixed charges—constituted a fund applicable, primarily, to the payment of a 6 per cent dividend upon preferred stock. The use of that fund for any other purpose was, it is claimed, a breach of trust on the part of the Company and a violation of rights secured to preferred stockholders, both by the plan and agreement of December 14, 1877, and by the Company's articles of association. On the day the directors made their report to shareholders, they declared, by resolution, that in the then condition of the Company's property they did not "deem it wise or expedient to declare a dividend upon its preferred stock." It also clearly appears in evidence that the earnings for the year in question, after paying operating expenses and fixed charges, together with the amount realized from assessments paid on stock, were, in good faith, used in improving the Company's road and other property; that these improvements were in pursuance of a general plan marked out pending negotiations for reorganization; that the estimate of their extent and cost was made with reference to a general understanding that they would be commenced and carried to completion as rapidly as possible with money derived from assessments on stockholders, from concessions of interest by bondholders, from earnings of the Company, and from other sources; that the capacity of the

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Company to make earnings with less expense than formerly in proportion to service rendered and therefore its ability to earn the net profit which it did in 1880, was due to the bettered condition of the road and its equipment arising from these improvements, "thus, in the increase of traffic, and in the reduction of expenses, producing this result of $1,790,620.71." The testimony of Mr. Jewett, the president of the Company, which is uncontradicted by any evidence in the record, is that the use of that fund in the way in which it was applied was imperatively demanded by the interests as well of creditors, shareholders, and bondholders, as of the public. In answer to the question, whether these expenditures increased the earning capacity of the road and diminished relatively the expense of doing business, he said: "In my judgment, if these improvements had not been made, and most judiciously made, the Company could not have paid its fixed charges; *it would have again gone into bankruptcy and the entire interest of the stockholders been destroyed.*"

The court below adjudged, in effect, that the right to a dividend, for the year ending September 30, 1880, payable out of the "net profit" arising from the operations for that period, was absolutely secured to preferred stockholders both by the plan and agreement and by the articles of association. Such, it held, was the contract between the Company and the preferred stockholders, which the court was not at liberty to disregard. This, in our judgment, is an erroneous interpretation of both the agreement and the Company's charter. There is nothing in the language of either necessarily depriving the directors of the discretion with which managing agents of corporations are usually invested when distributing the earnings of property committed to their hands. As was said by the court, in *Clearwater* v *Meredith*, 1 Wall. 25, 40 [68 U. S. bk. 17, L. ed. 604, 608], "When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized." The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the Company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the Legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control.

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The claim of the appellees is based mainly on the thirteenth article of the agreement of 1877. It is contended that, as the noncumulative dividends to which preferred stockholders were entitled was "dependent on the profits of each particular year, as declared by the board of directors," the intention was to require the declaration and payment of a *dividend* in every year when it should be officially declared that there were net profits from the operations of that year.

It is not without significance that the words just quoted from the preliminary agreement for organization are omitted from that paragraph of the articles of association which, in obedience to the requirement of the statute (Laws, 1876, chap. 446, § 1, subd. 2), specifies the rights of each class of stockholders. That paragraph provides that the holders of preferred stock shall be entitled to "noncumulative dividends at the rate of 6 per cent per annum in preference to the payment of any dividend on common stock." The omission, in that connection, of the words "but dependent on the profits of each particular year, as declared by the board of directors," gives some force to the suggestion of counsel that the contemporaneous construction of those words by the parties was, that they conferred no such right upon preferred stockholders as they now claim. Independently of this view, we are of opinion that the contention of appellees is not sustained by a reasonable construction of the agreement. That instrument did, indeed, provide for preferred shareholders being paid a dividend of 6 per cent before any dividend was paid to common shareholders. But it was not intended to confer upon the former an absolute right to a dividend in any particular year, dependent alone on the fact, or the official ascertainment of the fact, that there were profits in that year, after paying operating expenses and fixed charges. The words of the thirteenth article "as declared by the board of directors" do not qualify the words "dependent on the profits for each particular year." They should rather be read in connection with the preceding words, "noncumulative dividends, at the rate of 6 per cent per annum, in preference to the payment of any dividend on the common stock." Preferred stockholders of the old company, receiving in exchange preferred stock in the new Company, did not thereby become creditors of the latter. Their payments on account of old stock were in consideration of the concessions and agreements made by bondholders. In certain circumstances they also received income bonds. They were stockholders in the old corporation, and they held that relation to the reorganized Company. What was stipulated to be paid to them as holders of preferred stock in the new Company was not a *debt*, payable in every event out of the general funds of the Corporation, but a *dividend*, "as declared by the board of directors," and payable out of such portion of the profits as should be set apart for distribution among shareholders; noncumulative, because, "dependent on the profits of each particular year," and not to be fastened on the profits of succeeding years. That the parties contemplated a declaration of a dividend, and not a mere statement of net profits during a designated period, is made evident by the requirement that "dividends" to preferred

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stockholders should be paid "in preference to the payment of any dividend on the common stock." This language is not consistent with the theory that the holders of preferred stock were entitled to 6 per cent thereon simply because there were profits, and irrespective of any declaration of a dividend. A declaration of profits, as, in itself, and without further action by the directors, entitling shareholders to dividends, is unknown in the law or in the practice of corporations. Dividends are "declared" by some formal act of the corporation; the question whether there are or are not profits being settled entirely by the accounts of the company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books.

A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. Indeed, there is some ground to contend that, according to appellees' interpretation of the charter, the directors were not at liberty, in any year when the current receipts were in excess of operating expenses, to pay even interest on funded debt, or rentals of leased lines, before paying a dividend on preferred stock. We are of opinion, that while the agreement of 1877 and the articles of association sustain the claim of preferred stockholders to a 6 per cent dividend in [307] advance of common stockholders, the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the Company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the Company's property and affairs as a whole. As the evidence shows that the profits for the year ending September 30, 1880, were applied to objects that were legitimate and proper, and as the condition of the Company was not such as to make the declaration of a dividend a duty upon the part of the directors, we perceive no ground upon which the claim of the appellees can be sustained.

Attention is called by counsel to the language of the nineteenth article of the plan and agreement of reorganization, as throwing some light on the true interpretation of the thirteenth article. We do not think that that article aids the contention of appellees. The noncumulative income bonds, provided for in the nineteenth article, were to bear 6 per cent interest, or such lesser rate, "for any fiscal year, as the net earnings of the Company for that year, as declared by the board of directors and applicable for the purpose, shall be sufficient to satisfy." So far from these words aiding the contention of appellees, they tend to show that the directors had the right to determine whether the condition of the Company did not require a reduction of the interest. Such, we think, is the meaning of the words "and applicable for the purpose." The applicability of net earnings for interest on such income bonds could only be determined by them.

A case very much resembling this is *St. John* v. *Erie R. Co.*, 22 Wall. 136, 147 [89 U. S. bk. 22, L. ed. 743-746]. Certain creditors of that company received preferred stock, in lieu of payment of their debts, under a clause of its charter providing that such stock should be entitled "to preferred dividends out of the net earnings of said road (if earned in the current year, but not otherwise), not to exceed 7 per cent in any one year, payable semi-annually, after payment of mortgage interest and de- [308] layed coupons in full." A preferred stockholder sought by suit to enforce full payment of his dividends from the net earnings, prior to any payment on account of new leases of roads, or of debts subsequently contracted for borrowed money used in the repair and equipment of the road, in paying rent on leased lines, and interest on the money so borrowed. The circuit court (10 Blatchf. 271) said: "What it (the stock) is entitled to is 'dividends,' and only 'dividends,' and they are of a defined and special character. It is entitled to nothing else. It has no privilege or priority by reason of being preferred stock, except in reference to stock that is not so preferred, that is, common stock. In reference to such common stock the preferred stock is entitled to its specified preferential dividends, and is not entitled to anything else in reference to anything." Upon appeal to this court it was held that the suit could not be maintained; that the takers of the preferred stock had abandoned their position as creditors and assumed that of stockholders, in which capacity they could claim dividends only when they were declared or should be declared; that they were only entitled to dividends out of the net earnings of the principal road and its adjuncts accruing in the current year; that, as the company had not agreed to be limited in the exercise of its faculties and franchises, it had the right to conduct its operations in good faith as it might see fit; and that the materials for the computation of its net earnings in any particular year were to be derived from all of its operations, viewing its business as a unit, and not from a part of its operations, or without reference to the necessary and legitimate purposes to which its current receipts might be applied for the benefit of all interested in the property. These principles were again applied in the analogous case of *Warren* v. *King*, 108 U. S. 389 [Bk. 27, L. ed. 769]. See also *Union Pac. R. R. Co.* v. *U. S.* 99 U. S. 402 [Bk. 25, L. ed. 274]; *Barnard* v. *Vermont & Mass. R. R. Co.* 7 Allen, 521; *Williston* v. *Mich. S. & N. I. R. R. Co.* 13 Allen, 400; *Chaffee* v. *Rutland R. R. Co.*, 55 Vt. 110; *Taft* v. *Hartford, P. & F. R. R. Co.* 8 R. I. 310; *Elkins* v. *Camden & Atlantic R. R. Co.* 36 N. J. Eq. 233; *Lockhart* v. *Van Alstyne*, 31 Mich. [309] 76; *Culver* v. *Reno Real Est. Co.* 91 Pa. 367.

The views we have expressed are not inconsistent with the adjudged cases upon which appellees' counsel chiefly rely. A brief reference to some of them will be sufficient. In *Dent* v. *London Tramway Co.* 16 Ch. Div. 344,

decided by *Sir George* Jessel, Master of the Rolls, at special term, the company increased its capital stock by an issue of shares of the same denomination as the prior shares, "bearing a preferential dividend of 6 per cent per annum over the present shares of the company, dependent upon the profits of the particular year only." There the question was whether the company was bound to pay preferred stockholders the amount of a dividend declared for the half year ending December 31, 1878, but which it has refused to pay, and also a dividend for the year 1879, which, it is to be inferred from the report of the case, ought to have been declared. The precise point determined is shown in these remarks of the court: "The argument of the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they, the company, are entitled to make good that deficiency by taking away the fund available for the preference shareholders, to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained. The company either have a right to recover back from the ordinary shareholders any sums overpaid, or not. If they have a right, they must recover them; if they have no right to recover them, *a fortiori* they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders."

It is scarcely necessary to say that the present case is entirely different from the one decided by the English court. No question was raised in the latter as to the authority and discretion of directors to use earnings for the improvement of the corporate property from year to year. In was, in effect, a contest simply between preferred and common stockholders. [310] The only point decided was that the payment of large sums of money to common stockholders, which should have been used in the repair of the tramway, was not a valid ground for refusing to pay preferred stockholders dividends to which they were entitled. To withhold dividends from preferred stockholders, in order to make good a deficiency caused by payments to common shareholders which ought not to have been made, was practically to destroy the right of preference. A different decision would have made the preferred shareholders pay what the company should have recovered from the common stockholders by suit.

The case of *Richardson* v. *Vermont & Mass. R. R. Co.* 44 Vt. 613, is also relied upon to support the decree below. There the question was as to the right to recover interest dividends on stock, to be paid in full at a specified date, if there was then sufficient money in the company's treasury. If there was not enough for that purpose, then as much should be paid as the amount in the treasury justified, the balance when the treasurer was able to make payment. The defense was that there was an adequate remedy at law and that the stock certificates were void. The certificates were held to be valid, the right to resort to equity was sustained, and the company was required to pay. The vital fact in that case distinguishing it from this one is that the company substantially admitted that it had funds applicable to the payment of the claims, if they should be held to be valid. Some of the general observations of the court seem to be in accord with the views we have expressed. "The mere fact," the court said, "of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient to show the ability of the corporation contemplated in the vote and certificates. That ability must consist of a fund adequate not only for the payment of the claims of the plaintiffs in the cause, but for the payment of all other stockholders having like claims; and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks and contingencies incident to the business of [311] operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders."

Our attention is also called to the case of *Bowdman* v. *L. S. & M. S. R. Co.* 84 N. Y. 157. But it has no direct bearing on the questions before us. It only decides that the dividends provided for in the contract there in question were not only to be preferred, but, being guarantied, were cumulative, and a specific charge upon the accruing profits, to be paid as arrears, before any other dividends were paid on the common stock. "The doctrine," said the court, "that preference shareholders are entitled to be first paid the amount of dividends guarantied, and of all arrears of dividends or interest, before the other shareholders are entitled to receive anything; and, although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority." It thus appears that that was a contest between preferred and common stockholders. No questions arose as to whether the company, under the circumstances, could or could not, in their discretion, have withheld a declaration of dividend.

Without further discussing the questions involved or suggesting other grounds upon which our conclusion might rest, we are satisfied that the complainants are not entitled to recover.

The decree is reversed and the cause is remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES H. HAPGOOD ET AL., *Appts.*, [226]

v.

HORACE L. HEWITT.

(See S. C. Reporter's ed. 226-234.)

Invention by employee—right of employer to use, after patent issued to employee—implied license of employer, not transferable.

Upon a bill filed by an assignee against a former employee of the assignor for the purpose of compelling the transfer of a patent for an article invented by the employee while at work for the as-

signor, and to enjoin any action at law or in equity for infringement, *held:*

1. That under the contract of employment the employee was not expressly required to exercise his inventive skill for the benefit of his employer, and that at best the employer had a mere license to use the invention.

2. That such a naked license did not pass by the employer's assignment.

3. That a court of equity would not interfere to enjoin a pending or threatened suit at law to which there existed a perfect legal defense.

[No. 88.]

Argued Nov. 10, 11, 1886. Decided Nov. 29, 1886.

APPEAL from the Circuit Court of the United States for the District of Indiana. *Affirmed.*

The case is stated by the court.

Messrs. **E. W. Pattison** and *Newton Crane,* for appellants:

1. Under the facts alleged in the amended bill the corporation of Hapgood & Company was the equitable owner of the patent issued to the defendant.

McClurg v. *Kingsland,* 1 How. 202 (42 U. S. bk. 11, L. ed. 102): *Wilkins* v. *Spafford,* 18 Pat. Off. Gaz. 675; *Whiting* v. *Graves,* 13 Pat. Off. Gaz. 455; *Continental Windmill Co.* v. *Empire Windmill Co.* 8 Blatchf. 295; *S. C.* 4 Fish. Pat. Cas. 428; *Gower* v. *Andrew,* 59 Cal. 119; *Grumley* v. *Webb,* 44 Mo. 444.

2. If the right which accrued to Hapgood & Company was only a license, that is sufficient to support the suit instituted by the trustees.

3. Such license is transmissible to the new corporation, the Hapgood Plow Company.

Brooks v. *Byam,* 2 Story, 525; Curt. Pat. 4th ed. 213; *Wilson* v. *Stolly,* 5 McLean, 1; *Goodyear* v. *Cong. Rubber Co.* 3 Blatchf. 449; *Goff* v. *Oberteuffer,* 3 Phil. 71.

4. Appellants have no adequate remedy at law, and the case as presented by the bill falls within the equity jurisdiction of the court.

1 Story, Eq. Jur. 669, 708; *Hartford* v. *Chipman,* 21 Conn. 488; *Barber* v. *Barber,* 21 How. 592 (62 U. S. bk. 16, L. ed. 229).

Messrs. **E. E. Wood** and **Edward Boyd,** for appellee.

[227] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the District of Indiana, by Charles H. Hapgood, James H. Hesse, and John Packer, trustees of Hapgood & Company, a dissolved Missouri corporation, and the Hapgood Plow Company, an Illinois [228] corporation, against Horace L. Hewitt. The main object of the suit is to obtain from Hewitt the transfer of letters patent granted to him for an invention. The defendant interposed a general demurrer to the bill, for want of equity. The circuit court sustained the demurrer and dismissed the bill (*Hapgood* v. *Hewitt,* 11 Biss. 184), and the trustees have appealed to this court.

The material allegations of the bill are as follows: The Missouri corporation was in existence from before August 1, 1873, to January 1, 1880, when it was dissolved. At the latter date the three trustees constituted its board of directors, and Hapgood was president. By virtue of the laws of Missouri, Hapgood and the other two persons became trustees of the corporation, with power to settle its affairs and recover the debts and property belonging to it. Hapgood was the president of the corporation during its entire existence, and had the control and management of its business. All the officers and employés were under his direction. He had power to hire and discharge all agents and employés of every grade, to determine the classes and kinds of goods that should be manufactured, and the general way in which the business should be conducted. The corporation employed a large number of manual laborers, and various employés of higher grades, among them a superintendent, a secretary, a foreman, and a traveling salesman, all of whom had charge of different departments, but were under the control and direction of the president as chief executive officer. The duties of the superintendent were to have general charge of the manufacturing department, subject to the discretion of the president, and to devise and get up such new devices, arrangements and improvements in the plows manufactured as should adapt them to the market, and as should be needed from time to time to suit the wants of customers. Shortly before August 1, 1873, Hewitt represented to the corporation that he was a man of large experience in mechanical pursuits; that he had been for several years immediately preceding engaged with Avery & Sons, plow manufacturers in Louisville, and had been since 1868 familiar with the manufacturing of plows and agricultural implements; that he had been instrumental in devising and getting up the best plows manufactured by Avery & Sons; that the most valuable improvements in the plows manufactured by them had been devised by him and adopted at [229] his suggestion and instigation; that since 1869 he had given his undivided attention to the manufacture of plows, and understood thoroughly the different kinds of plows in the market, and the classes of plows needed for the trade; and that he could and would give to any manufacturer who should secure his services the benefit of his experience in devising and making improvements in the plows manufactured. In consequence of these representations and relying upon them, the corporation employed Hewitt to devote his time and services to getting up, improving and perfecting plows and other goods, and to introducing the same; and, that he might be more fully identified with the corporation, he purchased one share of its stock, and was elected vice president. At some time in 1874, Hewitt increased his interest in the company by purchasing one half of the shares owned by the president. As a part of the same transaction, it was agreed between Hewitt and the corporation that from that date Hewitt should fill the position of superintendent of the manufacturing department, and as such, not only exercise a general supervision over that department, subject to the president, but also devote his time and services to devising improvements in, and getting up and perfecting, plows adapted to the general trade of the corporation. He accepted the position and held it until the fall of 1877, when his connection with the corporation ceased. He agreed, in such new position, to use his best efforts, and devote his knowledge and skill, in devising and making improvements in the plows manufactured by the corporation, and in getting up and perfecting plows and other

agricultural implements adapted to its trade. In view of the expected value of his services in this latter direction, the corporation was induced to pay him, and did pay him, a salary of $3,000 a year. It was manufacturing a plow known as a sulky or riding plow, so arranged that the plow was carried on a frame supported by wheels, and that the driver of the horses rode on the frame. Down to the year 1876 this sulky plow had a wooden frame. During that year it was thought desirable by the officers of [230] the corporation that a change should be made by the substitution of an iron frame for the wooden one The officers, including Hewitt, had frequent conversations during the winter of 1875-6 with reference to such change. In those conversations, and in personal conversations with Hewitt, the president stated that he was anxious to retain in the iron sulky all the essential features of the wooden sulky, so far as was consistent with the use of an iron frame, and suggested other features which he thought it important to adopt in the new plow; and Black, a salesman, urged the importance of having an iron axle of an arched form. As the result of these conversations and deliberations, Hewitt was early in the summer of 1876 directed by the president to proceed at once to devise and build an iron sulky plow according to the suggestions so made; that is, that he should retain in the new plow all the valuable features of the wooden sulky which the corporation had been manufacturing, should construct the plow of wrought and malleable iron, should adopt the other features suggested by the president and the arch suggested by Black, and should add such additional features as might seem advantageous to him, Hewitt. He was directed to proceed with the work without delay, so that the corporation might be ready to manufacture the new plow for the season of 1877. In accordance with those directions, Hewitt devised and constructed a sulky plow of wrought and malleable iron, and, after some delays, about the first of April, 1877, produced a plow satisfactory to the president. During all the time that he was engaged in devising and constructing the new plow, he was in the employ of the corporation, and drawing a salary of $3,000 a year. The time during which he was so engaged was the regular working hours in the factory. The men who did the manual labor on the new plow were all employés of, and paid by, the corporation; and all the materials used in its construction were bought and paid for by the corporation. The work, as it progressed, was under the general superintendence of Hewitt, but the work in the respective departments was also under the special superintendence of the respective foremen of those departments, who were also paid [231] by the corporation. During the whole time of the construction of the plow, it was understood by all the parties engaged therein, and by those at whose instance its construction was commenced, that it was being devised and constructed for the use and benefit of the corporation, and as a model for the future construction of sulky plows by it. After the plow was completed, and had been accepted by the president as satisfactory, the latter directed Hewitt to go to Chicago and have the necessary malleable castings made for the construction of plows after the model. Hewitt did so, obtaining at Chicago castings, molds, and other things necessary for the future building of plows after the model. During the time so spent, he was drawing his regular salary; and all his expenses, as well as the price of the models, castings and other things obtained by him, were paid by the corporation. During the time Hewitt remained in its employ, he never made any claim of property in any of the devices and improvements made or suggested by him in the new plow, and never stated or claimed that he was entitled to a patent on any of said improvements, or that he had any rights adverse to the corporation in any of said improvements or devices, and never, during the term of his employment, asserted any right to a patent in his own name for such improvements or devices, or any of them. After his connection with the corporation had ceased, and after he had made an arrangement with the president, whereby the latter bought back all his (Hewitt's) stock in the corporation, and after the corporation had been for many months, with the knowledge of Hewitt, engaged in the manufacture of such plows, Hewitt, on January 14, 1878, applied for a patent on the improvements in the plow, and on the 26th of March, 1878, a patent was granted to him, covering certain parts of the plow, being devices which had been theretofore used by the corporation with his knowledge and consent. After this patent was issued he for the first time claimed, as he has since claimed, that he had and has an exclusive right to manufacture such parts of the plow as are covered by the patent, and has threatened to enforce his rights under the patent as against the corporation, its representatives, successors and assigns, and to hold them liable in damages for any infringement of the same.

The bill also alleges that, in devising and [232] constructing the plow, Hewitt was only performing his duty as an employé of the corporation, and carrying out his contract with it; that he was doing only what he was hired and paid to do; that the result of his labors belonged to the corporation; that it became, in equity and good conscience, the true and rightful owner of the right to manufacture the plow; that, if there is any part thereof which is patentable, the patent belonged to the corporation as equitable assignee of Hewitt; and that he was and is bound, in equity and good conscience, to make an assignment of the patent to the corporation or to its trustees.

The bill also alleges that upon the dissolution of the corporation of Hapgood & Company, the stockholders thereof organized another corporation, under the laws of Illinois, under the name of the Hapgood Plow Company, one of the plaintiffs; that the Hapgood Plow Company succeeded to the business of the prior corporation and became, by assignment from it, the owner of all the latter's assets, whether legal or equitable, including the rights in the patent issued to Hewitt, which such prior corporation had or was entitled to, whether legal or equitable, and its right to manufacture a sulky plow in accordance with the model plow made by Hewitt, including all the devices covered or claimed to be covered by the patent; and that all the rights in the premises which the prior corporation had

erty, as we said on a former occasion, that its tribunals can inquire into the nonresident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the nonresident possesses no property in the State, there is nothing upon which its tribunals can act. *Pennoyer* v. *Neff*, 95 U. S. 723 [Bk. 24, L. ed. 569]. They cannot determine the validity of any demand beyond that which is satisfied by the property. For any further adjudication the defendant must be personally served with citation or voluntarily appear in the action. The laws of the State have no operation outside of its territory, except so far as may be allowed by comity; its tribunals cannot send their citation beyond its limits and require parties there domiciled to respond to proceedings against them; and publication of citation within the State cannot create any greater obligation upon them to appear. *Id.* p. 727 [570]. So, necessarily, such tribunals can have no jurisdiction to pass upon the obligations of nonresidents, except to the extent and for the purpose mentioned.

This doctrine is clearly stated in *Cooper* v. *Reynolds*, 10 Wall. 308 [77 U. S. bk. 19, L. ed. 931], where it became necessary to declare the effect of a personal action against an absent party without the jurisdiction of the court, and not served with process or voluntarily appearing in the action, and whose property was attached, and sought to be subjected to the payment of the demand of the resident plaintiff. After stating the general purpose of the action and the inability to serve process upon the defendant, and the provision of law for attaching his property in such cases, the court, speaking by *Mr. Justice* Miller, said: "If the defendant [189] appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." *Id.* p. 318 [932].

To this statement of the law may be added what, indeed, is a conclusion from the doctrine that whilst the costs of an action may properly be satisfied out of the property attached, or otherwise brought under the control of the court, no personal liability for them can be created against the absent or nonresident defendant; the power of the court being limited, as we have already said, to the disposition of the property, which is alone within its jurisdiction.

The pleadings in the case in which judgment was rendered for costs against Alderson are not before us. We have only the formal judgment, from which it should seem that the action was to recover an undivided interest in the property, and then to obtain a partition of it, and have [190] that interest set apart in severalty to the plaintiffs—a sort of mixed action to try the title of the plaintiffs to the undivided half of the property, and to obtain a partition of that half. Such action, though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property. The service of citation by publication may suffice for the exercise of the jurisdiction of the court over the property so far as to try the right to its possession, and to decree its partition; but it could not authorize the creation of any personal demand against the defendant, even for costs which could be satisfied out of his other property.

The judgment is for all the costs in the case, and no order is made that they be satisfied out of the property partitioned. Had satisfaction been thus ordered, no execution would have been necessary. The execution, also, is general in its direction, commanding the sheriff to make the costs out of any property of the defendant.

The judgment, as far as the costs are concerned, must therefore be treated as a judgment *in personam*, and, for the reason stated, it was without any binding obligation upon the defendant; and the execution issued upon it did not authorize the sale made, and, of course, not the deed of the sheriff. Were the conclusion otherwise, it would follow, as indeed it is claimed here, that a joint owner of real property might sue a nonresident cotenant for partition, and, having had his own interest set apart to himself, proceed to sell out on execution the interest of his cotenant for all the costs.

The judgment of the court below must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[152] HIRAM M. FRENCH, *Plf. in Err.*,

v.

ASSYRIA HALL.

See S. C. Reporter's ed. 152-155.)

Attorney may testify for client—discretion as to admission of testimony—practice.

1. The attorney of a party prosecuting or defending in a civil action may testify on behalf of his client.
2. It is error to reject testimony on an illegal ground, when such refusal deprives the party offering it of the exercise of the discretion of the court as to its reception when offered.
3. It *seems* that testimony of an admission by the defendant may be competent on rebuttal, especially to discredit him as a witness by proof of a contradictory statement made at another time and place.

[No. 628.]

Submitted Nov. 8, 1886. Decided Nov. 29, 1886.

IN ERROR to the Circuit Court of the United States for the District of Colorado. *Reversed.*

Messrs. **Amos Steck** and **M. B. Carpenter**, for plaintiff in error:

A witness cannot be excluded merely because his testimony is to be given in behalf of his client.

Potter v. *Inhab. of Ware*, 1 Cush. 519; *Chaffee* v. *Thomas*, 7 Cow. 358; *Newman* v. *Bradley*, 1 Dall. 240 (1 U. S. bk. 1, L. ed. 118); *Miles* v. *O'Hara*, 1 Serg. & R. 32; *Geisse* v. *Dobson*, 8 Whart. 34; *Slocum* v. *Newby*, 1 Murph. 423; *Reid* v. *Colcock*, 1 Nott & McC. 592; *Chadwick* v. *Upton*, 3 Pick. 442; *Jones* v. *Savage*, 6 Wend. 658; *Commonwealth* v. *Moore*, 5 J. J. Marsh. 655; *Brandigee* v. *Hale*, 13 Johns. 125; *Robinson* v. *Dauchy*, 3 Barb. 20; *Little* v. *McKeon*, 1 Sandf. 607.

The attorney was offered as a witness to contradict the defendant. The evidence was offered to impeach the defendant. He could not be impeached until he had testified. The plaintiff could not tell beforehand that Hall would deny having told the attorney. The testimony was proper in rebuttal. It was not cumulative to the testimony of the plaintiff.

Fain v. *Cornett*, 25 Ga. 184; *Yeaton* v. *Chapman*, 65 Me. 126.

Mr. **Edward O. Wolcott**, for defendant in error:

The reason for the refusal to listen to the testimony of the counsel as witness is not material. The plaintiff was not entitled to introduce this evidence at this stage of the trial. It was a part of his evidence in chief. This is apparent from the nature of the issue tried. The action was based upon a parol promise to pay. Evidence of the admission of the defendant that he had made such promises was as much a part of plaintiff's affirmative case as any other evidence which might properly be given upon that subject. The court so held in deciding the motion for a new trial. The question is fairly presented whether the discretion which is vested in the trial court, as to the order of proof and the conduct of the trial, may be reviewed by this court, in the absence of any fact or circumstances tending to show either that this discretion was abused or its exercise refused.

Phil. & Tren. R. R. Co. v. *Stimpson*, 14 Pet. 448 (39 U. S. bk. 10, L. ed. 535); *Johnston* v. *Jones*, 1 Black, 210 (66 U. S. bk. 17, L. ed. 117).

Mr. Justice **Matthews** delivered the opinion of the court: [153]

The plaintiff in error, who was plaintiff below, a citizen of Massachusetts, brought his action at law in the Circuit Court of the United States for the District of Colorado, against the defendant in error, to recover for the value of services alleged to have been performed by him for the defendant, as a broker, in reference to the sale of certain mining property in which the defendant was interested. There was a general denial by the answer of the defendant, and the cause was submitted to a jury upon the issue joined. The record shows that on the first trial there was a verdict in favor of the plaintiff for $5,000, which, on a motion for a new trial, was set aside on payment of costs. Thereupon, at a subsequent term, the cause came on again for trial by jury, and there was a verdict for the defendant, and judgment rendered thereon, to reverse which is the object of the present writ of error.

It appears from the bill of exceptions taken on the second trial that the plaintiff, to maintain the issue on his part, gave evidence tending to prove that the defendant, Hall, promised to pay him $5,000 for his services in assisting the defendant to make sale of certain mining property in which he was interested. The defendant, to maintain the issue on his part, gave evidence tending to prove that he never promised to pay the plaintiff any sum whatever. The defendant, while on the stand as a witness, on cross examination, testified that he never told anyone that he promised to pay the plaintiff the sum of $5,000, and further testified that he never told the attorney of the plaintiff, Mason B. Carpenter, that he promised to pay the plaintiff the sum of $5,000. The plaintiff in [154] rebuttal offered as a witness the said attorney, Mason B. Carpenter, who was the sole attorney of plaintiff in conducting the trial of said cause, and who offered to testify that the defendant, Hall, had told him, the said Carpenter, that at a certain time and place he, the defendant, promised to pay the plaintiff, French, the sum of $5,000.

The court refused to allow the said Carpenter to be sworn as a witness for the plaintiff because he was acting as an attorney for the plaintiff in conducting the trial of the cause; to which ruling the counsel for the plaintiff excepted.

It further appears from the bill of exceptions that afterwards, upon a motion for a new trial, the court said that the said Carpenter was in fact competent to testify as a witness for the plaintiff, but that his testimony was not offered at the proper time; that the testimony of the witness Carpenter was receivable only in chief and upon the plaintiff's opening, and not in rebuttal; and that this being the second trial of the cause, the plaintiff was not surprised by the testimony of the defendant, Hall, and it was his duty to give in chief and in his opening all evidence as to admissions by the defendant, as well as other matters. For this reason the motion for a new trial was denied.

The question for consideration is whether the court erred in its ruling in not permitting the examination of the plaintiff's attorney as a

witness on the plaintiff's behalf. It appears from the bill of exceptions that no objection was made to the examination of the witness by the defendant; the refusal to allow him to be sworn seems to have emanated from the court *sua sponte*, on the ground that he was acting as an attorney for the plaintiff in conducting the trial of the cause. There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong. Such seems, also, to have been the more deliberate opinion of the circuit court in this case, as it appears from the bill of exceptions that the refusal to grant a new trial for the alleged error in its ruling was justified, not on the ground that the witness was incompetent, but that his testimony was not offered at the proper time, being receivable only in chief upon the plaintiff's opening, and not in rebuttal.

[155]

This reason might have applied if the object of the testimony had been merely to prove an admission on the part of the defendant, and the offer had been rejected on that ground at the time, although it would be a strict application of the rule to require the plaintiff to assume in advance that the defendant would deny as a witness the truth of the plaintiff's case. But aside from that, the testimony seems to have been competent in rebuttal as proof of a contradictory statement made by the defendant at another time and place, with a view to discrediting him as a witness. However that may be, and admitting that the testimony offered was strictly competent only in chief, nevertheless it was a matter of discretion with the court at the time of the trial whether the testimony should be admitted when offered after the defendant had testified. The plaintiff was entitled to the exercise of that discretion on the part of the court at that time, which in the present case he was deprived of by the ruling of the court rejecting the offer of the testimony on another and an illegal ground. We are of the opinion that the court erred to the prejudice of the plaintiff in this respect.

The judgment of the Circuit Court is therefore reversed and the cause remanded, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[149]

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*,

v.

COLUMBUS ROLLING MILL COMPANY.

(See S. C. Reporter's ed. 149-152.)

Sales—offer to sell—qualified acceptance, a rejection—subsequent tender of acceptance does not revive offer—submission of question of law to jury.

1. An offer to sell imposes no obligation on either party until accepted according to its terms.
2. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and ends the negotiation, unless the offer is renewed, or the proposed modification accepted.
3. An offer which has been rejected cannot be revived by the tender of an acceptance of it.
4. The submission of a question of law to the jury is no ground of exception if they decide it aright.

[No. 43.]

Argued and submitted Nov. 12, 1886. Decided Nov. 29, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action by a railroad corporation established at Minneapolis in the State of Minnesota against a manufacturing corporation established at Columbus in the State of Ohio. The petition alleged that on December 19, 1879, the parties made a contract by which the plaintiff agreed to buy of the defendant, and the defendant sold to the plaintiff, two thousand tons of iron rails of the weight of fifty pounds per yard, at the price of $54 per ton gross, to be delivered free on board cars at the defendant's rolling mill in the month of March, 1880, and to be paid for by the plaintiff in cash when so delivered. The answer denied the making of the contract. It was admitted at the trial that the following letters and telegrams were sent at their dates, and were received in due course by the parties, through their agents:

December 5, 1879. Letter from plaintiff to defendant. "Please quote me prices for 500 to 3,000 tons 50-lb. steel rails, and for 2,000 to 5,000 tons 50-lb. iron rails, March, 1880, delivery."

December 8, 1879. Letter from defendant to plaintiff: "Your favor of the 5th inst. at hand. We do not make steel rails. For iron rails, we will sell 2,000 to 5,000 tons of 50-lb. rails for fifty-four ($54.00) dollars per gross ton for spot cash, F. O. B. cars at our mill, March delivery, subject as follows: In case of strike among our workmen, destruction of or serious damage to our works by fire or the elements, or any causes of delay beyond our control, we shall not be held accountable in damages. If our offer is accepted, shall expect to be notified of same prior to Dec. 20, 1879."

[150]

December, 16, 1879. Telegram from plaintiff to defendant: "Please enter our order for twelve hundred tons rails, March delivery, as per your favor of the eighth. Please reply."

December 16, 1879. Letter from plaintiff to defendant: "Yours of the 8th came duly to hand. I telegraphed you to-day to enter our order for twelve hundred (1200) tons 50-lb. iron rails for next March delivery, at fifty-four dollars ($54.00) F. O. B. cars at your mill. Please send contract. Also please send me templet of your 50-lb. rail. Do you make splices? If so, give me prices for splices for this lot of iron."

December 18, 1879. Telegram from defendant to plaintiff, received same day: "We cannot book your order at present at that price."

December 19, 1879. Telegram from plaintiff to defendant: "Please enter an order for two thousand tons rails, as per your letter of the sixth. Please forward written contract. Reply." [The word "sixth" was admitted to be a mistake for "eighth."]

December 23, 1879. Telegram from plaintiff to defendant: "Did you enter my order for two thousand tons rails, as per my telegram of December nineteenth? Answer."

After repeated similar inquiries by the plaintiff, the defendant, on January 19, 1880, denied the existence of any contract between the parties.

The jury returned a verdict for the defendant, under instructions which need not be particularly stated; and the plaintiff alleged exceptions, and sued out this writ of error.

[151] *Messrs.* **Eppa Hunton,** *C. N. Olds* and *L. J. Critchfield,* for plaintiff in error.

Mr. **Richard A. Harrison,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Eliason* v. *Henshaw,* 4 Wheat. 225 [17 U. S. bk. 4, L. ed. 556]; *Carr* v. *Duval,* 14 Pet. 77 [39 U. S. bk. 10, L. ed. 361]; *Nat. Bank* v. *Hall,* 101 U. S. 43, 50 [Bk. 25, L. ed. 822, 825]; *Hyde* v. *Wrench,* 3 Beav. 334; *Fox* v. *Turner,* 1 Bradw. 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. *Bost. & M. R. R.* v. *Bartlett,* 3 Cush. 224; *Dickinson* v. *Dodds,* 2 Ch. Div. 463.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December [152] 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendant's offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright *Pence* v. *Langdon,* 99 U. S. 578 [Bk. 25, L. ed. 420].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON, *Plff. in Err.* [176]

v.

EDWARD SALLINGER.

(See S. C. Reporter's ed. 176-184.

Municipal bonds—purchase of building for court house—change of site—construction of Statutes of North Carolina.

1. Section 8, chapter 20, Laws of North Carolina of 1868, providing that the site of a county building already located can only be changed by the unanimous vote of the board of county commissioners, does not invalidate bonds issued in pursuance of a majority vote, to pay for a building which had been previously leased for use as a court house, the county court house located elsewhere having been destroyed by fire.

2. The Act of February 27, 1877, providing that the board of county commissioners shall not have power to purchase real estate without the concurrence of a majority of the justices of the peace of the county, applies only to such officers as are chosen thereafter.

[No. 35.]

Argued Nov. 10, 1886. Decided Nov. 29, 1886

IN ERROR to the Circuit Court of the United States for the Eastern District of North Carolina. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **C. M. Busbee,** for plaintiff in error.

Messrs. **S. F. Phillips** and *John W. Hinsdale,* for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [177]

The object of this writ of error is to reverse a judgment rendered against the plaintiff in error on five obligations in writing, for $1,000 each, of like tenor, as follows, to wit:

"OFFICE OF THE BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON, N. C.

"No. 19.

"Twelve months after date, with interest from date at the rate of six per centum per annum, the Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or to his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said County in the purchase of brick building for court house.

"This first day of October, 1877.

"J. G. AUSBON, [SEAL.]

"*Chairman of the Board of Commissioners of Washington County.*

"Countersigned,

"W. H. STUBBS,

"*Register of Deeds and Clerk of said Board.*"

The plaintiff below was a purchaser for value before due, and without notice of any defense. His right to recover was denied on the ground that, under the circumstances, the Board of Commissioners of Washington County had no authority of law for making and issuing the obligations sued on.

It appears from the bill of exceptions that the court house of Washington County was destroyed by fire in the spring of 1872; that in the following August the defendants, the County Commissioners, rented the building for the purchase of which the bonds sued on were afterwards issued, which is situated about 200 yards from the court house which was destroyed by fire, in the Town of Plymouth, and, before the succeeding fall term of the superior court, gave notice, by public advertisement for thirty days, declaring the house so rented to be the public court house of Washington County; and that courts were held continuously therein until the commencement of the action.

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The defendant offered in evidence a copy of the proceedings, as recorded, of a special meeting of the Board of County Commissioners of Washington County, held on the first Monday in October, 1877, at which the whole number of five were present. The transcript of the proceedings of that meeting sets out a paper addressed to the Board of Commissioners of Washington County, signed by eight justices of the peace, requesting that body at its next meeting, to contract "for the purchase of the brick store and lot in Plymouth, lately the custom house, for the use of the County of Washington for a court house, paying for the same the bonds of the County, bearing six per cent interest; payable at one, two, three, four and five years, with interest from date, at price of five thousand dollars, or five bonds of one thousand dollars each, at the rate of interest due as aforesaid, as we have here reconsidered.

"Plymouth, N. C., September 24, 1877."

It was thereupon moved and seconded that a vote of the board be taken on the purchase of the brick building then used as a court house. Whereupon three votes were cast for said purchase and one vote against it. The record of the proceedings of the meeting then contains the following:

"Whereas, the court house of the County of Washington, with the offices for the preservation of the public records and for the transaction of the public business, were destroyed by fire in the month of May, 1872, and it is absolutely necessary that the County shall own a court house, with suitable offices wherein the public records may be safely kept, and wherein the officers of the court and the County can conveniently transact the public business, and this board declare that it is inexpedient longer to occupy a rented house for these purposes, and whereas, Louis M. Hornthal, of the City of New York, has offered to sell to this Board of Commissioners for said County the water part of lot numbered one hundred and forty-nine, situated in the Town of Plymouth in said County so numbered upon the plat or plan of said town, known as the custom house property, fronting fifty feet upon Water Street and extending to the river, including the wharf upon the same, with the brick house forty feet wide, sixty feet long, of three stories in height, with basement or cellar, at the price of five thousand dollars, to be secured by the bonds of the Board of Commissioners, payable in five equal annual installments, bearing interest at the rate of six per centum per annum, and agree to execute title to the same upon payment of the purchase money and interest, and to execute to this board a bond, with surety, to perform this agreement; and whereas a majority of the justices of said County have in writing directed this Board of County Commissioners to accept the offer of the said L. M. Hornthal, and to make the purchase of said property upon the terms named:

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"It is ordered by this board, a majority of said justices concurring, that James G. Ausbon, chairman of this board, contract with the said L. M. Hornthal, through his agent, L. H. Hornthal for the purchase of said property; that he take from the said L. M. Hornthal his bond, with surety as above provided, and that he execute, as chairman of this board, five bonds, each for one thousand dollars, payable severally first October, 1878, 1879, 1880, 1881, 1882, bearing six per centum interest; that he cause the same to be countersigned by the clerk of this board, who is the register of deeds for this County, and that the seal of his office be attached. (Signed) J. G. Ausbon, Chairman."

The transcript of the record of the proceedings of a special meeting of the Board of County Commissioners, held on the first Monday, November 5, 1877, was also put in evidence, wherein it appeared as follows: J. G. Ausbon, as chairman, reported in writing, "that in obedience to the order of this board proposed on the first day of October, 1877, he accepted the bond of L. M. Hornthal, of the City of New York, in the penal sum of ten thousand dollars, with justified surety, conditioned to execute title to this Board of County Commissioners for the brick store and lot in Plymouth, known as the custom house, upon payment of the purchase money, and that under said order he executed to him five bonds, each for one thousand dollars, dated the first day of October, 1877, bearing six per cent interest from date, payable at one, two, three, four, and five years from date, which were countersigned by the clerk of this board, and sealed with the seal of his office as register of deeds, and that he has caused the said title bond to be proved and registered."

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It was thereupon ordered that the report be adopted, and that the action of the chairman in the premises be in all respects confirmed and

approved. All the commissioners were present at this meeting.

Upon this state of case, the court directed the jury that the plaintiff was entitled to recover, and there was verdict and judgment accordingly.

It is now contended by the plaintiff in error that the ruling of the court and the judgment rendered in pursuance thereof, are erroneous on two grounds: First, that by the laws of North Carolina in force at that time, and applicable to the transaction, the Commissioners of the County had no power to change the site of the county court house, unless authorized to do so by a unanimous vote of all the members of the board at their September meeting, and after a notice of the proposed change, specifying the new site, published in a newspaper printed in the County, and posted in one or more public places in every township in the County for three months next immediately preceding the annual meeting at which the final vote on the proposed change was to be taken; and upon that point cites the Laws of North Carolina, 1868, chap. 20, § 8, subsec. 3; and Battle's Revisal, 1873, chap. 27, § 8, subsec 8. Second, that the Board of Commissioners did not have the power to make the contract in question, and the bonds in pursuance and execution of the same, "without the concurrence of a majority of the justices of the peace sitting with them," in pursuance of section 5 of the Laws of North Carolina of 1876-1877, chap. 141. [181]

The Statute of North Carolina referred to in support of the first assignment of error is the Act of 1868, chap. 20. It provides for the organization and government of counties, and enacts that every county is a body politic and corporate, and has the powers specified by statute or necessarily implied in such a body, which can only be exercised by the board of commissioners or in pursuance of a resolution adopted by them. Among its general powers enumerated is, "To purchase and hold land within its limits, and for the use of its inhabitants, subject to the supervision of the General Assembly." The board of commissioners of each county are required to hold a regular meeting at the court house on the first Mondays of September and March of each year. They are expressly authorized "To purchase real property necessary for any public county building, and for the support of the poor, and to determine the site thereof where it has not been already located;" also, to locate the necessary county buildings, and to raise, by tax upon the county, the money necessary for their erection. Subdivision 8 of section 8 of the statute is as follows: "To remove or designate a new site for any county building; but the site of any county building already located shall not be changed unless by a unanimous vote of all the members of the board at the regular September meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there be one, and posted in one or more public places in every township in the county for three months next immediately preceding the annual meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the General Assembly."

It is for want of conformity to the directions of this clause that it is contended that the proceedings of the County Commissioners of Washington County, in the purchase of the court house building which constitutes the consideration for the obligations in suit, are illegal. We are of opinion, however, that the provisions of that subsection do not apply to the circumstances of the present case. The language of the law is limited to the removal or designation of a new site for an existing county building, and cannot be applied to a case such as the present, where the court house has been destroyed by fire. It was the duty of the commissioners, after the destruction of the existing court house, to provide a place where the courts could be held and a building suitable for the purpose. The renting of a building in another locality cannot be considered as a removal or designation of a new site for the county building already located. Where a county building has been destroyed by fire, its site cannot be said any longer to exist as a location. A literal adherence, as required by the argument for the plaintiff in error, to the terms of the section in its application to this case leads to a necessary absurdity; for the regular September meeting, at which the unanimous vote of the board must be given, which it is contended is a necessary condition precedent to the validity of the transaction, is required to be held at the court house, but, according to the circumstances of this case, there was no court house at which any such meeting could be held. By the terms of the law the county commissioners have power to designate the site of any county building not already and previously located, and the terms of the subsection relied on apply, we think, only to the case where it is a naked proposition to abandon one building, then in use for county purposes, and to establish another one in another site for the same purpose. [182]

In the present case, also, if there was any change in the site of the county building, it took place immediately after the destruction by fire of the old one, when the premises subsequently purchased were leased by the commissioners and occupied as a county court house. This had been done five years previously. In the meantime the occupancy of the place in question as a court house had been public and notorious, so that, we think, it may be considered at the time when the purchase of the property was made that the site for a county court house had been already established. The change of title from that of lessee for a term of years to an ownership in fee by reason of the purchase was not a change of the site of a county building. It, therefore, does not come within the prohibition relied on. [183]

As to the second assignment of error, reliance is had upon an Act to establish county governments, ratified February 27, 1877, Laws N. C. 1876-1877, chap. 141, p. 226. That was a statute which enacted a new mode of governing counties. It provided in section 4 that justices of the peace should be elected by the General Assembly; and the General Assembly, it was provided, at its then present session, should elect three justices of the peace for each town-

ship in the several counties of the State, to be divided into three classes, and hold their offices for the terms of two, four, and six years respectively; but the successor of each class, as his term expired, should be elected by the General Assembly for the term of six years. It was also provided that the terms of those elected at the then present session of the General Assembly, should begin at the expiration of the terms for which the justices of the peace then in office had been elected, and not before. Section 5 enacted that justices of the peace for each county, on the first Monday in August, 1878, and, on the first Monday in August every two years thereafter, should assemble at the court houses of their respective counties, and, a majority being present, should proceed to the election of not less than three, nor more than five, persons to be chosen from the body of the county, including the justices of the peace, who should be styled the board of commissioners for the county, and hold their offices for two years from the date of their qualification, and until their successors should be elected and qualified. Those elected on the first Monday in August, 1878, were to enter upon the duties of their office immediately upon the expiration of the term for which the board of county commissioners then in office had been elected, and not before. The same section contained the following proviso: "*Provided however*, That the board of commissioners shall not have power to levy taxes, to purchase real property, to remove or designate new sites for county buildings, to construct or repair bridges the cost whereof may exceed five hundred dollars, or to borrow money for the county, nor alter or make additional townships, without the concurrence of a majority of the justices of [184] the peace sitting with them; and for the purposes embraced in this proviso the justices of the peace of the county shall meet with the board of commissioners on the first Monday in August, one thousand eight hundred and seventy-eight, and annually thereafter, unless oftener convened by the board of commissioners, who are hereby empowered to call together the justices of the peace, when necessary, not oftener than once in three months; but for such services the justices of the peace shall receive no compensation."

The next section of the statute provided that the board of commissioners so elected should have and exercise the jurisdiction and powers vested in the board of commissioners then existing.

It is quite evident, we think, that the proviso to section 5, which is relied upon as prohibiting the exercise of the powers specified, except in conjunction with the justices of the peace sitting with the board of commissioners, applies only to those commissioners who should be chosen thereafter under the provisions of that Act, the first election under which could not occur prior to the first Monday in August, 1878; and that those then elected could not enter upon the duties of their offices until after the expiration of the term for which the existing boards of county commissioners then in office had been elected. The limitations upon the powers of the commissioners under that statute cannot be construed as affecting the powers of the boards of commissioners in office at the date of this transaction, which was in the year 1877. The Act of February 27, 1877, therefore, has no application to this case.

There is, therefore, no error in the record, and the judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CONTINENTAL LIFE INSURANCE COMPANY OF HARTFORD, CONN., [237]

Plf. in Err.,

v.

ANN ELIZA RHOADS, Admrx. of MARIS RHOADS, Deceased.

(See S. C. Reporter's ed. 237-240.)

Jurisdiction of circuit court—jurisdictional facts must appear on face of record—citizenship—action by administratrix—amendment of record.

1. The facts on which the jurisdiction of the circuit court rests must, in some form, appear on the face of the record.
2. Where, in an action by an administratrix, the jurisdiction of the court depends on the citizenship of the parties, it is not sufficient that the citizenship of the intestate appears, or that it appears in what State the letters of administration were granted.
3. The record cannot be amended in this court to show the citizenship of the plaintiff, but the court below may in its discretion allow it to be so amended when the case gets back.

[No. 33.]

Argued Nov. 9, 10, 1886. Decided Nov. 29, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The case is stated by the court.

Mr. **Samuel C. Perkins**, for plaintiff in error.

Messrs. F. C. Hooton and **R. T. Cornwell**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [239]

One of the errors assigned on this record is that the circuit court had no jurisdiction. It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rest must, in some form, appear on the face of the record of all suits prosecuted before them. *Turner* v. *Bank of N. A.* 4 Dall. 8 [4 U. S. bk. 1, L. ed. 718]; *Bushnell* v. *Kennedy*, 9 Wall. 387 [76 U. S. bk. 19, L. ed. 786]; *Hornthall* v. *Collector*, 9 Wall. 565 [76 U. S. bk. 19, L. ed. 562]; *Ex parte Smith*, 94 U. S. 455 [Bk. 24, L. ed. 165]; *Robertson* v. *Cease*, 97 U. S. 646 [Bk. 24, L. ed. 1057]; *Grace* v. *Am. Cent. Ins. Co.* 109 U. S. 283 [Bk. 27, L. ed. 934]; *Börs* v. *Preston*, 111 U. S. 255 [Bk. 28, L. ed. 420]; *Mansfield, C. & L. M. R. R. Co.* v. *Swan*, 111 U. S. 379 [Bk. 28, L. ed. 463]; *Hancock* v. *Holbrook*, 112 U. S. 229 [Bk. 28, L. ed. 714]. And it is error for a court to proceed without its jurisdiction is shown. *Grace* v. *American Cent. Ins. Co. supra; Thayer* v. *Life Asso.* 112 U. S. 717 [Bk. 28, L. ed. 864]; *Mansfield R. Co.* v. *Swan, supra.*

It is conceded that the jurisdiction in this case depends alone on the citizenship of the parties, and that there is not in the declaration any averment in express terms of the citizenship of

the plaintiff. It does appear that the defendant was, at the commencement of the suit, a citizen [240] of Connecticut, and that the intestate, Maris Rhoads, was at the time of his death a citizen of Pennsylvania; but there is nothing to show the citizenship of the plaintiff, and the jurisdiction depends on her citizenship, and not on that of her intestate. *Amory* v. *Amory*, 95 U. S. 186 [Bk. 24, L. ed. 428]. It is true that the record does show that letters of administration were granted to her in Pennsylvania, but that does not make her a citizen of that State. It may be that by the law of Pennsylvania the personal representative of a deceased citizen of Pennsylvania is, in contemplation of law, resident within the State, and at all times amenable to the jurisdiction of the proper courts of that State; but that does not necessarily imply citizenship of the State. He must be there for the purposes of his administration, but that is all. And, besides, the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively. *Brown* v. *Keene*, 8 Pet. 112 [33 U. S. bk. 8, L. ed. 885]; *Robertson* v. *Cease*, *supra*. If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the court below may, in its discretion, allow it to be done when the case gets back. *Morgan's Exr.* v. *Gay*, 19 Wall. 81 [86 U. S. bk. 22, L. ed. 100]; *Robertson* v. *Cease*, *supra*.

It is not necessary to consider any of the other assignments of error.

The judgment of the Circuit Court is reversed and the cause remanded for further proceedings.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[259] G. D. NEWHALL, *Appt.*,

v.

E. J. LEBRETON, Admr. of THEODORE LEROY, Deceased, VICTOR LEROY ET AL., Heirs at Law of THEODORE LEROY, Deceased.

(See S. C. Reporter's ed. 259-265.)

Decree of the court below, affirmed upon the evidence.

Where, from the general language used in a deed of trust, it became necessary for the plaintiff to resort to parol evidence to show that his claim was included within those protected by the trust, it was competent for the defendant to show by parol evidence that it was the intention of the parties to the instrument to apply the proceeds from the sale of the trust property to the reimbursement of the trustee, for all advances and payments made, and expenses incurred, by him, before paying the claim of the plaintiff. The plaintiff below, appellant here, brought this complaint, alleging that the defendant received certain property in trust to pay $446,849, of which sum $49,000 was due to plaintiff's assignors, and the remaining sum to the trustee. It did not appear from the terms of the deed of trust, whether the $49,000, was included in the gross sum named in the deed of trust as protected by the deed. It became necessary for plaintiff to establish this fact by parol evidence, and such evidence being introduced, the defendant was then allowed to show by parol proof that advances made by the trustee, debts assumed by him, and expenses incurred were to be first paid out of the sum realized on the sale of the trust property, and that such sum had not been sufficient to discharge such preferred claims. Upon this proof the Circuit Court of the United States, to which the cause was removed from the Superior Court of the State of California for the City and County of San Francisco, dismissed the bill, from which decree this appeal was taken. The appellee was appointed administrator of the estate of the defendant, who died after the appeal, and entered his appearance.

[No. 24.]

Argued and submitted Nov. 2, 1886. Decided Nov. 29, 1886.

APPEAL from the Circuit Court of the United States for the District of California. *Affirmed.*

Messrs. **Henry Beard** and **Charles H. Armes**, for appellant:

Under the Statutes of California, trusts in relation to real estate arise under instruments of writing and by provision of law.

Code, tit. 4, § 852; tit. 8, §§ 2258, 2282, 857.

Courts never permit parol proof to contradict an intention expressed on the face of the instrument.

1 Perry, Trusts, § 76; *Bast* v. *First Nat. Bank of Ashland*, 101 U. S. 93 (Bk. 25, L. ed. 794).

Equity will not allow a trustee to set up, chiefly by his own declarations, a parol understanding inconsistent with the deed, for the purpose of increasing his own share in the property, to the detriment of his *co-cestui que trust*.

Hidden v. *Jordan*, 21 Cal. 92; *Case* v. *Codding*, 38 Cal. 191; *Bayles* v. *Baxter*, 22 Cal. 575; *Millard* v. *Hathaway*, 27 Cal. 119; *Currey* v. *Allen*, 34 Cal. 254; *Kreutz* v. *Livingston*, 15 Cal. 344; 1 Perry, Trusts, § 127; 2 Story, Eq. § 1211; *Van Horn* v. *Fonda*, 5 Johns. Ch. 408.

That LeRoy took this title in his own name does not affect our rights. He cannot secure the property to himself absolutely by a purchase at judicial sale, which he holds under his deed as trustee.

Jenkins v. *Frink*, 30 Cal. 586; *Burhans* v. *Van Zandt*, 7 N. Y. 523; *Rothwell* v. *Dewees*, 2 Black, 613 (67 U. S. bk. 17, L. ed. 309); *Flagg* v. *Mann*, 2 Sumn. 523; *Gunter* v. *Janes*, 9 Cal. 644; *Cavagnaro* v. *Don*, 63 Cal. 227; *King* v. *Remington*, Supreme Court, Minn. not yet reported; *Baldwin* v. *Allison*, 4 Minn. 29; *Jewett* v. *Miller*, 10 N. Y. 402; *Michoud* v. *Girod*, 4 How. 503 (45 U. S. bk. 11, L. ed. 1076); *Greenland* v. *King*, 5 Land Jur. 18; *Van Epps* v. *Van Epps*, 9 Land Jur. 237.

Messrs. **Evans S. Pillsbury** and **Pillsbury & Blanding**, for appellees:

As between the grantee and the trustee the trust deed, though in form absolute, was, nevertheless, only a mortgage. The transaction was only in the way of security, and the legal title to the property did not pass.

Dutton v. *Warschauer*, 21 Cal. 623; *Grattan* v. *Wiggins*, 23 Cal. 16; *Cunningham* v. *Hawkins*, 27 Cal. 603; *Taylor* v. *McClain*, 60 Cal. 651; *S. C.* 64 Cal. 518.

Where an estate results by implication of law, the title and legal estate of the whole, or of some aliquot part of the whole, must vest in the party to whom it results.

White v. *Carpenter*, 2 Paige, Ch. 239.

If LeRoy had collected the full amount named in the deed of trust, and refused to pay over to plaintiff, an action at law could have

been maintained by him against LeRoy for this sum.

Kreutz v. *Livingston*, 15 Cal. 344.

If we admit a resulting trust by the provisions of law we insist that such trust may not only be proved by parol, but may also be defeated by parol proof of an agreement for a different trust from that which would be implied by law.

Bayles v. *Baxter*, 22 Cal. 575; *Millard* v. *Hathaway*, 27 Cal. 119; *Roberts* v. *Ware*, 40 Cal. 637; Story, Eq. Jur. § 1202; *Botsford* v. *Burr*, 2 Johns. Ch. 406; *Roe* v. *Popham*, 1 Doug. (Eng.) 24; *Walker* v. *Walker*, 2 Atk. 98; *Lake* v. *Lake*, Amb. 126; *Bellasis* v. *Compton*, 2 Vern. 294; *Page* v. *Page*, 8 N. H. 187; *Jackson* v. *Feller*, 2 Wend. 465.

The parol evidence is to establish the circumstances of a collateral fact, which, when established, controls the deed.

Troll v. *Carter*, 15 West Va. 577.

When LeRoy, under the judgment in the foreclosure proceeding, bought in the property, he became the sole and exclusive owner of the same, devested of all trust in favor of the plaintiff's assignor, who acted as the attorney for the defendant's grantor, who instituted the foreclosure. The plaintiff's assignor must have intended to cut his client off by that proceeding, for it cannot be admitted that he intended to foreclose his client, and not himself. The presumption of honesty is equivalent to legal evidence.

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54 (Bk. 26, L. ed. 693); *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696.

LeRoy had the legal right to buy this property at the judicial sale, and he thereafter held it as his own, in fee simple absolute.

Wight v. *Ross*, 36 Cal. 414; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587 (Bk. 23, L. ed. 328).

A mortgagee, in order to avoid a loss to himself by a sale to a stranger at a less price than he is willing to pay, may purchase at a judicial sale, when he is both a trustee and a *cestui que trust*.

Jones, Mort. §§ 1636, 1881, 1882; *Bergen* v. *Bennett*, 1 Cal. Cas. 1, 9.

Where the transaction is between the attorney and his client, equity does not permit advantage to be taken of the client.

Wood v. *Downes*, 18 Ves. 126; *Jones* v. *Tripp*, Jacob, 322; *Montesquieu* v. *Sandys*, 18 Ves. 302; *Caine* v. *Allen*, 2 Dow P. C. 289; *Edwards* v. *Meyrick*, 2 Hare, 68; *Gibson* v. *Jeyes*, 6 Ves. Jr. 270, 280; Tiffany & Bullard, Trusts, 187; Story, Eq. Jur. 219, 310, 311, 401; *Howell* v. *Ransom*, 11 Paige Ch. 540, 542; *Jennings* v. *McConnel*, 17 Ill. 150; *Ford* v. *Harrington*, 16 N. Y. 288, 289; *Evans* v. *Ellis*, 5 Denio, 640, 643.

Mr. Justice **Harlan** delivered the opinion of the court:

The amount secured to be paid by the deed of trust executed on the first day of October, 1870, by Juana M. Estudillo and others to Theodore LeRoy, was $446,849 in gold coin of the United States. Whether that sum included the $49,000 which is alleged to be due to Patterson, Wilson, Crittenden and Felton, for legal services rendered, cannot be determined by anything in the deed itself. The plaintiff, who sues as assignee of the claims of said attorneys, is compelled to resort to parol evidence to show that the parties to the deed intended to provide for the payment of the $49,000 out of the proceeds of the sale of the trust property, and to that end included it in the aggregate of $446,849. If that evidence was competent, it was the right of the defendant to show by parol evidence that the intention of the parties was to apply the proceeds of sale to the reimbursement of LeRoy for all advances and payments made and expenses incurred by him, before anything was paid on the claims of the attorneys. Looking at all the evidence, we are satisfied that these propositions are sustained, namely; 1. That the $49,000 was embraced in [265] the $446,849; 2. The former sum was not to be paid until LeRoy was reimbursed the entire amount due and to become due to him on account of principal, interest, advances, and expenses. That the sales of the trust property fell short of meeting these latter demands, by a large amount, is clearly established by the record of the suit in which the accounts of the trustee were audited and settled, and by other evidence in this cause.

Upon the whole case we think the decree was right, and it is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

EAST TENNESSEE, VIRGINIA AND [240 GEORGIA RAILROAD COMPANY, *Appt.*,

v.

JOHN W. GRAYSON.

(See S. C. Reporter's ed. 240-244.)

Removal of causes—separable controversy—necessary party.

Grayson filed a bill against the appellant and the Memphis and Charleston Railroad Company, in the latter of which corporations he was a stockholder, asking that a lease made by the latter company to the former be declared void and that the latter company be enjoined from issuing stock and raising funds for the purpose of paying for the cancellation of the lease. On a petition for removal filed by the appellant, alleging that it was a citizen of Tennessee and Grayson a citizen of Alabama, *held*:

1. That the Memphis and Charleston Railroad Company was a necessary party defendant to the controversy.

2. That there was no separate controversy between the appellant and the appellee.

[No. 331.]

Submitted Nov. 8, 1886. Decided Nov. 29, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama. *Affirmed.*

The case is stated by the court.

Mr. **W. M. Baxter**, for appellant.

Messrs. **Henry E. Davis, F. P. Ward** and **R. W. Walker**, for appellee:

Mr. Chief Justice **Waite** delivered the opin- [24 ion of the court;

This is an appeal from an order remanding a suit in equity which had been removed from the Chancery Court of the Eastern Division of the State of Alabama. The bill was filed by John W. Grayson, a citizen of Alabama, and

a stockholder of the Memphis and Charleston Railroad Company, "in his own behalf, and in behalf of all other stockholders * * * who may come in and contribute to the expenses," against the Memphis and Charleston Railroad Company, a corporation existing under the laws of the States of Tennessee, Alabama and Mississippi, and the East Tennessee, Virginia and Georgia Railroad Company, a corporation existing under the laws of Tennessee and Georgia. The bill was filed August 31, 1882, and alleged that on the second of June, 1877, the Memphis and Charleston Company executed what purported to be a lease of its railroad and [249] appurtenances to the East Tennessee, Virginia and Georgia Company for a period of twenty years from July 1, 1877; that this lease was modified in some particulars December 2, 1879; that neither the lease nor the modification were within the corporate power or authority of either of the parties thereto; that, notwithstanding this, the East Tennessee, Virginia and Georgia Company had taken possession of and was operating the leased railroad; that Grayson, the complainant, was not present, either in person or by proxy, at any meeting of the stockholders of the Memphis and Charleston Company, if any there ever had been, when the lease was authorized or approved; that he had never consented thereto, and his rights as a stockholder "are in nowise affected by any such action of a stockholders' meeting at which he was not present, in which he did not participate, and in which his stock was not represented—such action being *ultra vires* and without legal authority;" that at a meeting of the stockholders of the Memphis and Charleston Company, on the 22d of August, 1882, a resolution was adopted authorizing the directors to appoint a committee to meet the East Tennessee, Virginia and Georgia Company and arrange for a cancellation of the lease, it being understood that the last named Company would surrender its rights as lessee on payment of $400,000: that the resolution was adopted under the influence of the belief that upon the payment of this amount the lease would be abrogated; that at the same meeting a further resolution was adopted authorizing the issue of five millions of dollars of additional stock to be sold at eight cents on the dollar to raise the amount to be paid the East Tennessee, Virginia and Georgia Company, in case the proposed arrangement was carried out; that Grayson, the complainant, voted against both these resolutions; that, on a fair settlement of the accounts between the two Companies for the operations of the East Tennessee, Virginia and Georgia Company during the time it had been in possession under the lease, a large sum would be found due to the Memphis and Charleston Company; and that the directors of the Memphis and Charles- [243] ton Company will not, and Grayson, the complainant, cannot, bring a suit in the name of the company to have the lease set aside. The prayer of the bill is for a cancellation of the lease, for an account, and for an injunction to restrain the East Tennessee, Virginia and Georgia Company from operating the road, and the Memphis and Charleston Company from paying $400,000 or any other sum for the cancellation of the lease, and from issuing the new stock to raise the money to make the payment.

On the 4th of September, 1882, the East Tennessee, Virginia and Georgia Company filed a petition for the removal of the suit to the Circuit Court of the United States, on the ground that the Company is a citizen of Tennessee, and Grayson a citizen of Alabama, and "there is a controversy which is wholly between citizens of different States, and which can be fully determined between them; to wit, a controversy between the said petitioner and the said John W. Grayson." The circuit court, on motion, remanded the cause, and that order is now here for review.

We are unable to distinguish this case from that of *N. J. Cent. R. R. Co.* v. *Mills*, 118 U. S. 249 [Bk. 28, L. ed. 949]. It is brought by a stockholder of the Memphis and Charleston Railroad Company, in behalf of himself and any other stockholders who will contribute to the expenses, to set aside a lease made by that corporation to the East Tennessee, Virginia and Georgia Railroad Company, in excess of its corporate powers, and to restrain the Memphis and Charleston Company from carrying into effect a resolution of its stockholders authorizing a settlement with the East Tennessee, Virginia and Georgia Company, by the payment of $400,000, to secure a cancellation of the lease. The bill was filed by one of the minority stockholders nine days after the resolution in favor of the settlement was passed, and one of its objects is to defeat this action of the majority. Under these circumstances it is clear that the Memphis and Charleston Company is not a mere formal party, or a party in the same interest with Grayson, but is rightly and necessarily a defendant. The corporation, as a corporation, has determined, by a vote of its stock- [244] holders, to pay $400,000, which it proposes to raise by a ruinous sale of stock, to get rid of a lease that Grayson insists is void and ought to be annulled without any payment whatever, and the lessee brought to an account.

Neither is there a separate controversy in the case between the complainant and the East Tennessee, Virginia and Georgia Company. The principal purpose of the suit is to set aside the lease for want of authority to make it. For that purpose both the lessor and lessee are necessary parties. Grayson is not suing for the Memphis and Charleston Company, but for himself. It is true a decree in his favor may be for the advantage of the Memphis and Charleston Company, but he does not represent the company in its corporate capacity, and has no authority to do so. As a stockholder, he seeks protection from the illegal acts of his own company as well as the other. According to the allegations of the bill, it may fairly be inferred that a majority of the stockholders of the Memphis and Charleston Company have combined with the East Tennessee, Virginia and Georgia Company to sacrifice the rights of the minority, and this suit is in behalf of the minority to protect themselves against this unlawful and fraudulent combination. Left to themselves, the two Companies will settle on a basis that will be ruinous to the interest of Grayson and those in like situation with himself. This he seeks to prevent.

In the argument it is suggested that this case differs from that of the *N. J. Cent. R. R. Co.* v. *Mills*, in the fact that in that the two corpora-

tions joined in an answer insisting on the validity of the lease, and in this nothing of the kind has been done. But here the allegations of the bill, which, for the purposes of the present inquiry, must be considered as confessed, are to the effect that the two companies are acting in harmony upon the question of validity, and that, unless restrained, the Memphis and Charleston Company will make a settlement which will be greatly to the injury of its minority stockholders, of whom this complainant is one. This is certainly the equivalent of the joint answer in the other case.

The order remanding the case is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court,

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[191]

WILLAMETTE WOOLEN MANUFACTURING COMPANY, *Appt.*,

v.

BANK OF BRITISH COLUMBIA.

(See S. C. Reporter's ed. 191-199.)

Corporations—authority to mortgage franchises and powers—construction of charter.

The sixth section of appellant's charter, which provided that the Corporation "shall have the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent or sell the same, or any portion thereof as it may deem expedient," conferred upon the Company the right to mortgage "the power to bring water from the Santiam River," and also the exclusive right to the hydraulic powers and privileges created by the water from said river. A mortgage executed by the Company created a lien upon such powers and franchises.

[No. 32.]

Argued and submitted Nov. 9, 1886. Decided Nov. 29, 1886.

APPEAL from the Circuit Court of the United States for the District of Oregon. *Affirmed.*

The case is stated by the court.

Mr. **George H. Williams**, for appellant:

Corporations have none of the elements of sovereignty, and can have and exercise only such powers as are expressly conferred on them by the Act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties.

Black v. *Del. & R. Canal Co.* 22 N. J. Eq. 130; *Thomas* v. *West J. R. R. Co.* 101 U. S. 71 (Bk. 25, L. ed. 950).

The Act of incorporation confers upon the Company "power to purchase, receive and possess lands, goods, chattels and effects of every kind, the same to use and dispose of at pleasure;" and "shall have the exclusive right to hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent, or sell the same, or any portion thereof, as it may deem expedient." Its power to sell is defined, and does not include the power to dispose of its franchise; and the Act makes no provision for "assigns," and therefore the Corporation cannot merge itself into any "assigns," or confer upon them its corporate powers and functions. The right to take private property for its use upon paying a just compensation therefor is granted, and this was within the power of the Legislature.

Head v. *Amoskeag Mfg. Co.* 113 U. S. 9 (Bk. 28, L. ed. 889).

The power not being conferred upon "the assigns" of the Company, the Corporation cannot, by the action of its directors, confer this right of eminent domain upon the Bank of British Columbia, a foreign corporation, or upon a private individual. The consent of the sovereign power would be necessary.

1 Bl. Com. 472.

The franchise of becoming and being a corporation is in its nature incommunicable by the act of the parties, and incapable of passing by assignment.

Commonwealth v. *Smith*, 10 Allen, 448; *Memphis & L. R. R. R. Co.* v. *Commissioners*, 112 U. S. 609 (Bk. 28, L. ed. 837); *Hall* v. *Sullivan R. R.* 21 Law Rep. 138; 2 Redf. Am. R. Cas. 621; 1 Brunner, Col. Cas. 613; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244 (27:922); *Wilson* v. *Gaines*, 103 U. S. 417 (26:401); *Morgan* v. *La.* 98 U. S. 217 (23:860); *Branch* v. *Jesup*, 106 U. S. 468 (27:279).

There can be no distinction between railroad cases and this, resting on the ground that the former are quasi public corporations, and the defendant Corporation not of that description.

Head v. *Amoskeag Mfg. Co. supra; Scudder* v. *Trenton Del. Falls Co.* Saxt. 694; *Boston & R. Mill Corp.* v. *Newman*, 12 Pick. 467; *Hazen* v. *Essex Co.* 12 Cush. 475; *Commonwealth* v. *Essex Co.* 13 Gray, 239; *Hankins* v. *Lawrence*, 8 Blackf. 266; *Great F. Mfg. Co.* v. *Fernald*, 47 N. H. 444; *Munn* v. *Ill.* 94 U. S. 113 (Bk. 24, L. ed. 77); *Carpenter* v. *Black Hawk G. Min. Co.* 65 N. Y. 50; *Cass* v. *Manchester Iron & Steel Co.* 9 Fed. Rep. 640; *Salem Mill Dam Corp.* v. *Ropes*, 6 Pick. 32; *Whittenton Mills* v. *Upton*, 10 Gray, 582; *Stewart* v. *Jones*, 40 Mo. 140; *Richardson* v. *Sibley*, 11 Allen, 65; *Middlesex R. R. Co.* v. *Boston & C. R. R. Co.* 115 Mass. 347; *Thomas* v. *Armstrong*, 7 Cal. 286; *Mahoney* v. *Spring Val. W. Co.* 52 Cal. 163; *Abbott* v. *Am. H. Rubber Co.* 33 Barb. 580; *McCullough* v. *Moss*, 5 Denio, 567; *Miners Ditch Co.* v. *Zellerbach*, 37 Cal. 544.

This suit is to enforce that part of the contract which remains executory, and therefore the Corporation can set up the plea of *ultra vires.*

Thomas v. *West J. R. R. Co. supra.*

This is not a misuse of an admitted power, but an act not within the scope of the powers of the Corporation to perform under any circumstance or for any purpose.

Head v. *Prov. Ins. Co.* 2 Cranch, 127 (6 U.S. bk. 2, L. ed. 229); *Bank of Augusta* v. *Earle*, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274); *Perrine* v. *Chesapeake & Del. Canal Co.* 9 How. 172 (50 U. S. bk. 13, L. ed. 92); *Pearce* v. *Mad. & Ind. etc. R. R. Co.* 21 How. 441 (62 U. S. bk. 16, L. ed. 184).

This Corporation has not been dissolved. The insolvency of a corporation does not extinguish its legal existence.

Boston Glass Mfg. Co. v. *Langdon*, 24 Pick. 49.

Nor does the assignment or sale of the property dissolve a corporation created by special charter.

Barclay v. *Talman*, 4 Edw. Ch. 128; *State* v.

Bank of Md. 6 Gill & J. 205; *Farmers Bk. of Del.* v. *Beaston*, 7 Gill & J. 421; *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 224; *Sullivan* v. *Triunfo Mfg. Co.* 39 Cal. 468; *Kincaid* v. *Dwinelle*, 59 N.Y. 552.

Mr. **J. N. Dolph**, for appellee:

That which was mortgaged by the appellant was in no sense a franchise. The power to condemn land for a right of way was the power to exercise a temporary franchise which, when the right of way was acquired, was exhausted, and the right of way, and the right to take water from the Santiam, became the property of the Corporation.

Morgan v. *La.* 93 U. S. 217 (Bk. 23, L. ed. 860).

By section 2 of its charter, the Corporation was empowered to purchase and receive and possess lands, goods, chattels and effects of every kind, and to dispose of them at pleasure. Whatever rights to the beneficial use of the waters of the Santiam River the Corporation acquired under the fifth section of its charter, whether the same was property, as distinguishable from its franchise, or not, it was expressly empowered to sell, in whole or in part, by the sixth section of its charter. This power to sell includes the power to sell the right to take the water, together with the means of conducting the same to the place where it is to be used.

Sheets v. *Selden's Lessee*, 2 Wall. 187 (Bk. 17, L. ed. 825).

The power of a corporation to sell its property and franchise includes the power to mortgage the same.

E. Boston Freight Co. v. *Eastern R. R. Co.* 18 Allen, 423; *McAllister* v. *Plant*, 54 Miss. 106; *Sessions* v. *Bacon*, 23 Miss. 272; *Stone* v. *Montgomery*, 35 Miss. 83.

Every corporation, unless expressly or impliedly prohibited, has the same power as an individual to sell its property, either absolutely or conditionally.

Aurora Agr. & H. Soc. v. *Paddock*, 80 Ill. 263; Ang. & Ames Corp. 153; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Thompson* v. *Lambert*, 44 Iowa, 239; *Vanaradall* v. *State, etc.* 65 Ind. 176; 1 Jones, Mort. § 124; 3 Dan. Neg. Inst. §§ 382, 383; *Clark* v. *Farmers Woolen Mfg. Co.* 15 Wend. 256; *Fay* v. *Noble*, 12 Cush. 1; *Ketchum* v. *Buffalo*, 14 N. Y. 356; *White Water Val. Can. Co.* v. *Vallette*, 21 How. 414 (62 U. S. bk. 16, L. ed. 154); *Commercial Bank* v. *Newport Mfg. Co.* 35 Am. Dec. 172; *State* v. *Comrs. of Mansfield*, 57 Am. Dec. 418.

If it be conceded that the rights in controversy were a part of the franchises of the appellant, it still had power to mortgage the same.

N. O. Spanish Fort & L. R. R. Co. v. *Delamore*, 114 U. S. 501 (Bk. 29, L. ed. 244); *Ragan* v. *Aiken*, 9 Lea (Tenn.) 609; *Houston & T. C. R. Co.* v. *Shirley*, 54 Tex. 125; *Miles* v. *Thorne*, 38 Cal. 335; *Randolph* v. *Larned*, 27 N. J. Eq. 561; *Lippincott* v. *Allander*, 27 Iowa, 460; *Bowman* v. *Wathen*, 2 McLean, 376; *Felton* v. *Deall*, 22 Vt. 170; *Benson* v. *Mayor, etc.* 10 Barb. 223; *Ladd* v. *Chotard*, 1 Minor (Ala.) 366; *Lewis* v. *Gainsville*, 7 Ala. 85; *Dundy* v. *Chambers*, 28 Ill. 370; *Bank of Middlebury* v. *Egerton*, 30 Vt. 182; *Billings* v. *Breinig*, 45 Mich. 70.

The appellant is estopped from denying its power to mortgage the portion of its property in controversy. It received and seeks to retain the benefit of the loan secured by the mortgage, and it cannot set up its want of power to execute it, to deprive appellee of the benefit of its security.

Field, Corp. § 235; Green's, Brice, *Ultra Vires*, 42, 717; *Cowell* v. *Col. Springs Co.* 100 U. S. 55 (Bk. 25, L. ed. 547); Morawetz, Priv. Corp. § 86; *Argenti* v. *San Francisco*, 16 Cal. 265; *Darst* v. *Gale*, 83 Ill. 141, *Aurora A. & H. Soc.* v. *Paddock*, 80 Ill. 266; *Bradley* v. *Ballard*, 55 Ill. 417.

If the appellant was not authorized to mortgage the property in controversy, the State only could question the transaction.

Cowell v. *Springs Co. supra; Arthur* v. *Commercial etc. Bank of Vicksburg*, 48 Am. Dec. 719; *Moore* v. *Schoppert*, 22 West. Va. 282; *Logan* v. *Vernon G. etc. R. R. Co.* 90 Ind. 552; *Toledo & A. A. R. R. Co.* v. *Johnson*, 49 Mich. 148; *Pixley* v. *Roanoke Nav. Co.* 75 Va. 320; *Wallamet Falls etc. Co.* v. *Kittridge*, 5 Sawy. 44; *Union Nat. Bank of St. Louis* v. *Matthews*, 98 U. S. 621 (Bk. 25, L. ed. 188); *Elizabeth City Academy* v. *Lindsey*, 45 Am. Dec. 500; *Oakland R. R. Co.* v. *Oakland, etc. R. R. Co.* 45 Cal. 365; *Hackett* v. *Wilson*, 6 Pac. Rep. 9, 659; 2 Redf. Railw. 499.

Mr. Justice **Miller** delivered the opinion of the court: [192]

This is an appeal from the Circuit Court of the United States for the District of Oregon.

The Willamette Woolen Manufacturing Company, the appellant, was incorporated by an Act of the Territorial Legislature of Oregon on the 17th day of December, 1856, which Act is in the following language:

"Sec. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That George H. Williams, Alfred Stanton, Joseph Watt, Joseph Holman, Daniel Waldo, William H. Rector, E. M. Barnum, J. G. Wilson, and J. D. Boon, and their associates, stockholders in the joint stock Company known as the 'Willamette Woolen Manufacturing Company,' and their successors, are hereby declared a body [193] corporate and politic by the name and style of the 'Willamette Woolen Manufacturing Company,' for the purpose of creating and improving water powers and privileges, and manufacturing; and the present organization of said joint stock Company shall continue until changed by said Corporation.

"Sec. 2. Said Corporation shall have power to purchase, receive and possess, lands, goods, chattels, and effects of every kind, the same to use and dispose of at pleasure; to contract and be contracted with; to sue and be sued; to have a common seal, and the same to use and change at pleasure; and to ordain and establish such by-laws and regulations as it may deem expedient for its own government and the efficient management of its affairs, consistent with the Constitution and laws of the United States and the laws of this Territory.

"Sec. 3. The capital stock of said Corporation shall not exceed two hundred thousand dollars, and shall be divided into shares of not less than one hundred dollars each, transferable as its by-laws may provide.

"Sec. 4. Said Corporation shall receive, possess and enjoy all the property, interests, and rights of said joint stock Company, and shall

hold and have, and may enforce by legal remedies, all claims and obligations due or to become due, given or that may be given to said Company; and all stock due or to become due to said Company shall be payable to and collected by said Corporation; and the individual members of said Corporation shall each and singular be liable for the corporate debts of said Company, contracted while a member of the same, to the amount of his share of the corporate property.

"Sec. 5. Said Corporation shall have power to bring water from the Santiam River to any place or places in or near Salem, to be brought as far as practicable through the channel or the valley of Mill Creek; and for such purpose may enter upon lands and also said creek, and do all things proper and suitable for a safe, direct and economical conveyance of water as aforesaid; but said Corporation shall do no unnecessary injury to private property, and shall be answerable in damages to any person whose property is injured by its acts.

"Sec. 6. Said Corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent, or sell the same, or any portion thereof, as it may deem expedient. [194]

"Sec. 7. This Act shall be in force from and after its passage."

The present suit was brought by the Bank of British Columbia against that Corporation to foreclose a mortgage executed by it on the 24th day of August, 1875, to secure the payment of promissory notes made by the Company, amounting originally to over $80,000, of which, at the time of bringing the suit, only about $15,000 remained unpaid. To the bill of foreclosure the defendant, in the circuit court, filed an answer and a plea. The plea, which raises the only question in issue here, is as follows:

"And for a further defense and plea to said bill of complaint, said defendant, the Willamette Woolen Manufacturing Company alleges that it is now, and continuously for more than twenty years next last past has been, incorporated under and by virtue of an Act of the Legislative Assembly of the Territory of Oregon, passed December 17, 1856, and entitled 'An Act to Incorporate the Willamette Woolen Manufacturing Company.' That the fifth section of said Act provides as follows, viz.:

"'Sec. 5. Said Corporation shall have power to bring water from the Santiam River to any place or places in or near Salem, to be brought as far as practicable through the channel or the valley of Mill Creek; and for such purpose may enter upon lands and also said creek, and do all things proper and suitable for a safe, direct, and economical conveyance of water as aforesaid; but said Corporation shall do no unnecessary injury to private property, and shall be answerable in damages to any person whose property is injured by its acts.'

"That the rights and powers enumerated in said section five of said Act, and thereby conferred upon defendant, constitute the personal and exclusive franchise of defendant as such Corporation, and that said mortgage mentioned in plaintiff's bill of complaint included said franchise, and of right ought by this honorable court to be declared null and void and of no effect so far as the same includes said franchise. That it is necessary to the use, enjoyment, and maintenance of defendant's said franchise that defendant shall have and retain the exclusive use and enjoyment of all the property mentioned and described in plaintiff's mortgage, set out in said bill of complaint, which relates to the power to bring water from said Santiam River to said Salem." [195]

That court overruled the plea, and decree was rendered for the plaintiff, ordering a sale of all the mortgaged property upon failure to pay the sum found due within a reasonable time. Sale was accordingly made by the commissioner appointed for the purpose, and the Manufacturing Company brought this case here on appeal.

The assignments of error made in this court are as follows:

"The court below erred:

"1. In holding that the mortgage was valid as to the franchise created by said section five of the Act.

"2. In entering a decree for the sale of said franchise.

"3. In determining said question in the affirmative.

"4. In holding that said Corporation had power to devest itself of its corporate franchise by mortgage, sale, or otherwise, without the consent of the Legislature of Oregon."

The mortgage commences its granting clause, descriptive of the property conveyed, by saying that the said Corporation "doth hereby grant, bargain, sell, assign, transfer, set over, and convey unto the party of the second part" —meaning the Bank—"its assigns, successors, and representatives, all the following real property lying and being situate in the County of Marion, and State of Oregon, more particularly described as follows, to wit:" Then follows a minute description by metes and bounds and courses and distances of the realty upon which the mill property of the party of the first part now stands. "The design hereof being to convey the entire parcel of realty, together with the tenements and buildings, together with all and singular the machinery of every kind used therein or thereabout. Also the power to bring water from the Santiam River to any place or places in or near Salem, the same to be brought as far as practicable through the channels or the valley of Mill Creek, and for such purposes may enter upon lands, and also said creek, and do all things proper and suitable for a safe and economical conveyance of water as aforesaid; also the exclusive right to the hydraulic powers and privileges created by the water from the Santiam River; also all the rights and powers of the said party of the first part in and to the water rights, powers, and privileges obtained under its charter or articles of incorporation, including all rights and property of kindred character acquired by said party of the first part in any way or from any person since the incorporation aforesaid. Also all that tract or parcel of realty upon which the party of the first part has now in operation a sash factory"—giving a full description of it—"together with all the rights of way now owned by said party of the first part, as appurtenant to or necessary to the [196]

use or enjoyment of said rights, privileges, and easements in the water aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining," etc.

The decree of the court finds "that the defendant Corporation, the Willamette Woolen Manufacturing Company, did have full authority and power to make and execute the mortgage now here sought to be foreclosed, and that it conferred upon the plaintiff Corporation, by said mortgage, a lien upon all its right and power, under said territorial Act, to take water from the Santiam River in upon its franchise touching the taking, carrying, and using of said water, and all the rights, privileges, and uses incident thereto," and orders a sale of the property as mortgaged, unless the defendant Company pay the sum of $15,606.51 within thirty days from the date of the decree.

The right of the Corporation to make a mortgage which should cover everything described in this mortgage under ordinary Acts of incorporation, or the provisions usually found in such Acts, might be an interesting question. It also admits of doubt whether the mortagor Corporation in this case intended, by the use of the general language found in this instru- [197] ment describing what was conveyed, to transfer all of the powers, the privileges, and the franchises conferred upon it by its charter. It was undoubtedly desirable, in making this mortgage, that if it became necessary to sell under it, the purchaser, in getting the realty, the houses, the mills, the manufacturing machinery, the conduits through which the water power came to operate upon that machinery, and all the tangible property necessary to the use of that water power, should also get the privilege of using it; and so far as the privilege of using that particular water appropriated to these mills was a franchise or special grant to the Corporation, it was intended to be conveyed in the mortgage. For all the powers which it was necessary to exercise in the use of this water as a manufacturing motive power, the Woolen Company intended to create a lien upon the property it mortgaged.

But there were franchises created by the Act of incorporation which would be of no value to the purchaser, which, in the nature of things, could not be transferred to it, and which were not intended to be transferred to it. Obviously among these was the right to exist as a Corporation. The sale under the decree of foreclosure did not annihilate the Willamette Woolen Manufacturing Company so that it no longer had any existence. Nor was its power to make contracts, to sue and be sued, to have a common seal, to buy other lands and sell them, to make by-laws, and to do many other things which an incorporated body can do, and which are described in the second section of its charter, ended with such sale. Nor is it at all clear that, if it had sold outright the property which it mortgaged to this Company, it would not have still had the right to take other water from the Santiam River and conduct it to other mills and other places for the purposes of manufacture, provided it did not interfere with or limit the water and the use of the water which it had sold.

It is, however, unnecessary to examine these matters very critically. The charter itself seems to have given unlimited power to the Company to sell everything it had, including its exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River. Such is the express language of the sixth section of the charter. Describing what it is that is granted to this [198] Corporation with regard to the water and its use, and in the same language, what it may do in the way of disposing of it, it says, "said Corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent, or sell the same, or any portion thereof, as it may deem expedient."

There seems to be here no limitation upon the power of the Corporation to dispose of whatever it acquired under the statute which called it into being. Describing in the same sentence that it shall have "the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River," it declares that it "may use, rent, or sell the same," which means all of it; and to show that it does mean all of it, there is added after the words "sell the same," the further clause, "or any portion thereof, as it may deem expedient."

It is hardly necessary to say that this right to sell in these general and strong terms, or to rent or to use it, must include the power to mortgage it. A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of the title. This language is in its nature inconsistent with a limitation upon the power of the Company to transfer its rights and privileges. If there is anything peculiar in the word franchise it must include, in any definition that can be given it, this word "privileges;" especially when the statute speaks of "the exclusive right to the hydraulic powers and privileges."

As we have already said, it would be unprofitable to go into an inquiry of how far the Corporation could have transferred these exclusive rights and privileges to anybody else, and how far it could have devested itself of them, and of its power to use them, if no such language had been in the charter. But the supreme legislative power, which had the right to make this Corporation, and to which it would be subject more or less in its exercise of the powers conferred upon it, has also said, as it had a right to say, that it may sell these privileges, may part with them, and may transfer them to other persons, and we think this language is sufficient warrant for anything actually conveyed by the mortgage and by the decree of the court.

The decree is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[215]

MOSES R. CROW, *Plff. in Err.*,

v.

TOWNSHIP OF OXFORD.

(See S. C. Reporter's ed. 215-226.)

Municipal bonds—reference in to statute—owner bound to take notice of statutory requirements—of official records when—Kansas Acts of March 1, 2, 1872—registration under latter Act.

In an action on bonds issued by the Township of Oxford, Kansas, *held:*

1. That the plaintiff, being referred by the recitals in his bonds to the Act of March 1, 1872, as the statute under which they were issued, was bound (*McClure* v. *Oxford*, bk. 24) to take notice of that statute and of all its requirements, and if, finding the bonds invalid under that statute, he claims the right to refer to the Act of March 2, 1872, as the source of authority, he was bound to take notice of the requirements of that statute.

2. That though the plaintiff was a *bona fide* holder, he was, in the absence of recitals in the bonds to protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds, and such records showed proceedings not in conformity with the Act of March 2, and the recitals of the bonds excluded the possibility that they were issued under that Act.

3. That the registration of the bonds by the State Auditor, purporting to be done under the Act of March 2, 1872, and his certificate upon the bonds that they were regularly issued, etc., was not conclusive of the fact as to whether or not they were issued under the Act of March 2.

[No. 934.]

Submitted Oct. 25, 1886. Decided Nov. 29, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kansas. *Affirmed.*

The case is stated by the court.

Mr. **S. E. Brown,** for plaintiff in error.

Mr. **J. Wade McDonald,** for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought in the Circuit Court of the United States for the District of Kansas, by Moses R. Crow against the Township of Oxford, in the County of Sumner, and State of Kansas, to recover the amount of ten bonds, of $500 each, issued by that Township, and one hundred forty coupons, of $25 each, cut from those bonds, being in all $8,500. It was tried before the court, without a jury; a special find-
[216] ing of facts was made, and a judgment was rendered for the defendant. The plaintiff has sued out a writ of error.

The defendant, on the 15th of April, 1872, made twenty bonds for $500 each. Coupons cut from some of those bonds were the subject of the suit of *McClure* v. *Oxford*, 94 U. S. 429 [Bk. 24, L. ed. 129]. The bonds and coupons involved in the present suit are all of the forms of the bond and coupon set out in the report of the McClure case, and each bond has indorsed on it, of the date of April 25, 1872, a certificate duly signed by, and attested by the seal of office of, the Auditor of the State of Kansas, the certificate being in the form of that contained in the report of the McClure case.

The bonds were made for the purpose of aiding in the construction of a bridge across the Arkansas River, at the town of Oxford, in the Township of Oxford; and were issued and delivered in payment for eighty-five shares, of $100 each, of the stock of the Oxford Bridge Company, a corporation which erected the bridge, for which the Township subscribed, and which it has ever since owned and held. The Township paid interest on the bonds up to April 15, 1877. It received dividends on the stock, amounting to about $650 per annum, from October, 1872, till June, 1876. The following proceedings were had and taken by the trustee, treasurer, and clerk of the township, on the following dates, as shown by the public records of the township:

"MARCH 8TH, 1872.

Township board met.

Present: George T. Walton, trustee, and John H. Folks, clerk.

The fact being known to the clerk that an Act authorizing a majority of the township board to issue bonds for $10,000, and to subscribe stock in the Oxford Bridge Company, after giving notice thereof, and the voters of Oxford Township voting thereon, was passed and approved on the first day of March, 1872, and believing that, owing to the danger of a June freshet, injuring or preventing work and increasing the cost of said bridge, and believing the law only required 20 days' notice, it was ordered that such notice be given immediately, which notice was given by written no-
[217] tices posted on Clark's store, on the postoffice at Stanton's store, and at the schoolhouse in Oxford, believed to be three of the most public places in the Township.

GEORGE T. WALTON, *Trustee.*
JOHN H. FOLKS, *Clerk.*

MARCH 24TH, 1872.

At a special meeting of the Board of Oxford Township, held this day—George T. Walton, trustee, and John H. Folks present—a copy of the—Commonwealth was presented, in which the law relating to the bridge bonds was published, in which it was made necessary to give 30 days' notice thereon. It was ordered that said election be held on the 8th day of April, 1872, and additional notices were appended to the original notice posted as above stated, so continuing the time until the said 8th day of April.

GEORGE T. WALTON, *Trustee.*
JOHN H. FOLKS, *Clerk.*

April 8th, 1872.

At a special election held in pursuance of notices and of the Act of March 1, 1872, authorizing the trustee, treasurer and clerk, or any two of them, of the Township of Oxford, County of Sumner, and State of Kansas, to subscribe stock in the Oxford Bridge Company to the amount of $10,000, to aid in the construction of a bridge across the Arkansas River, at Oxford, in said county and State, and to issue bonds of said Township in payment thereof; George T. Walton, Edward Slay, Sr., and James Thompson, judges; and James O. Carpenter and W. H. Knapp, clerks. Whole number of electors voting, 140; for the bridge and bonds, 126; against the bridge and bonds, 14. Walton to return poll-books.

GEORGE T. WALTON, *Trustee.*
JOHN H. FOLKS, *Clerk.*

April 10th, 1872.

At a meeting of the trustee and clerk of Oxford Township, to take into consideration the subscribing of stock in the Oxford Bridge Com-

pany—present, George T. Walton, trustee, and John H. Folks, clerk—it was ordered that the [218] said George T. Walton, trustee, and John H. Folks, clerk, do subscribe to the capital stock of the Oxford Bridge Company for such amount of capital stock as the ten-thousand-dollar bonds may purchase, not to be less than eighty-three shares of said stock; and the said George T. Walton and John H. Folks are further authorized to vote the number of votes said Township shall be entitled to, at any meeting of stockholders of said bridge company, during their continuance in office, in pursuance of law. Also ordered, that a copy of said law be sealed in this book. GEORGE T. WALTON, *Trustee.*
JOHN H. FOLKS, *Clerk.*
April 12th, 1872.

At a meeting of the Board of Oxford Township, George T. Walton, trustee, T. E. Clark, treasurer, and John H. Folks, clerk, were present, and subscribed the said bonds to the Oxford Bridge & Ferry Company, and participated in the stockholders' meeting of said company, for and on behalf of the said Township; and George T. Walton, T. E. Clark and John H. Folks were elected directors of said Oxford Bridge & Ferry Company. Said township board authorized William J. Hobson to procure the printing of suitable bonds, and also authorized said William J. Hobson to contract the sale of said bridge bonds at not less than 88 cents, and such higher amount as he may be able to procure; and it was further agreed by said William J. Hobson, in behalf of C. Baker & Co., that, if he shall not be able to sell said bonds for 88 cents or over, the said C. Baker & Co. will take said bonds in payment for the township stock, at 88 cents on the dollar, and make a good and sufficient bond to Oxford Township, conditioned that said company will build said bridge, in all respects, in conformity to contract this day signed by the said C. Baker & Co. and the directors of said Oxford Bridge & Ferry Company, said bond to be delivered to the township board of Oxford Township, and the bridge bonds to be delivered to said William J. Hobson as soon as may be after said bonds are printed.
GEORGE T. WALTON, *Trustee.*
JOHN H. FOLKS, *Clerk.*

[219] No other proceedings were had or taken by or before the township board in respect to issuing the bonds, except that, on April 8, 1872, an election was held in the Township on the question, with the result set forth on the face of the bonds. The bridge was erected by the corporation, and was maintained as a toll bridge until it was destroyed by water on June 9, 1876.

The plaintiff owns and holds the bonds and coupons sued on, having purchased them before their maturity, for value, without actual notice of any defense to them or of any defect or infirmity in the proceedings for issuing them.

The petition of the plaintiff alleged that the bonds were issued in pursuance of an election held in the Township in conformity with an Act of the Legislature of Kansas, passed March 2, 1872, chapter 68.

A special Act of the Legislature of Kansas, approved March 1, 1872, chapter 158, entitled as set forth on the face of the bonds, authorized the trustee, treasurer and clerk of Oxford Township, or any two of them, to issue the bonds of the Township, to the amount of $10,000, for the purpose of aiding in building such bridge. It required that the bonds should be in sums not less than $500, payable in ten years from the date of issuing, with interest at the rate of 10 per cent per annum, payable semi-annually, in the City of New York; that interest coupons should be attached, signed by the trustee and attested by the clerk; that the bonds should contain a statement of the purpose for which they were issued, and the result of the vote of the inhabitants of the Township on the question of issuing the bonds; that before any of the bonds should be issued, the question of issuing them should be submitted to the legal voters of the Township, at an election for that purpose; that the time and place of holding the election should be designated by the trustee, treasurer, and clerk, or any two of them, "by giving at least thirty days' notice, by posting written or printed notices thereof in three of the most public places in said Township; and that if, at the election, a majority of the votes should be for the bridge and bonds, the bonds should be issued." Section 7 of the Act was as follows: "This Act shall take effect from and after its [220] publication in the *Kansas Weekly Commonwealth.*" It was published in the *Kansas Weekly Commonwealth*, March 21, 1872.

The Act passed March 2, 1872, chapter 68, referred to in the petition as the Act in conformity with which the election was held in pursuance of which the bonds were issued, was an Act approved March 2, 1872, section 24 of which provided that it should "take effect and be in force from and after its publication in the *Kansas Weekly Commonwealth.*" It was published in the *Kansas Weekly Commonwealth*, March 7, 1872. It bore the title set forth in the auditor's certificate indorsed on the bonds, and was the Act therein referred to. It was a general law applicable to all counties, cities and townships. It embraced bridges, railroads and water power. It authorized the issuing of bonds to build bridges, and also as donations, and to pay for stock, in aid of railroads and bridges. It graded the amount of bonded debt by taxable property. It allowed bonds of not less than $100, required them to be payable in the City of New York, in not less than five nor more than thirty years from their date, with interest not to exceed 10 per cent per annum, payable semi-annually, on coupons, the bonds, if issued by a township, to be signed by the township trustee and attested by the township clerk. The bonds could not be issued unless ordered by a vote of the qualified electors of the township. To procure such vote, a petition was required, signed by at least one fifth of the voters of the township, to be presented to the trustee, clerk and treasurer, asking for a vote; and they were to call an election to be held within 30 days thereafter, and to give notice of it by publication, for at least three consecutive weeks, in each newspaper published in the township, and, if none were published, by posting up written or printed notices in at least 5 public places in each voting precinct in the township, for at least 20 days preceding the election, the notice to set forth the time and place of holding the election, the bridge pro-

posed to be built, and whether the aid was to be by donation or taking stock.

The question of the validity of the bonds [221] involved in the McClure case was there passed upon by this court. No question was there presented as to their validity under the Act of March 2, 1872, or as to their having been issued under that Act, and not under the Act of March 1, 1872. It was there held that as the Act of March 1, 1872, did not go into effect till it was published, and it was not published till March 21, 1872, and required 30 days' notice of the election, and as the bonds were dated April 15, 1872, and stated that the election was held April 8, 1872, and gave the title of the Act, and the date of its approval, their invalidity appeared on their face, in connection with the terms of the Act, because 30 days had not elapsed between the time the law took effect and the day of the election.

It is contended for the plaintiff in the present case, that, as the Act of March 2, 1872, took effect on March 7, 1872, the day before the commencement of the proceedings for an election, and there was an interval of full 30 days between March 8, 1872, and April 8, 1872, the day of the election, there was legislative authority under the Act of March 2, 1872, for all that was done. It is urged that in the McClure case no reference was made, in the record or in the arguments of counsel, to the latter Act, and that the question, as to the validity of the bonds under that Act is not controlled by the decision in the McClure case. The whole point of the contention in favor of the validity of the bonds is based on the proposition that the bonds were in fact issued under the authority of, and in compliance with, the provisions of the Act of March 2, 1872, instead of the Act of March 1, 1872.

The plaintiff, being referred by the bonds to the Act of March 1, 1872, as the statute under which they were issued, was bound, as was said in the McClure case, to take notice of the statute and of all its requirements. If, finding the bonds invalid under that statute, as he is held by law to have done, he claims the right to refer to the Act of March 2, 1872, as the source of authority, because that Act was in force from March 7, 1872, he was bound to take notice of the requirements of that Act. Looking at them, he was met by the fact that that Act required that the proceedings should be initiated by a petition of voters to the trustee, clerk, and treasurer of the township, and be [222] followed by the publication of the notice of election for three consecutive weeks in each newspaper, if any, published in the township; and if none were published, then by the posting of written or printed notices in at least five public places in each voting precinct in the township, for at least twenty days preceding the election. These proceedings were all variant from those to be had under the Act of March 1, 1872, which did not require any prior petition of voters, nor any newspaper publication of the notice, but only a posting of notices, and those only in three public places in the township, and not in five public places in each voting precinct in the township. Looking at the public records of the Township, he was met by the following facts: The proceedings made no reference to the Act of March 2, 1872, or to any petition of voters, but stated that they were taken under the Act of March 1, 1872, and that the officers gave thirty days' notice of election by posting written notices in only three public places in the Township. Even though the plaintiff purchased the bonds and coupons, as the finding of facts says, "before their maturity, for value, without actual notice of any defense to them, or of any defect or infirmity in the proceedings for issuing them," he was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds. The recitals in the bonds could not avail him, because as to the only Act recited, that of March 1, 1872, that Act was not in force long enough before the election to allow the required notice to be given; and, as to the Act of March 2, 1872, the records, which showed proceedings not in conformity with it, and the bonds, by the absence of all reference to it, and by their recitals as to the Act of March 1, 1872, excluded the possibility that the town officers issued the bonds, or intended to issue them, under the authority of, or in pursuance of, the Act of March 2, 1872. The statement in the bonds that they were issued "in pursuance of a vote of the qualified electors of said township, had at an election held therein on the eighth day of April, A. D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total [223] vote of 140," can refer only to an election held under the Act of March 1, 1872, before recited in the bond by its title and date, which was an illegal election for want of due notice; and the records showed that the election was held under that Act.

The case of *Anderson Co.* v. *Beal*, 113 U. S. 227 [Bk. 28, L. ed. 966], is relied on by the plaintiff, but does not aid him. In that case, although the bonds recited the wrong Act, the records of the county officers who issued the bonds did not show any want of compliance with the later Act, but showed a substantial compliance with it, and in fact the proceedings were had and were intended to be had under it. The reference in the bonds to the earlier Act as the source of authority was thus a mere clerical error. In the case at bar, the reference in the bonds to the Act of March 1, 1872, was not a clerical error, and the proceedings were intended to be had under that Act, and the records show a failure to comply with the Act of March 2, 1872, and an attempt to comply only with the Act of March 1, 1872. In the Anderson County case, legislative authority having been given for the issue of bonds by a statute under which the authorities in fact acted, the recital in the bonds, that the bonds were issued in pursuance of the vote of the electors, was effective to cover any irregularity as to notice, which did not appear of record, but was sought to be proved *aliunde*. In the present case, no such doctrine is applicable.

In *Commissioners* v. *January*, 94 U. S. 202 [Bk. 24, L. ed. 110], an Act was recited in the bonds which had been repealed by a later Act. The order for the election was made while the earlier Act was in force. The election was held after its repeal, and after the new Act went into force, but there was no new order of election. Otherwise, all the proceedings after the new

Act went into force were in conformity with it. It was held that a recital in the bonds that they were issued "in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county" "at a regular election, held on" a day named, estopped the county from raising the objection of the want of an order under the new Act, although the old Act, and not the new Act, was recited in the [224] bonds, as the statute authority. We think that case is distinguished from the present one by the fact that in it all the proceedings after the new law took effect were in conformity with it, while in the case at bar, none of the proceedings were in conformity with the Act of March 2, 1872.

Another question is presented in the case before us. Section 14 of the Act of March 2, 1872, provides that the holder of bonds issued under it shall, within 30 days after their delivery, present them to the Auditor of State for registration, and that he shall, on being satisfied that the bonds have been issued according to the provisions of the Act, and that the signatures thereto of the officers signing the same are genuine, register them in a book, "and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine; and that such bonds have been registered in his office according to law." As each of the bonds in suit has indorsed on it a certificate under the hand and seal of office of the Auditor of the State of Kansas, dated April 25, 1872, certifying that it "has been regularly and legally issued; that the signatures thereto are genuine; and that such bond has been duly registered" in his office, in accordance with the Act of March 2, 1872, giving its title, it is contended, for the defendant, that this certificate concludes all questions as to the regularity and legality of the issuing of the bonds.

In *McClure* v. *Township of Oxford* [*supra*], although the record set forth at length the certificate of the auditor on the bonds, and the brief of the plaintiff in error contended that such certificate was a final and conclusive determination that the bonds were regularly and legally issued, according to the provisions of the Act of March 1, 1872, this court, in its opinion, made no reference to that point. It was argued in that case, for the defendant in error, that the Act of March 2, 1872, as to registration, did not apply to the bonds as bonds issued under the Act of March 1, 1872, and that, if it did, the registration could not, as a recital, aid the want of authority disclosed by the face of the bond.

[225] But now it is contended that the provision for registration in the Act of March, 2, 1872, settles the question, that the bonds were bonds issued under that Act, and were "regularly and legally issued," according to the provisions of that Act. The case of *Lewis* v. *Commissioners*, 105 U. S. 739 [Bk. 26, L. ed. 993], is cited as sustaining that view. But we do not so regard it. In that case, section 14 of the Kansas Act of March 2, 1872, was under consideration in regard to the bonds of a county in Kansas, issued, in fact, under that Act, each of which had indorsed on it a certificate by the state auditor, that it had been "regularly and legally issued," and that it had been registered in his office according to law. A defense was set up against a *bona fide* holder of the bonds, that they had been issued in violation of a condition contained in the popular vote, and were fraudulently parted with by the person in whose hands they were put, to be deposited with the state treasurer in escrow, to await a compliance with the condition. This court held, as to the effect of the registration, that the determination by the auditor involved an investigation as to every *fact* essential to the validity of the bonds; that the *bona fide* purchaser was not bound, under the circumstances disclosed in that case, to find out whether the auditor had ascertained all the facts; and that the auditor was authorized by the statute to inquire whether the bonds were, as a matter of *fact*, of the class which, under the Act, should have passed through the hands of the state treasurer (it being required by the Act that some should do so, and others not), and, also, whether the conditions on which they were deliverable had been performed. But there is nothing in the decision which carries the doctrine further than that the auditor is authorized to ascertain whether the *facts* exist which the statute requires should exist, to make a valid issue of bonds. That this is so is shown by the case of *Dixon Co.* v. *Field*, 111 U. S. 83 [Bk. 28, L. ed. 360]. In that case, there was an innocent holder of bonds, of a county in Nebraska, and on each bond was indorsed a certificate of the state auditor that the bond was "regularly and legally issued." As against an objection that the bonds were issued in violation of a restriction in the Constitution of the State as to the amount of bonds to be issued, it was held by this court, under a registration statute like that in the present case, that [226] no conclusive effect was given by the statute to the registration or to the certificate; that the certificate was no more comprehensive or efficacious than the statement in the bond; that such statement did not extend to or cover matters of law; and that "a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law."

As the recitals in the bonds here are of no avail to the plaintiff, as before shown, so the certificate of the auditor does not aid him. The bonds on their face excluded the possibility of their having been issued under the Act of March 2, 1872, and as the public records showed that the proceedings were not taken under that Act, and as the auditor was authorized by section 14 of that Act only to register bonds issued under that Act, and as these bonds did not fall within the purview of bonds authorized to be registered by him under section 15 of that Act, it follows that the auditor had no right to decide, as matter of law, that the bonds were bonds of the kind which he was authorized by the Act of March 2, 1872, to register and certify, when, as a matter of law, they were not.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[322] ABBIE B. CLARK, EXIX. AND RUFUS D. CHASE, EXR. of ANDREW J. CLARK, Deceased, ET AL., *Appts.*,

v.

GEORGE H. WOOSTER.

(See S. C. Reporter's ed. 322-326.)

Bill to restrain, and to recover damages for, infringement of patent—equity jurisdiction—reissued patent, prima facie *evidence of its validity—established license fee, usual measure of damages.*

1. A court of equity has jurisdiction of a bill filed to restrain the infringement of a patent and to recover profits and damages, although the patent expired fifteen days after the bill was filed, when, by the course of the court, an injunction might have been obtained within that time. Whether to retain or dismiss the bill was within the discretion of the court below with which this court will not interfere unless that discretion was illegally exercised.

2. The reissued patent itself, with proof of infringement, made a *prima facie* case for complainant; and allegations in the answer, that the patent was illegally reissued, required to be proved.

3. Established license fees are the best measure of damages that can be used in patent cases; and the evidence in the present case as to the license fee was sufficient.

[No. 31.]

Argued Nov. 8, 9, 1886. Decided Dec. 6, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The case is stated by the court.

Messrs. **Frederick P. Fish** and *T. L. Livermore*, for appellants.

Mr. **Frederick H. Betts**, for appellee.

[323] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is a suit on a patent, brought by Wooster, the appellee, against the persons composing the firm of Johnson, Clark & Co., of New York, to restrain them from infringing the patent, and to recover profits and damages. The bill was filed on the 20th of December, 1879, and the patent expired fifteen days afterwards. The patent was for folding guides used on sewing machines, and is the same that was involved in the case of *Thomson* v. *Wooster*, 114 U. S. 104 [Bk. 29, L. ed. 105]. It was granted to one Douglas in October, 1858, for a period of fourteen years, was extended in October, 1872, for seven years longer, and was then, in the same month, surrendered and reissued. The bill does not specify the particular ground on which the reissued patent was granted; and although the answer avers that it was unlawfully granted, that the original was surrendered for the purpose of claiming more and other things than were described and claimed in it, and that the reissued patent is not for the same invention for which the original was granted, it does not set out the original, nor was the original put in evidence in the cause, and no evidence was offered to substan-
[324] tiate the allegations of the answer. The complainant produced the reissued patent in evidence and proved infringement. The defendant adduced evidence before the examiner, but out of time, and it was ruled out by the court. A decree was made establishing the patent, and the infringement thereof by the defendants, and referring it to a master to take and state an account of profits, and to assess damages, and the defendants were ordered to produce their books, papers, and devices used, so far as related to the matter in issue. Upon this reference, the parties entered into a stipulation before the master, by which the defendants admitted that they had purchased and disposed of 15,000 folding guides covered by the decree; and in consideration thereof the complainant waived all further testimony as to profits received by the defendants therefrom, and agreed to rely on proof of damages in place of profits. The complainant adduced evidence to show that he had an established license fee of ten cents for each folding guide purchased or disposed of, and had granted licenses at that rate to divers sewing machine companies. The master, being satisfied with this evidence, reported the damages at $1,500. The defendants filed a number of exceptions to the report, none of which were sustained, and a decree was entered for the amount of damages reported. The defendants thereupon appealed.

The points taken by the appellants are:

First. That the court below, sitting as a court of equity, had no jurisdiction of the case, because the complainant had a plain and adequate remedy at law

Second. That the reissue of the patent was illegal by reason of laches in applying for it.

Third. That the court erred in finding that the measure of damages was an established license fee, and that such license fee was proved.

As to the first point, the bill does not show any special ground for equitable relief, except the prayer for an injunction. To this the complainant was entitled, even for the short time the patent had to run, unless the court had deemed it improper to grant it. If, by the course of the court, no injunction could have been obtained in that time, the bill could very properly have been dismissed, and ought to have been. But by the rules of the court in [325] which the suit was brought, only four days' notice of application for an injunction was required. Whether one was applied for does not appear. But the court had jurisdiction of the case, and could retain the bill, if in its discretion it saw fit to do so, which it did. It might have dismissed the bill, if it had deemed it inexpedient to grant an injunction; but that was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal. We see no illegality in the manner of its exercise in this case. The jurisdiction had attached, and although, after it attached, the principal ground for issuing an injunction may have ceased to exist by the expiration of the patent, yet there might be other grounds for the writ arising from the possession by the defendants of folding guides illegally made or procured whilst the patent was in force. The general allegations of the bill were sufficiently comprehensive to meet such a case. But even without that, if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take

away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect; and there is nothing in the decision in *Root* v. *R. Co.* 105 U. S. 189 [Bk. 26, L. ed. 975] to the contrary. *Cotton Tie Co.* v. *Simmons*, 106 U. S. 89 [Bk. 27, L. ed. 79]; *Lake Shore & M. S. R. Co.* v. *Car-Brake Co.* 110 U. S. 229 [Bk. 28, L. ed. 129]; *Consolidated Valve Co.* v. *Crosby Valve Co.* 113 U. S. 157 [Bk. 28, L. ed. 939]; *Thomson* v. *Wooster*, 114 U. S. 104 [Bk. 29, L. ed. 105]. It is true that where a party alleges equitable ground for relief and the allegations are not sustained, as where a bill is founded on an allegation of fraud, which is not maintained by the proofs, the bill will be dismissed *in toto*, both as to the relief sought against the alleged fraud, and that which is sought as incidental thereto.

The point insisted on, that the bill contained no charge of continued infringement, or of infringement at the time of commencing the suit, if it were material, is not sustained by the fact. The bill does contain such a charge.

[326] As the court had jurisdiction at the inception of the suit, even though upon a narrow ground, yet, as the defendants did not ask the dismissal of the bill on the ground of want of jurisdiction, we should be very reluctant, if we had the power, now, on an appeal, after the case has been tried and determined, to reverse the decree.

The second point raised was substantially disposed of in the case of *Thomson* v. *Wooster*, *qua supra*. The allegations in the present bill are the same as they were in that case. Neither the bill nor the proofs show any thing from which the court can infer that the reissue was illegally granted; and the allegations of the answer are unsupported by evidence. The reissued patent itself made a *prima facie* case for the complainant. The allegations of the answer, that it was issued for the mere purpose of expanding the claim of the original, and that it was for another and different invention, should have been proved. But we have no evidence on the subject, not even the original patent with which to compare the reissue. This point, therefore, is wholly without foundation.

The third point, as to the measure of damages and the want of proof thereof, is equally untenable. It is a general rule in patent causes, that established license fees are the best measure of damages that can be used. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant, and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subjects of allowance by the court under the authority given to it to increase the damages.

As to the sufficiency of the proof, we see no occasion to disturb the conclusion reached by the master on this point. The complainant proved several instances of licenses given by him to large sewing machine companies, the fees on which were regularly paid, and corresponded with the rate allowed by the master. We think that the defendants have no occasion to complain of the amount awarded.

The decree of the Circuit Court is affirmed.

True copy. Test:
JAMES H. McKENNEY, Clerk, Sup. Court, U. S.

JAMES HAMILTON, *Plf. in Err.*, [280]
v.
VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 280-285).

Construction of bridges across navigable streams—regulation of, within power of States when Congress has not acted—damnum absque injuria.

1. Whenever the exercise of a right conferred by law for the benefit of the public is attended by temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor.

2. Where a railroad company has been authorized by a State to construct a bridge across a navigable stream, and some obstruction to navigation is unavoidable during its construction, a private party damaged by such obstruction cannot hold the company liable for such damage.

3. There is nothing in any of the Acts of Congress which deprives the Legislature of the State of Louisiana of the power to determine the character of the bridges which may be erected over the Boeuf River.

4. When a State provides for the form and character of a bridge its directions will control, irrespective of its effect upon navigation, except as against the action of Congress.

[No. 23.]

Argued and submitted Nov. 10, 1886. Decided Dec. 6, 1886.

IN ERROR to the Supreme Court of the State of Louisiana. *Affirmed.*

The case is stated by the court.

Mr. **John T. Ludeling,** for plaintiff in error:

The Supreme Court of Louisiana held that the Legislature of that State had the power to confer upon the defendant the right to build all necessary bridges across any navigable stream in the course of its line.

34 La. Ann. 973.

Upon rehearing the court said: "As to streams which are navigable only within the limits of a single State, the authority of its Legislature is complete." *Id.* 975.

The navigable rivers and waters in the Territories of Orleans and Louisiana are made public highways by the Act of March, 3, 1811. The Mississippi and navigable waters leading into the same, or into the Gulf of Mexico, are made public highways and forever free by the Act of the 20th of February, 1811, Act of March 1, 1817, and by the Act of June 4, 1812.

Gordon, Digest, 640, note.

They are so declared by the Revised Statutes of the United States, sections 5251 and 2476.

The Boeuf River is in fact navigable, and is therefore in law a public navigable river.

The Montello, 20 Wall. 441 (87 U. S. bk. 22, L. ed. 394).

Usefulness for purposes of transportation for rafts, boats, or barges, gives a navigable character; reference being due to its natural state rather than to its average depth the year round.

The Montello, supra; Little Rock R. R. Co. v. *Brooks*, 39 Ark. 403; *The Daniel Ball*, 10 Wall. 557 (77 U. S. bk. 19, L. ed. 999); *Moore* v. *Sanborne*, 2 Mich. 519; *Morgan* v. *King*, 35 N. Y. 454; *Brown* v. *Chadbourne*, 31 Me. 9; *Walker* v. *Allen*, 72 Ala. 456; *Ingram* v. *Police Jury*, 20 La. Ann. 226.

If the proof is not sufficient to show the navigability of the water, the court will take judicial notice of such navigability.

1 Greenl. Ev. § 6; *Win. Lake Co.* v. *Young*, 40 N. H. 420; *Atwater* v. *Schenck*, 9 Wis. 160; *The Peterhoff*, Blatchf. Prize Cases, 463; *Mossman* v. *Forest*, 27 Ind. 233; *Ind. & C. R.R. Co.* v. *Stephens*, 28 Ind. 429; *Neaderhouser* v. *State*, 28 Ind. 257; *Wright* v. *Hawkins*, 28 Tex. 452; *McManus* v. *Carmichael*, 3 Iowa, 1; *Wood* v. *Fowler*, 26 Kan. 682; *Pennsylvania* v. *Wheeling etc. Bridge Co.* 13 How. 519 (54 U. S. bk. 14, L. ed. 267).

Waters navigable in fact come within the power of the General Government, when by themselves or their connections with other waters they form a continuous channel for commerce among the States or with foreign countries.

The Daniel Ball, supra; Escanaba, etc. Co. v. *Chicago*, 107 U. S. 682 (Bk. 27, L. ed. 444).

Where the power of the State and that of the Federal Government come in conflict, the latter must control. (683)

The decisions are that the Ordinance of 1787, and that the Act of Sep. 9, 1850, admitting California, "must be considered as in no way impairing the power which the State could exercise if the cause had no existence."

Escanaba, etc. Co. v. *Chicago*, 107 U. S. 678 (bk. 27, L. ed. 442); *Cardwell* v. *American Riv. Br. Co.* 113 U. S. 205 (28: 959); *Pollard* v. *Hayan*, 3 How. 212 (44 U. S. bk 11, L. ed. 565); *Permoli* v. *Munic. No. 1 of N. O.* 3 How. 589 (11: 739); *Strader* v. *Graham*, 10 How. 82 (51 U. S. bk. 13, L. ed. 337).

Such a decision does not apply to a valid law which Congress had the power to enact where the waters were within a State or territory.

Wallamet Iron Br. Co. v. *Hatch*, 19 Fed. Rep. 347.

But whatever may be the construction of the Acts of Congress, admitting the States of Louisiana, Mississippi, etc., Congress has, since the admission of Louisiana into the Union, legislated upon the subject of the navigation of Boeuf River.

Rev. Stat. U. S. 1878, §§ 2476, 5251.

The decision in *Wilson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245 "was based entirely upon the absence of any legislation of Congress upon the subject."

Escanaba, etc. Co. v. *Chicago, supra.*

In cases last cited, the decision rested upon the fact that "bridges over navigable streams which are entirely within the limits of a State," are regulated by the State. *E converso*, rivers running through two or more States are not.

In the *Slaughter House Cases*, "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States," is recognized.

16 Wall. 79 (83 U. S. bk. 21, L. ed. 409). See 3 Kent, Com. 411.

Messrs. **George Hoadly, Jr.**, *Edgar M. Johnson, Edward Colston* and *George Hoadly*, for defendant in error:

The power of the original States to authorize the obstruction of navigable streams, within their territory, was recognized in *Wilson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245 (27 U. S. bk. 7, L. ed. 412).

Gilman v. *Phila.* 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96).

The Statutes of the United States upon which the plaintiff in error relies have no bearing upon the power of the States to thus obstruct navigable waters within their limits.

Pound v. *Turck*, 95 U. S. 459 (Bk. 24, L. ed. 525); *Escanaba, etc. Co.* v. *Chicago*, 107 U. S. 678 (27: 442); *Cardwell* v. *American Riv. Br. Co.* 113 U. S. 205 (28: 959).

Mr. Justice **Field** delivered the opinion of the court: [281]

The authority vested by its Act of incorporation in the Vicksburg, Shreveport and Texas Railroad Company, to construct a railroad from a point opposite Vicksburg to the state line of Texas, empowered it to construct as part of the road all necessary bridges for the crossing of navigable streams which might be on its line. It was so held by the Supreme Court of the State of Louisiana, and it would seem to be a self-evident proposition. What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulation of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams. Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation. [282]

As has often been said by this court, bridges are merely connecting links of turnpikes, streets and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases, the local authority can best determine which of the two modes of transportation should be favored, and how far either should be made subservient to the other. *Gilman* v. *Phila.* 3 Wall. 713, 729 [70 U. S. bk. 18, L. ed. 96, 101].

In the case at bar no specific directions as to the form and character of the bridges over the streams on the line of the railroad were prescribed by the Legislature of the State. The authority of the Company to construct them was only an implied one, from the fact that such structures were essential to the continuous connection of the line. Two conditions, however, must be deemed to be embraced within this implied power: one, that the bridges should be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; and the other that they should not interfere unnecessarily with the navigation of the streams.

The line of road crossed a small stream, one of the tributaries of the Ouachita River, called Boeuf River, which was navigable for about six months in the year. This river has its rise

in Arkansas, and by its connection with the Ouachita, which empties into the Red River, its waters find their way to the Mississippi. Over this river the Company constructed a bridge with a draw sufficiently large to allow the passage of steamers. It was used for years without complaint from anyone, so far as the record discloses. But in 1880 it was found, upon inspection, to be decayed and unsafe for the passage of trains. The defendant, which had succeeded to the property and interests of the Vicksburg, Shreveport and Texas Company, therefore determined to rebuild it. To carry out this purpose with as little inconvenience as practicable to vessels navigating the river, the [283] Company contracted with an experienced builder to construct the bridge during the summer months, when the river was usually too low for navigation. The work could not be begun until the subsidence of the water in July. In order to expedite its construction, the Company stipulated with the contractor to prepare the timbers at its workshops and transport them to the ground as soon as the state of water would permit the work to be commenced; and it carried out its stipulation in that respect. In the construction of the new bridge it became necessary to dismantle the draw of the old one, and to erect temporary supports while the timbers and draw of the new bridge were being put in place. To prevent the stoppage of its trains while this building was going on, the Company constructed a temporary bridge adjoining the old one, for their transportation, expecting to have the new bridge completed before the winter rise, which usually began near the close of December, should render the river navigable. But early in August rains set in, and continued almost incessantly for months, rendering the river navigable in November, much earlier than usual. The work on the new bridge was thereby greatly impeded. To obviate this impediment, as far as possible, the Company added to the contractor's force a gang of its own bridge laborers, who assisted by working at night and on Sundays.

The court below found that the Company did everything in its power to accelerate the work on the new bridge, but it was not completed until December 20, following. The water in the river being increased by the unusual rains, there was sufficient depth on the 6th of November to carry the plaintiff's steamer with freight above the bridge. But the steamer could not pass owing to the temporary structure and the supports used in the erection of the new bridge. For the losses alleged to have been sustained from this obstruction between the 6th of November and the 20th of December, the plaintiff brought this action.

The District Court of Louisiana gave judgment for the plaintiff in the sum of $1,000, from which both parties appealed to the Supreme Court of the State—the plaintiff because he did not recover as much as he claimed, and the de- [284] fendant because there was a recovery of any sum. The supreme court reversed the judgment, holding that the Company was authorized by the charter of the original company, to which the defendant had succeeded, to construct a bridge over the river for the passage of its trains, and, when out of repair and decayed, to replace it with a new one; that the obstruction to navigation caused by the construction of the new bridge was unavoidable, and the Company could not, therefore, be held responsible for any injury resulting therefrom; that it was a case in which the defendant was entitled to the protection of the rule of *damnum absque injuria*. It accordingly reversed the judgment, and ordered that the action be dismissed.

The plaintiff contends that Congress had previously acted with respect to the navigation of this river and of all other navigable waters in Louisiana, and had thereby interdicted the placing of any obstruction in them, even of a temporary character, to the passage of vessels. He cites in support of this position the Act of February 20, 1811, enabling the people of the Territory of Orleans to form a constitution and state government, the third section of which enacted that the convention called to frame the Constitution should, by an ordinance irrevocable without the consent of the United States, provide, among other things, "that the River Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State" (2 Stat. at L. 642); and also the proviso to the Act of April 8, 1812, for the admission of Louisiana, which declares that it is upon a similar condition that the State is incorporated into the Union. *Id.* 701, § 1.

A similar provision is found in the Acts admitting the States of California, Wisconsin and Illinois into the Union, with respect to the navigable rivers and waters in them, the purport and meaning of which have been the subject of consideration by this court. *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [Bk. 27, L. ed. 442] and *Cardwell* v. *American Bridge Co.* 113 U. S. 205 [28: 959]. In the latter case we had before us [285] the clause in the Act admitting California, and we held that it did not impair the power which the State could exercise over its rivers, even if the clause had no existence. We there referred to previous decisions upon a similar enactment, and said "that if we treat the clause as divisible into two provisions, they must be construed together as having but one object; namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public."

The objection to the authority conferred upon the Company to construct the bridge, from the legislation of Congress, is therefore not tenable; and we agree with the ruling of the court below that whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to any damages therefor. The obstruction caused to the navigation of the stream during the progress of the work on the new bridge, therefore, afforded no ground of action. The inconvenience was *damnum*

absque injuria. Bennett v. *New Orleans*, 14 La. Ann. 120; *Barbin* v. *Police Jury, etc.* 15 La. Ann. 559. *Judgment affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[156] EDWARD G. HANRICK, *Plff. in Err.*,

v.

W. A. PATRICK, Admr. of ELIZA M. O'BRIEN, Deceased, ET AL.

WHARTON BRANCH ET AL., Intervenors, *Plffs. in Err.*,

v.

W. A. PATRICK, Admr. of ELIZA M. O'BRIEN, Deceased, ET AL.

(See S. C. Reporter's ed. 156-176.)

Separate writs of error from joint judgment—alienage—construction of the Texas Statutes—repeal—grantor of present interest in real property not estopped as to subsequently acquired title by covenant of general warranty—evidence—objections to deed—erasure—execution—power of attorney—conveyance of real property in Texas to wife, upon nominal consideration—intention to vest title in her, presumed.

1. When a judgment against defendants is joint, all the parties affected thereby must join in the writ of error, or there must be a summons and severance, or its equivalent.

2. In an action to try the title to real estate, where intervenors are admitted, who claim under the plaintiffs, but hostile to them, and who can only recover by establishing the rights of the plaintiffs to recover, a finding for the plaintiffs and against both the intervenors and the defendant, and a judgment thereon, although single, is upon different and distinct issues, and must be regarded as joint only in form, and severable in fact and law; and a motion to dismiss a writ of error sued out by the defendant, on the ground that the judgment was jointly against him and the intervenors, and that all should have been in the same writ, will be denied.

3. The same principle must govern judgments at law, rendered in actions according to the forms of procedure prescribed by the statutes of the State in which they are tried, where interventions to assert title are permitted, as in equity, where interventions *pro interesse suo* have been permitted to those affected by the proceeding, but not parties to the original controversy; which principle is, that where the decree is final, and separate or separable, those not affected by it are not necessary parties to the appeal.

4. This court holds, both upon reason and the authority of the Supreme Court of Texas, that the Act of 1854 of that State, defining the rights of aliens, did not repeal the provision of the Act of 1848, providing that alien heirs of real property should be entitled to nine years in which to dispose of it, or to become citizens and take possession thereof; and that, under the Act of 1854, the English Act of 1870 changed the defeasible title of the alien heirs of an owner of lands situated in Texas, who died in 1865, into an indefeasible title.

5. In the absence of a recital in a deed which estops the grantor as to the character of his title, or the *quantum* of interest intended to be conveyed, a covenant of general warranty, where the estate granted is the present interest and title of the grantor, does not operate as an estoppel to pass a subsequently acquired title.

6. Where a deed, executed in a foreign country, professes to have been signed, sealed and delivered in the presence of two witnesses, one of whom, a justice of the peace, certifies to such execution, and the other subscribing witness makes an affidavit of its execution, which is certified by the Consul of the United States, the proof of execution is sufficient to entitle the deed to admission in evidence.

7. Where it appears upon the face of a deed that wherever the name of the grantor was mentioned in the body, the name, as originally written, was Elizabeth O'Brien, and that a portion of said name had been erased so as to read Eliza O'Brien, proof that Elizabeth O'Brien and Eliza O'Brien, were one and the same person, met any objection based upon the erasure. The presumption was that the erasure was made before the execution of the deed.

8. Where some of the parties who have executed a power of attorney, granting authority "to recover their interest in an estate," died before action under the power, as to them and their heirs or assigns, if not as to all who have executed, the power is revoked. Such a power does not authorize the execution of a deed conveying away the interest of the principals.

9. While by the law of Texas property purchased during the marriage, whether conveyed to the husband or the wife, is *prima facie* community property, the rule only holds where the purchase is made with community funds. Where the consideration was nominal, and the deed was made to the wife, the presumption is that it was intended to vest the title in her as separate property.

[Nos. 20, 475.]

Argued Oct. 28, 29, 1886. Decided Nov. 29, 1886

IN ERROR to the Circuit Court of the United States for the Northern District of Texas. *Motion to dismiss denied and judgment affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **J. T. Brady** and *H. N. Low*, for defendants in error, on motion to dismiss writ of error for want of jurisdiction.

The writ of error is prosecuted by the plaintiff in error, Hanrick, alone, and the record does not show any attempt to join the other parties against whom judgment was also rendered, nor does it disclose any reason for their nonjoinder. The judgment is joint.

Simpson v. *Greeley*, 20 Wall. 152 (87 U. S. bk. 22, L. ed. 338); *Masterson* v. *Herndon*, 10 Wall. 416 (77 U. S. bk. 19, L. ed. 953); *Burleson* v. *Henderson*, 4 Tex. 55; *Schram* v. *Gentry*, Galveston Term, 1885, Sup. Court of Texas; *Smith* v. *Gentry*, Id.

The writ of error must be dismissed.

Simpson v. *Greeley*, and *Masterson* v. *Herndon*, *supra*; *O'Dowd* v. *Russell*, 14 Wall. 402 (81 U. S. bk. 20, L. ed. 857); *Hampton* v. *Rouse*, 13 Wall. 187 (80 U. S. bk. 20, L. ed. 593); *Williams* v. *Bank*, 11 Wheat. 414 (24 U. S. bk. 6, L. ed. 508); *Owings* v. *Kincannon*, 7 Pet. 399 (32 U. S. bk. 8, L. ed. 727); *Todd* v. *Daniel*, 16 Pet. 521 (41 U. S. bk. 10, L. ed. 1054); Fields, Fed. Courts, 296; 2 Abb. U. S. Pr. 248, 250.

See also authorities under next proposition.

The objection to nonjoinder of Branch and Sargent in the petition for writ of error goes to the jurisdiction of the court, and may be made at any time.

Wilson's Heirs v. *Life & Fire Ins. Co.* 12 Pet. 140 (37 U. S. bk. 9, L. ed. 1032; *Simpson* v. *Greeley* and *Masterson* v. *Herndon*, *supra*; *Semple* v. *Hagar*, 4 Wall. 431 (71 U. S. bk. 18, L. ed. 402); 2 Abb. U. S. Pr. 250.

This defect can only be cured by dismissing the writ and bringing another in which all against whom judgment is rendered are made parties.

Mussina v. *Cavazos*, 20 How. 280 (61 U. S. bk. 15, L. ed. 878).

Messrs. **W. Hallett Phillips** and **L. W. Goodrich**, for E. G. Hanrick, plaintiff in

error in case No. 20, and *Mr. M. F. Morris*, for plaintiffs in error in case No. 475 in answer to motion,

The general rule proceeds upon the principle that all the parties who are united in interest ought to unite under the writ of error, that the court may not be required to decide for the second time the same question on the record. An additional reason is that the successful party should be allowed to proceed against the parties who are satisfied with the judgment.

Owings v. *Kincannon*, 7 Pet. 399 (32 U. S. bk. 8, L. ed. 727); *Todd* v. *Daniel*, 16 Pet. 521 (41 U. S. bk. 10, L. ed. 1054); *Masterson* v. *Herndon*, 10 Wall. 416 (77 U. S. bk. 19, L. ed. 953); *Cox* v. *U. S.* 6 Pet. 172 (31 U. S. bk. 8, L. ed. 359); *Germain* v. *Mason*, 12 Wall. 259 (79 U. S. bk. 20, L. ed. 392); *Feibelman* v. *Packard*, 108 U. S. 14 (Bk. 27, L. ed. 634).

Intervenors cannot be considered defendants, as their titles are hostile to both. The circuit court followed the Texas state practice, which confounds distinctions between law and equity.

Hurt v. *Hollingsworth*, 100 U. S. 100 (Bk. 25, L. ed. 569); *Noonan* v. *Lee*, 2 Black, 499 (67 U. S. bk. 17, L. ed. 278); *Bein* v. *Heath*, 12 How. 168 (53 U. S. bk. 13, L. ed. 939); *Boyle* v. *Zacharis*, 6 Pet. 648 (31 U. S. bk. 8, L. ed. 532).

The defendant Hanrick and the intervenors were not united in interest, and the judgment as to them is severable. In legal effect the judgment is against them for the land which they respectively claimed.

Ex parte French, 100 U. S. 1 (Bk. 25, L. ed. 529).

Messrs. **W. Hallett Phillips and L. W. Goodrich**, for E. G. Hanrick, plaintiff in error in case No. 20, on the merits:

The common-law rule as to aliens is stated in *Orr* v. *Hodgson*, 4 Wheat. 453 (17 U. S. bk. 4, L. ed. 613); *Cryer* v. *Andrews*, 11 Tex. 171; *Barclay* v. *Cameron*, 25 Tex. 242; *White* v. *Sabriego*, 30 Tex. 584; *Hardy* v. *DeLeon*, 5 Tex. 243.

The Constitution of Texas of 1836 declared that no alien should hold land except directly from that Republic. Section 14 of the Act of 1840, re-enacted as section 9 of the Act of 1848, provided that every alien to whom land may be devised, or may descend, shall have nine years to become a citizen, and take the land, or nine years to sell the same, before it shall be declared forfeited. This provision was construed in *McKinney* v. *Saviego*, 18 How. 235 (59 U. S. bk. 15, L. ed. 365).

The Act of 1854 accorded such rights as are accorded American citizens by the laws of the nation to which the alien belongs. Section 4 repeals section 9 of the Act of 1848, so far as inconsistent with the Act of 1854. The law of Great Britain giving aliens the right to inherit was not passed until 1870. As the ancestor died before the passage of the English Statute, it would be contrary to the spirit of the Act of 1854 to permit the heir to take any estate which an American citizen could not have taken at that time in England.

Chirac v. *Chirac*, 2 Wheat. 259 (15 U. S. bk. 4, L. ed. 234); *Hauenstein* v. *Lynham*, 100 U. S. 483 (Bk. 25, L. ed. 628); *State* v. *International & G. N. R. R. Co.* 57 Tex. 534; *Bryan* v. *Sundburg*, 5 Tex. 423; *Sharpe* v. *De St. Sauveur*, 26 L. T. N. S. (Ch.) 142; *Crane* v. *Reeder*, 21 Mich. 24; *Shelton* v. *Collector*, 5 Wall. 113 (72 U. S. bk. 18, L. ed. 544).

As the Act of 1854 covers the whole subject of the Act of 1848, and embraces new provisions, it is a repeal by construction.

U. S. v. *Tynen*, 11 Wall. 92 (78 U. S. bk. 20, L. ed. 154); *Davies* v. *Fairbairn*, 3 How. 636 (44 U. S. bk. 11, L. ed. 760); *State* v. *Stoll*, 17 Wall. 431 (84 U. S. bk. 21, L. ed. 654); *Cook Co. Nat. Bank* v. *U. S.* 107 U. S. 450 (Bk. 27, L. ed. 539); *Bryan* v. *Sundburg*, *supra*.

The guiding principle in the legislation of modern States on the subject of alien property rights has been that of reciprocity.*

Sirey, under art. II, Aubry and Rau. tit. Droit's Civil; Proudhon, chap. 9, § 2, chap. II, § I; Merlin, art. Etranger, § 1, Nos. 7 and 8; Duranton, 1, pp. 159, 160; Dalloz, Jurisp. Generale.

If it were necessary to resort to section 9 of the Act of 1848, we understand that the Legislature by that Act only meant the alien to take and dispose of the estate, or become a citizen, and that it applied to cases where the property would vest at once in the State for want of some person who could at common law inherit. Such was the construction placed by this court on the Missouri Alien Act.

Sullivan v. *Burnett*, 105 U. S. 338 (Bk. 26, L. ed. 1125).

The Act of 1854 makes no distinction between indefeasible and defeasible estates. The sole test is reciprocity. A defeasible title by descent in an alien is unknown to the common law.

Fairfax v. *Hunter*, 7 Cranch. 603 (11 U. S. bk. 3, L. ed. 453); *Blight's Lessee* v. *Rochester*, 7 Wheat. 535 (20 U.S. bk. 5, L. ed. 516).

The decision of the question, here presented, by the Supreme Court of Texas, was rendered in a suit brought by different plaintiffs, and delivered after this suit had been brought in the United States Circuit Court, and after the demurrer interposed by the defendant had been overruled; and is only so far obligatory on this court as its reasoning convinces.

Gibson v. *Lyon*, 115 U. S. 447 (Bk. 29, L. ed. 442); *East Alabama R. Co.* v. *Doe*, 114 U.S. 352 (Bk. 29, L. ed. 140).

At the time the circuit court ruled on the demurrer in this case, the state court had not so held the law to be, but by a well settled line of decisions had held to the contrary.

Hardy v. *DeLeon*, and *Cryer* v. *Andrews*, *supra*; *McGahan* v. *Baylor*, 32 Tex. 792; *Wardrup* v. *Jones*, 23 Tex. 489; *Warnell* v. *Finch*, 15 Tex. 163.

*NOTE.—The following references to the volume of Public Treaties, 1873, show the right of our citizens to hold real estate and the right of succession in foreign countries, so far as secured by treaty, as also the rights of aliens in this country:

Real Estate, Succession.	Page
Citizens of each country in the territories of the other may dispose of, by will, donation, or otherwise—	
France, 1778, 1800	207, 226
New Granada, 1846	552
San Salvador, 1850	677
Swiss Confederation, 1850	750
Two Sicilies, 1855	781
Their heirs, etc., being citizens or subjects of the other party, may succeed to—	
France, 1778, 1800	207, 226

The decision in *Hanrick* v. *Hanrick*, 54 Tex. 101, and 61 Tex. 596, cannot be reconciled with the opinion of this court in *McKinney* v. *Saviego*, *supra*.

Osterman v. *Baldwin*, 6 Wall. 116 (73 U. S. bk. 18, L. ed. 730).

Much less can they be reconciled with a long line of decisions, beginning with *Orr* v. *Hodgson*, *supra*, and *Phillips* v. *Moore*, 100 U. S. 208 (Bk. 25, L. ed. 603); *Chirac* v. *Chirac* and *Hauenstein* v. *Lynham*, *supra*.

The decision in *Hanrick* v. *Hanrick*, *supra*, is still pending and undetermined, and on final disposition the court may restore the old rule.

Reeves v. *Petty*, 44 Tex. 252.

Where a circuit court has decided a question in accordance with the decisions of the state court at the time, a reversal by the state court of its rulings will not induce the supreme court to reverse the decision of the circuit court.

Burgess v. *Seligman*, 107 U. S. 33 (Bk. 27, L. ed. 365); *Carroll Co.* v. *Smith*, 111 U. S. 563 (Bk. 28, L. ed. 519).

Although two of the makers of the power of attorney had died, yet the deeds subsequently made under the power conveyed the interest of the survivor, Elizabeth O'Brien.

Jackson v. *Van Dalfsen*, 5 Johns. 43; *Holladay* v. *Daily*, 19 Wall. 606 (86 U. S. bk. 22, L. ed. 187).

Where it appears on the face of a deed that the property was acquired during marriage, and for a valuable consideration, it is community property, and can be conveyed by the husband's deed.

Cooke v. *Bremond*, 27 Tex. 457; *Kirk* v. *Houston Nav. Co.* 49 Tex. 215; *Morrison* v. *Clark*, 55 Tex. 437; *Wallace* v. *Campbell*, 54 Tex. 87; *French* v. *Strumberg*, 52 Tex. 92; *Rogan* v. *Williams*, 63 Tex. 123; *Harrison* v. *Boring*, 44 Tex. 255.

That the deed from O'Brien and wife to William Brady was placed on record before the deeds by the same grantors to Sargent and Branch were recorded gives no preference, without proof that Brady was an innocent purchaser.

Watkins v. *Edwards*, 23 Tex. 443.

The plaintiffs cannot claim any interest in the 9,400 acres of land without contributing some portion of the expense.

Freem. Cotenancy, §§ 156, 162; *Roberts* v. *Thorn*, 25 Tex. 728; *Venable* v. *Beauchamp*, 3 Dana, 321.

It was error to withdraw from the jury the question whether the possession by defendant Hanrick and his cotenant Gurley was adverse and sufficient to constitute a bar.

Alexander v. *Kennedy*, 19 Tex. 488; *Teal* v. *Terrell*, 58 Tex. 257; *Portis* v. *Hill*, 3 Tex. 279.

It is the rule in the federal courts that an action to try titles can be maintained only on a legal title.

Fenn v. *Holme*, 21 How. 482 (62 U. S. bk. 16, L. ed. 198); *Greer* v. *Mezes*, 24 How. 268 (65 U.S. bk. 16, L. ed. 661); *Smith* v. *McCann*, 24 How. 398 (65 U. S. bk. 16, L. ed. 714); *Jones* v. *McMasters*, 20 How. 22 (61 U. S. bk. 15, L. ed. 810); *Singleton* v. *Touchard*, 1 Black, 343 (66 U. S. bk. 17, L. ed. 50); *Binney's Lessee* v. *Chesapeake & O. Can. Co.* 8 Pet. 214 (33 U. S. bk. 8, L. ed. 921).

The indorsement of the petition "this action is brought as well to try title as for damages," is sufficient in an action at law.

Pilcher v. *Kirk*, 55 Tex. 208; *Bridges* v. *Cunditf*, 45 Tex. 443; *Edgar* v. *Galveston City Co.* 46 Tex. 421; *Hill* v. *Allison*, 51 Tex. 390.

The covenants of seisin, of right to convey, and of general warranty, estopped O'Brien and wife from asserting to the contrary.

Harrison v. *Boring*, *supra*; *Smith* v. *Sheeley*.

New Granada, 1846 552
San Salvador, 1850 677
Swiss Confederation, 1850 750
Two Sicilies, 1855 781
Most favored footing in respect to—
Italy, 1871 444
Citizens of each country may dispose of, in the territories of the other where the laws of the State permit—
Nicaragua, 1867 ..... 568, 569
May possess and dispose of, in the same manner as citizens—
Argentine Confederation, 1853 ..... 18, 19
France, 1853 251
San Salvador, 1850 677
President of the United States to recommend States of the Union to pass laws authorizing aliens to hold—
France, 1853 251
France reserves the right of establishing reciprocity in regard to possession and inheritance of 251
Persons disqualified by alienage from taking, by descent, allowed two years to sell and withdraw proceeds—
Austria, 1848 25
Bavaria, 1845 41
Hesse-Cassel, 1844 422
Nassau, 1846 531
Saxony, 1845 690
Wurtemburg, 1844 809
Shall be allowed three years—
Brazil, 1838 ..... 83, 84
Central America, 1828 97
Chili, 1832 106
Colombia, 1824 152
Ecuador, 1839 189
Guatamala, 1849 308
Hanseatic Republics, 1827 402
Peru, 1851 616
Peru-Bolivia, 1836 604
Swiss Confederation, 1847 747
Venezuela, 1836 789
Shall have the longest period allowed by the law of the country—
Bolivia, 1858 71
Dominican Republic, 1867 179
Venezuela, 1860 799
Shall have the time allowed by the law of the State or country—
Brunswick and Luneburg, 1854 98
Nicaragua, 1867 568
Orange Free State, 1871 581
Portugal, 1840 637
Russia, 1832 669
Swiss Confederation, 1850 759
Shall be allowed a reasonable time—
Hanover, 1840, 1846 ..... 300, 306
Hawaiian Islands, 1849 408
Mecklenburg-Schwerin, 1847 471
Oldenburg, 1847 578
Portugal, 1840 637
Prussia, 1785, 1799, 1828 ..... 643, 651, 661
Russia, 1832 669
Sardinia, 1838 686
Spain, 1795 707
Time allowed may be prolonged by the government in whose territories the land is situated—
Austria, 1848 25
Bavaria, 1845 41
Hesse-Cassel, 1844 422
Nassau, 1846 531
Saxony, 1845 690
Wurtemberg, 1844 809

12 Wall. 358 (79 U.S. bk. 20, L. ed. 430); *Comstock* v. *Smith*, 13 Pick. 116.

Marking the deed canceled, did not devest the title out of Sargent.

Washington v. *Ogden*, 1 Black, 450 (66 U. S. bk. 17, L. ed. 203).

The allegation that the deed was delivered as an escrow does not limit its legal effect.

Lott v. *Kaiser*, 61 Tex. 665; *Miller* v. *Fletcher*, 21 Am. Rep. 356; *S. C.* 27 Gratt. 403.

The allegation of the nonperformance of the consideration which induced the deed was of no effect.

East Line, etc. R. R. Co. v. *Garrett*, 52 Tex. 183; *Rainey* v. *Chambers*, 56 Tex. 17; *Galveston H. & S. A. R. Co.* v. *Pfeuffer*, 56 Tex. 66.

The allegation of fraud could not be heard in a court of law to avoid the deeds that had been voluntarily executed and delivered with knowledge of their legal effect.

Jones v. *McMasters* and *Lott* v. *Kaiser*, *supra*; *Connolly* v. *Hammond*, 51 Tex. 636.

The grantor O'Brien could not set up his own fraud or want of authority in order to avoid the deed.

Hudson v. *Morris*, 55 Tex. 595.

Brady, being neither creditor nor subsequent purchaser for value without notice, could not join O'Brien to avoid the prior deeds.

Crocker v. *Bellangee*, 70 Am. Dec. 489; *Fowler* v. *Stoneum*, 11 Tex. 478; *Lehmberg* v. *Biberstein*, 51 Tex. 457.

The deed did not on its face purport to vest title in Eliza M. O'Brien to hold as her separate property.

Rogan v. *Williams*, *Kirk* v. *Houston Nav. Co.* and *Wallace* v. *Campbell*, *supra*.

Such a purpose cannot be shown after the property has passed into the hands of an innocent purchaser.

Cooke v. *Bremond*, 27 Tex. 460; *Smith* v. *Boquet*, 27 Tex. 507; *Veramendi* v. *Hutchins*, 48 Tex. 550; *Johnson* v. *Harrison*, 48 Tex. 248; *Kirk* v. *Houston Nav. Co. supra*; *French* v. *Strumberg*, 52 Tex. 929; *McCamlay* v. *Thorp*, 61 Tex. 650; *Morrison* v. *Clark* and *Rogan* v. *Williams*, *supra*.

Mr. **M. F. Morris**, for plaintiffs in error in case No. 475, upon the merits:

The circuit court was not justified in following the practice of the state courts, in their blending of common-law and equity procedure, and in permitting the attempt to break down the deeds under which the intervenors claimed title, by merely equitable considerations.

Hurt v. *Hollingsworth*, *Noonan* v. *Lee*, *Bein* v. *Heath* and *Boyle* v. *Zacharie*, *supra*.

The heirs at law of James Hanrick brought suit in 1879 against the same defendant, Edward G. Hanrick, for their one third interest in the estate of Edward Hanrick, deceased, in one of the state courts, and the same question of alienage was there raised. The Supreme Court of the State held that the plaintiffs were not disqualified.

Hanrick v. *Hanrick*, *supra*.

Elizabeth O'Brien was the only person that could object that the deed from Philip O'Brien to Jenkins, and the deed from Jenkins to her, were not warranted by the power of attorney to the former; and yet she ratified and confirmed it by her conveyance to Eliza M. O'Brien. This is the very deed under which the defendants in error claimed title, and by operation of the covenant of warranty in the deed from Eliza M. O'Brien to Sargent, the title acquired by the grantor inured to the benefit of the grantee.

Van Rensselaer v. *Kearney*, 11 How. 297 (52 U. S. bk. 13, L. ed. 703); *Harrison* v. *Boring*, *supra*.

Evidence that the deed from Elizabeth O'Brien to Eliza M. O'Brien was a gift, and therefore within the exception of the statute, was inadmissible, because another consideration is stated in the deed.

Richardson v. *Traver*, 112 U. S. 423 (Bk. 28, L. ed. 804); *Hitz* v. *National Met. Bank*, 111 U. S. 722 (Bk. 28, L. ed. 577); *Cooke* v. *Bremond* and *Rogan* v. *Williams*, *supra*.

Messrs. **J. T. Brady** and *H. F. Ring*, for defendants in error, on the merits:

The power of attorney did not authorize the conveyance to Jenkins for trust purposes, much less for the consideration proved.

Dupont v. *Westherman*, 10 Cal. 354; *Morrill* v. *Cone*, 22 How. 75 (63 U. S. bk. 16, L. ed. 253); *Phelps* v. *Harris*, 101 U. S. 376 (Bk. 25, L. ed. 857); *Mech. Bank* v. *Bank of Columbia*, 5 Wheat. 337 (18 U. S. bk. 5, L. ed. 103); *Holton* v. *Smith*, 7 N. H. 446; *Batty* v. *Carswell*, 2 Johns. 48; *Allen* v. *Ogden*, 1 Wash. C. C. 174.

Eliza M. O'Brien could not authorize her husband by power of attorney to convey her interest in lands, much less to bind her by covenants of seisin.

Clark v. *Munford*, 66 Tex. 531.

The warranty is not binding unless the extent of interest warranted is clearly evident.

Van Rensselaer v. *Kearney*, 11 How. 297 (52 U. S. bk. 13, L. ed. 703); *Gilmer* v. *Poindexter*, 10 How. 257 (51 U. S. bk. 13, L. ed. 411).

Where the condition of title is known to both parties, or may be ascertained with equal facility by both, there is no estoppel.

Brant v. *Virginia Coal & I. Co.* 93 U. S. 326 (Bk. 23, L. ed. 927).

An unauthorized delivery of the deed does not pass the title.

Calhoun Co. v. *Am. Emigrant Co.* 93 U. S. 124 (Bk. 23, L. ed. 826).

The plaintiff is entitled to recover a less interest than that sued for.

Williams v. *Davis*, 56 Tex. 250; *Hutchins* v. *Bacon*, 46 Tex. 408; *Stark* v. *Barrett*, 15 Cal. 363.

A conveyance by the agent for the principal is void at law so far as the principal is concerned.

Martin v. *Flowers*, 8 Leigh, 158; *Redmond* v. *Caffin*, 2 Dev. Ch. 437; *Clarke* v. *Courtney*, 5 Pet. 319 (30 U. S. bk. 8, L. ed. 140); *Locke* v. *Alexander*, 1 Hawk. (N. C.) 412; *Fowler* v. *Shearer*, 7 Mass. 14; *Elwell* v. *Shaw*, 16 Mass. 42; 4 Mass. 575; *Copeland* v. *Ins. Co.* 6 Pick. 198; *Coucher* v. *Jergenk*, 2 Pick. 392; *Damon* v. *Granby*, 2 Pick. 345; *Welsh* v. *Usher*, 2 Hill, Ch. (S. C.) 167; *Bogart* v. *De Busey*, 6 Johns. 94; *Rossiter* v. *Rossiter*, 8 Wend. 494; *Sencerbox* v. *McGrade*, 6 Minn. 484; *Holmes* v. *Carman*, 1 Freem. Ch. (Miss.) 408; *Morrison* v. *Bowman*, 29 Cal. 337; *Echols* v. *Cheney*, 28 Cal. 157; *Love* v. *Sierra Nevada L. W. & W. Co.* 32 Cal. 639; *Agricultural Bank of Miss.* v. *Rice*, 4 How. 225 (45 U. S. bk. 11, L. ed. 949).

It was competent for the court to admit the deed in evidence, and then permit us to establish the identity of the party by parol evidence.

Gainer v. *Cotton*, 49 Tex. 101; *Cordier* v. *Cage*, 44 Tex. 585.

Where a deed is taken in the name of the wife, it will be presumed to be for her separate use and benefit.

Smith v. *Strahan*, 16 Tex. 314; *Story* v. *Marshall*, 24 Tex. 305; *Dunham* v. *Chatham*, 21 Tex. 232; *Higgins* v. *Johnson's Heirs*, 20 Tex. 389.

Parol evidence is always admissible in such cases to show real intention.

Baker v. *Baker*, 55 Tex. 577.

Immaterial alterations will not vitiate a deed.

1 Greenl. Ev. 564, note; Abb. Tr. Ev. 696.

Whether alterations are material or not is a question of law for the court.

Steele v. *Spencer*, 1 Pet. 552 (26 U. S. bk. 7, L. ed. 259).

Since by article 2257, Texas Practice, the deed is admissible, unless impeached by the affidavit of forgery, in the absence of such affidavit the deed is admissible, although alterations are material.

Fitch v. *Boyer*, 51 Tex. 336; 1 Greenl. Ev. 564, note; *Walton* v. *Start*, 5 Gilm. 252.

When instructions are asked in the aggregate, and there is anything exceptional in either of them the court may reject all.

Indianapolis & St. L. R. R. Co. v. *Horst*, 93 U. S. 291 (Bk. 23, L. ed. 898); *Worthington* v. *Mason*, 101 U. S. 149 (Bk. 25, L. ed. 848); *U. S.* v. *Hough*, 103 U. S. 71 (Bk. 26, L. ed. 305).

When the exception is to a series of propositions in the mass, it must be overruled if any proposition be sound.

Johnston v. *Jones*, 1 Black, 209 (66 U. S. bk. 17, L. ed. 117); *Rogers* v. *The Marshal*, 1 Wall. 644 (68 U. S. bk. 17, L. ed. 714); *Harvey* v. *Tyler*, 2 Wall. 328 (69 U. S. bk. 17, L. ed. 871); *Lincoln* v. *Claflin*, 7 Wall. 132 (74 U. S. bk. 19, L. ed. 106); *Beaver* v. *Taylor*, 93 U. S. 46 (Bk. 23, L. ed. 797); *Moulor* v. *Am. L. Ins. Co.* 111 U. S. 335 (Bk. 28, L. ed. 447).

Filing an affidavit of forgery is insufficient to raise the issue of forgery before the jury, in Texas.

Cox v. *Cock*, 59 Tex. 521.

An assignment of error cannot be considered by the court, if it does not show how or why the court below erred in refusing to instruct the jury to find for the defendants.

Klein v. *Russell*, 19 Wall. 462 (86 U. S. bk. 22, L. ed. 124); *Beaver* v. *Taylor*, *supra*; *Wilson* v. *McNamee*, 102 U. S. 572 (Bk. 26, L. ed. 234); *Norris* v. *Jackson*, 9 Wall. 127 (76 U. S. bk. 19, L. ed. 609).

Since the institution of this suit, the Supreme Court of Texas in other cases has expressly decided this question in our favor.

Hanrick v. *Hanrick*, 54 Tex. 101; 61 Tex. 596; 63 Tex. 622.

Decisions of state courts on the construction of their own Constitution and statutes, if settled by the highest court, will be followed in the United States Courts.

Luther v. *Borden*, 7 How. 1 (48 U. S. bk. 12, L. ed. 581); *Neesmith* v. *Seldon*, 7 How. 812 (48 U. S. bk. 12, L. ed. 925); *Webster* v. *Cooper*, 14 How. 488 (55 U. S. bk. 14, L. ed. 510); *Gelpcke* v. *Dubuque*, 1 Wall. 175 (68 U. S. bk. 17, L. ed. 520); *Randall* v. *Brigham*, 7 Wall. 523 (74 U. S. bk. 19, L. ed. 285); *Township* v. *Marcy*, 92 U. S. 289 (Bk. 23, L. ed. 710); *Township* v. *Perkins*, 94 U. S. 260 (Bk. 24, L. ed. 154); *Fairfield* v. *Gallatin Co.* 100 U. S. 47 (Bk. 25, L. ed. 544); *Post* v. *Supervisors*, 105 U. S. 667 (Bk. 26, L. ed. 1204).

If there was error in withdrawing the deed from the jury, the error has been cured by the *remittitur* filed in this court.

Bank of Ky. v. *Ashley*, 2 Pet. 327 (27 U. S. bk. 7, L. ed. 440); *Hughes* v. *Union Ins. Co.* 8 Wheat. 294 (21 U. S. bk. 5, L. ed. 620).

An exception in this language; "to which ruling of the court in withdrawing the said issues from the jury defendant excepted," no charge on this point being asked, was too indefinite to be available.

Wilson v. *McNamee*, *supra*; *Springer* v. *U. S.* 102 U. S. 586 (Bk. 26, L. ed. 253); *Clark* v. *Fredericks*, 105 U. S. 4 (Bk. 26, L. ed. 938); *Danks* v. *Rodheaver*, 26 W. Va. 90.

The effect of the conveyance to Sargent and Branch, at most vests in them an equitable title. The authorities are conclusive to the effect that in ejectment an outstanding equitable title cannot be shown.

Fitch v. *Boyer*, 51 Tex. 337; *Johnson* v. *Timmons*, 50 Tex. 521; *Larriviere* v. *Madegan*, 1 Dill. 455; *Brolaskey* v. *McClain*, 61 Pa. 146; *Causey* v. *Davis*, 13 Ala. 833; *Smith* v. *Allen*, 1 Blackf. (Ind.) 23.

Sargent and Branch, having no other standing in court than intervenors, they could not take exceptions to the pleadings existing when their plea was filed.

Hanchett v. *Gray*, 7 Tex. 549; *Smith* v. *Allen*, 28 Tex. 501; H. on Parties to Action, § 111.

The record contains no bill of exceptions showing that the court below refused to limit the proof of fraud to the procurement of the execution of the deeds referred to in the supplemental petition.

Desty, Fed. Procedure, 321, and authorities cited.

Mr. Justice **Matthews** delivered the opinion of the court: [158]

Eliza M. O'Brien, since deceased, with Philip O'Brien, her husband, and William Brady, citizens of New York, commenced their action in the Circuit Court of the United States for the Northern District of Texas, against Edward G. Hanrick, a citizen of Texas. It was an action of trespass to try the title to real estate in the County of Falls, in that State, described generally as three tracts, one known as the Antonacio de Le Serda eleven league grant; the second as two parcels granted to Pedro Zarza; and the third a part of the eleven league tract granted to Rafael de Aquire. The common source of title as between these parties was Edward Hanrick, who died in 1865 in Montgomery County, Alabama, intestate and without issue, never having married. The plaintiffs below claim title as follows: Edward Hanrick left surviving him as his next of kin and only heirs at the time of his death, one sister, Elizabeth O'Brien, two brothers, named respectively: John and James Hanrick, and one nephew, Edward G. Hanrick, the defendant, he being the son and only child of Philip Hanrick, who died in 1852, and who was another brother of [159]

Edward Hanrick. Elizabeth O'Brien resided in the County of Wexford, Ireland, and is, and always was, an alien to the United States, and a subject of Great Britain. John Hanrick died intestate and without issue, never having married, in the year 1870, in the County of Wexford, Ireland, an alien to the United States, and a subject of Great Britain. The said James Hanrick left surviving him, as his next of kin and only heirs, four daughters, named respectively Elizabeth Clare, Catherine O'Neill, Annie, otherwise called Honora, and Ellen Hanrick, and four grandchildren, the children of a deceased daughter, named respectively Mary, Elizabeth, Bridget, and Robert Whelan, and one son, Nicholas Hanrick. These descendants of James Hanrick reside in Ireland, except Nicholas, Annie otherwise called Honora, and Ellen Hanrick, who reside in the State of New York. By virtue of these facts, and of the laws of Texas and Great Britain, as hereafter shown, it was claimed that Eliza O'Brien in 1878 was seised and possessed of an undivided one-third interest in the said estate of Edward Hanrick in the said lands, when it was claimed she conveyed to the plaintiff, Eliza M. O'Brien, her daughter-in-law, for her separate use and benefit, all her interest in the said estate and lands; William Brady, the other plaintiff below, being entitled to one half of the said undivided one third by virtue of a conveyance from Eliza M. O'Brien and her husband, Philip O'Brien.

[160] The defendant in possession, having pleaded not guilty of the trespass complained of, asserted title in himself as the sole heir at law of the said Edward Hanrick, deceased, on the ground that he was the only descendant having inheritable blood, according to the laws of Texas.

The suit was begun February 13, 1880, and issue was finally joined on amended pleadings by the filing of an answer by Edward G. Hanrick on April 3, 1883. On the next day, Wharton Branch appeared as an intervenor in the cause, and filed a pleading called an original answer, in which he denies the sufficiency in law of the plaintiffs' petition; objects that on its face it is shown that necessary parties have not been joined as plaintiffs; denies all the allegations of the petition; pleads not guilty to the trespasses alleged therein; and then sets up title in himself to an undivided one fourth of three fourths of the estate under a conveyance alleged to have been made to him on the 14th of February, 1878, by Philip O'Brien, as attorney in fact, acting under a power of attorney alleged to have been made on the 16th of May, 1870, by Elizabeth O'Brien and James and John Hanrick. It is alleged that by that power of attorney Philip O'Brien was authorized and empowered to sell and convey their interests in said estate, and in pursuance of which he made the deed under which the intervenor claims title. The consideration of that deed is stated to have been money theretofore paid out, and expenses incurred and legal advice and information furnished and rendered by the defendant to the said Philip O'Brien. The pleading concludes by praying judgment for the defendant against all parties to the suit, establishing his right, title and interest in the estate; and that the same be set apart to him in severalty; and for costs and general relief.

On the same day John B. Sargent also appeared as intervenor, and filed an original answer on his behalf, similar in form to that of Wharton Branch, and claiming title to an undivided one half of the interest of Elizabeth O'Brien and John and James Hanrick, under a deed made to him conveying that interest on the 14th of February, 1878, by Philip O'Brien, acting as their attorney in fact under the same power of attorney referred to in the answer of [161] Wharton Branch; and concluding with a prayer for a similar judgment in his own behalf.

Thereupon the plaintiffs in the action filed pleadings styled an answer to the petition for leave to intervene, and plaintiffs' first supplemental petition, in which they asked that the leave to intervene on behalf of Branch and Sargent be denied and their petitions struck from the files; and specifically setting out the grounds on which they claimed that the alleged conveyances made by Philip O'Brien, as attorney in fact, to them respectively, should be held to be null and void. Amongst those grounds were the following: First. Prior to the execution of the deeds under which the intervenors claim title, two of the principals in the power of attorney, James and John Hanrick, had died, thereby revoking the authority. Second. That the execution of the said deeds on the part of said Philip O'Brien had been obtained by the said Branch and the said Sargent by fraudulent representations, and that the same had never in fact been delivered. The plaintiffs' supplemental petition concludes with a prayer that they have and recover of the said Wharton Branch and the said John B. Sargent, as well as the said Edward G. Hanrick, an undivided one third interest in the lands described in their original complaint, and for all other relief, general and special.

The defendant, Edward G. Hanrick, after the filing of these interventions, moved to dismiss the cause on the ground, among others, that he had no interest in the controversy as between the plaintiffs on the one hand and Branch and Sargent on the other; but all objections to the intervention were overruled or disregarded, and the cause proceeded to trial on the issues as made between the plaintiffs and the defendant, Edward G. Hanrick, and also on those as between the plaintiffs and the said Branch and Sargent. The cause having been submitted to the jury on the 10th of April, 1883, a verdict was returned as follows: "We, the jury, find for the plaintiffs;" and thereupon judgment was entered on the verdict as follows: "It is, therefore, ordered and adjudged by the court that the plaintiffs, Eliza M. O'Brien and Philip O'Brien and William Brady, have and recover of the defendant, Edward G. Hanrick, [162] and of the intervenors, Wharton Branch and John B. Sargent, an undivided one third interest in and to the following described lands: * * *. And it is further ordered that a writ of possession in favor of said plaintiffs issue therefor; and that plaintiffs do have and recover of such intervenors such costs by them incurred by reason of such intervention, and of defendant all costs which were incurred herein, not including any costs incurred by the said intervention, for which let execution respectively issue."

To reverse this judgment, the defendant,

Edward G. Hanrick, sued out a writ of error on April 16, 1883, which was docketed in this court on the 16th of August of the same year. To reverse the judgment as against them, the intervenors, Wharton Branch and John B. Sargent, sued out their writ of error separately on September 26, 1884, which was docketed in this court on the 24th of November of the same year. The intervention of Branch and Sargent was permitted in compliance with article 4788 of the Revised Statutes of 1879, Laws of Texas, which provides that "When a party is sued for lands, the *real owner* or warrantor may make himself, or may be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action."

Article 1188 prescribes that "The pleadings of an intervenor shall conform to the requirements of pleadings, on the part of plaintiff and defendant respectively, so far as they may be applicable."

The defendants in error, the administrator of Eliza M. O'Brien, Philip O'Brien, and William Brady, now move to dismiss the writ of error sued out by Hanrick, on the ground that the judgment was jointly against him and the intervenors, Branch and Sargent, and that all should have joined in the same writ. The same objection, of course, applies to the writ of error sued out severally by the intervenors, Branch and Sargent. This motion presents the first question for consideration.

We assume, without so deciding, that the [163] proceedings on the part of the intervenors may be justified under the Statutes of Texas. It must also be admitted to be a general rule, well established by the practice and in the decisions of this court, that when a judgment against defendants is joint, all the parties affected thereby must join in the writ of error, or there must be a summons and severance, or its equivalent. The question here, however, is whether this judgment, although so in form, is joint in law as against the original defendant and the intervenors. The verdict in favor of the plaintiffs against them, although single, was rendered upon different and altogether distinct issues. The intervenors defended as against the plaintiffs, not on behalf of the original defendant, but altogether in their own interest, claiming title, not only against the plaintiffs, but adverse to that of the defendant. Indeed, the intervenors' title was derived through the plaintiffs, and their claim was under them, and, as between them and the original defendant, their interest was altogether with the plaintiffs and against the defendant. The ground of their right of recovery against the defendant was the very title asserted by the plaintiffs, and their claim could be successfully prosecuted only by establishing the right of the plaintiffs to recover. Their right against the defendant was to recover against him if the plaintiffs recovered; and their right against the plaintiffs was to recover against the defendant, only in the event that the plaintiffs first succeeded in recovering against him. The situation as to them is anomalous. The litigation was triangular. The judgment must be regarded as joint only in form, but severable in fact and in law. It is to be read as if it were based upon a finding that the plaintiffs recover as against the defendant for the title asserted against him, and against the intervenors in respect to the title asserted by them against the plaintiffs. The judgment for costs is in fact separated, the costs of the intervention being regarded as costs in a separate suit. In fact there were two suits, one interjected in the other, in which the parties are different, the titles are different, the interests are different; and there could be no joint judgment in both except in mere words. None of the cases cited in support of the motion to dismiss are applicable here, because they refer to judgments in common-law actions [164] where no such anomaly as is presented in this record could occur. In equity, where interventions *pro interesse suo* have been permitted to those affected by the proceeding, but not parties to the original controversy, or where the original parties have distinct and separable interests, the same general rule as to appeals applies to joint decrees; but it has always been held that where the decree is final and separate or separable, those not affected by it are not necessary parties to the appeal. *Forgay* v. *Conrad*, 6 How. 201 [47 U. S. bk. 12, L. ed. 404].

The same principle must govern judgments at law rendered in actions according to the forms of procedure prescribed by the statutes of the States in which they are tried where interventions such as the present are permitted, and the same rule must be adopted in reference to them.

The motions to dismiss are therefore denied.

The principal question in the original action arises upon the defense that the plaintiffs below were aliens at the time of descent cast by the death of Edward Hanrick, in 1865 and, under the laws of Texas, therefore not capable of acquiring title by inheritance; it being claimed that the defendant, Edward G. Hanrick, a citizen of Texas, was the sole heir at law.

The Constitution of the Republic of Texas, continued in that of the State, contained the following provision (section 10, General Provisions): "No alien shall hold land in Texas, except by titles emanating directly from the Government of this Republic. But if any citizen of this Republic shall die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same, in a manner hereafter to be pointed out by law."

In pursuance of this provision, an Act defining what a reasonable time should be was passed on January 28, 1840 (Hart's Digest, article 585), and re-enacted March 18, 1848 (Paschal's Digest, article 44), in section 9 of an Act entitled "An Act to Regulate the Descent and Distribution of Intestates' Estates," as follows: "Section 9. In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; [16 and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the Republic and take possession of such land, or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the government."

An Act was passed February 13, 1854, entitled "An Act to Define the Civil Rights of Aliens," which is as follows:

"Section 1. Any alien, being a free white person, shall have and enjoy in the State of Texas such rights as are or shall be accorded to American citizens by the laws of the nation to which such alien shall belong, or by treaties of such nation with the United States.

"Section 2. Aliens may take and hold any property, real or personal, in this State by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien.

"Section 3. Any alien, being a free white person, who shall become a resident of this State, and shall, in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this State, in the same manner as if he were a citizen of the United States.

"Section 4. The ninth section of an Act entitled 'An Act to Regulate the Descent and Distribution of Intestates' Estates,' approved March 18, 1848, is hereby repealed so far as the same may be inconsistent with this Act; and this Act shall take effect and be in force from and after its passage."

This Act was in force in 1865, when Edward Hanrick died. At that time the common law was in force in England whereby, as was held by this court in *Orr* v. *Hodgson*, 4 Wheat. 453 [17 U. S. bk. 4, L. ed. 613], an alien might take an estate by the act of the parties, as by purchase, but could not take by the act of the law, as by descent, for want of inheritable blood. "Where a person dies leaving issue who are aliens, the latter are not deemed his heirs at [166] law, for they have no inheritable blood, and the estate descends to the next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence."

But on the 12th of May, 1870, the British Parliament passed an Act entitled "An Act to Amend the Law Relating to the Legal Condition of Aliens and British Subjects, styled the Naturalization Act of 1870." By section 2 it prescribed the *status* of aliens in the United Kingdom as follows: "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and the title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject; *Provided, first*, That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise; second, that this section shall not entitle any alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; third, that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act."

It is conceded that if Edward Hanrick, the ancestor, had died after the enactment of this British Statute, the plaintiffs below would have been entitled under the Texas Statute of 1854 to claim as his heirs at law their proportion and interest in his real estate. It is contended, however, on the part of the defendant, that inasmuch as at the time of the descent cast in 1865 there was no such British Statute as that contemplated by the Texas Act of 1854, the plaintiffs were under such a disability of alienage at that time that they were cut off from the inheritance, which, becoming at that instant vested [167] by law in the defendant, Edward G. Hanrick, the subsequent passage of the British Statute could not be permitted by any retroactive effect to devest that interest in favor of the plaintiffs. On the other hand, it is contended by the plaintiffs that under the ninth section of the Act of March 18, 1848, which they claim was still in force in 1865, Elizabeth O'Brien, as sister of Edward Hanrick, although an alien, was entitled as his heir at law to a defeasible estate as such, which she was entitled to make indefeasible within nine years after descent cast by becoming a citizen of the State and taking possession of the land, with the right to sell the same in the alternative before it should be declared to be forfeited, or before it should escheat to the government, and which subsequently became indefeasible by the operation of the Act of 1854, in consequence of the passage of the British Statute of 1870.

This contention on the part of the plaintiffs below is met again by the defendant with the proposition that section 9 of the Act of March 18, 1848, was repealed by section 4 of the Act of February 13, 1854.

This very question in another litigation involving the same title came up directly for adjudication in the Supreme Court of Texas in the case of *Hanrick* v. *Hanrick*, 54 Tex. 101. The following is an extract from the opinion of the court in that case: "The Statute of 1854 is an affirmative one, and by long established rules of construction must be considered as additional to the then existing section 9, Act of 1848, upon the same subject matter, and that the latter is not repealed by it, unless this is done in express terms or by necessary implication. Potter's Dwarris, Stat. 189; 1 Bish. Crim. L. 1st ed. par. 175, 194. The Statute of 1854 does not in express terms repeal section 9, Act of 1848, for it is affirmatively provided that it is repealed so far as inconsistent with the Act of 1854, thus clearly evincing the legislative intent that the latter Act would be the rule only in certain cases. Neither, it is believed, was this section 9 repealed by the Statute of 1854 by implication, under old and well-established rules of construction governing such cases."

The court then proceeds to point out from the history of the legislation of Texas on the [168] subject the policy of the State, and adds as follows: "In pursuance of this policy, and to meet in a proper spirit the modern liberal international legislation upon the subject of alienage, the Act of 1854 was passed, not it is believed in a spirit of retaliation and to withdraw from citizens of those countries which may not have passed such reciprocal laws, as contemplated by

that Act, the benefits of our previous legislation, but simply to make our legislation conform in the particular case with that of those countries which may also have legislated upon the subject. The Act of 1854 did not in terms limit the rights of aliens generally which previously had been granted by section 9, Act of 1848, by restricting them to such rights, *and those only*, as were or might be granted to citizens of the United States by their government. On the contrary, it was an affirmative and enlarging statute, and intended to give to aliens such rights and privileges, in addition to those granted by section 9, Act of 1848, as had been or should be given by their government to citizens of the United States."

In conclusion on this point, the court says: "We are of opinion, therefore, that the Statute of 1854, neither by its express terms nor by a proper construction of its provisions and intention, did so repeal section 9, Act of 1848, as to prevent, if they are otherwise entitled, the alien heirs of Edward Hanrick from deriving title by descent under it to real estate in Texas."

The Supreme Court of Texas thereupon proceeded to consider the further question whether, if a title did so descend and vest in such alien heirs, they can, being still aliens and subjects of Great Britain, maintain a suit for the recovery of their interests after nine years have elapsed since descent was cast in 1865. In answer to that question they say: "Notwithstanding the tendency of the earlier decisions of this court to the contrary, under its more recent decisions and those of the Supreme Court of the United States, the effect of the provision of the Constitution of the Republic, and the Statutes of 1840 and 1848, upon the subject of alienage, before quoted, was to vest a defeasible title to real estate in Texas, into the alien children and heirs of a citizen of the United States who may have died intestate leaving such property; which [169] title was valid both against individuals and also the State, not only for the period of nine years, but for such further time until the State by some proper proceedings in the nature of *office found* had declared a forfeiture. *Sabriego* v. *White*, 30 Tex. 576; *Settegast* v. *Schrimpf*, 35 Tex. 328; *Andrews* v. *Spear*, 48 Tex. 567; *Osterman* v. *Baldwin*, 6 Wall. 116 [73 U. S. bk. 18, L. ed. 730]; *Airhart* v. *Massieu*, 98 U. S. 491 [Bk. 25, L. ed. 213]; *Phillips* v. *Moore*, 100 U. S. 208 [Bk. 25, L. ed. 603]. No proceeding has been taken in this case to declare the land forfeited. From the date of the death of Edward Hanrick, in 1865, to the passage of the above Act of the Parliament of the United Kingdom of Great Britain and Ireland in 1870, nine years have not elapsed. Immediately upon the passage of this Act the defeasible title in the alien heirs of Edward Hanrick was, by the provisions of the Act of 1854, changed into an indefeasible title; the same vesting into his heirs according to our Statute of Descent and Distribution in force at the time of descent cast."

This decision of the Supreme Court of Texas is directly in point, and was repeated in the case of *Hanrick* v. *Hanrick*, 61 Tex. 596, and also in the case of *Hanrick* v. *Hanrick*, 63 Tex. 618.

In the case of *Airhart* v. *Massieu* [*supra*] some of these provisions of the law of Texas in one aspect were carefully reviewed, and it was there said that "The Act of January, 1840, declared that, in making title by descent, it should be no bar to a party that any ancestors through whom he derives his descent from the intestate is or hath been an alien. This law would seem to be the legitimate result of the status of aliens with regard to title to lands in Texas; the prohibition to hold lands being provisional only, not operative unless they fail to become citizens or dispose of their land within nine years; and not even then until regular proceedings should be provided for and should be had to annul the title. The later cases in Texas have fully established this doctrine;" referring to the cases of *Sabriego* v. *White*, *Settegast* v. *Schrimpf*, and *Andrews* v. *Spear* [*supra*].

Great weight, if not conclusive effect, in our opinion, is to be given to these decisions of the Supreme Court of Texas upon the question of [170] the construction of the statutes of the State, as affecting titles to real estate within its territory, and upon the authority of those decisions alone we are quite willing to rest the conclusion that the ninth section of the Act of 1848, so far as it conferred upon the plaintiffs below a defeasible estate by inheritance from Edward Hanrick, notwithstanding their alienage, is not repealed by the subsequent provisions of the Act of 1854. *Middleton* v. *McGrew*, 23 How. 45 [64 U. S. bk. 16, L. ed. 403]. We are, however, also of the opinion that the decisions of the Supreme Court of Texas on that point are well sustained by the reasons on which they proceed. It follows, therefore, that the defense put forward by Edward G. Hanrick, as against the plaintiffs, based on the alienage of Elizabeth O'Brien, cannot be sustained.

We proceed, in the next place, to consider and dispose of certain assignments of error predicated on the rulings of the court as to the admission in evidence and effect of a deed produced by the plaintiffs and read to the jury, dated May 11, 1878, purporting to be signed by Eliza O'Brien, to Eliza M. O'Brien, one of the plaintiffs. This deed appears to have been made between Eliza O'Brien, in the County of Wexford, Ireland, as grantor, and Eliza Mercy O'Brien, the wife of Philip O'Brien, as grantee. It is expressed to be in consideration of the sum of one dollar. It grants all the right, title, and interest of the grantor in and to certain tracts of land therein described, which belonged to Edward Hanrick, deceased, including that in controversy. It professes to have been signed, sealed and delivered in the presence of two witnesses, of whom one was Francis Ruttledge, a justice of the peace of the County of Wexford, who certifies that Elizabeth O'Brien, personally known to him to be the individual described in and who executed the deed, personally came before him and acknowledged its execution. Martin O'Brien, the other subscribing witness, makes an affidavit that he knew Eliza O'Brien, the individual described in the document, and that he was present, and saw her sign, seal, and deliver it as her act and deed, which is certified on the deed by the Consul of the United States for Dublin. It also appears from the indorsement on the deed that it has been duly recorded in [171] the various counties in which the land lies.

It is stated in the bill of exceptions that "Upon the face of said deed it appeared that wherever the name of the grantor was mentioned

in the body of said deed, the name, as originally written, was Elizabeth O'Brien, and that a portion of said name had been scratched or erased so as to read Eliza O'Brien, of which changes no note of explanation or emendation appeared in said deed."

When the deed was offered, the defendant objected to its introduction in evidence for the following reasons: 1. Because it had been impeached as a forgery by the affidavit of Wharton Branch, one of the intervenors, who filed his affidavit to that effect on the 4th of April, 1883. 2. Because the deed did not purport to be the deed of Elizabeth O'Brien, nor to vest title in the grantee, Eliza M. O'Brien, to hold as her separate property. 3. Because of the unexplained changes apparent on the face of the deed. The court overruled the objections, but before the deed was read in evidence to the jury, the plaintiffs offered preliminary proof to the court to prove the execution of the instrument as at common law, and a witness was called and sworn who testified to the court that "the grantor in said deed and the subscribing witnesses all reside in Ireland; that he was acquainted with the handwriting of Francis Ruttledge, one of the subscribing witnesses to said deed, and that he believed the said Francis Ruttledge to have signed the same as subscribing witness thereto." Evidence was also given to the court tending to rebut said statement, and in the further progress of the case before the jury evidence was introduced by the plaintiffs tending to show that Elizabeth O'Brien and Eliza O'Brien were one and the same person. Evidence was also introduced tending to rebut the alleged fact. Plaintiffs then proposed to prove by the deposition of Philip O'Brien that no consideration was paid for said conveyance, and that the same was intended as a gift to his wife, Eliza M. O'Brien. To the admission of this testimony the defendant objected, because the deed, being upon its face a deed for valuable consideration [172] made to a married woman during coverture, was in law a deed to the community, and subject to the sole control and disposition of the husband, and a trust in favor of a separate right could not at law be engrafted upon it by parol testimony. These objections were overruled by the court, and the testimony was admitted.

We are of opinion that these rulings of the court were correct, on the supposition that the plaintiffs were properly put upon proof of the genuineness of the deed. irrespective of the certificate from the record. The proof of execution, by proof of the handwriting of the subscribing witness, was sufficient. The objection founded upon the supposed erasures was fully met by testimony as to the identity between Elizabeth O'Brien and Eliza O'Brien. The only erasure appearing, being a change from one name to the other, was sufficiently explained by the proof of identity At any rate, the presumption was that the erasure was made before the execution of the deed. *Little* . *Herndon*, 10 Wall 26 [77 U. S. bk. 19, L. ed. 878]. The consideration of the deed, being one dollar was merely nominal. *Hitz* v. *Nat. Met. Bank*, 111 U. S. 722 [Bk. 28, L. ed. 577]. And while it appears to be well established law in Texas that property purchased during the marriage, whether the conveyance be to the husband or wife, is *prima facie* community property (*Higgins* v. *Johnson*, 20 Tex. 389), that rule only holds where the purchase is made with community funds, and this presumption may be rebutted by proof that the purchase was intended for the wife, *Dunham* v. *Chatham*, 21 Tex. 244. As in this case the consideration was nominal only, and the deed made to the wife, the presumption is that it was intended to vest the title in her as separate property.

The remaining questions, which we deem it important to notice, arise upon the title claimed by the intervenors, Branch and Sargent. They are material also in the controversy between the plaintiff and the original defendant, as the latter was entitled to defeat the plaintiff's recovery by showing an outstanding legal title in any other parties. To sustain this claim of title, the defendant and the intervenors introduced, first, a power of attorney, dated May 16, [173] 1870, purporting to be executed by James Hanrick, John Hanrick, and Elizabeth O'Brien to Philip O'Brien. This power of attorney granted power and authority to Philip O'Brien, on behalf of the other parties, to recover their interest in the estate of Edward Hanrick, and for that purpose to do all such acts, and take such proceedings, and use all such lawful ways and means, as he should deem necessary to assert and establish their right. It also contained the following clause: "And also for and on behalf and in the names of us, and as our acts and deed, to make, sign, seal, execute, and deliver all such agreements, contracts, leases, conveyances and assurances, with all usual and reasonable covenants therein, on our part, of all and any part of said messuages, tenements, premises, estate and effects, as shall be found necessary or expedient."

Professing to act under this power of attorney, Philip O'Brien executed a deed in the names of his principals, on February 1, 1878, to William Jenkins, Jr. in consideration of one dollar and other valuable considerations, conveying all the right, title and interest of his principals in the real estate belonging to them as heirs of Edward Hanrick. On the same day, William Jenkins, Jr., the grantee in that deed, conveyed the same interest to Eliza M. O'Brien, the wife of Philip O'Brien. On the same day, Eliza M. O'Brien, wife of Philip O'Brien, in her own right, her husband joining in the conveyance, in consideration of one dollar and other valuable considerations, granted to John B. Sargent, one of the intervenors, "one undivided half of all my right, title, and interest in and to the following described lands, situated in the State of Texas, the said land being the same this day conveyed to me by William Jenkins, Jr." This deed contained covenants that the grantor is "lawfully seised of an interest in fee simple of the granted premises aforesaid; that they are free from all incumbrances by me incurred, and that I have good right to sell and convey the same as aforesaid, and that I will, and my heirs, executors, and administrators shall warrant and defend the same to the said grantee, and to his heirs and assigns forever, against the lawful claims and demands of all persons."

On the 14th of February, 1878, Philip O'Brien, acting for himself and his wife, Eliza M. O'Brien, and for James Hanrick, John [174] Hanrick, and Elizabeth O'Brien, the heirs of

Edward Hanrick, deceased, in consideration of one thousand dollars to be paid by John B. Sargent, conveyed to him in fee simple an undivided one-half interest in and to all the estate of Edward Hanrick, deceased, to which the grantors were entitled, their interest therein being described as three fourths thereof. This deed contained covenants "that *our said interest* in the property and premises are free and clear of all and every incumbrance, and that we," etc., "will warrant and defend the the same," etc. A similar deed, on the same date, was made in the name of the same grantors to Wharton Branch, conveying an undivided one-fourth interest in and to all the estate of Edward Hanrick, deceased, to which the grantors were entitled. It was also shown that Eliza M. O'Brien, in the years 1877 and 1878, had acquired the title of Nicholas Hanrick, Ellen Hanrick, and Honora Hanrick, children and heirs at law of James Hanrick, a brother of Edward Hanrick. On the 11th of May, 1878, Elizabeth O'Brien, by the name of Eliza O'Brien, executed a deed conveying all her right, title and interest in the estate of her deceased brother, Edward, to Eliza M. O'Brien, the wife of Philip O'Brien, being the same deed already referred to in a previous part of this opinion. It is conceded that John Hanrick and James Hanrick, brothers of Edward Hanrick, who joined in the power of attorney to Philip O'Brien, dated May 16, 1870, had both died, John Hanrick in 1870, and James Hanrick in 1875, and before Philip O'Brien executed any conveyance of the property as their attorney in fact. As to them and their heirs or assigns, of course the power of attorney was thereby revoked.

The deed from Philip O'Brien to Branch, dated February 14, 1878, and the deed to Sargent of the same date, were also ineffectual as to Eliza M. O'Brien, his wife, for whom he had no authority to act at all. They were also void as to Elizabeth O'Brien, because the conveyances were not authorized by the power of attorney, even if the latter was not revoked as to [175] her also by the death of her brothers, with whom she had joined in its execution. Equally unwarranted was the deed from Philip O'Brien to Jenkins, dated February 1, 1878, and the conveyance by Jenkins to Eliza O'Brien of the same date. O'Brien's authority under the power of attorney from his principals was to recover their estate for them, and not to give it away. The intervenors, however, rely upon the operation of the covenant of warranty contained in the deeds to John B. Sargent of February 1, 1878, made by Eliza M. O'Brien, in conjunction with her husband, Philip O'Brien, claiming that it operated to convey her title subsequently acquired under the deed from Eliza O'Brien, her mother-in-law, dated May 11, 1878.

The covenant of warranty in the deed to Sargent, however, relates only to the premises granted, which the grantors agree to warrant and defend, and the premises granted are described as "one undivided half of all my right, title and interest in and to the following described lands," and cannot, therefore, operate as an estoppel preventing the grantors from asserting any subsequently acquired title. The conveyance and the covenants are both confined to the right, title and interest which Eliza M. O'Brien had at the date of the deed, expressly referred to and described in the deed of February 1, 1878, as the interest conveyed by the deed from Jenkins. There is no recital in the deed to estop her as to the character of her title or the *quantum* of interest intended to be conveyed, within the rule laid down by this court in *Van Rensselaer* v. *Kearney*, 11 How. 297 [52 U. S. bk. 13, L. ed. 703]. In the absence of such recital, a covenant of general warranty, where the estate granted is the present interest and title of the grantor does not operate as an estoppel to pass a subsequently acquired title.

The rule on that point seems well stated by Mr. Rawle (Covenants for Title, 4th ed. 393) in the following language: "Where the deed, although containing general covenants for title, does not on its face purport to convey an indefeasible estate, but only the right, title and interest of the grantor, in cases where those covenants are held not to assure a perfect title, but to be limited and restrained by the estate conveyed, the doctrine of estoppel has been considered not to apply, in other words, although the covenants are as a general rule invested with the highest functions of an estop- [176] pel in passing, by mere operation of law, an after-acquired estate, yet they will lose that attribute when it appears that the grantor intended to convey no greater estate than he was possessed of." *White* v. *Brocaw*, 14 Ohio St. 343; *Adams* v. *Ross*, 1 Vroom (N. J.) 509; *Blanchard* v. *Brooks*, 12 Pick. 47; *Brown* v. *Jackson*, 3 Wheat. 452 [16 U. S. bk. 4, L. ed. 432].

In the present case there is no ground for supposing that the parties to the deed had in contemplation anything more than the supposed interest of Eliza M. O'Brien existing at that date, as derived under the deed from William Jenkins, Jr., of February 1, 1878. The conclusion is that the covenant of warranty relied upon does not have the effect claimed of enlarging the estate conveyed by including the subsequently acquired title which passed to Eliza M. O'Brien by the deed from Elizabeth O'Brien of May 11, 1878.

This disposes of all questions of substance arising upon the record. We find no error in the proceedings and judgment of the circuit court.

Its judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[335]

CLARK POMACE HOLDER COMPANY

Appt.,

v.

WILLIAM H. FERGUSON.

(See S. C. Reporter's ed. 335-338.)

Patent law—patent void for want of invention.

A patent for an "improvement in cheese formers for cider presses" held void; the device of the patentee not involving any invention.

[No. 58.]

Argued Nov. 19, 1886. Decided Dec. 6, 1886

APPEAL from the Circuit Court of the United States for the Northern District of New York. *Affirmed.*

The case is stated by the court.

Mr. **Walter E. Ward,** for appellant:

Clark did all that is necessary to constitute one an inventor. He invented a new "guide frame," a new "extended pomace rack," and an entirely new combination of the "racks," "form," and "cloths," which operated in a manner never before known. His invention was new and useful and has been of great benefit to the public. He was clearly entitled to a patent.

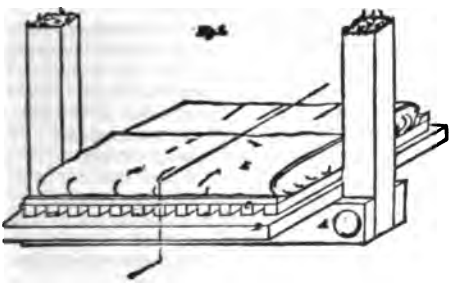
Winans v. *Denmead*, 15 How. 341 (56 U. S. bk. 14, L. ed. 721); *Davis* v. *Palmer*, 2 Brock. 310; *Mabie* v. *Haskell*, 2 Cliff. 510; *Aiken* v. *Dolan*, 8 Fisher, 204; *Consolidated Valve Co.* v. *Crosby Valve Co.* 118 U. S. 157 (Bk. 28, L. ed. 989); *Hollister* v. *Benedict*, 113 U. S. 59 (Bk. 28, L. ed. 901); *N. Y. Belting & Packing Co.* v. *Magowan*, 27 Fed. Rep. 362; *Asmus* v. *Alden*, 27 Fed. Rep. 684; *Smith* v. *Goodyear etc. Co.* 93 U.S. 486 (Bk. 23, L. ed. 952); *Washburn & Moen Mfg. Co.* v. *Haish*, 4 Fed. Rep. 907; *Eppinger* v. *Richey*, 14 Blatchf. 307; *Hill* v. *Biddle*, 27 Fed. Rep. 560; *Celluloid M. Co.* v. *American Zylonite Co.* 36 O. G. 1043.

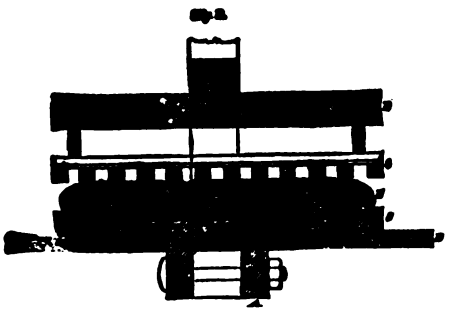
Mr. **William H. King,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of New York, for the infringement of letters patent No. 187100, granted to John Clark, February 6, 1877, for an "improvement in cheese formers for cider presses," on an application filed September 11, 1876. The specification and drawings of the patent are as follows:

[336] "The object I have in view is, in laying up a 'cheese' for the cider press, where each layer is folded up in a cloth, to secure uniformity of





thickness of all the layers in the mass or cheese, and thus secure uniform pressure on its entire area, and to avoid all tendency to break the pomace frames or racks. To this end it consists in the employment of a guide frame, in combination with extended pomace racks, as more fully hereinafter set forth. Figure 1 is a perspective view, showing the manner of laying up a cheese in press. Figure 2 is a cross section at *x x*. In the drawing, A represents [337] the lower framework of a cider press, on which is laid a bed, B. C is a pomace rack, which may be rigid, as shown, or flexible, as described in letters patent No. 148084, issued to me March 3, 1874. On this rack is laid a guide frame, D, whose bottom girts are not spaced far enough apart to extend the full length of the rack on which they rest. A cloth, E, large enough to envelop the layer, is then laid on the rack, inside the frame, and opened out to receive the pomace, which is 'struck' level with the girts of the frame, after which the cloth is folded over the leveled pomace, and the frame is lifted off. The next and succeeding racks are in like manner laid on the first, and filled up, and a follower is placed on the upper one, when the cheese is ready to press. Laid up in this way, the several layers are uniform in thickness, and the cheese, in mass, is level on top, and offers a uniform resistance to the pressure, over its entire area, thus assuring the expression of all the juice and precluding all danger of breaking the pomace racks. If the bed, B, be extended, a cheese may be built upon a board while one is being pressed, and then be slid under the follower when the first one is removed."

The claim is in these words: "The guide frame, D, in combination with an extended pomace rack, and a cloth to inclose a layer of pomace therein, substantially as described."

The answer sets up as defenses, want of novelty, want of patentability, and public use for more than two years before the application for the patent. After a hearing on proofs, a decree was made adjudging the patent to be invalid and dismissing the bill. The plaintiff has appealed.

The decision of the circuit court (21 Blatchf. 376) proceeded on these grounds: 1. Cloths, and also racks, and also guide frames, having each been used before, the aggregation of them, as described in the patent, was not a valid combination. 2. The use of the described guide frame, in connection with the racks and cloths, did not involve invention. 3. The precise combination described in the patent was in public use more than two years before the patent was applied for. [338]

Without examining any other question raised in the case, we are of opinion that the patent must be held void on the second ground above mentioned. A rack on which to place the pomace was old, and a cloth to cover the pomace lying on the rack was old, the two being used in connection, and an enclosure was used with them, which enabled the operator to make the pomace of uniform depth on each rack, and prevented the lateral spreading of the pomace. The only point of the invention would seem to be the use of a guide frame smaller than the rack; or, in other words, the use of a rack larger than the guide frame. There was no invention in making the guide frame or the rack of the desired size. It required only ordinary mechanical skill and judgment. Within the

recent cases in this court on the subject the patent must be held void. *Vinton* v. *Hamilton*, 104 U. S. 485 [Bk. 26, L. ed. 807]; *Hall* v. *Macneale*, 107 U. S. 90 [Bk. 27, L. ed. 367]; *Atlantic Works* v. *Brady*, 107 U. S. 192, 200 [Bk. 27, L. ed. 438, 441]; *Slawson* v. *Grand St. R. R. Co.* 107 U. S. 649 [Bk. 27, L. ed. 576]; *King* v. *Gallun*, 109 U. S. 99 [Bk. 27, L. ed. 870]; *Double-Pointed Tack Co.* v. *Two Riv. Mfg. Co.* 109 U. S. 117 [Bk. 27, L. ed. 877]; *Estey* v. *Burdett*, 109 U. S. 633 [Bk. 27, L. ed. 1058]; *Bussey* v. *Excelsior Mfg. Co.* 110 U. S. 131 [Bk. 28, L. ed. 95]; *Penn. R. R. Co.* v. *Locomotive etc. Co.* 110 U. S. 490 [Bk. 28, L. ed. 222]; *Phillips* v. *Detroit*, 111 U. S. 604 [Bk. 28, L. ed. 532]; *Morris* v. *McMillin*, 112 U. S. 244 [Bk. 28, L. ed. 702]; *Hollister* v. *Benedict Mfg. Co.* 113 U. S. 59 [Bk. 28, L. ed. 901]; *Thompson* v. *Boisselier*, 114 U. S. 1, 11 [Bk. 29, L. ed. 76, 79]; *Stephenson* v. *Brooklyn etc. R. R. Co.* 114 U. S. 149 [Bk. 29, L. ed. 58]; *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554 [Bk. 29, L. ed. 952]; *Gardner* v. *Herz*, 118 U. S. 180 [*ante*, 158].

Decree affirmed.

True copy: Test.

James H. McKenney, Clerk, Sup. Court, U. S.

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[327] RUFUS McCREERY, *Plff. in Err.*,

v.

ELLEN HASKELL AND J. C. HASKELL.

(See S. C. Reporter's ed. 327-334.)

Construction of Act of Congress of July 23, 1866, "to quiet land titles in California"—survey operative without approval of land commissioner—rights of State and settlers—when title vests.

*1. Where, under the eighth section of the Act of July 23, 1866, "to quiet land titles in California," a survey is made by the U.S. Surveyor-General for California of a claim to land under a confirmed Mexican grant and land is set off by him in satisfaction of the grant, the survey is operative without the approval of the Commissioner of the General Land-Office. Land lying outside of such survey then becomes subject to state selection in lieu of school sections covered by the grant, and is open to settlement under the preemption laws.

2. As between the State and the settler, the party which first commences the proceedings required to obtain the title, if they are followed up to the final act for its transfer, is considered to have priority of right. The rule prevails in such cases, first in time first in right.

3. For lands selected by the State of California, it has not been the practice of the Land Department to issue patents. When the selections are approved by the Secretary of the Interior, a list of them, with the certificate of the Commissioner of the General Land-Office, is forwarded to the state authorities. This listing operates to transfer the title to the lands, as of the date when the selections were made and reported to the local land-office, and cuts off all subsequent claimants. Accordingly, where a selection was made in 1868, which was subsequently approved by the Secretary of the Interior, and the lands were listed to the State by the Commissioner of the General Land-Office, a patent for the same lands issued upon a settlement made in December, 1869, under the preemption laws, conferred no title as against the State.

[No. 46.]

Argued Nov. 12, 1886. Decided Dec. 6, 1886.

IN ERROR to the Supreme Court of the State of California. *Affirmed.*

The case is stated by the court.

*Head notes by *Mr. Justice* FIELD.

Messrs. **George F. Edmunds** and *William J. Johnson*, for plaintiff in error.

Messrs. **Walter H. Smith**, *A. T. Britton*, *J. H. McGowan* and *A. B. Browne*, for defendants in error.

Mr. Justice **Field** delivered the opinion of court:

This was an action for the possession of a tract of land in the County of Los Angeles, California, described in the omplaint as the southeast quarter of section fourteen, in township two, in that county. The plaintiff asserted [328] title to the premises by a patent of the United States, bearing date October 10, 1879, issued upon an alleged settlement and purchase under the preemption laws. He claimed to have settled upon the land December 21, 1869; to have filed his declaratory statement November 28, 1871; and to have paid the purchase money and received his certificate of entry in April, 1876.

When this action was commenced and when it was tried, Mrs. Fuller was one of the defendants. She traced title to the land by a patent of the State of California to one Keller, bearing date March 4, 1874, issued to him upon a certificate of purchase, given December 21, 1871; and by conveyance from him to her husband, now deceased. By order of the Probate Court of Los Angeles County the land was set apart to her as a homestead. The other defendant claimed possession merely as her agent and employee. After the case was brought to this court she died, and, upon representation that her interest had passed to Ellen Haskell, the latter was substituted as defendant in her place.

The land was selected by the State in part satisfaction of section sixteen of one of the townships of the county, which was within the limits of a confirmed Mexican grant, as hereafter mentioned. By the Act of Congress of March 3, 1853, making the public lands of California, with certain exceptions, subject to the general preemption law of September 4, 1841, sections sixteen and thirty-six of each township were granted to the State for the purpose of public schools, provided the sections, before the public surveys were extended over them, were not settled upon, and the settlement shown by the erection of a dwelling house, or the cultivation of a portion of the land, or were not reserved for public uses or "taken by private claims." If the sections were thus settled upon, or reserved, or "taken by private claims," the State was authorized to select other lands in lieu thereof. 10 Stat. at L. 244, chap. 195, §§ 6, 7. The Mexican grant, within the claimed limits of which the premises in controversy were situated, was known as the Sausal [329] Redondo Rancho; it also embraced sections sixteen and thirty-six of the township. It was made to one Antonio Ignacio Abila, May 20, 1837, by the then acting Governor of California. The claim of the grantee to the land was confirmed, on the 10th of June, 1855, by the board of land commissioners for the ascertainment and settlement of private land claims in California, and by the District Court of the United States, at its December Term, 1856. The decree of the court became final by the dismissal, under stipulation of the Attorney-General, of the appeal taken from it to the Supreme Court of the United States. In 1858, a survey

of the land claimed was made by a deputy surveyor, but not being approved by the Surveyor-General it amounted to nothing more than a private survey. It was not until 1868 that any other survey was made, nor does it appear that there was any application for one by the grantee or any party interested in the claim. For such neglect, the Act of Congress of July 23, 1866, "to quiet land titles in California," furnished a remedy. 14 Stat. at L. 218, chap. 219. It provided that in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities had been finally confirmed, or should thereafter be finally confirmed and a survey and plat thereof should not have been requested within ten months after the passage of that Act, or after the final confirmation subsequently made, it should be the duty of the Surveyor-General of the United States for California, as soon as practicable, to cause the lines of the public surveys to be extended over said lands, and to set off in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed by such final decree, and as nearly as could be done in accordance with it. And the Act declared that "All the land not included in such grant as so set off shall be subject to the general land laws of the United States." Under this Act, the land claimed was surveyed by a deputy United States Surveyor, George Hansen, and set apart to the grantee in satisfaction of the grant. The survey was approved by the Surveyor-General, and over the land the section and township lines were extended. On [330] the 22d of April, 1868, the township plats were filed in the district land-office at San Francisco.

The land lying outside of this survey thus became, in the language of the Act, "subject to the general land laws of the United States." It was opened to settlement with other public lands, and consequent preemption by settlers; and to selection by the State in lieu of the school sections within the confirmed Mexican grant. *Frasher* v. *O'Connor*, 115 U. S. 102, 118 [Bk. 29, L. ed. 311, 315]. As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. In such cases, the rule prevails that the first in time is the first in right. In *Shepley* v. *Cowan*, 91 U. S. 330 [Bk. 23, L. ed. 424] where there was a contest between a state selection and a settler, we said: "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land-office; and the patent upon a preemption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the government having in their custody the records and other evidences of title to the property of the United States, before their respective claims to priority of right can be recognized. But it was not intended by the eighth section of the Act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that Act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had."

For selections of lands in California in lieu [331] of the school sections covered by Mexican grants, it has not been the practice of the Land Department to issue patents. When the selections are approved by the Secretary of the Interior, a list of them, with the certificate of the Commissioner of the General Land-Office, is forwarded to the state authorities. The list thus certified operates to convey the title to the State as fully as by patent. The Revised Statutes, embodying the provisions of the Statute of August 3, 1854, 10 Stat. at L. 346, chap. 201, provide that when a law of Congress making a grant does not convey the fee simple title to the lands, or require patents to be issued therefor, the lists of such lands certified by the Commissioner of the General Land-Office under his seal of office, either as originals or copies of the originals or records, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." U. S. R. S. 2449.

Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection as of the day when made and reported to the local land-office, and cuts off, as would a patent in such cases, all subsequent claimants.

In the present case the selection by the authorities of the State, of the land in controversy, in part satisfaction of school section sixteen covered by the Mexican grant, was made on the 22d of April, 1868, nearly one year and eight months before the alleged settlement of the plaintiff. The subsequent approval of the selection by the Secretary of the Interior and the listing of the land to the State by the Commissioner of the General Land-Office, completed the proceedings which vested the title in the State as of the date of the selection.

The case at bar is similar in the principles [332] which control its disposition to that of *Frasher* v. *O'Connor*, which was before us at the October Term, 1884 [*supra*]. It differs from it in the fact that there the defendants claimed that they had acquired, by their settlement upon the land, the right of preemption, and as preemptors were entitled to patents of the United States, and therefore could call in question the validity of the proceedings by which the land was selected by the state agents and listed to the State; but here the plaintiff has obtained a

patent of the United States, issued upon a settlement made after the selection of the land by the State. In the former case the court held that the only question for consideration by the officers of the United States respecting lands granted to the State was, whether the State possessed the right to claim the land under the grant, and whether the land was subject to selection by its agents. Irregularities in the transactions between the state agents and its purchasers were matters which did not come under review by those officers. So far as the General Government is concerned, it was sufficient that the State did not complain, and accepted the selection in satisfaction of the grant to her. The claim of a third party could not be improved by showing irregularity in the proceedings to which the State did not object. The issue of a patent to the alleged preemptors in that case—it being held that they had no right to settle upon the land with a view to secure a preemptive right—would not have rendered their position more tenable.

The contention of the plaintiff, as we understand it, is that the land in controversy, being within the claimed limits of a Mexican grant, was not open to selection by the State until the survey of the land confirmed was finally approved by the Land Department, and that such approval was not had until October, 1871, after his settlement. It was upon that theory that the local court of California held that the Secretary of the Interior and the Commissioner of the General Land-Office (for it seems that they both acted) had inadvertently and by mistake listed the land to the State in lieu of the quarter section supposed to be lost. It would seem that at one time the Land Department had come to the same conclusion, although its utterances on the subject were hesitating and conflicting. In *Frasher* v. *O'Connor* we considered at length the effect of the survey of Hansen, and the right of the State to select lieu lands outside of it. By the Act of Congress of July 1, 1864, "to expedite the settlement of titles to land in the State of California" (13 Stat. at L. 332, chap. 194), the surveys of private land claims in that State were made subject to the supervision and control of the Commissioner of the General Land-Office. Without his approval a survey had no binding force, and could not be treated as segregating the land surveyed from the public lands. That Act also provided that it should be the duty of the Surveyor-General of California to cause all private land claims finally confirmed to be accurately surveyed, and plats thereof to be made whenever requested by the claimants, provided the claimant should first deposit in the district court of the district a sufficient sum of money to pay the expenses of the survey and plat, and of the publication required. It was supposed that the surveys of confirmed claims under Mexican grants would be thus expedited and patents sooner obtained. But no such result followed. Many claimants failed to ask for a survey of their claims. Most of the grants were of a specific quantity of land lying within boundaries embracing a much larger quantity. The specific quantity to which alone the grantee was entitled could be segregated and set apart only by an official survey. Until that was had the grantee remained a cotenant with the government in possession and use of the whole tract. He was not, therefore, inclined to expedite the survey. His interest was to postpone it. To do away with the delays which grew out of this and other causes, the Act of July 23, 1866, to which we have referred, was passed, declaring that if no survey be requested, as provided by the Act of 1864, within ten months as to previously confirmed claims, and ten months after confirmation as to subsequently confirmed claims, it should be the duty of the Surveyor-General to survey the land and to set off the land confirmed in full satisfaction of the grant; and "that all the land not included in such grant as so set off shall be subject to the general land laws of the United States." The survey in such cases was thus withdrawn from the supervision of the Land Department. That the grantee should be bound by it, at least until the survey should be set aside by competent authority, was not unreasonable. It was always in his power to have a survey made of the confirmed claim under the Act of 1864, which would have been subject to the supervision and control of the Land Department. It was his neglect to request such survey that conferred upon the Surveyor-General the duty of acting upon his own responsibility That action was sufficient to subject the land outside of the survey to state selection and other modes of disposal of the public lands It is true the Surveyor-General did afterwards, upon the demand of the grantee, order a new survey and recall the township plats; but his action was not sustained by the Secretary of the Interior. That officer set aside the new survey and ordered the township plats to be returned to the land-office, and approved of the original survey. The selection by the State was made before the order for a new survey and the withdrawal of the township plats. It is not necessary to express any opinion as to what would have been the effect upon the selection if the new survey had been sustained As we said in *Frasher* v. *O'Connor*, "All that is necessary to decide here is, that, after the grant had been surveyed and the township plats filed, the State was at liberty to make selections from land lying outside of the survey, and preemptors were at liberty to settle upon it, and, if the survey were not ultimately set aside, their rights thus initiated would be protected." [*Supra.*]

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The conclusion we have reached renders it unnecessary to consider the effect of the judgment rendered in the case of *Keller* v. *McCreery*, as an adjudication of the questions presented with reference to the premises in controversy.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S

[265] CITY OF NEW ORLEANS; BOARD OF ASSESSORS OF THE STATE OF LOUISIANA In and For the PARISH OF ORLEANS, by E. T. LECHE, President Thereof; and the Individual Members of said BOARD, viz., E. T. LECHE ET AL., *Appts.*

v.

J. D. HOUSTON, State Tax Collector, AND LOUISIANA STATE LOTTERY COMPANY.

(See S. C. Reporter's ed. 265-280.)

Constitutional law—charter of Louisiana State Lottery Company—embodied in State Constitution of 1879—Legislature cannot contravene, even in exercise of police power—tax upon corporation.

1. The effect of article 167 of the Constitution of Louisiana of 1879 was to revive the charter of the Louisiana State Lottery Company, granted in 1867, except as to certain exclusive privileges, and to recognize the charter, thus modified, as a contract binding on the State for the period therein specified.
2. The grant of the charter to the Louisiana State Lottery Company, being contained in the Constitution of the State, the Legislature, acting under that Constitution, cannot contravene it, although the subject matter of such contract may have been embraced within the police power of the State.
3. Section 48, Act No. 77 of 1880, of the Legislature of Louisiana, imposes a tax upon a corporation, as distinguished from a tax on stockholders, within the meaning of the prohibition in the charter of the Lottery Company.
4. The taxation of the Louisiana State Lottery Company is not within the purview of section 48, or if otherwise, the Act is void.

[No. 54.]

Argued Nov. 17, 18, 1886. Decided Dec. 6, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The case is stated by the court.

Messrs. **Walter H. Rogers** and **J. Ward Gurley, Jr.,** for appellants.

[266] *Mr.* **John A. Campbell,** for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

On the 27th of January, 1881, the Louisiana State Lottery Company, alleging itself to be a corporation under the laws of the State of Louisiana, filed its bill in chancery against the City of New Orleans and the tax assessors for the Parish of Orleans, the object and prayer of which were to obtain a perpetual injunction restraining the defendants from the assessment and collection of certain taxes about to be enforced against the complainant by the seizure and sale of its property. On final hearing there was a decree in conformity with the prayer of the bill, from which the defendants below prosecute the present appeal.

The allegations of the bill are, in substance, that by an Act of the Legislature of the State of Louisiana passed in 1868, being Act No. 25 of that year, the Louisiana State Lottery Company was established and organized as a corporation. That, among other immunities and franchises granted by said Act, it was provided in article 5 that the Company "shall pay the State of Louisiana the sum of forty thousand dollars per annum, which sum shall be payable quarterly in advance, from and after the first day of January, 1869, to the state auditor, who shall deposit the same in the treasury of the State, and which shall be credited to the educational fund; and said Corporation shall be exempt from all other taxes and licenses of any kind whatever from the state, parish, or municipal authorities." That in the year 1871 legal proceedings were instituted by the City of New Orleans against the said Company, in the Superior District Court for the Parish of Orleans, for the purpose of enforcing on behalf of said City certain taxes alleged to have been assessed against it, notwithstanding said exemption contained in its charter, the City of New Orleans claiming therein that said exemption was void. That such proceedings were had thereon that on final hearing in the Supreme Court of Louisiana a judgment was rendered in favor of the Lottery Company, declaring said exemption to [267] be valid and the said taxes illegal. That the said Company claims that the provision in its said charter exempting it from taxes as aforesaid beyond the sum of $40,000, payable annually, is a contract between the State of Louisiana and itself, and has been expressly confirmed and recognized as such by the present Constitution of the State of Louisiana, adopted in 1879, in article 167, all the provisions of which, it is alleged in the bill, the complainants have complied with.

The bill further alleges that, notwithstanding the provisions of the said charter, and in defiance of the judgment of the Supreme Court of Louisiana, and contrary to the Constitution of the State, the defendants "are about to levy and assess a tax upon the capital stock and other property of your orator, and the other defendants hereinbefore named have threatened and are about to take proceedings against your orator for the collection of said illegal tax, which is illegal because prohibited by the Constitution of the United States as violative of the said contract between your orator and the State of Louisiana;" that the said officers of the State pretend to justify their action under the provisions of Act No. 77 of the Legislature of Louisiana of 1880, which the complainant avers to be null and void and of no effect, so far as it may be construed to authorize the proceedings of the defendants. The bill alleges that the complainant has always promptly paid the amount called for by its charter to the state treasurer, and in advance, and owes nothing to the State on that account; and accordingly prays for an injunction to restrain the defendants from further attempts to enforce the collection of the tax complained of.

To this bill a joint and several answer was filed by all of the defendants. That answer admits the incorporation of the Louisiana State Lottery Company, as alleged in the bill, and that its charter constitutes a valid contract between the State of Louisiana and the Company. It admits that the defendants are about to levy a tax upon the capital stock and upon other property of the complainant, but denies that such proceedings are illegal; and claims that Act No. 77 of the year 1880, passed by the Louisiana Legislature, is in no respect null and void.

On final hearing a decree was passed, wherein "The court decrees and declares that the Act of [268] the Legislature (No. 77 of the Acts of 1880), so

far as it imposes a tax upon the capital stock of the complainant, or upon the shares of the stock held by the shareholders of the complainant, is in conflict with article 5, section 1, of complainant's charter, found in Act No. 25 of the Acts of 1868, and therefore impairs the obligation of a contract and is void. The court further decrees and declares that, under the provisions of said charter as adopted as a contract by the Constitution of 1879, the capital of the complainant, both in the aggregate and as held by its shareholders, is exempted from all taxation of every kind, excepting the annual payment of $40,000. The court further decrees that the defendants herein be enjoined and restrained in manner and form and to the extent prayed for in the bill of complaint herein."

It is objected to this decree, in the first place, on behalf of the City of New Orleans, that that municipality was not properly in court by due service of process, but the objection does not seem to be well founded in fact. There was service of process upon the mayor, which is conceded to be the statutory method of serving process in such cases, and the City actually appeared by attorney and answered.

The principal question, however, arises upon the terms of article 167 of the Constitution of the State of 1879. That clause is as follows: "The General Assembly shall have authority to grant lottery charters or privileges; *Provided*, Each charter or privilege shall pay not less than forty thousand dollars per annum in money into the treasury of the State; and provided further, that all charters shall cease and expire on the first of January, 1895, after which no lottery shall be drawn within the State of Louisiana. The forty thousand dollars per annum now provided by law to be paid by the Louisiana State Lottery Company, according to the provisions of its charter granted in the year 1868, shall belong to the Charity Hospital of New Orleans, and the charter of said Company is recognized as a contract binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated; and all laws contrary to the provisions of this article are hereby declared null and void; provided said Company shall file a written renunciation of all its monopoly features in the office of the Secretary of State within sixty days after the ratification of this Constitution."

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It appears that by an Act of the Legislature of Louisiana, which took effect on the 31st of March, 1879, Act No. 25 of the year 1868, which incorporated and established the Louisiana State Lottery Company, and all other laws on the same subject matter, were repealed, and the Louisiana State Lottery Company was thereby abolished and prohibited from drawing any and all lotteries or selling lottery tickets, either in its corporate capacity, or through its officers, members, stockholders or agents, either directly or indirectly. That Act also made it a penal offense to draw any lottery or have any connection or interest in or with the drawing of any lottery in the State, or to sell or offer to sell any lottery tickets, or to set up or promote any lottery in the State. This statute took effect before the adoption of the Constitution of 1879, and was in force when the latter went into operation in December, 1879.

It is now contended, on the part of the appellants, that article 167 of the Constitution of the State does not have the effect to revive the original charter of the Louisiana State Lottery Company as though it had never been repealed, but revives it only so far as under that clause the General Assembly was authorized to grant lottery charters or privileges in the future; that this constitutional authority to grant new lottery charters or privileges does not warrant the Legislature in stipulating, by way of contract, that the minimum license tax of $40,000 per annum shall be in lieu of all other taxes upon the property, and operate to exempt the Company, so far as taxation is concerned, from the effect of other clauses of the Constitution; that, by other provisions of the Constitution, particularly article 207, no property can be exempt from taxation except public property, places of religious worship or burial, charitable institutions, buildings and property used exclusively for colleges and other school purposes, real and personal estate of public libraries, household property to the value of $500, and, for the period of ten years from the adoption of the Constitution, the capital, machinery and other property employed in certain enumerated manufactories, wherein not less than five hands are employed in any one factory.

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It is argued that the whole proper effect to be given to the provisions of article 167 of the Constitution is to secure to the Louisiana State Lottery Company such a charter as the General Assembly was authorized thereby to grant to any other lottery company, and to modify it as though it had been actually granted by the General Assembly under that clause. This intent is inferred from the language of the Constitution, which specifically forbids the future existence of the "monopoly clause" of the charter of the Company, and requires it to file a written renunciation of this feature with the Secretary of State within sixty days after the ratification of the Constitution; the object in view being, as it is contended, obviously, to place the Louisiana State Lottery Company under its charter as granted in the year 1868, but subject to and modified by the provisions of the Constitution of 1879, on an equal footing merely with other and new lottery companies, to which by the terms of the Constitution the General Assembly was authorized to grant charters; and the conclusion deduced is that as under that Constitution the General Assembly had no authority to grant a charter for a lottery company which should contain the exemption relied upon as the ground of relief in the present suit, the exemption so relied on was repealed by the Constitution.

The argument seems to be that if the Louisiana State Lottery Company is exempt from taxation beyond the annual sum of $40,000, and other companies to be chartered under the Constitution of 1879 are not and cannot be, the monopoly secured to the former by its original charter is perpetuated and not abrogated, as it was the express purpose of the Constitution to accomplish, for the reason that such a discrimination effectually and in advance prevents all possible competition.

The charter of the Louisiana State Lottery Company, being Act No. 25 of the year 1868, establishes a corporation for the purpose of carrying on the business of a lottery, with a capital

[27

stock of $1,000,000. By the 4th section of the 8th article it was provided that the Corporation should continue during the term of twenty-five years from January 1, 1869, for which time, it was added, it "shall have the sole and exclusive privilege of establishing and authorizing a lottery or series of lotteries, and selling and disposing of lottery tickets, policy combination devices, and certificates and fractional parts thereof." And by section 5 of the same article it was provided "That the said Corporation shall also have the sole right and privilege, during the whole term of its existence as hereinbefore provided for, to dispose of by lottery, or series of lotteries, any lands, improved or unimproved, which said Corporation may become possessed of by purchase or otherwise."

The exclusive right conferred by these provisions became the subject of judicial consideration by the Supreme Court of Louisiana in the case of *Louisiana State Lottery Co.* v. *Richoux*, decided in November, 1871, and reported in 23 La. Ann. 743. By the decision in that case the exclusive right claimed by the Louisiana State Lottery Company to establish lotteries and to sell lottery tickets in the State, was adjudged in its favor by an injunction restraining the defendants from vending lottery tickets of other companies, in violation of the exclusive right claimed by the plaintiffs. The validity of the exemption of the Lottery Company from taxation in excess of the annual sum of $40,000, as stipulated in article 5, section 1, of its charter, was upheld by a decision of the same court in the case of *Louisiana State Lottery Co.* v. *New Orleans*, 24 La. Ann. 86. The exemption was attacked in that case on the ground that it was in violation of the State Constitution then in force, because it infringed the principle of equality and uniformity in the matter of imposing taxes, the Legislature being prohibited from exempting from taxation any species of property except such as was actually used for charitable, educational or religious purposes; and for the additional reason that it granted certain rights to the plaintiff which were denied to other citizens of the State. In reference to these objections the Supreme Court of Louisiana said: "It may be said that the power [272] of a State Legislature to impose what is known as a commutation tax is a well-recognized power, not only in our own jurisprudence, but generally. *New Orleans* v. *Mascaro*, 11 La. Ann. 733; *Chicago* v. *Sheldon*, 9 Wall. 50 [76 U. S. bk. 19, L. ed. 594]; *Ill. Cent. R. R.* v. *Co. of McLean*, 17 Ill. 291; *Clarke* v. *Henshaw*, 30 Ind. 146. In the Act under consideration the Legislature has deemed it advisable to grant to the Lottery Company an exemption from all other taxation except of paying $40,000 per annum to the State for public education. On the commutation principle, we think the Act is not violative of the Constitution. It is not clear that the City has any grounds to object to this exemption by the State of the Company it claims the right to require the payment of licenses from, the City being a municipal corporation and deriving its right to levy licenses from the State, and in this instance the right is withheld." The City of New Orleans was accordingly enjoined from further attempts to collect from the Lottery Company any municipal taxes or licenses.

It was in view of these decisions of the Supreme Court of the State, that the present Constitution was framed and adopted. Article 167 of that instrument expressly recognizes the charter of the Louisiana State Lottery Company, as granted in the year 1868, as existing with the force both of law and of contract, with the exceptions mentioned. It specifies that "The $40,000 per annum *now provided by law* to be paid by the Louisiana State Lottery Company, according to the provisions of its charter, granted in the year 1868, shall belong to the Charity Hospital of New Orleans;" but the only law which provided for the payment of $40,000 per annum was the charter of the Company, and this clause diverts it from the educational fund, to which it had been appropriated by the terms of the charter, to the uses of the Charity Hospital of New Orleans. The article of the Constitution then proceeds to say: "And the charter of said Company is recognized *as a contract* binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated." The monopoly clause hereby excepted and abrogated can be no other than that already referred to as contained in sections 4 and 5 of article 8, by which was conferred upon the Corporation the sole and exclusive privilege of establishing and authorizing a lottery or series of lotteries, and selling and disposing [273] of lottery tickets, etc. These are the only clauses in the charter granting any exclusive rights, and, therefore, the only ones which can be properly styled monopoly clauses.

The constitutional article then proceeds to say that "All laws contrary to the provisions of this article are hereby declared null and void." This clause operates as a repeal of so much of Act No. 44, approved March 27, 1879, as repeals the charter of the Louisiana State Lottery Company, and prohibits it from drawing lotteries and selling lottery tickets. That it did operate to that extent, but no further, was the express decision of the Supreme Court of Louisiana in the case of *State, ex rel. Carcass* v. *Judge of First Dist. Court*, 32 La. Ann. 719. It was held in that case that those portions of Act No. 44 which define the offenses of drawing lotteries and selling lottery tickets, and providing punishment therefor, by all persons other than the Louisiana State Lottery Company, were not affected by the Constitution of 1879. The court in its opinion says: "Construing the Act of 1879 and the article of the Constitution together, so as to give full effect to each and all the parts of both, and blending them together, we consider that the law of Louisiana on the subject of the vending of lottery tickets simply is: The sale of lottery tickets in this State is absolutely prohibited unless by organizations chartered by the State, which *before* dealing in that kind of speculation, shall have paid an annual license of not less than $40,000 to the State. There shall exist no monopoly for the sale of such tickets or doing such business. Individuals violating the law by selling lottery tickets or dealing in the lottery business, *without having previously obtained a charter and paid the required license in the manner provided by law, shall be prosecuted and punished by fine and imprisonment.* The Louisiana State Lottery Company, previously in existence, shall continue its operations on abdicating all its professions to a monopoly, and on complying with

the requirements touching the payment of the license."

The effect, therefore, of article 167 of the Constitution of Louisiana is to revive the charter of the Louisiana State Lottery Company granted in the year 1868, notwithstanding its repeal [274] by Act No. 44 of the year 1879, except as to the clause which confers upon it the exclusive privilege of establishing a lottery and dealing in lottery tickets, and to recognize the charter thus modified as a contract binding on the State for the period therein specified. This renews and establishes the obligation of the Corporation under section 1, article 5 of its charter, to pay to the State the annual sum of $40,000, in consideration of which it is declared to be "exempt from all other taxes and licenses of any kind whatever, whether from state, parish or municipal authorities."

In answer to the argument of counsel that this places the Louisiana State Lottery Company, under the Constitution of 1879, on a better footing than any other lottery company chartered by the General Assembly thereafter, for the reason that no such exemption can be granted to the latter, it is sufficient to say, that, if this consequence be admitted, the monopoly, which is supposed to be thus created in favor of the Louisiana State Lottery Company, is not one derived under any clause of its charter, as granted in the year 1868, but is one created by the Constitution itself, although, merely by way of inference, by this mode of interpretation.

It is further contended, however, on the part of the appellants, that if the charter of the Louisiana State Lottery Company is recognized as a contract by article 167 of the Constitution, it is not such a contract as is protected by the Constitution of the United States against future legislation by the State impairing its obligation, for the reason that its subject matter is embraced within the scope of the police power of the State, the exercise of which cannot be effectually bound by contract. And thus the case is thought to be brought within the principle established by this court in the case of *Stone* v. *Mississippi*, 101 U. S. 814 [Bk. 25, L. ed. 1079]. In its opinion in that case the court said: "The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. * * * Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people [275] in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege, on the terms named, for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

This language must be construed in reference to the circumstances of the case in respect to which it was used. That was a case of an Act of the Legislature of Mississippi granting a charter to a lottery company abrogated by a provision in the Constitution of the State subsequently adopted. The converse is the present case. The grant of the charter to the Louisiana State Lottery Company is contained in the Constitution, and the question is whether the Legislature, acting under that Constitution, can contravene it. That is a question which needs no answer; its statement is sufficient. It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision which a subsequent Constitution might not destroy without impairing the obligation of a contract, within the sense of the Constitution of the United States, for the reason assigned in the case of *Stone* v. *Mississippi*. But an ordinary Act of legislation cannot have that effect, because the constitutional provision has withdrawn from the scope of the police power of the State, to be exercised by the General Assembly, the subject matter of the granting of lottery charters, so far as the Louisiana State Lottery Company is concerned, and any Act of the Legislature contrary to this prohibition is upon [276] familiar principles null and void. The subject is not within the jurisdiction of the police power of the State, as it is permitted to be exercised by the Legislature under the Constitution of the State.

It is next contended, on the part of the appellants, that the exemption contained in the charter of the Louisiana State Lottery Company, as confirmed by the Constitution of the State, does not extend further than those taxes and licenses in excess of the annual sum of $40,000, which may be assessed upon the Corporation itself; and it is said that the tax sought to be levied, and the assessment of which has been enjoined in the present case, is not a tax upon the Corporation itself, but upon the shareholders on account of their shares in its capital stock held by them as individuals. The facts in regard to the character of the tax, and the mode of its assessment, do not clearly appear from the pleadings. In the bill it is alleged that the defendants "are about to levy and assess a tax upon the capital stock and other property of your orator," and "are about to take proceedings against your orator for the collection of said alleged tax * * * by serving a notice to that effect, to seize and sell the property rights and credits of your orator," and that these acts are done under the pretended authority of "the provisions of Act No. 77 of the Legislature of Louisiana of 1880, which said law," it is averred, "is null and void and of no effect, so far as your orator is concerned, inasmuch as by authorizing the levy of a tax upon the property of your orator, other than that provided for in the charter of your orator as aforesaid, said Act violates the contract between your orator and the State of Louisiana by requiring of your orator other taxes than those provided for in said charter, and is repugnant to paragraph 2, section 10 of article 1 of the Constitution of the United States."

In the answer the defendants "admit that, at the time of the issuance of the preliminary in-

junction herein, the State Assessors for the Parish of Orleans were about to levy a tax upon the capital stock of the complainant, and upon other of complainant's property;" and the State Tax Collector admits that he had served notice [277] upon the Company, that he was about "to seize and sell the property rights and credits of complainant, and to take the legal measures to enforce the collection of the tax complained of." It is also admitted, on the part of the City of New Orleans, that it intended to compel payment of the taxes assessed as aforesaid on its behalf, and Act No. 77 of the Legislature of Louisiana of 1880 is set up as a justification. Section 48 of that Act is as follows: "That no assessment shall hereafter be made under that name, as heretofore, of the capital stock of any national bank, state bank, banking company, banking firm, or banking association, or of any corporation, company, firm, or association, whose capital stock is represented by shares; but the actual shares shall be assessed to the shareholders who appear as such upon the books, regardless of any transfer not registered or entered upon the books; and it shall be the duty of the president, or other proper officer, to furnish to the tax collector a complete list of those who are borne upon the books as shareholders; and all the taxes so assessed shall be paid by the bank, company, firm, association or corporation, which shall be entitled to collect the amounts from the shareholders or their transferees. All property owned by the bank, company, firm, association or corporation, which is taxable under sections one and three of this Act shall be assessed directly to the bank, company, firm, association or corporation, and the *pro rata* of such direct property taxes, and of all exempt property, proportioned to each share of capital stock, shall be deducted from the amount of taxes assessed to that share under this section. * * * Such assessments shall be made where the bank, etc., is located, and not elsewhere, whether the shareholders reside there or not. * * * ."

It is well settled by the decisions of this court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed. *Van Allen* v. *Assessors*, 3 Wall. 573 [70 U. S. bk. 18, L. ed. 229]; *Delaware R. R. Tax*, 18 Wall. 206 [85 U. S. bk. 21, L. ed. 888]; *Farrington* v. *Tennessee*, 95 U. S. 679 [Bk. 24, L. ed. 558].

In *Tennessee* v. *Whitworth*, 117 U. S. 129, 136 [278] [Bk. 29, L. ed. 830, 832], the chief justice delivering the opinion of the court, said: "In corporations four elements of taxable value are sometimes found: (1) franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all, and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes fall on the same person. Sometimes tax laws have that effect; but if they do, it is because the Legislature has mistakenly so enacted. All presumptions are against such an imposition."

But the question of legislative intent is always open upon the language of the exemption. In the present case the Corporation is exempted by its charter from all other taxes and licenses of any kind whatever in excess of the sum of $40,000 per annum, and yet by Act No. 77, though the assessment is not to be made upon its capital stock, but upon the shares of shareholders appearing upon its books, nevertheless, the tax so assessed is to be paid by the Company, although it is entitled to collect the amount so paid from the shareholder on whose account it is payable; but this payment by the Company is to be made irrespective of any dividends or profits payable to the shareholder out of which it might be repaid. That it is substantially a tax upon the Corporation itself, is unequivocally shown by the subsequent clause which authorizes a deduction from the amount of taxes assessed to each share of its proportion of the direct property taxes paid by the Company as such under sections 1 and 3, and of all exempt property belonging to the Corporation. But as all the property of the Louisiana State Lottery Company is exempt from taxes after payment of the annual sum of $40,000, nothing remains to be charged as a tax upon the shareholder as distinct from the Corporation under the provisions of this section. Indeed, it is quite [279] apparent from the language of the whole section, that, while nominally the taxes authorized are not to be assessed upon the capital stock of the Corporation in the aggregate and as its property, yet in substance that is its effect. The taxes are assessed upon the actual shares as registered in the names of individual shareholders but are to be paid by the Corporation, so that, while the form and mode of taxation is changed, its substance remains as though assessed against the Corporation by name.

The case differs altogether from that of *U. S.* v. *R. R. Co.* 17 Wall. 322 [84 U. S. bk. 21, L. ed. 597], in which it was held that the tax provided for in the 122d section of the Internal Revenue Act of 1864, as amended, requiring railroad and other corporations to pay a tax upon interest and dividends payable by them, with the right to deduct the same from the amounts otherwise due to creditors and stockholders, was a tax upon the latter and not upon the corporation, because the corporation was made use of merely as a convenient means of collecting the tax. And it cannot be considered as ultimately a tax upon the shares, as the property of the shareholders, within the principle of the decision in *Nat. Bank* v. *Commonwealth*, 9 Wall. 353 [76 U. S. bk. 19, L. ed. 701]. There the Act of Congress expressly distinguished between the taxing of the bank and the taxing of its shareholders on account of their shares, and, as was held in that case, left it open to the State to collect the tax levied on the shares by imposing the duty of collecting it upon the corporation. That, we think, is prohibited in this case by the terms of the contract contained in the charter, which exempts the

Corporation from the payment of all taxes whatever in excess of the specified annual sum, whether levied on it or to be paid by it on any account whatever. A tax such as that sought to be imposed upon the Company by the appellees is a tax upon the Corporation within the meaning of the prohibition of its charter, because it is compelled to become surety for taxes nominally imposed upon its stockholders, and is made liable primarily for their payment; a payment which, in the first instance, must be made out of the corporate property, without other resource than an action against individual [280] stockholders to recover the amounts advanced on their account.

The fair inference is that the taxation of the Louisiana State Lottery Company is not within the purview of section 48 of Act No. 77 of the year 1880, and that it was not within the intention of the Legislature, as expressed in that Act, to impose upon the Company any other taxes than those provided for in its own charter; but if otherwise, Act No. 77 is void, as a law impairing the obligation of a contract.

We find no error in the decree of the Circuit Court, and it is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

RICHARD WOOD ET AL., Partners, as R. D. [312] WOOD & CO., *Plffs. in Err.*,

v.

CITY OF FORT WAYNE.

(See S. C. Reporter's ed. 312-322.)

Construction of contract for water works—changes in plan by city—contractors' claim for extras allowed.

1. The clause in a contract for the construction of water works, providing that no claim for extra work should be allowed unless done in obedience to a written order by the engineer and trustees, and the clause providing that the trustees shall have the right to make any alterations in the plan of the work, held to be independent.

2. The trustees having changed the place of crossing a river, after the contract had been made, so as largely to increase the expense, the contractors are entitled to recover the value of the extra labor and material, although no written order for such change had been given to them.

3. A provision in the contract that all loss or damage arising "from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the work shall be incurred by the contractors without extra charge" to the city, does not apply to difficulties at the changed place of crossing the river, arising from increased depth of water and quicksand.

4. A provision in the contract that the contractors "shall have no claim upon the city for any delay in the delivery of pipes or other materials from the manufacturers" does not cover the case of damages occasioned by the defective character of castings, which defect was such as could only be discovered after the castings had been delivered and put in place.

5. The size of valve boxes, not being mentioned in the contract, the usual size was to be understood; and the contractors were entitled to recover for the extra expense involved in putting in those of an unusual size which were required by the trustees.

[No. 51.]

Argued Nov. 16, 1886. Decided Dec. 6, 1886.

IN ERROR to the Circuit Court of the United States for the District of Indiana. *Reversed.*

The case is stated by the court.

Messrs. **J. Rodman Paul** and **George W. Biddle**, for plaintiffs in error:

The plaintiffs were entitled, under the contract, to submit to the jury their claim for the additional expense caused by a change of plan, ordered by the defendant, which fixed the crossing of the river at Clinton Street instead of at Calhoun Street.

The stipulation of the contract that claims for extra work should not be entertained, unless done in obedience to a written order, had no reference to work done in pursuance of a change of plan, which was governed by an entirely different clause of the contract, by which the water works trustees were authorized to change the plan; and it was agreed that extra work performed in consequence of such change should be paid for at contract rates for work of its class.

Plaintiffs might have disregarded the express agreement for payment altogether, and recovered on their common counts by *indebitatus assumpsit* for the work done.

The trustees were expressly authorized to make alterations in the plan of the work, and alterations made by them were in legal effect made by the City itself.

Where contract work is increased by reason of a change of plan directed by the party for whom the work is done, or by one authorized by him to make such change, the contractor is entitled to recover the value of such work in an action of *indebitatus assumpsit* apart from his remedy under the contract.

Dermott v. *Jones*, 23 How. 283 (64 U. S. 16: 448); *Dermott* v. *Jones*, 2 Wall. 9 (69 U. S. 17: 764); *Mfg. Co.* v. *U. S.* 17 Wall. 592 (84 U.S. 21: 715).

In Indiana where the contract was made, it is established that a party to a special contract may recover on a *quantum meruit* for work done outside of it.

Adams v *Cosby*, 48 Ind. 153; *Canby* v. *Ingersol*, 4 Blackf. 493; *Shilling* v. *Templeton*, 66 Ind. 585.

The plaintiff is entitled to show to a jury that this extra work was done.

Dubois v. *Del. etc. Canal Co.* 12 Wend. 334 *Bestor* v. *U. S.* 3 Nott & Hunt. 425.

The plaintiffs were entitled to submit to the jury their claim for the extra expense caused by the defective shape and size of the special castings furnished by the defendant.

Messenger v. *Buffalo*, 21 N. Y. 196.

The plaintiffs were entitled to submit to the jury their claim for the difference in cost between the valve boxes originally agreed upon, and those subsequently ordered by the defendant. There is no provision in the contract relating to the size or cost of the valve boxes; and where a contract is silent the ordinary and usual dimensions and costs are presumed.

Whart. Ev. § 969; *Heald* v. *Cooper*, 8 Me. 32.

Mr. **L. M. Ninde**, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court: [313]

This is an action at law, brought October 26, 1881, in the Circuit Court of the United States for the District of Indiana, by Richard Wood and others, partners, doing business as R. D. Wood & Co., in Philadelphia, Pennsylvania, against the City of Fort Wayne, a municipal

corporation in Indiana, to recover damages for the alleged breach by the latter of a written agreement made between it and the plaintiffs, on the 10th of September, 1879, in reference to the construction by the latter of water works in the City of Fort Wayne. The agreement was made between the City, by its "trustees of water works," of the first part, and R. D. Wood & Co., of the second part, and bore the seal of the City, and the statement that it was "approved by the City Council, September 15, 1879," signed by the clerk.

By the contract the party of the second part agrees, for the consideration mentioned in it, "to do all the work and furnish all the materials called for by this agreement, and in strict accordance with the specifications and requirements as hereinafter set forth. And that the said City shall have the right to appoint such civil engineer, and inspectors under him, as the trustees of water works may deem advisable; and that said engineer shall determine the amount of work and materials to be paid for under this contract, decide all questions relative to the execution thereof, and his estimate and decision shall be final and conclusive. The whole to be in accordance with the preceding proposal signed by the said second party, and conformably to the following specifications, [314] both of which are to be mutually considered, as to all expressions, intents and purposes, as a part of this contract."

The material parts of the agreement, out of which the questions involved in the suit arise, are as follows:

"Specifications. The work to be done consists in furnishing * * * cast-iron water pipes," some "of sizes ranging from 24 inches to 4 inches diameter; * * * also, in trenches, laying pipes and special castings, including back filling, setting valves, constructing and setting valve boxes, vaults and covers, and setting hydrants, including all crossings of rivers and canals. * * *

The delivery of the pipe shall commence on or before the first day of October, 1879, and be continued with regularity until the completion of the contract, which shall be on or before the first day of June, 1880. Special castings shall be delivered as may be required by the engineer. * * *

Pipe laying will consist in excavating and refilling trenches; in taking up and replacing pavements or other surfaces; in hauling and laying pipes, setting special castings, stopcocks, aircocks, checkvalves, hydrants, and all other appurtenances incident to the pipe distribution; in cutting pipes. making joints, preparing foundations, building brick or stone vaults, blow-off wells; in repairing damages caused to gas pipes, sewers, drains, and cisterns; in clearing the streets and grounds of all rubbish or refuse caused by the above work; in furnishing lead and gasket for joints, fuel for melting lead, clay and rope for bands, blocks and wedges for use under pipes, wrought-iron straps for securing caps, reducers, and other parts liable to draw; in furnishing and setting or constructing boxes or vaults for stopcocks, aircocks and manholes, including furnishing and fitting cast-iron frames and covers thereto; in furnishing sand and all other materials for masonry, and all tools and labor necessary for the complete fulfillment of this contract. * * *

The above work to be done in the City of Fort Wayne, Indiana, along the lines and in the streets, as indicated on the distribution map in the office of the trustees or city engineer's office, and in such other streets and places in said City as may be directed. The trenches for [315] the pipes shall be opened in accordance with the lines and grades as given or directed by the engineer. * * *

All pipes, special castings, stopcocks, aircocks, checkvalves and hydrants will be furnished to the contractor in the city pipeyard, or on the cars upon which they are received from the foundry. They will be delivered to him as soon as received, and it shall be his duty to notify the engineer of any defects or breakage before removal from cars; otherwise, all damage arising from such cause shall be made good by said contractor. The contractor shall have no claim upon the City for any delay in the delivery of pipes or other materials from the manufacturers. * * *

Stopcocks, aircocks, hydrants, special castings, and all other parts pertinent to the supply or distribution, shall be set or laid at the required points in such manner as the engineer may direct. * * *

A box or vault of wood or masonry shall be furnished and set over each of the stopcocks, and over each of the aircocks and manhole pipes, and the iron frames and covers shall be properly fastened to them. These boxes are to be made of the form and dimensions shown on the plans furnished, and approved by the engineer. * * *

And the said party of the second part hereby agrees to receive, and the said first party hereby agrees to pay, the following prices as full compensation for the work contemplated in this contract:

1. For laying the pipes and all special castings appertaining thereto, setting checkvalves, stopcocks and aircocks, including the excavation and refilling of trenches; all bailing and shoring and ramming; the taking up and replacing paving or other surface of the streets; the removal of all rejected or surplus materials from the grounds or streets; the repairing of damage caused to gaspipes, sewers, drains, streets, cisterns, etc., and the expense of avoiding such obstructions; the hauling of all pipes and other castings and appurtenances on to the grounds, and returning those not used to the pipeyard; the furnishing of all blocks and wedges, and all materials for making the joints; the cutting of pipes; and all other expenses of materials, tools and labor required by the speci- [316] fications and incident to this particular work; the lengths to be measured along the center of the pipe, and in the case of branches as starting from the center of the main pipe—twenty-four-inch pipe—the sum of sixty (60) cents per lineal foot. * * *

5. For furnishing and setting all wooden stopcock and aircock boxes, including fitting and securing the iron covers, the sum of —— each; cost is included in price for pipe laying. * * *

And it is hereby agreed that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obe-

dience to a written order of the engineer and trustees, and a stipulated price for same agreed upon, whenever such stipulation may be practicable. When otherwise, such claims to be made to the trustees in writing within ten days after the completion of such extra work, or before the payment of the next succeeding monthly estimate after such work is done; failing to do which all rights of the contractor to such extra pay shall be forfeited. * * *

The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alterations diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work, such actual increase to be paid for at contract rate for work of its class.

All loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the same, also for all expenses which may be incurred in consequence of the temporary suspension of any part of said work, shall be incurred by the contractor without extra charge to said City."

The complaint sets forth a compliance by the plaintiffs with the contract, and the completion of the work September 1, 1880, and the failure of the defendant to pay to them $4,179.75 allowed by the contract to be retained by the defendant until six months after the completion [317] of the work.

It also avers, in its second paragraph, that, before the contract was made, two agents of the plaintiffs were shown by the trustees a distribution map in the office of the city engineer, as indicating the lines and streets on which the pipes were to be laid, from which to make their bid for the work; that, before making their bid, they examined the map, and found that the main pipe leading from the pumping works to the reservoir was to cross the St. Mary's River on the line of Calhoun Street; that they thereupon carefully examined the river bed in the Calhoun Street line, and estimated that the crossing of the river at that place would cost only $500, which was a correct estimate of such costs; that the bid of the plaintiffs for the work and the contract was made with express reference to the crossing of the river at that place; that the contract expressly refers to such distribution map, as showing the lines and the streets on which the work was to be done, it being the only distribution map then on file in the office of the trustees or in that of the city engineer; that, as the plaintiffs were about commencing the work, their agents were informed by the trustees and the engineer that they had changed the plan of the work so as to make the crossing of the river on the line of Clinton Street instead of Calhoun Street, and the plaintiffs were ordered to make the crossing at Clinton Street; that the plaintiffs, after their agents had examined the river bed at the Clinton Street crossing, and had found that the water there was seven feet deep (it being only about two feet deep at the Calhoun Street crossing), and that the bed of the river was composed of quicksand, protested against the change, and declined to go on with the work unless they would be paid for the extra or additional cost of making the crossing at Clinton Street, over the cost of making it at Calhoun Street; that the trustees requested such agents not to make at that time any claim for extra work or extra pay for crossing the river, and insisted that the work should be proceeded with, promising that they would in future make it all right about such extra work; that such agents gave to the trustees notice in writing that, by reason of such change, the plaintiffs would demand extra pay for crossing at Clinton Street equal to the difference in cost [318] over crossing at Calhoun Street; that, under the direction of the trustees and the engineer, the plaintiffs laid the main pipe across the river, on the new line, at an additional cost, over the cost of crossing at Calhoun Street, of $4,575; and that, within two days after the completion of the work of crossing the river, such agents made their claim in writing to the trustees for the extra work, with an itemized account of its cost, the whole cost being $5,075, from which $500 was to be deducted, as the cost of crossing at Calhoun Street, the item being, "Extra expense on river crossing with 24 inch pipe, caused by change of original plan, $4,575."

The complaint also contains, in its third paragraph, the common counts, claiming $12,000 for work and labor done, materials furnished, personal property sold and delivered, and money paid, laid out and expended. A bill of particulars under this paragraph claims, in addition to the $4,575, these items: "Extra expense caused by special castings not fitting, and delay in receiving same, in 20 inch line, $750; 149 wooden valve boxes, difference between those furnished and those contracted for, at $3, $447."

The defendant demurred to the second paragraph of the complaint, but the demurrer was overruled. It then answered by a general denial and a plea of payment in full. It also set up a claim of $3,000 against the plaintiffs for work done by the defendant, which the plaintiffs were bound by the contract to do but neglected to do.

As to the second paragraph of the complaint, the answer avers that, when the contract was executed, it was stated to the plaintiffs, and agreed, that no map or plan of distribution of pipes had been made, but that the defendant's engineer, Cook, would prepare such a map and plan and file it in the office of the trustees or in that of the city engineer; that such map and plan was to be the map and plan referred to in the contract, and was to designate the streets on which the pipes were to be laid, to all of which the plaintiffs then agreed; that Cook prepared a plan and map, and it was filed; that, when the plaintiffs commenced work, they inquired where the pipes were to be laid, and [31 the city engineer pointed out to them where the work was to be done and, at their request, prepared a map and plan showing the manner in which the pipe was to be laid under the river on the line of Clinton Street, which the plaintiffs accepted, and which was in accordance with Cook's map and plan; that the plaintiffs then commenced work on Clinton Street, in excavating and laying pipes under the river, where it crossed Clinton Street, and according to such working plan, without objecting; that it was no more difficult or expensive to lay the

pipe under the river on Clinton Street than it would have been to lay it under the river where the river crosses Calhoun Street; and that any expenditure over $500 was the result of extravagance and unskillfulness.

As to the third paragraph of the complaint, the answer, in its sixth paragraph, avers that all the materials were furnished, and all the labor was performed, under the written contract, at prices specially set forth therein; that the contract price has been fully paid; and that no written order was made by the city engineer and the trustees, directing the plaintiffs to furnish any extra materials or do any extra work.

A motion by the plaintiffs to strike out the sixth paragraph of the answer was denied, and then the plaintiffs replied denying generally the allegations of the answer.

The case was tried before a jury, who found a verdict for the plaintiffs, for $4,100, being the amount agreed to be due to the plaintiffs, excluding the three above named items of $4,575, $750, and $447, amounting to $5,772; and a judgment for $4,100, with interest and costs, was entered for the plaintiffs, to review which they have brought this writ of error.

The plaintiffs gave some evidence in support of the three items amounting to $5,772 (the defendant introducing no evidence); but the court declined to allow the plaintiffs to introduce further testimony in support of those items, "on the ground," as the bill of exceptions states, "that, notwithstanding the location of the crossing of the St. Mary's at Calhoun Street, the defendant had a right, under its contract with the plaintiffs, to change the place of crossing to Clinton Street, as it did, said contract securing to the defendant that right, [320] and that the plaintiffs had no right, under the contract between the parties, to claim anything on account of either of the three items." The court also struck out all of the plaintiffs' evidence, except the contract, in support of the three items, and instructed the jury to return a verdict for the plaintiffs for $4,100. To these rulings and instructions the plaintiffs excepted. This action of the circuit court is assigned for error.

We are of opinion that the court erred in its view of the rights of the plaintiffs under the contract. The clause providing that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer and trustees, is an independent clause from that which provides that the trustees shall have the right to make any alterations in the plan of the work, either before or after its commencement; and the extra work referred to in the former clause does not embrace work done in pursuance of an alteration made by the trustees in the plan. The latter work may be, in one sense, extra work; but if it results from an alteration of plan by the trustees, and there is, in consequence, an increase in the quantity of work, the actual increase is to be paid for at the "contract rate for work of its class." The extra work referred to in the former clause required the authoritative written order of the engineer and trustees; but, as the trustees had the right to alter the plan, work done to carry out such alteration, when made by the trustees, was authorized by the trustees, in a manner equivalent to a written order by them and the engineer. The change of plan involved in crossing at Clinton Street was authority for the additional cost of crossing there, without a written order.

The contract states that the work is to be done "along the lines and in the streets, as indicated on the distribution map." The plaintiffs gave evidence tending to show that the map which the plaintiffs' agents examined before making the contract did not then show a crossing at Clinton Street; that the plaintiffs consequently based their estimates and bid on a crossing at Calhoun Street; that the change by the trustees to Clinton Street was notified to the plaintiffs on the day on which the work on the river was to begin; that the map was sub- [321] sequently marked with a crossing at Clinton Street; and that the increased cost caused by the change was $4,575. The contract expressly provides that if the alteration of the plan increases the quantity of work, the actual increase shall be paid for by the City. The only measure of payment provided for is the "contract rate for work of its class." The price fixed in the contract, of 60 cents per lineal foot for laying 24 inch pipe, such as that used in crossing the river, was based on the obstructions and difficulties to be expected in crossing at Calhoun Street, in two feet of water; the general price being based on the laying of the pipe on land, and the expense of crossing the river at Calhoun Street being estimated at $500, in the price per lineal foot asked for laying 24 inch pipe. The increase of cost in crossing at Clinton Street was $4,575. The contract fixes no special rate for laying the pipe under the river; and it cannot fairly be said that there was any contract rate for work of the class of that done in crossing the river in the depth of water, and with the quicksand, found at Clinton Street. On the view taken by the defendant, the trustees could have made an alteration of plan requiring that the pipes should traverse a great length of the river, in deep water and quicksand, in crossing it diagonally, and the City could have had all the work done at the general price per lineal foot for laying the pipe. The contract is not capable of such a construction. The actual increase of cost is to be paid for.

The provision that all loss or damage arising "from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the" work, "shall be incurred by the contractor without extra charge" to the City, cannot fairly apply to the obstructions and difficulties at the changed place of crossing, resulting from the increased depth of water and the quicksand.

As to the claim for the $750, the "special castings" were to be supplied by the defendant from a manufacturer at Fort Wayne, and not by the plaintiffs. They were connections between larger and smaller pipes. The plaintiffs had the trenches ready, but the castings, when [322] furnished to them, were defective in size; and expense and delay ensued, in remedying the defects, causing a damage to the plaintiffs, as alleged, of $750. The defendant contends that the clause in the contract which provides that the plaintiffs "shall have no claim upon the

City for any delay in the delivery of pipes or other materials from the manufacturers," throws the loss from these defects on the plaintiffs. But we do not so think. The defects were such as could not be detected till the castings were being put in place, and the claim is not for delay in their delivery, within the meaning of the clause referred to. Nor does any work done by the plaintiffs in altering the castings, come under the head of such extra work as required a written order.

The size of the valve boxes is not mentioned in the contract, nor their cost. They were, therefore, to be of the usual size and cost. The trustees afterwards required the valve boxes to be of a size which made them cost $3 more each than those of the usual size would have cost. This was a change of plan, and the increased work caused by it is agreed to be paid for, but there is no contract rate for work of the class. The item of $447 seems to be recoverable.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to award a new trial.

Judgment reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[343] FRANKLIN COIT, Admr. of WILLIAM A. COIT, Deceased, *Appt.*,

v.

NORTH CAROLINA GOLD AMALGAMATING COMPANY ET AL.

(See S. C. Reporter's ed. 343-347.)

Corporations—personal liability of stockholders—stock paid for in property—increase of capital stock.

In an action brought by a judgment creditor of a corporation to compel stockholders to pay what was claimed to be due on the shares held by them, *held:*

1. That, where the charter authorized capital stock to be paid in property, and the shareholders honestly and in good faith put in property, instead of money, in payment of their subscriptions, third parties have no ground of complaint.
2. That, in the present case, there was no evidence to sustain the allegations of intentional fraud.
3. That the increase of the capital stock, as was permitted by the charter—a part of which increase was distributed to the old stockholders, the capital stock being afterwards reduced to the original amount—did not render the stockholders liable on such increased stock to a creditor who did not become such after the increase and relying upon such increased capital stock as security.

[No. 56.]

Argued Nov. 18, 19, 1886. Decided Dec. 6, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The case is stated by the court.

Messrs. **Edward F. Hoffman** and **Chas. Hart**, for appellant.

Messrs. **R. C. McMurtrie** and *Pierce Archer*, for appellees.

Mr. Justice **Field** delivered the opinion of the court.

The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing and assaying ores and metals, with the power [344] to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the Company for $5,489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1, 1874, and the other August 15, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the Company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the Company to institute a suit for that purpose, but that under various pretenses they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at $100,000, divided into 1,000 shares of $100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such installments, in such manner and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss, or damages, or be responsible beyond the assets of the Company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a Corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of $100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property; and the [34 average estimate amounted to $187,500. This sum they reduced to $100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value; averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the Corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the Company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property,

and the shareholders honestly and in good faith put in property instead of money, in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received there must be actual fraud in the transaction, to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynton* v. *Hatch*, 47 N. Y. 225; *Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Carr* v. *LeFevre*, 27 Pa. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not [346] sustained by the evidence. The patent and the machinery had been used by the corporators in their business which was continued under the charter. They were immediately serviceable, and therefore had to the Company a present value. The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties to the transaction.

In May, 1874, the Company increased its stock, as it was authorized to do by its charter, to $1,000,000 or 10,000 shares of $100 each. This increase was made pursuant to an agreement with one Howes, by which the Company was to give him 2,000 shares of the increased stock for certain lands purchased from him. Of the balance of the increased shares, 4,000 were divided among the holders of the original stock upon the return and delivery to the Company of the original certificates; they thus receiving four shares of the increased capital stock for one of the original shares returned. The other 4,000 shares were retained by the Company. The land purchased was subject to three mortgages, of which the plaintiff held the third; and the agreement was that, under the first mortgage, a sale should be made of the property, and that mortgages for a like amount should be given to the parties according to their several and respective amounts, and in their respective positions and priorities.

The plaintiff was to be placed by the Company, after the release of his mortgage, in the same position. Accordingly he made a deed to it of all his interest and title under the mortgage held by him, the trustee joining with him, in which deed the agreement was recited. The Company thereupon gave him its mortgage upon the same and other property, which was payable in installments. The plaintiff also received at the same time an accepted draft of Howes' on the Company for $1,000. When the first installment on the mortgage became due, [347] the Company being unable to pay it, he took its draft for the amount, $3,000, payable in December following. It is upon these drafts that the judgment was recovered in the Court of Common Pleas of Philadelphia, which is the foundation of the present suit. It is in evidence that the plaintiff was fully aware, at the time, of the increase in the stock of the Company, and of its object. Six months afterwards the increase was canceled, the outstanding shares were called in, and the capital stock reduced to its original limit of $100,000. Nothing was done after the increase to enlarge the liabilities of the Company. The draft of Howes was passed to the plaintiff and received by him at the time the agreement was carried out upon which the increase of the stock was made; and the draft for $3,000 was for an installment upon the mortgage then executed. The plaintiff had placed no reliance upon the supposed paid-up capital of the Company on the increased shares, and therefore has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the Company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and canceled.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

FREDERICK M. KER, *Plff. in Err.*, [436]

v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 436-445.)

International and criminal law—indictment in state court—defendant kidnaped in Peru—plea of violation of extradition treaty—error lies to this court—no relief—treaty does not guaranty asylum—remedy against trespasser—defense of forcible transfer into jurisdiction is matter for state court.

*1. A plea to an indictment in a state court, that the defendant has been brought from a foreign country to this country by proceedings which are a violation of a treaty between that country and the United States, and which are forbidden by that treaty, raises a question, if the right asserted by the plea is denied, on which this court can review, by writ of error, the judgment of the state court.

2. But where the prisoner has been kidnaped in the foreign country, and brought by force, against his will, within the jurisdiction of the State whose law he has violated, with no reference to the extradition treaty, though one existed, and no proceeding or attempt to proceed under the treaty, this court can give no relief, for these facts do not establish any right under the Constitution, or laws, or treaties of the United States.

3. The treaties of extradition to which the United States are parties do not guaranty a fugitive from the justice of one of the countries an asylum in the other. They do not give such person any greater or more sacred right of asylum than he had before. They only make provision that for certain crimes he shall be deprived of that asylum and surrendered

*Head notes by *Mr. Justice* MILLER.

to justice, and they prescribe the mode in which this shall be done.

4. The trespass of a kidnaper, unauthorized by either of the governments, and not professing to act under authority of either, is not a case provided for in the treaty, and the remedy is by a proceeding against him by the government whose law he violates, or by the party injured.

5. How far such forcible transfer of the defendant, so as to bring him within the jurisdiction of the State where the offense was committed, may be set up against the right to try him, is the province of the state court to decide, and presents no question in which this court can review its decision.

[No. 849.]

Argued April 26, 1886. Decided Dec. 6, 1886.

IN ERROR to the Supreme Court of the State of Illinois. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **C. Stuart Beattie** and *Robert Hervey*, for plaintiff in error:

When the General Government has provided, by a positive law, the mode and conditions upon which the authorities of the State shall reach into a foreign country to procure the presence of an accused person in its courts, can the conditions of that positive law be evaded, and the State obtain the benefit of such evasion?

This treaty is a law to be enforced by the courts,—not simply an international compact, to be obeyed or waived at pleasure by the contracting parties. Every treaty is a law "whenever it operates of itself without the aid of legislative provisions."

Foster v. *Neilson*, 2 Pet. 314 (27 U. S. bk. 7, L. ed. 435); *Com.* v. *Hawes*, 13 Bush, 700; *Blandford* v. *State*, 10 Tex. Ct. App. 627, 635; *State* v. *Vanderpool*, 39 Ohio, 273; *U. S.* v. *Watts*, 14 Fed. Rep. 130; *Ex parte Hibbs*, 26 Fed. Rep. 431.

There is no rule of comity or international law regarding foreign extradition, so far as the United States is concerned.

U. S. v. *Wat's*, *supra;* 6 Ops. Attys. Gen. 431.

The rule that an offender against the justice of his country gets no rights by flight, has no application to a claim of "right of asylum," acquired by reason of a federal treaty with a foreign country. Such right of asylum exists by virtue of the treaty, and not by reason of the flight. It is a personal right which the accused may set up in the courts of this country to bar a trial which would evade or obstruct it. The rights of the State over the accused are controlled by the terms of the treaty. See the authorities first above cited.

Under the treaty, a fugitive cannot, under any circumstances, be taken out of Peru, to be tried in the United States, for any other crimes than those named.

Blandford v. *State*, *State* v. *Vanderpool*, and *U. S.* v. *Watts*, *supra*.

Messrs. **Geo. Hunt**, *Atty-Gen. of Illinois*, **P. S. Grosscup** and *Leonard Swett*, for defendants in error:

It is well settled that the jurisdiction of the trial court cannot be affected by the circumstances of the capture.

Ex parte Scott, 9 Barn. & C. 446; *State* v. *Smith*, 1 Bailey (S.C.) Law, 283; *State* v. *Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. 37; *State* v. *Ross*, 21 Iowa, 467; *U. S.* v. *Caldwell*, 8 Blatchf. 131; *U. S.* v. *Lawrence*, 13 Blatchf. 295; *Adriance* v. *Lagrave*, 59 N. Y. 110; *Ex parte Coupland*, 26 Tex. 388.

The treaty contains no implied stipulation that a fugitive shall not be put to trial for any offense unless his capture has been effected under the authority and forms of the treaty. It is a contract solely between nations, and does not confer upon the fugitive any right of immunity which is enforceable by the judiciary.

See *Head-Money Cases*, 112 U. S. 598 (Bk. 28, L. ed. 803); *State* v. *Stanton*, 6 Wall. 50 (18: 721); *Luther* v. *Borden*, 7 How. 1 (12: 581); *Kennett* v. *Chambers*, 14 How. 38 (14: 316); *Cherokee Nation* v. *Ga.* 5 Pet. 1 (8: 25).

No question under the treaty arises in this case. If the captors of the fugitive acted outside of its authority, they were at most only guilty of a tort upon his personal rights. By the treaty the United States does not guarantee that its private citizens will not be guilty of offenses against the municipal law of Peru. Neither does the United States promise that the arm of our law shall not be laid upon its offenders until the private wrongs of the offender have all been righted.

Mr. Justice **Miller** delivered the opinion of the court. [437]

This case is brought here by a writ of error to the Supreme Court of the State of Illinois. The plaintiff in error, Frederick M. Ker, was indicted, tried and convicted in the Criminal Court of Cook County, in that State, for larceny. The indictment also included charges of embezzlement. During the proceedings connected with the trial the defendant presented a plea in abatement, which, on demurrer, was overruled; and the defendant refusing to plead further, a plea of not guilty was entered for him, according to the statute of that State, by order of the court, on which the trial and conviction took place. [438]

The substance of the plea in abatement, which is a very long one, is that the defendant, being in the City of Lima, in Peru, after the offenses were charged to have been committed, was in fact kidnaped and brought to this country against his will. His statement is that, application having been made by the parties who were injured, Governor Hamilton, of Illinois, made his requisition, in writing, to the Secretary of State of the United States, for a warrant requesting the extradition of the defendant, by the Executive of the Republic of Peru, from that country to Cook County; that, on the first day of March, 1883, the President of the United States issued his warrant, in due form, directed to Henry G. Julian, as messenger, to receive the defendant from the authorities of Peru, upon a charge of larceny, in compliance with the Treaty between the United States and Peru on that subject; that the said Julian, having the necessary papers with him, arrived in Lima, but, without presenting them to any officer of the Peruvian Government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him, placed him on board the United States vessel Essex, in the Harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred in the same forcible manner on board another vessel; to wit, The City of Sydney, in

which he was carried a prisoner to San Francisco, in the State of California. The plea then states that, before his arrival in that city, Governor Hamilton had made a requisition on the Governor of California, under the laws and Constitution of the United States, for the delivery up of the defendant, as a fugitive from justice, who had escaped to that State, on account of the same offenses charged in the requisition on Peru and in the indictment in this case. This requisition arrived, as the plea states, and was presented to the Governor of California, who made his order for the surrender of the defendant to the person appointed by the Governor of Illinois; namely, one Frank Warner, on the 25th day of June, 1883. The defendant arrived in the City of San Francisco on the 9th day of July thereafter, and was immediately placed in the custody of Warner, under the order of the [439] Governor of California, and, still a prisoner, was transferred by him to Cook County, where the process of the criminal court was served upon him, and he was held to answer the indictment already mentioned.

The plea is very full of averments that the defendant protested, and was refused any opportunity whatever, from the time of his arrest in Lima until he was delivered over to the authorities of Cook County, of communicating with any person or seeking any advice or assistance in regard to procuring his release by legal process or otherwise; and he alleges that this proceeding is a violation of the provisions of the Treaty between the United States and Peru, negotiated in 1870, which was finally ratified by the two governments and proclaimed by the President of the United States, July 27, 1874. 18 Stat. at L. pt. 3, p. 719.

The judgment of the Criminal Court of Cook County, Illinois, was carried by writ of error to the Supreme Court of that State, and there affirmed, to which judgment the present writ of error is directed. The assignments of error made here are as follows:

"First. That said Supreme Court of Illinois erred in affirming the judgment of said Criminal Court of Cook County, sustaining the demurrer to plaintiff in error's plea to the jurisdiction of said criminal court.

"Second. That said Supreme Court of Illinois erred in its judgment aforesaid, in failing to enforce the full faith and credit of the Federal Treaty with the Republic of Peru, invoked by plaintiff in error in his said plea to the jurisdiction of said criminal court."

The grounds upon which the jurisdiction of this court is invoked may be said to be three, though from the briefs and arguments of counsel it is doubtful whether, in point of fact, more than one is relied upon. It is contended in several places in the brief that the proceedings in the arrest in Peru, and the extradition and delivery to the authorities of Cook County, were not "due process of law," and we may suppose, [440] although it is not so alleged, that this reference is to that clause of article XIV of the Amendments to the Constitution of the United States which declares that no State shall deprive any person of life, liberty, or property "without due process of law." The "due process of law" here guarantied is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution; but for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be "without due process of law." But it would hardly be claimed that after the case had been investigated, and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested "without due process of law." So here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there "without due process of law," within the meaning of the constitutional provision.

So, also, the objection is made that the proceedings between the authorities of the State of Illinois and those of the State of California were not in accordance with the Act of Congress on that subject, and especially that, at the time the papers and warrants were issued from the Governors of California and Illinois, the defendant was not within the State of California and was not there a fugitive from justice. This argument is not much pressed by counsel, and was scarcely noticed in the Supreme Court of Illi- [441] nois; but the effort here is to connect it as a part of the continued trespass and violation of law which accompanied the transfer from Peru to Illinois. It is sufficient to say, in regard to that part of this case, that when the Governor of one State voluntarily surrenders a fugitive from the justice of another State to answer for his alleged offenses, it is hardly a proper subject of inquiry on the trial of the case to examine into the details of the proceedings by which the demand was made by the one State and the manner in which it was responded to by the other. The case does not stand, when the party is in court and required to plead to an indictment, as it would have stood upon a writ of *habeas corpus* in California, or in any of the States through which he was carried in the progress of his extradition, to test the authority by which he was held; and we can see in the mere fact that the papers under which he was taken into custody in California were prepared and ready for him on his arrival from Peru, no sufficient reason for an abatement of the indictment against him in Cook County, or why he should be discharged from custody without a trial.

But the main proposition insisted on by counsel for plaintiff in error in this court is that by virtue of the Treaty of Extradition with Peru the defendant acquired by his residence in that country a right of asylum; a right to be free from molestation for the crime committed in

Illinois; a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty; and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty amounting to an unlawful and unauthorized kidnaping.

This view of the subject is presented in various forms and repeated in various shapes, in the argument of counsel. The fact that this question was raised in the Supreme Court of Illinois may be said to confer jurisdiction on this court, because, in making this claim, the defendant asserted a right under a Treaty of the United States, and, whether the assertion was well founded or not, this court has jurisdiction [442] to decide it; and we proceed to inquire into it.

There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

Nor can it be doubted that the Government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything it must mean this. The right of the Government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

In the case before us, the plea shows that although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; [443] and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnaping within the dominions of Peru, without any pretense of authority under the treaty or from the Government of the United States.

In the case of *United States* v. *Rauscher*, [*post*, 425] just decided, and considered with this, the effect of extradition proceedings under a treaty was very fully considered; and it was there held that, when a party was duly surrendered, by proper proceedings, under the Treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the Treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny and convicted by the verdict of a jury of embezzlement; for the statement in the plea is that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

We think it very clear, therefore, that in invoking the jurisdiction of this court, upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right.

The question of how far his forcible seizure [444] in another country, and transfer by violence, force or fraud to this country, could be made available to resist trial in the state court, for the offense now charged upon him is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: *Ex parte Scott*, 9 Barn. & C. 446 (1829); *Lopez & Sattler's Cases*, 1 Dearsly & B. C. C. 525; *State* v. *Smith*, 1 Bailey (S. C.) Law, 283 (1829); *State* v. *Brewster*, 7 Vt. 118 (1835); *Dow's Case*, 18 Pa. 37 (1851); *State* v. *Ross*, 21 Iowa, 467 (1866); *The Richmond* v. *U. S.* 9 Cranch, 102.

However this may be, the decision of that question is as much within the province of the state court as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of

the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

It must be remembered that this view of the subject does not leave the prisoner or the Government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnaping, and on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action. Whether he could recover a sum sufficient to justify the action [445] would probably depend upon moral aspects of the case, which we cannot here consider.

We must therefore hold that, so far as any question in which this court can revise the judgment of the Supreme Court of the State of Illinois is presented to us, the judgment must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[407] UNITED STATES, *Plff.*,
v.
WILLIAM RAUSCHER.

(See S. C. Reporter's ed. 407-436.)

Extradition—in absence of treaty, rests on comity, not obligation—negotiation for, must be by Federal Government—Ashburton Treaty—extradited person can be tried only for crime specified in demand for surrender.

*1. Apart from the provisions of treaties on the subject, there exists no well defined obligation on one independent nation to deliver to another fugitives from its justice; and though such delivery has often been made, it was upon the principle of comity. The right to demand it has not been recognized as among the duties of one government to another which rest upon established principles of international law.

2. In any question of this kind which can arise between this country and a foreign nation, the extradition must be negotiated through the Federal Government, and not by that of a State, though the demand may be for a crime committed against the law of that State.

With most of the civilized nations of the world with which we have much intercourse, this matter is regulated by treaties, and the question we are now to decide arises under the Treaty of 1842 between Great Britain and the United States, commonly called the Ashburton Treaty.

The defendant in this case, being charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the government of that country, and surrendered on this charge. The Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but for a minor offense not included in the treaty of extradition; and the judges of that court have certified to this court for its judgment the question whether this could be done.

This court holds:

3. That a treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.

*Head notes by *Mr. Justice* MILLER.

4. That, on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and Acts of Congress on that subject (Revised Statutes, sections 5272, 5275), he cannot lawfully be tried for any offense other than murder.

5. The treaty, the Acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offense, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. The national honor also requires that good faith shall be kept with the country which surrendered him.

6. The circumstance that the party was convicted of inflicting cruel and unusual punishment, on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, does not change the principle.

[No. 827.]

Argued and submitted, March 2, 1886. Decided December 6, 1886.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **John Goode,** *Solicitor-Gen.*, for plaintiff.

Messrs. A. J. Dittenhoefer and *David Gerber*, for defendant.

Mr. Justice **Miller** delivered the opinion of the court: [409]

This case comes before us on a certificate of division of opinion between the Judges holding the Circuit Court of the United States for the Southern District of New York, arising after verdict of guilty and before judgment, on a motion in arrest of judgment.

The prisoner, William Rauscher, was indicted by a grand jury, for that, on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular State of the United States, and within the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and unusual punishment. This indictment was found under section 5347 of the Revised Statutes of the United States.

The statement of the division of opinion between the judges is in the following language:

"This cause coming on to be heard at this term, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial before the two judges above mentioned, at such hearing the following questions occurred:

"First. The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under section 5339 U. S. R. S., had the Circuit Court of the Southern District of New York jurisdiction to put him to trial upon an indictment under section 5347, U. S. R. S., charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceedings?

"Second. Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?

"Third. Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment under section 5347 of the United States Revised Statutes, charging the accused with cruel and unusual punishment of one Janssen, one of the crew of a vessel of which accused was an officer, it having been established upon said plea that the accused was extradited under the Extradition Treaty with Great Britain, upon the charge of murder of the same Janssen, under section 5339 of the United States Revised Statutes?

[410]

"Fourth. Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the Extradition Treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was investigated, and the same witnesses examined as at the trial?

"In respect to each of which questions the judges aforesaid were divided in opinion.

"Wherefore, at the same term, at the request of the United States Attorney, they have caused the points above stated to be certified under the seal of this court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision according to law.

"WM. J. WALLACE.
"CHAS. L. BENEDICT."

The Treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade and for the Giving up of Criminals, Fugitive from Justice, in Certain Cases." Stat. at L. Vol. 8, p. 576.

With the exception of this caption, the tenth article of the treaty contains all that relates to the subject of extradition of criminals. That article is here copied, as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

[411]

Not only has the general subject of the extradition of persons charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the executive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country and in Great Britain.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law that there was no well defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

[412]

Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the States, and in the absence of any Act of Congress upon the subject, a *State* can, through its own judiciary or Executive, surrender him for trial to such foreign nation is a question which has been under consideration by the courts of this country without any very conclusive result.

In the case of *Daniel Washburn*, 4 Johns. Ch. 106, who was arrested on a charge of theft committed in Canada, and brought before *Chancellor* Kent upon a writ of *habeas corpus*, that distinguished jurist held that, irrespective of all treaties, it was the duty of a State to surrender fugitive criminals. The doctrine of this obligation was presented with great ability by that learned jurist; but shortly afterwards *Chief Justice* Tilghman, in the case of *Short* v. *Deacon*, 10 S. & R. 125, in the Supreme Court of Pennsylvania, held the contrary opinion: that the delivery up of a fugitive was an affair of the executive branch of the National Government, to which the demand of the foreign power must be addressed; that judges could not legally deliver up, nor could they command the Executive to do so; and that no

magistrate in Pennsylvania had the right to cause a person to be arrested in order to afford the President of the United States an opportunity to deliver him up, because the President had already declared he would not do so.

In the case of *Holmes* v. *Jennison*, 14 Pet. 540 [39 U. S. bk. 10, L. ed. 579], on a writ of error to the Supreme Court of Vermont, it appears that application had been made to the President for the extradition of Holmes, a naturalized citizen of the United States, who was charged with having committed murder in [413] Lower Canada. There being then no extradition treaty between the two governments, the President declined to act, through an alleged want of power. Holmes, having been arrested under authority from Governor Jennison, of Vermont, obtained a writ of *habeas corpus* from the supreme court of that State, and the sheriff returned that he was detained under an order of the Governor, which commanded the sheriff to deliver him up to the authorities of Lower Canada; and the supreme court of the State held the return sufficient. On the writ of error from the Supreme Court of the United States two questions were presented: first, whether a writ of error would lie in such case from that court to the supreme court of the State; and second, whether the judgment of the latter court was right. The eight judges who heard the case in this court were equally divided in opinion on the first of these questions, and therefore no authoritative decision of the principal question could be made. A very able and learned opinion in favor of the appellate jurisdiction of the Supreme Court of the United States, and against the right attempted to be exercised by the Governor of Vermont, was delivered by *Chief Justice* Taney, with whom concurred *Justices* Story, McLean and Wayne. *Justices* Thompson, Barbour and Catron delivered separate opinions, denying the power of the Supreme Court of the United States to revise the judgment of the Supreme Court of Vermont. These latter, with whom concurred *Justice* Baldwin, did not express any clear opinion upon the power of the authorities of the State of Vermont, either executive or judicial, to deliver Holmes to the Government of Canada; but, upon return of the case to the supreme court of that State, it seems that that court was satisfied, by the arguments of the chief justice and those who concurred with him, of the error of its position, and Holmes was discharged. In the final disposition of the case the court uses the following language:

"I am authorized by my brethren, says the chief justice, "to say, that, on an examination of this case, as decided by the Supreme Court of the United States, they think, if the [414] return had been as it now is, a majority of that court would have decided that Holmes was entitled to his discharge, and that the opinion of a majority of the Supreme Court of the United States was also adverse to the exercise of the power in question by any of the separate States of the Union. The judgment of the court therefore is that Holmes be discharged from his imprisonment." *Ex parte Holmes*, 12 Vt. 631.

The Court of Appeals of New York, in the case of *People* v *Curtis*, 50 N. Y. 321, also decided that an Act of the Legislature of that State authorizing the rendition to foreign States of fugitives from justice was in conflict with the Constitution of the United States. This was in 1872.

The question has not since arisen so as to be decided by this court, but there can be little doubt of the soundness of the opinion of *Chief Justice* Taney, that the power exercised by the Governor of Vermont is a part of the foreign intercourse of this country which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the States to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the State, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives.

At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or Acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a State of this Union and a foreign government.

Fortunately, this question, with others which might arise in the absence of treaties or Acts of Congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by Acts of Congress, and both [415] are in their nature exclusive.

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. This Treaty of 1842 is supplemented by the Acts of Congress of August 12, 1848, 9 Stat. at L. 302, and March 3, 1869, 15 Stat. at L. 337, the provisions of which are embodied in sections 5270, 5272 and 5275 of the Revised Statutes, under Title LXVI, "Extradition."

The treaty itself, in reference to the very matter suggested in the questions certified by the judges of the circuit court, has been made the subject of diplomatic negotiation between the Executive Department of this country and the Government of Great Britain in the cases of *Winslow* and *Lawrence*. Winslow, who was charged with forgery in the United States, had taken refuge in England, and, on demand being made for his extradition, the foreign office of that country required a preliminary pledge from our Government that it would not try him for any other offense than the forgery for which he was demanded. To this Mr. Fish, the Secretary of State, did not accede, and was informed that the reason of the demand on the part of the British Government was that one Lawrence, not long previously extradited under

the same treaty, had been prosecuted in the courts of this country for a different offense from that for which he had been demanded from Great Britain, and for the trial of which he was delivered up by that government. Mr. Fish defended the right of the government or State in which the offense was committed to try a person extradited under this treaty for any other criminal offense, as well as for the one for which the extradition had been demanded; while *Lord* Derby, at the head of the foreign office in England, construed the treaty as requiring the government which had demanded the extradition of an offender against its laws for a prescribed offense, mentioned in the treaty and in the demand for his extradition, to try him for that offense and for no other. The correspondence is an able one upon both [416] sides, and presents the question which we are now required to decide, as to the construction of the treaty and the effect of the Acts of Congress already cited, and of a Statute of Great Britain of 1870 on the same subject. The negotiations between the two governments, however, on that subject were inconclusive in any other sense than that Winslow was not delivered up and Lawrence was never actually brought to judgment for any other offense than that for which his extradition was demanded.

The question was also discussed in the House of Lords, and *Lord* Derby stated and defended his views of the construction of the treaty with marked ability, while he conceded that the Act of Parliament on that subject, which declared that the person extradited could be tried for no other offense than that for which he had been demanded, had no obligatory force upon the United States as one of the parties to the treaty. Foreign Relations of the United States, 1876-7, p. 204-307.

The subject was also very fully discussed by Mr. William Beach Lawrence, a very learned authority on matters of international law, living in this country, in several published articles. Albany Law Journal, Vol. 14, p. 85; Vol. 15, p. 224; Vol. 16, p. 361. In these the author, with his usual ability, maintains the proposition that a person delivered up under this treaty on a demand charging him with a specific offense, mentioned in it, can only be tried by the country to which he is delivered for that specific offense, and is entitled, unless found guilty of that, to be restored in safety to the country of his asylum at the time of his extradition.

A very able article arising out of the same public discussion at that time; to wit, 1876, is found in the American Law Review, said to have been written by *Judge* Lowell, of the United States Court at Boston, in which, after an examination of the authorities upon the general rule, independent of treaties, as found in the continental writers on international law, he says, that rule is that the person whose extradition has been granted cannot be prosecuted and tried except for the crime for which his extradition has been obtained; and, entering upon the question of the construction of the Treaty of 1842, he gives to it the same effect in regard to that matter. 10 Am. Law Review, 1875-6, p. 617.

[417] Mr. David Dudley Field, in his draft of an outline for an international code, published about the same time, adopts the same principle. Field's International Code, § 267, p. 122. It is understood that the rule which he lays down represents as well what he understands to be existing law, as also what he supposes it should be.

A very learned and careful work published in this country by Mr. Spear, in 1884, after considering all the correspondence between our Government and Great Britain upon the subject, the debate in the House of Lords, the articles of Mr. Lawrence and *Judge* Lowell, as well as the treatise of Mr. Clarke, an English writer, with a very exhaustive examination of all the decisions in this country relating to this matter, arrives at the same conclusion. This examination by Mr. Spear is so full and careful that it leaves nothing to be desired in the way of presentation of authorities.

The only English work on the subject of extradition we have been able to find which discusses this subject is a small manual by Edward Clarke of Lincoln's Inn, published in 1867. He adopts the same view of the construction of this treaty and of the general principles of international law upon the subject which we have just indicated.

Turning to seek in judicial decisions for authority upon the subject, as might be anticipated, we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land; but the rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government. Speaking of the Ashburton Treaty of 1842, which we are now construing, Mr. Clarke says, that "In England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an Act of Parliament, but in the United States a treaty is as binding as an Act of Congress." Clarke, Extradition, 38.

This difference between the judicial powers of the courts of Great Britain and of this country in regard to treaties is thus alluded to by *Chief Justice* Marshall, in the Supreme Court of the [418] United States:

"A treaty is in its nature a contract between two nations, not a legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court." *Foster* v. *Neilson*, 2 Pet. 253, 314 [27 U. S. bk. 7, L. ed. 415, 435].

This whole subject is fully considered in the *Head-Money Cases*, 112 U. S. 580 [28: 798], in which the effect of a treaty as a part of the law

of the land, as distinguished from its aspect as a mere contract between independent nations, is expressed in the following language:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to [419] rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that 'This Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." See also *Chew Heong* v. *U. S.* 112 U. S. 536, 540, 565 [28: 770, 771, 780].

The Treaty of 1842 being, therefore, the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation, nor any absolute obligation of public duty, to seize a person who had found an asylum within its bosom and turn him over to another country for trial would be [420] willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government, without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned; to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, [421]

there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but devested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen [422] that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country, upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud, or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, "and for the giving up of criminals, fugitives from justice, *in certain cases*." The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated; and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated and that the proof is sufficient to satisfy the court or magistrate before [423] whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense and for no other.

If there should remain any doubt upon this construction of the treaty itself, the language of two Acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. It is there declared (Rev. Stat. § 5272), the two preceding sections having provided for a demand upon this country and for the inquiry into the guilt of the party, that "It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized in the name and on behalf of such foreign government, *to be tried for the crime of which such person shall be so accused*, and such person shall be delivered up accordingly."

For the protection of persons brought into this country by extradition proceedings from a foreign country, section 5275 of the Revised Statutes provides:

"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this govern- [424 ment to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings

That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if

not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

This precise question has been frequently considered by courts of the highest respectability in this country. One of the earliest cases is that of the *United States* v. *Caldwell*, 8 Blatchf. 131. Caldwell was extradited from Canada, in 1870, under the Treaty of 1842 with Great Britain, charged with forgery. He was not tried for this offense, however, but was tried and convicted for bribing an officer of the United States—an offense not designated in that treaty. In the Circuit Court of the United States, held by *Judge* Benedict, Caldwell called the attention of the court to this fact, and claimed that under the treaty he could not be tried for any offense committed prior to his extradition other than the one charged in the proceedings. To this plea the Government interposed a demurrer, which was sustained, and the prisoner was tried, convicted and punished for the bribery. *Judge* Benedict said that "While abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints [425] do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise. * * * But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. * * * And I cannot say that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed."

The next case, tried before the same court, was that of *United States* v. *Lawrence*, 13 Blatchf. 295. Lawrence was extradited from Ireland and brought into this country under the Treaty of 1842 on a charge of a single and specific forgery. He was indicted and put upon his trial for other forgeries than that specified in the extradition proceedings. To his trial for any other forgery than that he objected, by proper pleadings, on the ground that under the Treaty with Great Britain he could not be so tried for other forgeries. *Judge* Benedict held that he could be so tried; and he was tried and a verdict of guilty was rendered. It appears, however, but not very clearly from any report of the case, that, though tried and convicted, and having pleaded guilty to the other offenses of forgery, he was admitted to bail and no judgment was ever pronounced. *Judge* Benedict, adverting to the case of *United States* v. *Caldwell*, and to a decision of the Court of Appeals of New York in *Adriance* v. *Lagrave*, 59 N. Y. 110, proceeded to say:

"This ground of defense is therefore dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm."

And in addition to the proposition urged in the Caldwell case, that a question of that character arising on the treaty is exclusively for the consideration of the Executive Departments [426] of the respective governments, he proceeds to say:

"It is true that it (the Act of Congress) assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked; but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the Act of 1869, as a legislative Act, gives to the Treaty of 1842 the construction contended for by the accused." There are perhaps two or three other cases in which the circuit or district judges of the United States have followed these decisions rendered by *Judge* Benedict.

On the other hand, *Judge* Hoffman, of the District Court of California, in the case of *United States* v. *Watts*, 8 Sawy. 370, decided that the defendant, having been surrendered under the Extradition Treaty of 1842 by Great Britain, could not be tried for other offenses than those enumerated in that treaty, and supported this view with a very learned and able opinion. *Judge* Deady, of the District Court of Oregon, in *Ex parte Hibbs*, 26 Fed. Rep. 421, 431, February 4, 1886, held, in regard to the Treaty of 1842, that for a government to detain a person extradited under that treaty for any other charge than the one for which he had been surrendered "would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. A right of person or property, secured or recognized by treaty may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an Act of Congress."

But perhaps the most important decisions on this question are to be found in the highest courts of the States.

The case of *Adriance* v. *Lagrave* [*supra*], has been cited as supporting the doctrine held by *Judge* Benedict, and undoubtedly the language of the opinion delivered by *Chief Justice* Church, for the court in that case adopts the reasoning of *Judge* Benedict's opinion. Con- [427] sidering the high character of that court, it may be proper to make an observation or two on that case. First. It seems that while Lagrave was held for trial in this country under extradition proceedings, by which he was removed from France under the Treaty of 1843 with that nation, being out on bail, he was arrested under a writ in a civil suit for debt, which issued from one of the courts of the State of New York. He made application by a writ of *habeas corpus* to be released from this arrest, on the ground that he was protected from it by the terms of the treaty under which

he was surrendered, which, in that respect, are similar to those of the Treaty of 1842 with Great Britain. The difference between serving process in a civil action brought by a private party, whether arrest be an incident to that process or not, and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment. And while it is unnecessary to decide now whether he could be so served with process in civil proceedings, it does not follow that he would be equally liable to arrest, trial and conviction for a crime, and especially a crime not enumerated in the extradition treaty and committed before his removal. Second. The case of *Adriance* v. *Lagrave* was decided in the supreme court of the State by an order discharging Lagrave from arrest under the writ, and the writ was vacated. This judgment was the unanimous opinion of the court, in which sat three eminent judges of that State; to wit, Daniels, Davis and Brady. In the court of appeals this judgment was reversed by a divided court, *Judges* Folger and Grover dissenting.

While this is believed to be the only decision in the highest court of a State adopting that view of the law, there are three or four cases decided by appellate courts of other States holding a directly opposite doctrine.

The first of these is *Commonwealth* v. *Hawes*, 13 Bush (Ky.), 697. Hawes was demanded from the Dominion of Canada under the Treaty [428] of 1842 on four indictments charging him with as many acts of forgery, and was delivered up on three of them. He was brought to trial on two of these indictments in the courts of Kentucky and acquitted, while the other two were dismissed on motion of the attorney for the Commonwealth. There were, however, other indictments pending against him, charging him with embezzlement, and on one of these a motion was made to bring him to trial. Upon this motion the question was raised whether, under the circumstances in regard to the extradition, he could be tried for that offense. *Judge* Jackson, before whom the case was pending in the Kenton County Criminal Court, decided that he was bound to take judicial notice of the Treaty of 1842 between the United States and Great Britain, and that the defendant could not be tried for any offense for which he was not extradited, although he was within the power of the court, as the treaty was the supreme law of the land. By the terms of that treaty he held that Hawes could be tried for no other offense, because that treaty provides only for extradition in certain cases and under certain circumstances of proof, and that the right of asylum is to be held sacred as to anything for which the party was not and could not be extradited. He adds:

"I do not mean to say that he [Hawes] may not hereafter be tried; but what I mean to say is that, in the face of the treaty herein referred to, he is not to be tried until there is a reasonable time given him to return to the asylum from which he was taken."

The case was carried to the Court of Appeals of Kentucky, in which the whole matter was fully discussed, the opinion of the court, a very able one, being delivered by *Chief Justice* Lindsay, in 1878. The substance of the opinion is thus stated in the syllabus:

"1. Extradited criminals cannot be tried for offenses not named in the treaty, or for offenses not named in the warrant of extradition. A prisoner extradited from the Dominion of Canada under article 10 of the Treaty of 1842, between the United States and Great Britain, cannot be proceeded against or tried in this State for any other offenses than those mentioned in the treaty, and for which he was extradited, [429] without first being afforded an opportunity to return to Canada; and, after being acquitted on trials for the offenses for which he was extradited, he cannot be lawfully held in custody to answer a charge for which he could not be put on trial."

"3. The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty."

In 1881 a case involving the same question came before the Texas Court of Appeals (*Blandford* v. *State*, 10 Tex. Ct. of App. 627), in which the same principles were asserted as in that of Hawes. The case seems to have been very well considered, and the authorities up to that date were fully examined.

In 1883 the same question came before the Supreme Court of Ohio, in *State* v. *Vanderpool*, 39 Ohio St. 273. Vanderpool and Jones, having been delivered up under the Treaty of 1842 by the Dominion of Canada for offenses specified in that treaty, were tried, convicted and sentenced to the penitentiary for the crimes for which they were extradited. They were afterwards indicted for other offenses, to which they pleaded in abatement that by reason of the facts already stated they could not be tried for these latter offenses until a reasonable time had elapsed after the expiration of their sentences for the crimes of which they had been convicted. The Supreme Court of Ohio, to which the case came on appeal from the judgment of the Court of Common Pleas, sustained this view; and this was done upon the same general reasoning, already stated, as to the construction to be placed upon the Ashburton Treaty, of the obligations of that treaty as a law of the land, and of the rights conferred upon the party who was arrested and extradited under its provisions.

Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, [430] we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Two other observations remain to be made.

One of these is that the operation of this principle of the recognition of the rights of prisoners under such circumstances by the courts before whom they are brought for trial, relieves the relations between the Executive Department of the United States Government and the courts of a State before whom such case may be pending, of a tension which has more than once become very delicate and very troublesome. Of course, the interference of the executive branch of the Federal Government, when it may have been called upon by the nation which has delivered up a person to be tried for an offense against the laws of a State, with the proceedings of a state court in such case, is likely to be resented by such court; and yet, if the only mode of enforcing the obligations of the treaty is through the action of the respective national governments, it would seem that the government appealed to ought to have the right to see that the treaty is faithfully observed, and the rights of parties under it protected. In Great Britain the control of such matters would undoubtedly be recognized by any court to be in the Crown; but in this country such a proposition is, to say the least, not unaccompanied by serious embarrassments. The principle we have here laid down removes this difficulty; for under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, "anything in the laws of the States to the contrary notwithstanding," if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal Government, which [431] has been fully recognized. This remedy is by a writ of error from the Supreme Court of the United States to the state court which may have committed such an error. The case being thus removed into that court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided. If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ of *habeas corpus* from one of the federal judges or federal courts, issued on the ground that he is restrained of his liberty in violation of the Constitution or a law or a treaty of the United States, will bring him before a federal tribunal, where the truth of that allegation can be inquired into, and, if well founded, he will be discharged. *Ex parte Royall*, 117 U. S. 241, 251 [Bk. 29, L. ed. 868, 871]. State courts also could issue such a writ, and thus the judicial remedy is complete, when the jurisdiction of the court is admitted. This is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.

The other observation we have to make regards an argument presented in this particular case; namely, that the prisoner was convicted on the same testimony which was produced before the magistrate who ordered his extradition. Although it is thus stated in the brief, the record affords no sufficient evidence of it. What is found on that subject in the fourth question certified to this court is as follows:

"Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the Extradition Treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was *investigated*, and the same *witnesses* examined, as at the trial?"

It might be a sufficient answer to this argument to say that this does not prove that the *evidence* was the same upon the two trials. Although the act charged may have been the same and the witnesses may have been the same, yet the evidence elicited on the last trial may have been [432] very different from that obtained on the first. While the identity of facts investigated in the two trials is charged a little more specifically in the first question, we are of opinion that no importance should be attached to this matter, even if it were found that the party was convicted of inflicting cruel and unusual punishment on the seaman on the same evidence precisely upon which the committing magistrate in Great Britain delivered him up under a charge of murder. It may be very true that evidence which satisfied that officer that the prisoner was guilty of the crime of murder would also establish that he had inflicted cruel and unusual punishment on the person for whose murder he was charged; but as the treaty only justified his delivery on the ground that he was proved to be guilty of murder, before the committing magistrate, it does not follow at all that such magistrate would have delivered him on a charge, founded upon precisely the same evidence, of inflicting cruel and unusual punishment, an offense for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder. If the party could be convicted on an indictment for inflicting cruel and unusual punishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offense defined in the treaty, and then only seeking a trial and conviction for the minor offense not found in the treaty. We do not think the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge justifies this departure from the principles of the treaty.

This fourth question may also properly be treated as immaterial, for the question is, Should the trial judge have directed a verdict of acquittal? As all the matters set up by the defendant are in the nature of pleas in abatement, going rather to the question of trial on that indictment at that time, and not denying that at some future time, when the defendant may have been properly brought within the juris- [433] diction of the court, or rightfully found within such jurisdiction, he may be then tried, it did not involve an issue on the question of guilty or not guilty on which the court, if it proceeded to try that question at all, could direct either an acquittal or a conviction. Under the views we have taken of the case the jurisdiction of the court to try such an offense, if the party himself was properly within its jurisdiction, is not denied; but the facts relied upon go to show that while the court did have jurisdic-

tion to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial. The question therefore is immaterial.

The result of these considerations is that the first of the questions certified to us is answered in the negative; the second and third are answered in the affirmative; and it is ordered to be so certified to the judges of the Circuit Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Gray**, concurring:

I concur in the decision of the court, upon the single ground that by the Act of Congress of March 3, 1869, chap. 141, § 1 (embodied in § 5275 of the Revised Statutes), providing measures by which any person, delivered up by a foreign government for the purpose of being tried here for a crime of which he has been accused, may be secured against lawless violence "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter," the political department of the government has clearly manifested its will, in the form of an express law (of which any person prosecuted in any court within the United States has the right to claim the protection), that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States, before he can be arrested or detained for another offense.

Upon the broader question whether, independently of any Act of Congress, and in the absence of any affirmative restriction in the treaty, a man surrendered for one crime should [434] be tried for another, I express no opinion, because not satisfied that that is a question of law, within the cognizance of the judicial tribunals, as contradistinguished from a question of international comity and usage, within the domain of statesmanship and diplomacy.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Chief Justice **Waite**, dissenting:

I am unable to concur in the decision of this case. A fugitive from justice has no absolute right of asylum in a country to which he flees, and if he can be got back within the jurisdiction of the country whose laws he has violated, he may be proceeded with precisely the same as if he had not fled, unless there is something in the laws of the country where he is to be tried, or in the way in which he was got back, to prevent. I do not understand this to be denied. All, therefore, depends in this case on the treaty with Great Britain under which this extradition was effected, and section 5275 of the Revised Statutes. I concede that the treaty is as much a part of the law of the United States as is a statute; and if there is anything in it which forbids a trial for any other offense than that for which the extradition was made, the accused may use it as a defense to a prosecution on any other charge until a reasonable time has elapsed after his release from custody on account of the crime for which he was sent back. But I have been unable to find any such provision. The treaty requires a delivery up to justice, on demand, of those accused of certain crimes, but says nothing about what shall be done with them after the delivery has been made. It might have provided that they should not be tried for any other offenses than those for which they were surrendered, but it has not. Consequently, as it seems to me, the accused has acquired no new rights under the treaty. He fled from the justice of the country whose laws he violated, and has been got back. The treaty under which he was surrendered has granted him no immunity, and therefore it has not provided him with any new defense. This seems to have been the view taken by the English Government during the time of the controversy growing out of the demand made for the extradition of Winslow; for, in the debate in the House of Lords, the Lord Chancellor (Cairnes), while supporting the English view of the matter, and referring to the cases which had been cited against it, said: "In that class of cases * * * the prisoners, who had been surrendered on one charge, and who were being tried upon another, themselves attempted to raise the defense that they could not be tried for an offense different from that for which they had been surrendered. Such cases certainly have no application whatever to the present question, because nothing can be [435] more clear than that a prisoner himself has no right to raise such a defense. Even in France, where * * * the law and practice of extradition goes far beyond that which prevails in this country and in the United States, a prisoner is not permitted to set up such a defense, for the clear reason that he is within the jurisdiction of the court, which has the authority to try him for the offense of which he is charged, and that whether he ought to be tried for an offense other than that for which he has been surrendered is a matter of diplomacy between the two countries, and not a question between the prisoner and the court before which he is being tried." For. Rel. of the U. S. 1876, 291.

This is, I think, the true rule, and it is in full accord with the principles applied by this court in *The Richmond*, 9 Cranch, 102 [18 U. S. bk. 3, L. ed. 670], where it was insisted upon by way of defense that a vessel proceeded against for a violation of the Nonintercourse Act had been seized within the territorial jurisdiction of Spain. As to this *Chief Justice* Marshall said, in delivering the opinion of the court: "The seizure of an American vessel within the territorial jurisdiction of a foreign power is certainly an offense against that power, which must be adjusted between the two governments. This court can take no cognizance of it; and the majority of the court is of opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel." If either country should use its privileges under the treaty to obtain a surrender of a fugitive on the pretense of trying him for an offense for which extradition could be claimed, so as to try him [436] for one for which it could not, it might furnish a just cause of complaint on the part of the country which had been deceived, but it would be a matter entirely for adjustment between the two countries, and which could in no way

inure to the benefit of the accused except through the instrumentality of the government that had been induced to give him up.

As to section 5275 of the Revised Statutes, I have only to say, that, in my opinion, it neither adds to the rights of the accused nor changes the effect of the treaty as a part of the law of the United States. The accused was surrendered by Great Britain to the United States, and the United States are alone responsible to that country for whatever may be done with him in consequence of his surrender. He was delivered into the possession of the United States, and, in my opinion, that possession may at any time be regained by the United States, under this statute, from the State or its authorities, so long as the accused remains in custody, if it should be necessary in order to enable them to keep their faith with Great Britain in respect to the surrender.

I do not care to elaborate the argument on either of these questions. My only purpose is to state generally the grounds of my dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[469] CHARLES G. PEPER, Sued as CHARLES G. PEPER & COMPANY, AND GEORGE G. LATTA, *Appts.*,

v.

SAMUEL W. FORDYCE, Assignee of WALTER A. MOORE, AND WALTER A. MOORE.

(See S. C. Reporter's ed. 469-472.)

Jurisdiction—circuit court without, when an indispensable defendant is adverse in interest to the plaintiffs and is a citizen of the same State and there is no separable controversy—costs—equal division of—improper removal of cause.

1. Where, at the time of the commencement of an action in a circuit court, or its removal thereto, one of the defendants is an indispensable party adverse in interest to the plaintiffs and is a citizen of the same State, and there is no separable controversy between the plaintiffs and another defendant, who is a citizen of a different State, the court is without jurisdiction.

2. Upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require.

3. The plaintiffs having improperly brought a suit in the court below, and the defendants having improperly removed another suit thereto, without objection by either party, upon the reversal of a decree entered after the consolidation of said suits, this court orders that the costs be equally divided.

[No. 53.]

Argued and submitted Nov. 17, 1886. Decided Dec. 13, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Henry Hitchcock**, for appellants.

Messrs. **Eben W. Kimball** and *Geo. W. Murphy*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

From the record in this case it appears that on the 10th of January, 1881, Walter A. Moore, a citizen of Arkansas, conveyed to George G. Latta, a citizen of the same State, certain property in the City of Hot Springs, in trust to secure the payment of three notes for the sum of $2,433.46 each, payable to the order of Charles G. Peper, under the name of Charles G. Peper & Co., a citizen of Missouri, with power of sale in case of nonpayment. After the execution of this conveyance Moore became insolvent, and assigned his property to Samuel W. Fordyce, a citizen of Arkansas, for the benefit of his creditors. On the 11th of June, 1881, Fordyce as such assignee, at the instance of the creditors of Moore and in their behalf, began a suit in equity in the Circuit [470] Court of the United States for the Eastern District of Arkansas against Peper and Latta, the object and purpose of which was to prevent a sale of the property under the deed to Latta, and for an account of certain transactions between Peper and Moore connected with the notes which had been secured, with a view to the cancellation of the debt or at least its payment after the exact amount due should be determined. In the bill it appeared that both Fordyce and Latta were citizens of Arkansas, and that Peper was a citizen of Missouri. To this bill Peper and Latta filed a joint answer.

Afterwards, on the 31st of October, 1881, Fordyce, as assignee, and Moore began another suit against Peper and Latta in the Circuit Court of Garland County, Arkansas, the object of which was also to enjoin Peper and Latta from selling the property under the deed to Latta, and to obtain a cancellation of the conveyance. Immediately on the filing of this bill, a preliminary injunction was granted as prayed. On the same day, Peper and Latta filed a petition for the removal of this last suit to the Circuit Court of the United States for the Eastern District of Arkansas, on the ground that "There is a controversy in this suit between citizens of different States, and which can be fully determined between them." In their petition it was stated in express terms that Latta, Fordyce, and Moore were all citizens of Arkansas, and Peper a citizen of Missouri. This cause was entered in due form in the Circuit Court of the United States on the 14th of November, 1881, and on the 21st of the same month Peper and Latta filed in that court a joint answer to the bill which had been filed in the state court, and on which the injunction had been granted. On the 20th of December, 1881, the two causes thus in the Circuit Court of the United States were there consolidated on motion of Fordyce, and an order made "that the two causes be tried as one suit under the title" of the cause originally begun in that court.

On the 10th of June, 1882, Peper and Latta filed a cross bill in which they prayed a foreclosure and sale of the trust property. To this cross bill an answer was filed by Fordyce and Moore, setting up substantially the same de- [471] fenses as were shown in the bill of Fordyce in the Circuit Court of the United States, and to this a replication was filed by Peper and Latta. Testimony was taken, and on the final hearing of the cause a decree was entered dismissing

the cross bill and directing a cancellation of the deed of trust. From that decree Peper and Latta took this appeal.

The first objection now made to the decree is, that the circuit court had no jurisdiction, either of the suit originally begun in that court or of that removed from the state court. If the jurisdiction does not appear on the face of the record in some form, the decree is erroneous and must be reversed. That was decided at the present term in *Continental Life Ins. Co.* v. *Rhoads* [*ante*, 380], to which reference is made for the authorities.

The jurisdiction in this case depends alone on the citizenship of the parties; and in the suits as originally begun, and on their consolidation in the circuit court, Latta, one of the defendants, is, and was at the commencement of the actions, a citizen of the same State with the plaintiffs. This is fatal to the jurisdiction, because Latta was an indispensable party adverse in interest to the plaintiffs, and there was no separable controversy between the plaintiffs and Peper which would authorize the removal of the suit begun in the state court on that account. This was expressly decided in *Thayer* v. *Life Association*, 112 U. S. 717 [Bk. 28, L. ed. 864], a case which cannot be distinguished from this. It follows, therefore, that the decree must be reversed.

[472] It only remains to consider the question of costs, for in *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 [38:462], and *Hancock* v. *Holbrook*, 112 U. S. 229 [28:714], it was held that, upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require. Here the error is attributable equally to both the parties. Fordyce sued originally in the circuit court, when, upon the face of his bill, it appeared there was no jurisdiction. Without discontinuing that suit he sued again in the state court upon what was substantially the same cause of action and to obtain substantially the same relief. This suit Peper and Latta caused to be removed to the circuit court, and in their petition set forth a state of facts which showed that the case was not removable. The cause was then entered in the circuit court, and an answer and a cross bill filed by Peper and Latta without any attempt on the part of Fordyce or Moore to have the suit remanded, and without even calling the attention of the court to the question of jurisdiction. On the contrary, after the answer and before the cross bill, Fordyce moved for and obtained an order that the two cases—that which he had brought in the Circuit Court of the United States and that which Peper and Latta had removed there—be heard as one under the title of his own suit in that court The cases then proceeded, without objection by either party, until after a final decree below and an appeal by Peper and Latta to this court. Under these circumstances, we order that the costs of this court be divided equally between the parties, each paying half.

The decree of the Circuit Court is reversed for want of jurisdiction in the Circuit Court, and the cause remanded, with instructions to dismiss the bill filed originally in that court by Fordyce against Peper and Latta, without prejudice, and to remand the suit removed from the state court, each party to pay his own costs in the Circuit Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BALTIMORE AND OHIO RAILROAD COMPANY, *Plf. in Err.*, [464]
v.
GEORGE BATES.

(See S. C. Reporter's ed. 464–468.)

Removal of causes—security.

Subsection 3 of section 639, R. S., providing for the removal of causes from state courts, on the ground of prejudice and local influence, was not repealed by the Act of 1875. That part of said section, 639, R. S., which provides for the security to be given upon removal of a cause, also remains in force, it being necessary to carry said subsection 3 into effect.

[No. 49.]

Argued and submitted Nov. 12, 1886. Decided Dec. 13, 1886.

IN ERROR to the Supreme Court of the State of Ohio. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Hugh L. Bond, Jr., and John K. Cowen,** for plaintiff in error:

This court has repeatedly decided that the provisions of section 3, of the Act of 1875, do not govern the removal of suits on the ground of prejudice and local influence, under subsection 3, of section 639 R. S., so far as the time for filing the petition for removal is concerned.

Bible Society v. *Grove*, 101 U. S. 610 (Bk. 25, L. ed. 847); *King* v. *Cornell*, 106 U. S. 395 (27:60); *Hess* v. *Reynolds*, 113 U. S. 73 (28:927).

The two cases last above cited decided expressly that a suit between a citizen of the State in which the suit is brought, and a citizen of another State, wherein the latter has filed an affidavit of prejudice and local influence is not "any suit mentioned" in section 2 of the Act of 1875. And hence its removal is not governed by section 3 of that Act. It is submitted that the effect of the Act of 1875 was to strike out subsections 1 and 2 of section 639 of the Revised Statutes, but to leave the remainder of that section in full force, so as to provide a complete system of proceeding for the removal of suits, on the ground of prejudice and local influence. There are two distinct systems of proceeding for the removal of causes. There may be a removal under one system, or under the other system; but there can be no such thing as a removal partly under the Act of 1875 and partly under section 639.

Messrs. **Gibson Atherton** and *J. A. Flory*, for defendant in error:

This is a proceeding in error to reverse the judgment of the Supreme Court of Ohio in the case of *Bates* v. *Baltimore & Ohio R. R. Co.*, reported in full in 39 Ohio, 157.

We claim that the court of common pleas was right in refusing to certify the cause to the United States Court. The petition to remove was filed too late under the Act of Congress of March 3, 1875. U. S. Statutes, 1874 and 1875, p. 470.

Babbitt v. *Clark*, 103 U. S. 606 (Bk. 26, L. ed. 507); *Pullman P. C. Co.* v. *Speck*, 113 U. S. 84 (28:926); *Gregory* v. *Hartley*, 113 U. S. 742 (28:1150).

The Railroad Company attempted to make the application under paragraph 3 of section 639, Rev. Stat. p. 113, and frame their petition and bond under that section. The whole of section 639 was repealed by the Act of March 3, 1875.

Burdock v. *Hale*, U. S. Ct. D. of Ind. L. L. and E. Rep. No. 10, 246; *Clipinger's Admr.* v. *N. V. Ins.* 2 Cin. L. Bulletin, 218; *Danville R. R. Co. Case*, 7 Chic. Legal News, 241; *Chandler* v. *Coe*, 22 Am. Rep. 437; Smith's Constitutional Construction, §§ 786, 787; *Murdock* v. *Memphis*, 20 Wall. 617 (87 U. S. bk. 22, L. ed. 437); *U. S.* v. *Tynen*, 11 Wall. 88 (78 U. S. 20:153); 7 Am. Dec. 99, note; *Loraine Plank R. Co.* v. *Cotton*, 12 Ohio St. 263; *King* v. *Cornell*, 106 U. S. 396 (27:60).

Counsel say that part 3 of section 639 was not repealed by the Act of March 3; that the inconsistency between the two is not sufficient to repeal the former. But the law is that when a new statute enacts a thing to be done differently from the same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention.

Moore v. *Vance*, 1 Ohio, 10.

It seems to us, there is no doubt but that it was the intention of Congress, in passing the Act of March 3, 1875, to repeal all of the class of cases provided for in section 639.

First. Take the title of the Act of March 3, 1875.

Second. Then the language of the first section, which provides "That the circuit court shall have original cognizance of all suits of a civil nature, at common law, or in equity."

Third. Then the second section, which provides "that any suit of a civil nature at law or in equity," may be removed.

Fourth. Then the language of the third section, which provides that the person "entitled to remove any suit mentioned in the second section of this Act," the language of which, with section 1, is the same as that of section 2 of article 3 of the United States Constitution, under and by virtue of which the United States Courts can take or obtain jurisdiction.

Fifth. Then looking at the other provision of the Act of 1875, with its broad and comprehensive language, and that it provides a single straight and uniform mode of procedure so as not to allow experiments in the State (See Miller, J., in *Pullman Palace Car Co.* v. *Speck*, *supra*). Then the fact that the local prejudice resulting from the war, that gave rise to the Act of 1867, had ceased to any longer exist.

From all of the above facts, there seems to us to be no doubt but that it was the intention of Congress in passing the Act of March 3, 1875, to consolidate and codify all the law upon the subject relating to this class of cases, provided for in sections 2 and 3 of the United States Constitution, "between citizens of different States," into one single section, with one mode of procedure applying to all.

But if this third paragraph was not superseded by the Act of 1875, this case was not removable under that paragraph, because the petition was not filed before the trial of the case. The Revised Statutes, paragraph 3, provided that the petition for removal should be filed before "the trial" of the cause. This case was put at issue by the demurrer, under section 260, Ohio Code, and "A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."

Ohio Code, § 262, S. and C. Stat. 1020.

So that this case was finally tried and decided and final judgment rendered before the petition for removal was filed, and the petition for removal does not aver the case had not been tried, while the record shows it had been once tried.

But, say the counsel for the Railroad Company, where the judgment of the court has been set aside and a new trial granted the case is removable, and cite the case of the *Insurance Company* v. *Dunn*, 19 Wall. 214 (86 U. S. bk. 22, L. ed. 68). That case was decided under the Act of March 2, 1867, which required the petition for removal to be filed "at any time before the final hearing or trial of the suit," while in the Revised Statutes the word trial is transposed from after the word "final" and placed before it, so as to make it conform to the Act of 1866.

This change was not made for nothing. The case of *Insurance Co.* v. *Dunn* had already been decided, of which it is presumed Congress had full knowledge before it enacted the Revised Statutes. "It is apparent that this change was not the result of accident, but was deliberately made to secure uniformity upon the subject, in view of the conflicting decisions between the federal and state courts in the following cases:

Ackerly v. *Vilas*, 1 Abb. (U. S.) 284; *Johnson* v. *Monell*, Woolworth, 390; *Insurance Co.* v. *Dunn*, 20 Ohio St. 175, and same case 19 Wall. 214, *supra*; *Bryant* v. *Rich*, 106 Mass. 192; *Whittier* v. *Ins. Co.* 20 Am. Rep. 187.

This change in the wording of the statutes appears to have been made apparently to get around the construction given to the Act of 1867 in the 19 Wallace report; for if Congress, having full knowledge of that decision, had intended to follow the Act of 1867, it would have worded it the same. The change was apparently made to do away with the injustice resulting from the Act of 1867, under the construction given it by the 19 Wallace report, as is well illustrated by the case at bar. The change in the language of the Acts of the Revised Statutes and of March 3, 1875, were made so as to bring the law back to the same state in which it had been since the foundation of our National Government, and under which the rights of parties had been long since settled by judicial decisions.

Whittier v. *Hartford Ins. Co.* 20 Am. Rep. 187; *King* v. *Cornell*, *supra*.

If a removal can be made under the Revised Statutes, the conditions of the bond must be those required by the Act of March 3, 1875.

Torry v. *Locomotive Works*, 14 Blatchf. C. C. Rep. 260; 20 Am. Law Reg. p. 38; *Burdock* v. *Hale*, 8 Chic. L. News, 192; *Bates* v. *R. R. Co.* 39 Ohio St. 157; *Webber* v. *Bishop*, 13 Fed. Rep. 49; *McMurdy* v. *Con. G. L. Ins. Co.* 9 Chic. L. News, 324; *Farmers L. and Tr. Co.* v. *C. P. and S. R. R. Co.* 12 Chic. L. N. 65.

The right to remove a suit from a state court to a Circuit Court of the United States is statutory; and to effect a transfer of jurisdiction all

the requirements of the statutes must be followed.

Per Waite, *Ch. J.*, in *Babbitt* v. *Clark*, 103 U. S. 610 (Bk. 26, L. ed. 508); *Removal Cases*, 100 U. S. 474 (25: 599); *Gregory* v. *Hartley*, *supra*; *Ins. Co.* v. *Pechner*, 95 U. S. 183 (24: 427); *Amory* v. *Amory*, 95 U. S. 186 (24: 428); *Merchants Nat. Bank* v. *Brown*, 4 Woods, 263.

There was no justification, or evidence given to the court that the sureties on the bond were sufficient; and in the absence of a finding of the court, or showing to the court by affidavit or other evidence shown by a bill of exceptions setting forth the evidence, this court is bound to presume they were not good and sufficient sureties, if it is necessary, in order to sustain the judgment or order of the court of common pleas. It is said that this may be and was waived. We admit it might be waived, and if the court had ordered the removal, it would be presumed that the qualifications were made or waived to sustain the order of removal, but we know of no authority where it is held that a court of errors will presume such a fact, or hold that it was waived for the purposes of reversing an order or judgment.

Dallas v. *Ferneau*, 25 Ohio St. 635.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought in the Court of Common Pleas of Licking County, Ohio, on the first of July, 1875, by George Bates, a citizen of Ohio, against the Baltimore and Ohio Railroad Company, a Maryland corporation, and having its principal office in that State, to recover damages for personal injuries. The Railroad Company filed a general demurrer to the petition, on the 20th of September, 1876, and on the 7th of April, 1877, this demurrer was sustained and judgment entered in favor of the Company.

[465] On the 7th of July, 1877, this judgment was reversed by the district court of the county, and the cause remanded to the common pleas for further proceedings. When the case got back the Railroad Company filed a petition for removal to the Circuit Court of the United States for the Southern District of Ohio, under subsection 3 of section 639 of the Revised Statutes, on the ground of prejudice and local influence. The petition was in proper form, and it was accompanied by the necessary affidavit, but the security was such as was prescribed by section 639 of the Revised Statutes, and not such as was required by section 3 of the Act of March 3, 1875, chap. 137; 18 Stat. at L. pt. 3, 470. The Act of 1875 requires security for "All costs that may be awarded by the said circuit court, if the said court shall hold that such suit was wrongfully or improperly removed thereto." This is not found in section 639.

The petition for removal was denied by the court of common pleas, December 22, 1877, and thereupon the Railroad Company answered, and the parties went to trial May 23, 1878, when a judgment was rendered against the Company. The case was taken then, on petition in error, to the district court of the county, because, among others, the court erred in denying the petition for removal. On the 28th of February, 1880, the district court reversed the judgment for this error, and the case was then taken to the supreme court of the State, where the judgment of the district court was reversed, and that of the common pleas affirmed, on the 15th of May, 1883; that court holding that the security was defective, because it was not such as the Act of 1875 required. To reverse that judgment this writ of error was brought.

Subsections 1 and 2 of section 639 were repealed by the Act of 1875; *Hyde* v. *Ruble*, 104 U. S. 407 [Bk. 26, L. ed. 823]; *King* v. *Cornell*, 106 U. S. 395, 398 [27: 60, 61]; *Holland* v. *Chambers*, 110 U. S. 59 [28: 70]; *Ayers* v. *Watson*, 113 U. S. 594 [28: 1093]; but subsection 3 was not. *Bible Society* v. *Grove*, 101 U. S. 610 [25: 847]; *Hess* v. *Reynolds*, 113 U. S. 73, 80 [28: 927, 929]. Under subsection 3 the petition for removal may be filed at any time before the final trial or hearing. *Ins. Co.* v. *Dunn*, 19 Wall. 214 [86 U. S. 22: 68]; *Vannevar* v. *Bryant*, 21 Wall. 41 [88 U. S. 22: 476]; *Yulee* v. *Vose*, 99 U. S. 545 [25: 356]; *Railroad Co.* v. *McKinley*, 99 U. S. 147 [25: 272]. This petition was filed after a new trial had actually been granted, and while the cause was pending in the trial court for that purpose. It was, therefore, in time, and no objection is made to its form.

As subsection 3 has not been repealed, so much of the remainder of section 639 as is necessary to carry the provisions of that subsection into effect remains in force, unless something else has been put in its place. It is not contended that anything of this kind has been done, unless it be by the operation of section 3 of the Act of 1875; but that section by its very terms is only applicable to removals under section 2 of the same Act. The language is "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section," that is to say, section 2 of the Act of 1875, "shall desire to remove such suit," he shall petition and give security in the manner and form therein prescribed. Clearly, then, this section relates only to removals provided for in that Act; and as subsection 3 of section 639 remains in force, because the cases there [468] provided for are not included among those mentioned in the Act of 1875, it follows that the form and mode of proceeding to secure a removal under the subsection will be sufficient if they conform to the requirements of the other parts of the section. That section as it now stands unrepealed is complete in itself, and furnishes its own machinery to effect a removal of all cases which come within its operation. The security is as much governed by the remainder of the section as the time for filing the petition; and as to that, it was distinctly held in *Hess* v. *Reynolds*, *supra*, that the petition was in time if presented before the final trial, even though it was after the term at which the cause could have been first tried, which would be too late if section 3 of the Act of 1875 was applicable to this class of cases. As to this the court said in that case: "We are of opinion that this clause of section 639 remains, and is complete in itself, furnishing its own peculiar cause of removal, and prescribing, for reasons appropriate to it, the time within which it must be done."

It is true this suit is between citizens of different States, and as such it is mentioned in section 2 of the Act of 1875; but the fair meaning of section 3 is that the suit must be one that is

removable, simply for the reason that it is one of a class such as is mentioned in section 2. Some cases in the circuit courts have been ruled the other way, and the decision of the Supreme Court of Ohio was put largely on their authority; but they were all decided before *Hess* v. *Reynolds*, *supra*, in this court, and that case, as we think, substantially covers this.

The judgment of the Supreme Court of Ohio is reversed, and the cause remanded for further proceedings in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[385] JOHN L. STREET, *Appt.*,
v.
EDWARD P. FERRY.

(See S. C. Reporter's ed. 385, 386.)

Jurisdiction—appeals from Supreme Courts of the Territories and District of Columbia—construction of Act of March 3, 1885—affidavits of value.

1. The Act of March 3, 1885, limits appeals to this court from the Supreme Courts of the Territories and the District of Columbia, with certain exceptions, to cases in which the matter in dispute, at the date of final judgment or decree, exceeds $5,000.
2. The patent included in said exceptions is a patent for an invention or discovery, not for land.

[No. 1079.]

Submitted Nov. 23, 1886. Decided Dec. 13, 1886.

APPEAL from the Supreme Court of the Territory of Utah.

On motion to dismiss. *Granted.*

The case is stated by the court.

Messrs. **J. G. Sutherland** and **Arthur Brown**, for appellee, in support of motion.

Mr. **John A. Marshall**, for appellant, *contra.*

[386] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This appeal was taken since the Act of March 3, 1885, chap. 355, 23 Stat. at L. 443, went into effect. That statute, by section 1, limits appeals to this court from the Supreme Courts of the Territories and from the Supreme Court of the District of Columbia to cases where the value of the matter in dispute exceeds $5,000, except, by section 2, the validity of a patent or copyright is involved, or the validity of a treaty or a statute, or an authority exercised under the United States is drawn in question. The value here referred to is the value at the time of the final judgment or decree, not at the time of the appeal or writ of error. Nothing whatever appears on the face of the record proper to show the value of the matter in dispute. The judgment was rendered July 22, 1886, and an appeal allowed the same day in open court. Affidavits of value were filed in the court below after this allowance, and these affidavits were sent here with the transcript. Other affidavits have been filed in this court since the case was docketed, and, on consideration of the whole, we are satisfied that the value is not sufficient to give us jurisdiction. The appellant himself puts the value of the land alone at only $4,000, and the fair inference, from all the affidavits taken together, is that the improvements on the land are worth much less than $1,000. A large number of witnesses, who seem to be well qualified to judge of the value, put it at from $3,000 to $3,500, including all improvements.

The patent referred to in the second section of the Act is a patent for an invention or discovery, not a patent for land.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FREDERICK KRAMER, Assignee of ISAAC COHN, a Bankrupt, *Appt.*, [355]
v.
ISAAC COHN AND MARK S. COHN.

(See S. C. Reporter's ed. 355–357.)

Bankruptcy—fraudulent withholding assets—bill by assignee against bankrupt and another—equity jurisdiction.

A bill in equity, filed by an assignee in bankruptcy against the bankrupt and another, charging that the proceeds of property fraudulently concealed by said bankrupt had been invested in the stock in trade in a business carried on by him in the name of the other defendant, is held to have been properly dismissed, generally, as to the second defendant and without prejudice to an action at law against the bankrupt, there being no proof to connect the second defendant with the fraud.

[No. 42.]

Submitted Nov. 12, 1886. Decided Dec. 13, 1886.

APPEAL from the District Court of the United States for the Western District of Arkansas. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Morris M. Cohn**, for appellant.

Messrs. **J. H. Clendening** and **M. H. Sandels**, for appellees.

Mr. Justice **Gray** delivered the opinion of the court: [356]

This bill in equity was filed by the assignee in bankruptcy of Isaac Cohn, against him and Mark S. Cohn, alleging that Isaac Cohn, before the adjudication of bankruptcy, and with intent to defraud his creditors, concealed his property and sold it for a large sum of money, and, after obtaining his discharge in bankruptcy, invested that money in a stock of goods, with which he had since carried on business in the name of the other defendant; that this stock in fact consisted of the property so kept back from his creditors, with the increase thereof, and that the other defendant had little, if any, interest therein; and praying for an answer, an injunction, a receiver, an account; and, upon failure to answer and account, for a decree vesting in the plaintiff the title in the stock; and for further relief.

The defendants answered separately upon oath, denying these allegations, and alleging that the business was carried on by Isaac Cohn as clerk of the other defendant, and was wholly owned by the latter.

At the hearing upon pleadings and proofs, the court was of opinion that the plaintiff was entitled to recover against Isaac Cohn, for money and assets fraudulently withheld by him

from his assignee in bankruptcy, the sum of $6,500, but that the plaintiff had failed to connect the other defendant with the fraudulent withholding of assets; and therefore entered a decree against Isaac Cohn for that sum and costs, but as to the other defendant dismissed the bill with costs.

The plaintiff and Isaac Cohn each filed a petition for a rehearing. The plaintiff's petition was denied. But upon the petition of Isaac Cohn it was ordered that as to him, "it appearing to the court that it is without jurisdiction in this case," the former decree be set aside and the bill be dismissed with costs and without prejudice. The plaintiff appealed to this court.

[357] No reason is shown for sustaining the appeal. So far as the plaintiff's claim was against Isaac Cohn personally, an action at law to recover the value of the property fraudulently concealed and sold by him would afford a full, adequate and complete remedy. The only pretense for resorting to equity was the allegation that the proceeds of that property had been invested in the stock in goods of a business carried on by him in the name of the other defendant, whereby it was sought to affect the latter and the goods with a trust in favor of the creditors of Isaac, and of the plaintiff as representing them. But the proof wholly failed to support that allegation, and showed that the plaintiff had no right of action, except to recover pecuniary damages against Isaac alone. It thus appeared that the plaintiff never had any claim within the cognizance of a court of equity; and the bill was rightly dismissed generally as to the second defendant, and without prejudice to an action at law against the first defendant. *Dowell* v. *Mitchell*, 105 U. S. 430 [Bk. 26, L. ed. 1142], *Buzard* v. *Houston*, 119 U. S. 347 [*post*, 451], just decided.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[477] UNITED STATES, *Appt.*,

v.

JOHN PAUL JONES, Admr. of the Estate of GEORGE MCDOUGALL, Deceased.

(See S. C. Reporter's ed. 477-480.)

Jurisdiction of appeals from court of claims—when not affected by appropriation to pay judgment.

1. This court has jurisdiction of appeals from the court of claims.
2. Such jurisdiction is not affected by an appropriation to pay a judgment appealed from, where the appropriation is not applicable, before the expiration of the right of appeal.

[No. 1024.]

Submitted Dec. 6, 1886. Decided Dec. 13, 1886.

APPEAL from the Court of Claims.

On motion to dismiss. *Denied.*

The grounds for the motion are given in the opinion.

Mr. **John Paul Jones**, administrator, in support of motion.

Messrs. **A. H. Garland**, *Atty-Gen.*, and **Heber J. May**, *Asst. Atty-Gen.*, for appellant, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The grounds of this motion are:

1. That under the law as it now stands no appeal lies from a judgment of the court of claims to this court; and,

2. That since the appeal was taken Congress has appropriated the amount necessary to pay the judgment.

The case of *Gordon* v. *U. S.* 2 Wall. 561 [69 U. S. bk. 17, L. ed. 921], holding that no appeal would lie from a judgment of the court of claims to this court, was announced March 10, 1865. The cause was originally submitted on the 18th of December, 1863, and on the 10th of [478] April, 1864, it was ordered for argument on the second day of the next term. *Chief Justice* Taney died October 12, 1864, and the case was not reargued under the special order of the previous term until January 3, 1865. Consequently, the opinion published as an appendix to 117 U. S. 697, must have been prepared by him before the decision was actually made. The records of the court show that in announcing the judgment *Chief Justice* Chase said: "We think that the authority given to the head of an Executive Department by necessary implication in the 14th section of the amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, from the exercise of which alone appeals can be taken to this court. The reasons which necessitate this conclusion may be more fully announced hereafter. At present, we restrict ourselves to this general statement, and to the direction that the cause be dismissed for want of jurisdiction." This differs somewhat from the case as reported by Mr. Wallace*, and shows precisely the ground of the opinion; to wit, the special provisions of section 14. That section was as follows:

"Sec. 14. That no money shall be paid out of the treasury for any claim passed on by the court of claims till after an appropriation therefor shall have been estimated for by the Secretary of the Treasury."

At the next session of Congress after this decision the objectionable section was repealed by the Act of March 17, 1866, chap. 19, 14 Stat. at L. 9; and the court of claims was directed to transmit, at the end of every term, a copy of its decisions to the heads of departments and certain other officers specially mentioned. From that time until the presentation of this motion it has never been doubted that appeals would lie. Indeed, immediately after the repealing Act went into effect, and before the adjournment of the term then being held, a set of rules regulating such appeals was promulgated by this court, and it is safe to say that there has never been a term since in which many cases of the kind have not been heard and decided without objection from anyone. At December Term, 1866, in *De Groot* v. *U. S.* [479] 5 Wall. 427 [72 U. S. bk. 18, L. ed. 702], the new rules were referred to and explained; and at the next term, in December, 1867, in *U. S.* v. *Alire*, 6 Wall. 577 [73 U. S. 18: 948], a case which could not be entertained on a general appeal was sent back in order that a special appeal might be allowed of which this court could

*This case will be found correctly reported in Book 17 of this edition, at page 921. (Ed.)

take jurisdiction. In delivering the opinion, *Mr. Justice* Nelson, who was with the majority when *Gordon's Case* was decided, after referring to that case as denying the jurisdiction of this court "on account of the power of the Executive Department over its judgment by the fourteenth section of the Act of 1863," said "that section had been repealed by the first section of the Act of March 17, 1866." So, too, in *U. S.* v. *O'Grady*, 22 Wall. 641 [89 U.S. 22: 772], *Mr. Justice* Clifford, who also concurred in the judgment in *Gordon's Case*, said, for the court: "The supreme court declined to take jurisdiction of such appeals chiefly for the reason that the Act practically subjected the judgments of the supreme court rendered in such cases to the re-examination and revision of the Secretary of the Treasury;" but he added, "Subsequently Congress repealed the provision conferring that authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the supreme court should exercise jurisdiction of appeals in such cases." This case was decided at October Term, 1874, and afterwards, at October Term, 1879, in *Langford* v. *U. S.* 101 U. S. 344 [25: 1012], *Mr. Justice* Miller, who dissented from the judgment in *Gordon's Case*, after referring to that case and the grounds of its decision, said: "An Act of Congress removing this objectionable feature having been passed the year after that decision, this appellate power of this court has been exercised ever since." It is manifest, therefore, not only that the jurisdiction was originally denied solely on the ground of the objectionable 14th section, but that, with this section repealed, nothing has ever been supposed until now to stand in the way of our taking cognizance of such cases.

Reference is now made in argument to section [480] 236 of the Revised Statutes, which provides that all claims and demands against the United States shall be settled and adjusted in the Department of the Treasury, and it is claimed that this is the equivalent of the objectionable 14th section as a bar to our jurisdiction. This section of the Revised Statutes is not new law. It was first enacted as section 2 of the Act of March 3, 1817, chap. 45, 3 Stat. at L. 344, and it has been in force ever since. It evidently relates to an entirely different class of duties from that to which the payment of the judgments of the court of claims belongs. As to such judgments, the duty of the Secretary of the Treasury is to pay them out of "any general appropriation made by law for the payment and satisfaction of private claims, on presentation" to him "of a copy of said judgment, certified" according to law. Rev. Stat. § 1069. Of course this applies as well to special appropriations made for the satisfaction of the particular judgment. Under this statute the Secretary has no power whatever to go behind the judgment in his examination.

Reference is also made to an Act of March 3, 1875, chap. 149, 18 Stat. at L. 481, which provides for "deducting any debt due the United States from any judgment recovered against the United States by such debtor;" but this gives the accounting officers of the Government no authority to re-examine the judgment. It only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States for anything except what is included in the judgment, which is conclusive as to everything it embraces.

It is unnecessary to pursue this branch of the case further. We are entirely satisfied that, as the law now stands, appeals do lie to this court from the judgments of the court of claims in the exercise of its general jurisdiction.

As to the second ground of the motion, it is sufficient to say that it is expressly provided, in the Act making the appropriation referred to, "That none of the judgments herein provided for shall be paid before the right of appeal shall have expired." Stat. 1885–1886, 282. As this appeal was taken in time, the appropriation is not applicable to the payment of the judgment, at least until the case has been disposed of here.

The motion to dismiss is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MARY E. WILSON, *Plff. in Err.*, [387]
v.
ROBERT BLAIR.

(See S. C. Reporter's ed. 387, 388.)

Jurisdiction—burden of showing, on plaintiff in error—practice—affidavits of value.

1. The burden of showing jurisdiction is on the plaintiff in error; and if he fails to show by a fair preponderance of testimony that the value of the property in dispute exceeds $5,000, a motion to dismiss will be granted.

2. Where the record does not show the value of the property in dispute, it is good practice to grant leave to file affidavits as to such value.

[No. 580.]

Submitted Nov. 15, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

On motion to dismiss. *Granted.*

The case appears in the opinion.

Messrs. **Lewis A. Groff, C. S. Montgomery** and **M. H. Sessions**, for defendant in error, in support of motion.

Messrs. **C. O. Whedon** and **J. C. Crooker**, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

Our jurisdiction in this case depends on the value of the matter in dispute. Final judgment was entered in the action May 24, 1884. At that time there was nothing in the record to show the value. On the 16th of September, 1884, on motion, leave was given the defendant in the court below to file affidavits of value that day, and the plaintiff to file counter affidavits in twenty days. This was good practice, and, if oftener adopted, would save trouble to parties and to us. Under this leave, and others of a similar character, which were afterwards granted, a considerable number of affidavits were filed by both parties. The affidavits were contradictory, some having a tendency to prove that the value was more than $5,000, and others that it was less. On the 5th of May, 1885, the district judge, without formally deciding the question of value, allowed

a writ of error, thus sending the case here on
[388] the affidavits, free from any decision whatever by the court below as to their effect. In this respect the case differs from *Gage* v. *Pumpelly*, 108 U. S. 164 [Bk. 27, L. ed. 668], where the appeal was allowed by the court in session after considering the affidavits, and from *Zeigler* v. *Hopkins*, 117 U. S. 683 [29: 1019], where the value was found as one of the facts in the case.

The burden of showing jurisdiction is on the plaintiff in error. He must establish as a fact by a fair preponderance of testimony that the value of the property in dispute exceeds $5,000. This he has not done. Two witnesses swear that the property is worth more than $6,000, and eight that it is worth $5,000, "or more." These are for the plaintiff in error, but there are eight on the other side who say it is worth only from about $3,000 to about $3,500, and the certificate of the county clerk shows that it was valued for taxation in 1884 at only $700. Under these circumstances, we think the decided preponderance of the evidence is against our jurisdiction, and the motion to dismiss is therefore granted.

Dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[373] ROBERT NEWTON, *Appt.*,

v.

FURST AND BRADLEY MANUFACTURING COMPANY, CONRAD FURST, ET AL.

(See S. C. Reporter's ed. 373-385.)

Patent for improvement in gang-plows—reissue including new elements in combination, invalid.

1. In view of the state of the art at the date of the invention covered by letters patent No. 56812, for an improvement in gang-plows, the patentee's claims must be limited to his specific devices, said patent not extending to any device by which the plow may be lifted by the power of the team through a break or friction clutch.

2. Where no mistake or inadvertence is shown, a reissue which includes additional elements in the combination claimed cannot be sustained.

3. The first claim of reissued letters patent No. 8986, a reissue of said letters patent No. 56812, is held to be invalid.

[No. 73.]

Argued Dec. 3, 1886. Decided Dec. 13, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **L. L. Coburn**, for appellant.

The withdrawal of one ingredient in a patented combination, and the substitution of another which was well known at the date of the patent as a proper substitute, is a mere formal alteration of the combination, which does not constitute any defense to the charge of infringement.

Seymour v. *Osborne*, 11 Wall. 516 (78 U. S. bk. 20, L. ed. 33); *Gould* v. *Rees*, 15 Wall. 187 (83 U. S. 21: 39); *Blake* v. *Robertson*, 11 Blatchf. 237; *Taylor* v. *Garretson*, 9 Blatchf. 156; *King* v. *Louisville Cement Co.* 6 Fish. 336.

A combination claim is infringed when all of the elements of the claim are used, either in the form shown in the patent, or in the form of old and well known mechanical equivalents, whether substituted in place of all or part of them.

Seymour v. *Osborne*, 11 Wall. 553, 556 (78 U. S. bk. 20, L. ed. 42); *American Whip Co.* v. *Lombard*, 4 Cliff. 505; *Fuller* v. *Yentzer*, 94 U. S. 288 (24 : 103); *Water Meter Co.* v. *Deeper*, 101 U. S. 332 (25 : 1024).

The first claim of the reissue is within the scope of the claim of the original patent and is legally identical with it.

Gage v. *Herring*, 107 U. S. 640 (Bk. 27, L. ed. 601); *Reed* v. *Chase*, 25 Fed. Rep. 95.

Messrs. **L. L. Bond** and *E. A. West*, for appellees:

If the later combination is new, or one element thereof is new, it is not an infringement.

Gould v. *Rees*, 15 Wall. 187 (82 U. S. bk. 21, L. ed. 39); *Seymour* v. *Osborne*, 11 Wall, 516 (78 U. S. 20: '33); *Eames* v. *Godfrey*, 1 Wall. 78 (68 U. S. 17: 547); *Prouty* v. *Ruggles*, 16 Pet. 336 (41 U. S. 10 : 985); *Fuller* v. *Yentzer*, 94 U. S. 288 (24: 103).

If the elements are not combined, connected and arranged in the same manner, there is no infringement.

Singer v. *Walmsley*, 1 Fish. 558; *Brooks* v. *Fiske*, 15 How. 212 (56 U. S. bk. 14, L. ed. 665).

By combining old parts, a patentee cannot prevent others from recombining them.

Hailes v. *Van Wormer*, 20 Wall. 371 (87 U. S. bk. 22, L. ed. 249); *Fuller* v. *Yentzer*, 94 U. S. 288, 296 (24 : 103, 106).

Only the originator of a new art or an entire machine is entitled to a broad application of equivalents.

R. R. Co. v. *Sayles*, 97 U. S. 556 (Bk. 24, L. ed. 1054); *McCormick* v. *Talcott*, 20 How. 402 (15 : 930).

The reissue falls clearly within the rule stated in *Miller* v. *Brass Co.* 104 U. S. 350 (Bk. 26, L. ed. 783).

Mahn v. *Harwood*, 112 U. S. 354 (28 : 665); *Wollensak* v. *Reiher*, 115 U. S. 96 (29 : 350).

The reissue is void because obtained after appellants obtained their patents; intervening rights being involved.

Clements v. *Odorless, etc. Co.* 109 U. S. 641 (Bk. 27, L. ed. 1060); *Turner, etc. Mfg. Co.* v. *Dover Stamping Co.* 111 U. S. 319 (28 : 442); *Brown* v. *Davis*, 116 U. S. 237 (29 : 659).

Mr. Justice **Blatchford** delivered the opin- [374
ion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of Illinois by Robert Newton against the Furst and Bradley Manufacturing Company and others, to recover for the infringement of reissued letters patent No. 8986, granted to the plaintiff, December 2, 1879, on an application, filed October 15, 1879, for an improvement in gang-plows (the original patent, No. 56812, having been granted to F. S. Davenport as inventor, October 9, 1866).

The specification and claims of the original, and those of the reissue, and the drawings of the reissue, are as follows, the parts in each which are not found in the other being in italic:

Original.

"Be it known that I, F. S. Davenport, of Jerseyville, Jersey County, and State of Illinois, have invented a new and improved *gang* plow; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification, in which—

[375]

Reissue.

"Be it known that I, F. S. Davenport, of Jerseyville, Jersey County, and State of Illinois, have invented a new and improved *wheel* plow; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification.

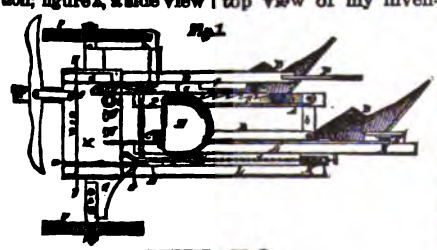
The object of my invention is to provide improved means for utilizing the draft of the team in raising a plow from the ground; and to this end my invention consists, first, in the combination, with a swing axle and ground or carrying wheel, of friction clutch mechanism and means for engaging and disengaging the latter with the ground or carrying wheel, said parts being constructed and adapted to raise the plow by locking the swing axle to the carrying wheel by friction clutch engagement, and raise the plow beam by the draft or power of the team; second, in the combination, with a ground wheel, a swing axle, and a plow beam connected to the latter, of clutch mechanism connected to the axle and adapted by engagement with the wheel to utilize the draft of the team in turning the swing axle into upright position, and thereby raise the plow beam; third, in the combination, with a ground wheel, a swing axle, and a plow beam connected to the latter, of a friction clutch connected to the axle and adapted, by contact with the wheel, to turn the axle into upright position, and thereby raise the plow beam by the aid of the draft of the team.

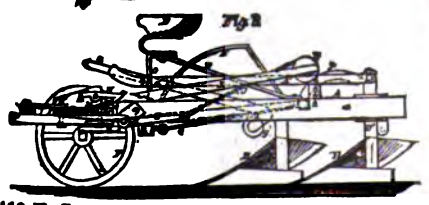
[377]

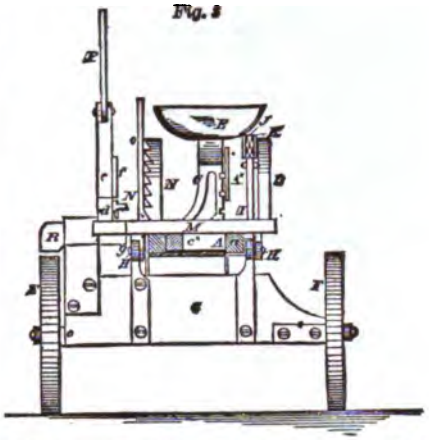
Figure 1 is a plan or top view of my invention; figure 2, a side view of the same, partly in section as indicated by the line *x x*, figure 1; figure 3, a transverse vertical section of the same, taken in the line *y y*, figure 1. Similar letters of reference indicate like parts.

Referring to the drawings, figure 1 is a plan or top view of my invention; figure 2 *is* a side view of the same, partly in section, as indicated by the line *x x*, figure 1; figure 3 *is* a transverse vertical section of the same, taken in the line *y y*, figure 1. Similar letters of reference indicate like parts.

[376]







This machine consists of a frame, A, made of two parallel beams or bars, *a a*, braced together near the front and back pieces, *b b*. From each of these beams or bars depends a plow, B. To the front cross piece is bolted an iron standard, C, strengthened by an iron stay, D, running down to the back cross piece. To the top of the standard, C, is attached a spring seat, E, the whole supported upon two wheels, F F, each turning upon *an iron axle*, *c*, *attached to* a *hinged board*, G.

This machine consists of a frame, A, made of two parallel beams or bars, *a a*, braced together near the front and back pieces, *b b*. From each of these beams or bars depends a plow, B. To the front cross piece is bolted an iron standard, C, strengthened by an iron stay, D, running down to the back cross piece. To the top of the standard, C, is attached a spring seat, E, the whole supported upon two wheels, F F, each turning upon *a journal*, *c*, *of a swing axle*, G.

It will be observed that one of the *axles*, *c*, is attached to the front or upper side of the *hinged board*, G, and the other to the back or under side, in such a manner that when it is turned down in a horizontal position to lower the plows to the ground, the wheel that runs in the furrow will be as much lower than the other as the depth of the furrow may require. The *axle* that carries the wheel that runs in the furrow is so formed that it may be removed from the back of the *hinged board* and *bolted* to the front so that the machine may run level when there is no furrow for the wheel to run in, as is the case when preparing the ground for cotton seed.

It will be observed that one of the *journals*, *c*, is attached to the front or upper side of the *swing axle*, G, and the other to the back or under side, in such a manner that when it is turned down in a horizontal position to lower the plows to the ground, the wheel that runs in the furrow will be as much lower than the other as the depth of the furrow may require. [378] The *journal* that carries the wheel that runs in the furrow is so formed that it may be removed from the back of the *swing axle* and *be secured* to the front, so that the machine may run level when there is no furrow for the wheel to run in, as is the case when preparing the ground for cotton seed.

The *hinged board* G is attached to the plow frame by two iron hinges, H H', the one H on the side of the long beam forming an arm or lever, I, to which is attached a chain, J, which passes over a wheel, K, and is made fast to the plow

The *swing axle* G is attached to the plow frame by two iron hinges, H H', the one H on the side of the long beam forming an arm or lever, I, to which is attached a chain, J, which passes over a wheel, K, and is made fast to the plow

frame. The wheel K turns upon a stud in the end of a lever, L, this lever being bolted to the foot board M, which is hinged to the plow frame in the same manner and at the same place as the axle *board* G. To the opposite end of the foot board is bolted a bracket or stop, *d*, against which rests an arm, *e*, by which the *hinged board* G is operated, the arm *e* being held in the vertical position by a latch, N, which is lifted by placing the foot on the back part of it.

[379] Now, it will be seen that to lower the *plows* to the ground it is only necessary to bring down the arm *e* till a block, *f*, which is bolted to its side, rests upon a *roller*, *g*, of a lever, O, which is secured in the required position by a notched quadrant, N. It will be observed, that, as the lever O is moved forward from notch to notch, the plows will cut deeper and deeper, and the reverse as it is drawn back. By these details the driver has entire control of the depth of the furrow without moving from his seat or stopping the machine.

Through a mortise in the top of *the* arm *e* passes a small iron lever, P, to which is attached a rod, Q, connecting it with a brake, R, which acts upon one of the wheels F, the brake R working upon a pin fixed in a block of wood or an iron plate fastened to the front side of the *hinged board* G. The object of this brake is to facilitate the operation of lifting the plows out of the ground when the machine is moving forward; for, by applying but a little force to the lever P the brake is pressed sufficiently hard to the wheel to turn the *hinged board* to the vertical position.

[380] The draft pole or tongue C† is fastened to the under side of the foot board M by two bolts, *a*†, a number of holes being made, so that the tongue may be moved to the right or left to give the required land to the plows. The back holes *b*† are made oblong, so that *it* can be slanted when needed. The tongue may, if necessary, be used on either side of the draft line, and the double tree attached to the foot board independent of the tongue. This arrangement is chiefly for the convenience of using three horses abreast.

When the *hinged board* G is turned down in the horizontal position the lever or arm I gives the chain J, which is attached to it, considerable slack, allowing the

frame. The wheel K turns upon a stud in the end of a lever, L, this lever being bolted to the foot board M, which is hinged to the plow frame in the same manner and at the same place as the axle G. To the opposite end of the foot board is bolted a bracket or stop, *d*, against which rests an arm, *e*, by which the *swing axle* G is operated, the arm *e* being held in the vertical position by a latch, N, which is lifted by placing the foot on the back part of it.

Now, it will be seen that to lower the *plow* to the ground it is only necessary to bring down the arm *e* till a block, *f*, which is bolted to its side, rests upon a *stop*, *g*, of a lever, O, which is secured in the required position by a notched quadrant, N. It will be observed that, as the lever O is moved forward from notch to notch, the plows will cut deeper and deeper, and the reverse as it is drawn back. By these details the driver has entire control of the depth of the furrow without moving from his seat or stopping the machine.

Through a mortise in the top of arm *e* passes a small iron lever, P, to which is attached a rod, Q, connecting it with a brake, R, which acts upon one of the wheels F, the brake R working upon a pin fixed in a block of wood or an iron plate fastened to the front side of the *swing axle* G. The object of this brake is to facilitate the operation of lifting the plows out of the ground when the machine is moving forward, for by applying but a little force to the lever P the brake is pressed sufficiently hard to the wheel to turn the *swing axle* to the vertical position.

The draft pole or tongue C× is fastened to the under side of the foot board M by two bolts, *a*×, a number of holes being made, so that the tongue may be moved to the right or left to give the required land to the plows. The back holes *b*× are made *as* oblong *slots*, so that *the tongue* can be slanted when needed. The tongue may, if necessary, be used on either side of the draft line, and the double tree attached to the foot board independent of the tongue. This arrangement is chiefly for the convenience of using three horses abreast.

When the *swing axle* G is turned down in the horizontal position the lever or arm I gives the chain J, which is attached to it, considerable slack,

tongue to move up and down without influencing the plows, constituting what is commonly called 'a limber tongue.'

In regard to raising the plows out of the ground, it will be observed that the front part of the machine is lifted nearly two thirds of its course before the lever I tightens the chain and commences to lift the back part. This contrivance produces an easy motion, without causing either jerk or strain upon the horses or the machine.

The hind plow can be raised or lowered independent of the other, the standard B' sliding in an iron block, O†, and operated by a lever, A†, extending forward to the front of the seat, and secured in the required position by notches in the side of the seat standard, as shown in figure 3.

I claim as new and desire to secure by letters patent:

1. *The lever P, rod Q, and brake R, arranged and operated as and for the purpose described.*

2. *The hinged board G, in connection with the reversible axles, substantially as and for the purpose described.*

3. *The lever O and quadrant N, for regulating the depth of the furrow, substantially as and for the purpose specified.*

4. *Lifting the hind part of the machine by means of the lever or arm I, in connection with the chain J, wheel K, and lever L, these parts operating together, substantially as and for the purpose described.*

5. *Hinging the foot board M to the plow frame, as described.*

6. *Securing the tongue or draft pole to the foot board M, in the manner and for the purpose described.*

7. *The sliding plow standard B', guide block O†, lever A†, and notched seat standard C, when used together and in connection with the other parts.*

8. *Connecting the lever L with the tongue or draft pole by fastening it to the foot board, the whole operating together, substantially as and for the purpose set forth.*"

allowing the tongue to move up and down without influencing the plows, constituting what is commonly called a 'limber tongue.'

In regard to raising the plows out of the ground, it will be observed that the front part of the machine is lifted nearly two thirds of its course before the lever I tightens the chain and commences to lift the back part. This contrivance produces an easy motion [381] without causing either jerk or strain upon the horses or the machine.

The hind plow can be raised or lowered independent of the other, the standard B' sliding in an iron block, O×, and operated by a lever, A×, extending forward to the front of the seat, and secured in the required position by notches in the side of the seat standard, as shown in figure 3.

Having fully described my invention, what I claim as new and desire to secure by letters patent *is:*

1. *In a wheel plow, the combination, with a swing axle and ground or carrying wheel, of friction-clutch mechanism, and means for engaging and disengaging the latter with the ground or carrying wheel, said parts being constructed and adapted to raise the plow by locking the swing axle to the carrying wheel by friction-clutch engagement, and raise the plow beam by the draft or power of the team, substantially as set forth.*

2. *In a wheel plow, the combination with a ground wheel, a swing axle, and a plow beam connected to the latter, of clutch mechanism connected to the axle, and adapted by engagement with the wheel to utilize the draft of the team in* [382] *turning the swing axle into upright position, and thereby raise the plow beam, substantially as set forth.*

3. *In a wheel plow, the combination, with a ground wheel, a swing axle, and a plow beam connected to the latter, of a friction clutch connected to the axle, and adapted, by contact with the wheel, to turn the axle into upright position, and thereby raise the plow beam by aid of the draft of the team, substantially as set forth.*"

The answer sets up, among other defenses, noninfringement; and that the reissued patent is invalid because not for the same invention as the original. On a hearing on proofs, the circuit court entered a decree, which finds that the equities are with the defendants, and that they do not infringe on the rights of the plaintiff, and dismisses the bill. The plaintiff has appealed to this court.

By the opinion of the circuit court in this case (11 Biss. 405), it appears that the defenses of noninfringement and of the invalidity of the reissue were sustained. Infringement is not asserted in this court as to any claim of the reissue but the first.

In regard to the subject matter of that claim, the specification of the reissue states that the invention consists "in the combination, with a swing axle and ground or carrying wheel, of friction-clutch mechanism, and means for engaging and disengaging the latter with the ground or carrying wheel, said parts being constructed and adapted to raise the plow by locking the swing axle to the carrying wheel by friction-clutch engagement, and raise the plow beam by the draft or power of the team." The first claim of the reissue uses the same language, [383] with the prefix of the words "In a wheel plow," and the addition, at the end, of the words "substantially as set forth."

The other alterations made in the specification are, that "*gang* plow" is changed into "*wheel* plow;" "*iron axle*" into "*journal;*" and "*hinged board*" into "*swing axle.*"

The first claim of the original patent is for a combination of the lever P with the rod Q and the brake R. When force is applied to the lever P, motion is communicated through the rod Q to the brake R, which brake acts on the periphery of one of the two supporting or carrying wheels F, the axle of which, *o*, is attached to a hinged board G, and by the action of the brake the hinged board is changed from a horizontal position to a vertical position, and the effect is to facilitate the operation of lifting the plows out of the ground. The first claim of the original patent covers only the combination of the three specific devices—the lever P, the rod Q, and the brake R. The first claim of the reissue calls the brake R "friction-clutch mechanism," and calls the lever P and the rod Q "means for engaging and disengaging the latter with the ground or carrying wheel," and then claims the combination of four things—(1) friction-clutch mechanism; (2) means for engaging and disengaging it with the ground or carrying wheel; (3) a swing axle; (4) a ground or carrying wheel.

The hinged board G of the plaintiff's original patent is ten or twelve inches wide, and at each end of it is a spindle for one of the two ground or carrying wheels to run on, the spindles being in line with one edge of the hinged board. The forward ends of the plow beams are attached by joints to what is the back edge of the hinged board while that board is horizontal, so that when it comes to be vertical by the action of the brake and the forward movement of the team, the forward ends of the plow beams are raised in height a distance equal to the width of the hinged board, lifting the plows.

The defendants' machine is thus described in the opinion of the circuit court, and the description is conceded by the counsel for the plaintiff to be a fair one: "The defendants' machine is a wheel or sulky plow, with a bent [384] or cranked iron axle, upon which the plow-beams are pivoted at about two thirds of the distance from the forward end to the coulter, so that the plow is nearly balanced upon the axle or crank, and the arrangement of the mechanism is such that when the plow is running or operating in the ground, the crank part is in a horizontal position; and when it is desired to raise the plows out of the ground, the crank is turned upward towards a vertical position, whereby the forward ends of the beam are raised until the point of the plow runs out of the ground. After the forward end of the beam has risen to a certain point, it strikes a stop, so that, when the crank has assumed a vertical position, the plow is balanced across the crank part of the axle, thus sustaining the plow at the height above the ground of the crank when in a vertical position. This turning of the crank axle so as to lift the plow is accomplished by a friction band or brake, which is made to engage with an inner extension of the hub of one of the carrying wheels, so that, as the wheel moves forward, it causes the crank axle to turn upwards from a horizontal to a vertical position."

The circuit court was of opinion that if the state of the art was such as to entitle Davenport to a broad claim for any device by which the plow is lifted by the power of the team through a brake or friction clutch, the defendants' machine would infringe. But the court found that, prior to Davenport, devices had been used in agricultural implements for utilizing by means of a brake the motion of the carrying wheel, through a crank axle, in raising operative parts of the machine from the ground, which devices were so alike in structure and so analogous in use to those of Davenport, as to require his claims to be limited to his specific devices. In view of those prior devices the court held that the defendants' friction band could not be regarded as the same means for engaging and disengaging the carrying wheel and the axle as the brake of Davenport; and that the defendants' crank axle was not the plaintiff's hinged board. In these views we concur.

The reissue was applied for more than thirteen years after the original was granted, and after the defendants had begun to make machines of the pattern now complained of. The [385] original patent did not make a swing axle and a carrying wheel elements in the combination of the first claim of that patent. The reissue was evidently taken to cover the defendants' machine, which did not infringe the first claim of the original patent, because it did not have the Davenport brake R. No mistake or inadvertence is shown. The plaintiff, in his testimony as a witness, assigns as a reason for the reissue that he thought there "was a mistake and a deficiency in the patent;" that he did not consider that other manufacturers [respected it; that he considered it deficient because it applied the friction brake to the periphery of the wheel; and that he believed the patent was entitled to cover different friction-clutch devices, so as to be a better protection against infringers.

Without pursuing the subject further, we are of opinion that, within numerous decisions of this court, the reissued patent is invalid, as respects its first claim.

Decree affirmed.

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WILLIAMSPORT NATIONAL BANK,
Plff. in Err.,
v.
DANIEL B. KNAPP AND WILLIAM F. THOMPSON.

(See S. C. Reporter's ed. 357–361.)

Jurisdiction—certificate of division of opinion—requisites of.

Under the Acts of Congress authorizing questions arising on a trial or hearing before two judges in the circuit court, and on which they are divided in opinion, to be certified to this court for decision, each question certified must be one of law purely, must be a distinct point or proposition, clearly stated, and not the whole case, and not the question whether upon the evidence the judgment should be for one party or the other.

[No. 61.]

Argued Nov. 23, 24, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania. *Dismissed.*

Statement by *Mr. Justice* **Gray**:

The original action was debt on section 5198 of the Revised Statutes, brought in the Circuit Court of the United States for the Western District of Pennsylvania, against a national banking association established within that district to recover twice the amount of interest, at the rate of [358] 9 per cent, received by the defendant upon the discount of certain promissory notes. Section 5197 prohibits any such association from receiving upon such a discount a higher rate of interest than is allowed by the laws of the State in which the bank is established, except that where by the laws of the State "a different rate is limited for banks of issue organized under state laws," the rate so limited is allowed. The answer denied that the defendant owed the sums demanded, or had violated any provision of the National Banking Act.

The record showed that at the trial certain oral testimony, therein stated, was offered by the plaintiffs in support of their allegations, was objected to by the defendant, the objection was overruled, and the defendant took exceptions. The record also showed that the defendant, for the purpose of proving that at the time of the discounts in question there were banks of issue, organized under the laws of Pennsylvania, allowed to receive interest on discounts at as high a rate as that received by the defendant, offered in evidence charters from the Legislature of Pennsylvania of a number of banks (the titles of which were given), some of which were thereby expressly authorized to receive interest at such rates as might be agreed upon by the parties; and also offered in evidence a number of other bank charters, in connection with evidence that some of the banks issued notes of circulation, commonly called bank notes, without special authorization of law, in order "to show that incorporated banks and banking companies in Pennsylvania issued notes of circulation, commonly called bank notes, under their respective general corporate powers, and not by virtue of any special authorization of law to issue such notes; and to show that incorporated banks and banking companies in Pennsylvania, not specially prohibited from issuing such notes, are banks of issue within the meaning of the Act of Congress, by virtue of their incorporation and organization as banks or banking companies, and without any special authorization of law to issue such notes;" and the evidence so offered by the defendant was objected to by the plaintiffs, and admitted subject to their exception.

The record further showed that a verdict was [359] returned for the plaintiffs, and that the circuit judge and the district judge signed a certificate that they were opposed in opinion upon the following questions arising at the trial:

"First. Whether under the evidence the defendant was legally authorized to take, receive, reserve and charge on the loans or discounts made for the plaintiffs upon the notes, bills of exchange and other evidences of debt, offered and received in evidence on the part of the plaintiffs, at the rate of interest charged by the defendant and paid by the plaintiffs, as shown in evidence; to wit, at the rate of 9 per centum per annum.

"Second. Whether under the laws of the State of Pennsylvania a rate of interest or discount was limited for banks of issue, organized under state laws, at a rate equal to or exceeding that charged by the defendant to the plaintiffs, and whether the defendant was, under the evidence and the Acts of Congress, allowed to take, receive, reserve and charge the rate so limited for the discounts made for the plaintiffs; to wit, at the rate of 9 per centum per annum.

"Third. Whether the decision of the Supreme Court of Pennsylvania, 'that there are no banks, nor have there been any such banks in Pennsylvania, authorized to take and receive interest at a greater rate than 6 per cent,' is binding and conclusive upon the judgment of the courts of the United States in determining the construction and effect in Pennsylvania of the Acts of Congress commonly called the Currency Acts, and especially sections 5197 and 5198 of the Revised Statutes of the United States.

"Fourth. Whether upon the whole evidence the plaintiff was entitled to recover."

Judgment was rendered for the plaintiffs in the sum of $2,150.38, and the defendant sued out this writ of error.

Messrs. **C. La Rue Munson, Wm. H. Armstrong** and *H. W. Watson*, for plaintiff in error.

Messrs. **H. C. Parsons, H. C. McCormick,** *J. C. Hill* and *H. T. Ames*, for defendants in error.

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Mr. Justice **Gray** delivered the opinion of the court:

Assuming, what does not appear in the record, that the evidence stated in the bills of exceptions was all the evidence introduced at the trial and referred to in the certificate of division, that certificate is clearly insufficient to support the jurisdiction of this court.

Under the Acts of Congress, authorizing questions arising on a trial or hearing before two judges in the circuit court, and upon which they are divided in opinion, to be certified to this court for decision, it has always been held that each question certified must be one of law, and not of fact, nor of mixed law and fact; and that it must be a distinct point or proposition,

clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other. *Saunders* v. *Gould*, 4 Pet. 392 [29 U. S. bk. 7, L. ed. 897]; *U. S.* v. *Bailey*, 9 Pet. 267 [9: 124]; *Weeth* v. *New Eng. Mortgage Co.* 106 U. S. 605 [27: 100]; *Cal. etc. Paving Co.* v. *Molitor*, 113 U. S. 609, 615-617 [28: 1106, 1108]; *Waterville* v. *Van Slyke*, 116 U. S. 699-704 [29: 772, 774].

Tested by these rules, the first and second questions certified, each being whether "under the evidence" the defendant was authorized to receive interest at a certain rate, as well as the fourth question, "whether upon the whole evidence the plaintiff was entitled to recover," are not questions which this court is required or authorized to answer.

The third question is equally irregular and insufficient. Instead of being clearly and distinctly stated, it is quite obscure and ambiguous, for it does not show whether the supposed decision of the Supreme Court of Pennsylvania, "that there are no banks, nor have there been any such banks in Pennsylvania, authorized to take and receive interest at a greater rate than 6 per cent," was based upon matter of law, or matter of fact, or both. The latest reported decision of that court, to which the learned counsel for the plaintiff in error referred to explain this question, affirmed a ruling of a lower court that, "in fact and in law, there is no [361] bank of issue in Pennsylvania, authorized to charge a rate of interest in excess of the legal rate;" and said nothing upon the question whether there ever had been any such banks. *Lebanon Nat. Bank* v. *Karmany*, 98 Pa. 65, 73.

Neither the amount of the judgment below, nor the certificate of division, being sufficient to give this court jurisdiction, it necessarily follows, as was held in *Weeth* v. *New Eng. Mortgage Co.* and *Waterville* v. *Van Slyke*, above cited, that the

Writ of error must be dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[388] JACOB JOHNSON AND JAMES B. CARTER, Owners of the Tug Boat PARKER, AND HENRY A. CHRISTY, *Plffs. in Errr.*,

v.

CHICAGO AND PACIFIC ELEVATOR COMPANY.

(See S. C. Reporter's ed. 388-401.)

Admiralty jurisdiction—tort must be consummated on navigable water, to confer—Illinois Statute, "Attachment of Water Craft"—liability of surety—denial of hearing to part owner—State may confer lien on vessels when.

1. The injury done by the jib boom of a schooner striking against an elevator situated on the bank of the Chicago River, through the negligent towing of such schooner, does not constitute a maritime tort of which a District Court of the United States as a court of admiralty would have jurisdiction.

2. The remedy for such wrong is wholly at common law and may be pursued in a state court according to the provisions of a state statute, although such statute gives a lien on the vessel.

3. The objection that judgment was entered against the surety on the bond on which the vessel was released, without any service of process or notice, was properly overruled,—the statute forming a part of the bond which he executed, and that statute providing for judgment against the surety in case the plaintiff should be found entitled to recover.

4. The objection by a party claiming to be part owner of the tug, and who filed a petition to be made a defendant, that he had been denied a hearing, was also properly overruled, the tug having been released from the lien on the filing of the bond.

[No. 65.]

Argued and submitted Nov. 30, 1886. Decided Dec. 13, 1886.

IN ERROR to the Supreme Court of the State of Illinois. *Affirmed.*

The case is stated by the court.

Mr. **Henry W. Magee**, for plaintiffs in error:

The "Attachment of Water Craft" Act is invalid in attempting to create and enforce a lien *in rem* against a vessel engaged in domestic commerce upon the navigable waters of the United States of America, above twenty tons burthen, duly enrolled and licensed. Exclusive jurisdiction for that purpose is in the District Court of the United States.

Sec. 2, art. III, Const. U. S.; subd. 8, § 563, Title XIII, Rev. Stat. U.S. "*The Judiciary*;" *The Hine* v. *Trevor*, 4 Wall. 555 (71 U. S. bk. 18, L. ed. 451); *The Moses Taylor*, 4 Wall. 411 (*Id.* 18 : 397); *The Belfast*, 7 Wall. 646 (74 U. S. 19: 272); *The Eddy*, 5 Wall. 481 (72 U. S. 18: 486); *The Lottawanna*, 21 Wall. 567 (88 U. S. 22 : 657); *Weston* v. *Morse*, 40 Wis. 459; *Re Josephine*, 39 N. Y. 22, and cases cited in Bump's Federal Procedure, p. 70.

The Legislature had not the power to confer upon the circuit courts jurisdiction to enforce a lien on vessels duly enrolled and licensed by the United States, by proceedings *in rem*, according to the procedure of admiralty courts.

Weston v. *Morse*, *supra*; *Campbell* v. *Sherman*, 35 Wis. 103; *The John Richards*, 1 Newb. 78; *The Golden Gate*, 1 Newb. 296; *Leon* v. *Galceran*, 11 Wall. 185 (78 U. S. bk. 20, L. ed. 74); *The Lottawanna*, *supra*; *The Edith*, 94 U. S. 518 (24 : 167); *Ferran* v. *Hosford*, 54 Barb. 209; *The Edith*, 5 Ben. 489.

The rendition of a judgment against Henry A. Christy, surety on the attachment bond, without any suit, issue, trial, hearing, presence, or representation by attorney or otherwise, amounted to a deprivation of property without process of law.

Art. V, Amendments, Const. U. S.

The denial to James B. Carter, part owner, of the right to interplead and defend was a violation of that provision of the Constitution of the United States providing that "No person shall be deprived of life, liberty or property without due process of law."

Art. V, Const. U. S.

The provisions of the Act entitled "Attachment of Water Craft" of the State of Illinois amount to a "regulation of commerce," which gives to the ports of Illinois a state admiralty proceeding, enforceable in its courts alone, and in violation of that provision in the Constitution of the United States, which provides:

"No preference shall be given by any regulation of commerce to the ports of one State over that of another."

Subd. 6, § 8, art. 1, Const. U. S.

American admiralty has jurisdiction of all cases of "maritime liens."

Ben. Adm. § 261; Henry, Adm. 27.

Mr. Robert Rae, for defendant in error:

[389] *Mr. Justice* **Blatchford** delivered the opinion of the court:

On the 22d of September, 1881, the Chicago and Pacific Elevator Company, an Illinois corporation, filed a petition in the Circuit Court of Cook County, Illinois, setting forth that on the 29th of August, 1881, it was the proprietor of a warehouse on the land, in Cook County, near the bank of the Chicago River, which had stored in it a quantity of shelled corn; that on that day Jacob Johnson, a resident of Chicago, in said county, was the owner of the tug boat Parker, of above five tons burthen, used and intended to be used in navigating the waters and the canals of Illinois, and having its home port in Illinois; that The Parker on that day was towing a schooner, attached to her by a hawser, in the Chicago River, in said county, the schooner being under the control of the officers of the tug; and that the tug and the schooner were so negligently managed, and the schooner was so negligently towed by those having control of the tug that the jib boom of the schooner went through the wall of the warehouse, whereby a large quantity of the corn ran out and was lost in the river, causing a damage of $394.38 to the petitioner. The petition prayed for a writ of attachment against Johnson, to be issued to the sheriff, commanding him to attach the tug and to summon the defendant to appear; and for a decree subjecting the tug to a lien for such damages.

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On the giving of the required bond on behalf of the petitioner, a writ of attachment was issued on the same day to the sheriff, commanding him to attach the tug and to summon Johnson to appear on the 17th of October. The return of the sheriff stated that he had attached all the right, title and interest of Johnson in and to the tug, and had served the writ on Johnson personally, on the same day.

A bond was given on the same day, executed by Johnson as owner of the tug, as principal, and Henry A. Cristy as surety, conditioned to pay all money which should be adjudged by the court in the suit to be due to the petitioner. Thereupon a writ was issued to the sheriff, commanding him to return the attached property to Johnson, which was done.

On the 17th of October, Johnson filed a paper called a "demurrer and exceptions," setting up, among other things, that the court had no jurisdiction to create or enforce a lien on the tug. On the 21st of October, the plaintiff entered a motion that the default of the defendant be taken for want of an affidavit of merits. On October 31, after the denial of a motion by the defendant for leave to file an affidavit of merits, the court entered of record the default of the defendant for the want of such an affidavit, and a judgment "that the plaintiff ought to recover of the defendant its damages by reason of the premises." At the same time the defendant entered a motion to vacate the default, insisting on the want of jurisdiction in the court.

On the same day, James B. Carter, alleging that he was, when the attachment was levied, and still continued to be, a part owner of the tug, filed a motion that he be made a defendant, and be permitted to defend against the petition.

On the 5th of November, the motion of Johnson to vacate the default against him was overruled; and the motion of Carter was denied. Thereupon Johnson filed a motion to dismiss the petition for want of jurisdiction in the court to enforce the lien claimed, because the tug was a steam vessel of above 20 tons burthen, duly enrolled and licensed in conformity to Title 50 of the Revised Statutes of the United States, and was engaged in the business of domestic commerce and navigation on the navigable waters of the United States, and that exclusive jurisdiction to enforce a lien *in rem* on the tug was in the District Courts of the United States. This motion was denied.

Proper bills of exceptions were allowed to the foregoing rulings.

On the 30th of January, 1882, the damages were assessed by a jury at $300; and a judgment was entered in favor of the plaintiff against Johnson and Christy, for $300 and costs, on the 11th of February, 1882. They excepted, and they and Carter appealed to the Appellate Court for the First District of Illinois. That court, in July, 1882, affirmed the judgment of the Circuit Court of Cook County, and an appeal was taken by the same parties to the Supreme Court of Illinois. Among the assignments of error in that court were these: That Carter was not allowed to defend; that the judgment was entered against Christy without notice or process; that the inferior courts had no jurisdiction to enforce the lien on a vessel engaged in domestic commerce between the States; that the Statute of Illinois violated the Constitution of the United States; and that the exclusive jurisdiction in the premises was in a court of the United States.

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The statute under which the proceedings in this suit took place is chapter 12 of the Revised Statutes of Illinois, entitled "Attachment of Water Craft," which went into effect July 1, 1874, Rev. Stat. Ill. 1881, p. 159. The Act (§ 1) gives a lien on all water craft of above five tons burthen, "used or intended to be used in navigating the waters or canals of this State, or used in trade and commerce between ports and places within this State, or having their home port in this State. * * * Fifth. For all damages arising from injuries done to persons or property by such water craft, whether the same are aboard said vessel or not, where the same shall have occurred through the negligence or misconduct of the owner, agent, master, or employé thereon." The following other sections of the Act are material:

"Sec. 4. The person claiming to have a lien under the provisions of this Act may file with the clerk of any court of record of competent jurisdiction, in the county where any such water craft may be found, a petition setting forth the nature of his claim, the amount due after allowing all payments and just offsets, the name of the water craft, and the name and residence of each owner known to the petitioner; and when any owner or his place of residence is not known to the petitioner he shall so state, and that he has made inquiry and is unable to ascertain the same; which petition shall be verified

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by affidavit of the petitioner or his agent or attorney. If the claim is upon an account or instrument in writing, a copy of the same shall be attached to the petition.

Sec. 5. The petitioner, or his agent or attorney, shall also file with such petition a bond, payable to the owner of the craft to be attached, or, if unknown, to the unknown owners thereof, in at least double the amount of the claim, with security to be approved by the clerk, conditioned that the petitioner shall prosecute his suit with effect, or, in case of failure therein, will pay all costs and damages which the owner or other person interested in such water craft may sustain in consequence of the wrongful suing out of such attachment, which bond may be sued by any owner or person interested, in the same manner as if it had been given to such a person by his proper name. Only such persons shall be required to join in such suit as have a joint interest; others may allege breaches and have assessment of damages, as in other cases of suits on penal bonds.

Sec. 6. Upon the filing of such petition and bond as aforesaid, the clerk shall issue a writ of attachment against the owners of such water craft, directed to the sheriff of this county, commanding him to attach such water craft, which writ shall be tested and returnable as other writs of attachments. Such owners may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles, or titles as they are usually known. If the name of any owner is unknown, he may be designated as unknown owner.

[393] Sec. 7. The writ shall be substantially in the following form:

State of Illinois, } *ss:*
—— County, }

The People of the State of Illinois, to the Sheriff of —— County, Greeting:

Whereas ——(name of the petitioner) hath complained that owners of the——(name of the vessel) are justly indebted to him in the [sum of] —— dollars (amount due), for which he claims a lien upon said vessel, and has given bond with security as required by law: We, therefore, command you that you attach the said —— (name of vessel) her tackle, apparel and furniture, to satisfy such demand and costs, and all such demands as shall be exhibited against such vessel according to law, and having attached the same you summon —— (here insert the names of owners of such vessel) owners of such vessel to be and appear before the —— Court of —— at its next term to be holden at the court house in said county, on the ——day of ——, then and there to answer what may be objected against them and the said——(name of vessel). And have you then and there this writ, with a return thereon in what manner you have executed the same.

Witness: —— clerk of —— Court, and the seal thereof, this —— day of ——, A. D. 18—.

—— ——, *Clerk.*

Sec. 8. The sheriff or other officer to whom such writ shall be directed shall forthwith execute the same by reading the same to such defendants, and attaching the vessel, her tackle, apparel and furniture, and shall keep the same until disposed of as hereinafter provided. Such sheriff or other officer shall also, on or before the return day in such writ, or at any time after the service thereof, upon the request of the petitioner, make a return to said court, stating therein particularly his doings in the premises, and shall make, subscribe and annex thereto a just and true inventory of all the property so attached.

Sec. 9. Whenever any such writ shall be issued and served, no other attachment shall issue against the said water craft, unless the first attachment is discharged, or the vessel is bonded.

Sec. 10. Upon return being made to such [394] writ, unless the vessel has been bonded, as hereinafter provided, the clerk shall immediately cause notice to be given in the same manner as required in other cases of attachment. The notice shall contain, in addition to that required in other cases of attachment, a notice to all persons to intervene for their interests on a day certain, or that said claim will be heard *ex parte.*

Sec. 11. Any person having a lien upon or any interest in the water-craft attached may intervene to protect such interest, by filing a petition as hereinbefore provided, entitled an intervening petition; and any person interested may be made a defendant at the request of himself, or any party to the suit, and may defend any petition by filing an answer as hereinafter provided, and giving security satisfactory to the court to pay any costs arising from such defense; and upon the filing of any intervening petition, a summons as hereinbefore provided shall issue; and if the same shall be returned not served, notice by publication may be given as aforesaid; and several intervening petitioners may be united with each other, or the original, in one notice.

Sec. 12. Any person intervening to enforce any lien or claims adverse to the owners of the craft attached shall, at the time of filing his petition, file with the clerk a bond as in the case of the original attachment.

Sec. 13. Intervening petitions may be filed at any time before the vessel is bonded, as provided in section fifteen (15); or, if the same is not so bonded, before order for distribution of the proceeds of the sale of the craft. And the same proceeding shall thereupon be had as in the case of claims filed before sale."

"Sec. 15. The owner, or his agent or attorney, or any other person interested in such water craft, desiring the return of the property attached, having first given notice to the petitioner, his agent or attorney, of his intention to bond the same, may, at any time before judgment, file with the clerk of the court in which the suit is pending, a bond to the parties having previously filed petitions against such craft, in a penalty at least double the aggregate of all sums alleged to be due the several petitioners, with security to be approved by the clerk, con- [395] ditioned that the obligors will pay all moneys adjudged to be due such claimants, with costs of suit."

"Sec. 17. Upon receiving a bond or deposit, as provided in either of the foregoing sections, it shall be the duty of the clerk to issue an order of restitution, directing the officer who attached the water craft to deliver the same to the person from whose possession the same was taken; and

said water craft shall thenceforth be discharged from all the liens secured by bond or deposit, unless the court or judge thereof, upon motion, shall order the same again into custody on account of the insufficiency or insolvency of the surety."

"Sec. 21. If, upon the trial, judgment shall pass for the petitioner, and the water craft has been discharged from custody as herein provided, said judgment or decree shall be rendered against the principal and sureties in the bond; *Provided*, That in no case shall the judgment exceed the penalty of the bond, and the subsequent proceedings shall be the same as now provided by law in personal actions in the courts of record in this State. If the release has been upon deposit, the judgment shall be paid out of said deposit."

The Supreme Court of Illinois affirmed the judgment of the Appellate Court of the First District. *Johnson* v. *Chic. & P. Elevator Co.* 105 Ill. 462. To review the judgment of the supreme court, Johnson, Carter, and Christy have brought a writ of error.

[396] It is assigned here for error (1) that the state court had no jurisdiction to enforce a lien *in rem* on a vessel above 20 tons burthen, engaged in domestic commerce among the States, and duly enrolled and licensed in conformity with Title 50 of the Revised Statutes; (2) that the state statute is repugnant to the Constitution of the United States, because it purports to give to a state court admiralty jurisdiction to enforce a maritime lien *in rem;* (3) that judgment was given against Christy without notice to him or due process of law; (4) that Carter, a part owner of the tug, was denied a hearing.

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Under the decisions of this court in *The Plymouth*, 3 Wall. 20 [70 U. S. bk. 18, L. ed. 125] and in *Ex parte Phœnix Ins. Co.* 118 U. S. 610 [*ante*, 274] at the present term, it must be held that the cause of action in this case was not a maritime tort of which a District Court of the United States, as a court of admiralty, would have jurisdiction; and that the remedy belonged wholly to a court of common law; the substance and consummation of the wrong having taken place on land, and not on navigable water, and the cause of action not having been complete on such water. This being so, no reason exists why the remedy for the wrong should not be pursued in the state court, according to the statutory method prescribed by the law of the State, even though that law gives a lien on the vessel. The cases in which state statutes have been held void by this court, to the extent in which they authorized suits *in rem* against vessels, because they gave to the state courts admiralty jurisdiction, were only cases where the causes of action were cognizable in the admiralty. Necessarily, no other cases could be embraced. *The Moses Taylor*, 4 Wall. 411 [71 U. S. 18: 397]; *The Hine* v. *Trevor*, Id. 555 [*Id.* 18: 451]; *The Belfast*, 7 Id. 624 [19: 266].

In the present case, the suit is a suit *in personam*. The petition states that the plaintiff "complains of Jacob Johnson," "and makes him defendant herein;" and that the plaintiff has demanded the amount of his damage from the defendant, but the latter refuses to pay it. The petition prays that the tug may be attached and the defendant be summoned. The writ of attachment recites that the plaintiff has complained that Johnson is indebted to it in $894.38, for which it claims a lien on the tug. The writ commands the sheriff to attach the tug and to summon Johnson to appear before the court on a day named. Attachment was made of "all the right, title and interest" of Johnson in and to the tug, and at the same time the writ was served on him by being read to him. The releasing bond executed by Johnson and Christy recites the action as being one for damages alleged to be due to the plaintiff from Johnson. From the time of the issuing of the writ of restitution, on the same day the petition was filed, the tug disappears from the proceedings, the bond having taken her place. The judgment was one *in personam* against Johnson and Christy, as required by section 21 of the statute, in a case where the attached vessel has been discharged from custody. That section also provides that the proceedings subsequent to the judgment "Shall be the same as now provided by law in personal actions in the courts of record in this State."

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So far, therefore, as this suit is concerned, the action, in the shape in which it comes before this court, is a suit *in personam*, with an attachment as security, the attachment being based on a lien given by the state statute, and a bond having been, by the act of the defendant, substituted for the thing attached.

In *Taylor* v. *Carryl*, 20 How. 583 [61 U. S. bk. 15, L. ed. 1028], this court upheld the validity of the seizure of a vessel under a process of foreign attachment issuing from a state court of Pennsylvania, in pursuance of a statute of that State, as against a subsequent attempt to seize her under process in admiralty. In the course of the opinion of the court, delivered by *Mr. Justice* Campbell, it is said: "The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined, by statute as well as judicial precedents. * * * The habit of courts of common law has been to deal with ships as personal property, subject in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution; and the titles to them, or contracts and torts relating to them, are cognizable in those courts."

The subsequent case of *Leon* v. *Galceran*, 11 Wall. 185 [78 U. S. bk. 20, L. ed. 74], is very much like the one now before us. There, by a Statute of Louisiana, a mariner had a lien or privilege on his vessel for his wages, and he brought a suit *in personam* therefor in a court of the State, and had the vessel sequestered. She was released on a bond given by her owner, and by Leon as surety, for the return of the vessel on final judgment. Judgment being rendered against the owner *in personam*, and the vessel not being returned, the mariner sued the surety, on the bond, in the same court, and had judgment for the amount fixed by the original judgment. On a writ of error from this court, sued out by Leon, it was urged for him, that, under the authority of *The Moses Taylor*, and *The Hine* v. *Trevor*, the state court had no jurisdiction to enforce the lien by a seizure before judgment. On the other side, it was urged that the suit was a common-law remedy, within the clause in section 9

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of the Judiciary Act of September 24, 1789, 1 Stat. at L. 77 (now embodied in section 711, subdivision 3, of the Revised Statutes) which, after granting to the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," saves "to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." This court held that the action *in personam* in the state court was a proper one, because it was a common-law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in the case, similar to a lien under the maritime law, and it was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against her owner, as a defendant; that the suit was not a proceeding *in rem*, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property; and that these views were not inconsistent with any expressed in *The Moses Taylor*, in *The Hine* v. *Trevor*, or in *The Belfast*.

The case of *Pennywit* v. *Eaton*, 15 Wall. 382 [82 U. S. 21: 114], is a similar one.

There being no lien on the tug, by the maritime law, for the injury on land inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under state statutes, enforceable by attachment, in suits *in personam*, are of every-day occurrence, and may even extend to liens on vessels [400] when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy, which a court of common law is competent to give. This disposes of the objection that the vessel being engaged in commerce among the States, and enrolled and licensed therefor, no lien on her could be enforced by attachment in the state court. The proceeding to enforce the lien, in this case, was not such a regulation of commerce among the States as to be invalid, because an interference with the exclusive authority of Congress to regulate such commerce, any more than regulations by a State of the rates of wharfage for vessels, and of remedies to recover wharfage, not amounting to a duty of tonnage, are such an interference, because the vessels are engaged in interstate commerce. *Cannon* v. *New Orleans*, 20 Wall. 577, 582 [87 U. S. bk. 22, L. ed. 417, 420]; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 [26: 1169]; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 [27: 584].

Nor is the Act of Illinois, so far as this case is concerned, obnoxious to the objection that it is a regulation of commerce which gives preference to the ports of Illinois over those of another State, within the inhibition of subdivision 6 of section 9 of article 1 of the Constitution of the United States. As was said in *Munn* v. *Illinois*, 94 U. S. 113, 135 [24: 77, 87]: "This provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs." See, also, *Morgan* v. *Louisiana*, 118 U. S. 455, 467 [*ante*, 237].

Whether proceedings under the Illinois Statute, different from those had in this case, may or may not be obnoxious to some of the objections raised, is a question which must be left to be determined when it properly arises.

As to the objection made by Christy to the judgment against him, the Supreme Court of Illinois overruled it on the ground that, as the bond was given with the statute existing, the [401] statute formed part of the bond; and the surety virtually consented that judgment might go against him on the bond, under section 21, if the plaintiff should be entitled to judgment against Johnson, citing *Whitehurst* v. *Coleen*, 53 Ill. 247, and *Hennies* v. *People*, 70 Ill. 100. This was a correct ruling. *Beall* v. *New Mexico*, 16 Wall. 535 [83 U. S. 21: 292]; *Moore* v. *Huntington*, 17 Wall. 417, 422 [84 U. S. 21: 642, 643].

As to the objection made by Carter, that he was denied a hearing, the Supreme Court of Illinois overruled it on the ground that, on the giving of the release bond, the tug was discharged from the lien unless ordered again into custody, and the subsequent judgment could only be against Johnson and Christy, *in personam*. This was a sound view.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

BENJAMIN F. BUZARD AND MOSES HILLARD, *Appts.*, [347]
v.
ROBERT A. HOUSTON.

(See S. C. Reporter's ed. 347-355.)

Equity jurisdiction—bill dismissed—adequate remedy at law.

1. It is the established doctrine of this court that "Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." A suit in equity to enforce a legal right can therefore only be brought when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side.

2. A bill in equity, filed for the purpose of having annulled an assignment of a contract for the sale of cattle and for the reinstatement of a contract between the complainants and defendant, for which the assignment had been substituted, the bill alleging fraudulent representations by the defendant and praying for discovery, dismissed for want of jurisdiction.

[No. 27.]

Argued and submitted Nov. 2, 1886. Decided Dec. 13, 1886.

APPEAL from the Circuit Court of the United States for the Western District of Texas. *Reversed and dismissed.*

[348] Statement by *Mr. Justice* **Gray:**

This was a bill in equity, filed November 28, 1881, by Buzard and Hillard, citizens of Missouri, against Houston, a citizen of Texas, the material allegations of which were as follows:

That the plaintiffs were partners in the business of pasturing and breeding cattle upon a tract of land owned by them in the State of Texas, and on October 14, 1881, negotiated a purchase from the defendants of fifteen hundred cows and fifty bulls, to be delivered at Lampasas in that State in May, 1882, at the price of $15.50 a head, one half payable upon the signing of the contract, and the other half upon delivery of the cattle; that the terms of their agreement were stated in a memorandum of that date, signed by the parties, and intended as the basis of a more formal contract to be afterwards executed; and that the plaintiffs at once paid to the defendant $500 in part performance.

That on October 31, 1881, the parties resumed negotiations, and met to complete the contract; that the defendant then proposed that, in lieu of the contract with him for the cattle mentioned in the memorandum, the plaintiffs should take from him an assignment of a similar contract in writing, dated August 13, 1881, and set forth in the bill, by which one Mosty agreed to deliver to the defendant an equal number of [349] similar cattle, at the same time and place, at the price of $14 a head.

That the defendant then stated that he had paid the sum of $15,000 on the contract with Mosty; and asked that in case of his assigning that contract to the plaintiffs, they should pay him that sum, and also the difference of $1.50 a head in the prices mentioned in the two contracts, but finally proposed to deduct from this twenty-five cents a head.

That, as an inducement to the plaintiffs to make the exchange of contracts, the defendant represented to them that Mosty was good and solvent, and able to perform his contract; that he was better than the defendant, and then had on his ranch twelve hundred head of the cattle; and that there was no doubt of the performance of this contract, because one McAnulty was a partner with Mosty in its performance—of all which the plaintiffs knew nothing, except that they knew that McAnulty was a man of wealth, and fully able as well as willing to perform his contracts.

That on November 1, 1881, the plaintiffs, believing and relying on the defendant's representations aforesaid, accepted his proposition, and paid the sum of $14,500, making, with the sum of $500 already paid, the amount of $15,000, which he alleged he had paid to Mosty on his contract; and executed and delivered to the defendant their obligation to pay him, on the performance by Mosty of that contract, an additional sum of $1,887.50, being the profit on the contract with Mosty in the sale to the plaintiffs, less the deduction of twenty-five cents a head; and returned to him his original contract with them, and in lieu thereof received from him his contract with Mosty and his assignment thereof to the plaintiffs, indorsed thereon, and set out in the bill, containing a provision that he should not be responsible in case of any failure of performance by Mosty.

That the aforesaid representations of the defendant were absolutely untrue, deceitful and fraudulent, and were known by the defendant to be false, and the plaintiffs did not know and had no means of knowing that they were untrue; that those representations were intended by the defendant to deceive the plaintiffs, and [350] did deceive them to their great injury; to wit, to the extent of the amount of $15,000 paid by them to him, and to the further extent of $10,000, for the expenses necessary to obtain other cattle, and for the loss of the increase of such cattle for the next year by reason of the impossibility of obtaining them in the exhausted condition of the market; and that Mosty at the time of the assignment was absolutely insolvent and had no property subject to be taken by his creditors, and his contract was utterly worthless, as the defendant then knew.

The bill then stated that the plaintiffs brought into court the contract between the defendant and Mosty, that it might be delivered up to the defendant; and also the assignment thereof by the defendant to the plaintiffs, that it might be canceled.

The bill prayed for a discovery; for a rescission and cancellation of the assignment of the contract with Mosty, and also of the plaintiffs' obligation to pay to the defendant the sum of $1,887.50; for the repayment to the plaintiffs of the excess of money received by the defendant from them beyond the amount which they were to pay him under the original contract; for a reinstatement and confirmation of that contract, and its enforcement upon such terms as the court might deem just and proper; or, if that could not be done, that the defendant be compelled to restore to the plaintiffs the sums of $500 and $14,500 received from them, and also to pay them the sum of $10,000 for damages which they had sustained by reason of the defendant's fraudulently obtaining the surrender of the original contract, and by reason of the other injuries resulting to them therefrom; and for further relief.

The defendant demurred to the bill, assigning as a cause of demurrer that the bill showed that the plaintiffs' only cause of action, if any, was for the sums of money paid by them on the contract, and for damages for breach of the contract for which they had an adequate and complete remedy at law. The circuit court overruled the demurrer.

The defendant then answered fully under oath, denying that he made any of the representations alleged, and repeating the defense taken by demurrer; the plaintiffs filed a gen- [35 eral replication; conflicting testimony was taken; at a hearing upon pleadings and proofs, the bill was dismissed with costs, and the plaintiffs appealed to this court.

Mr. **H. E. Barnard,** for appellants:

This cause was instituted for the purpose of canceling one contract and reinstating another, and readjusting certain payments, on the ground of fraud and misrepresentations; and the demurrer interposed by defendant to the jurisdiction of this court is unfounded.

The chancery rule in England is settled that equity has an undoubted jurisdiction to relieve against every species of fraud and misrepresentation.

Chesterfield v. *Janssen*, 2 Ves. 125; *S. C.* 1

Atk. 301, 1 Eng. Lead. Cas. 778, 4th Am. ed.

The same rule governs in the national courts of the United States whenever there is not a plain and adequate legal remedy at law to relieve against the same fraud or misrepresentations.

See note to section 875, Pomeroy, Eq. Jur.

An examination of the following cases will convince the mind that defendant's demurrer is not well taken.

Grand Chute v. *Winegar*, 15 Wall. 373 (82 U. S. bk. 21, L. ed. 174); *Oelrichs* v. *Spain*, 15 Wall. 211 (82 U. S. 21: 43); *Ins. Co.* v. *Bailey*, 13 Wall. 616 (80 U. S. 20: 501) *Jones* v. *Bolles*, 9 Wall. 369 (76 U. S. 19: 736); *Watson* v. *Sutherland*, 5 Wall. 74 (72 U. S. 18: 580); *Boyce's Exrs.* v. *Grundy*, 3 Pet. 214 (28 U. S. bk. 7, L. ed. 657); *Crane* v. *Bunnell*, 10 Paige, 333; *Bank* v. *Rutland, etc. R. R.* 28 Vt. 470; Pom. Eq. Jur. §§ 138, 140, 179.

Equity will relieve against fraud, although perhaps the party perpetrating the fraud, keeping within the limits of the strict law, so as to be sustained by the law courts, had committed some unconscientious act or breach of good faith and had thereby obtained an undue advantage over another, which advantage even though legal equity would not suffer him to retain.

At law it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be willful, in other words, should be knowingly and intentionally done by the party; but it is not essential in equity that there should be a knowledge of, and an intention to obtain, the undue advantage which results.

2 Pom., Eq. Jur. § 873.

Mr. James F. Miller, for appellee:

The complainants in this case have a remedy at law, if any at all, in an action on the case in the nature of deceit; and should not seek a rescission of the contract in a court of equity.

The sixteenth section of the Judiciary Act of 1789, 1 Stat. at L. p. 82, provides: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

The bill here is based solely upon the allegations that the complainants were induced to take an assignment of the Mosty contract by the false, deceitful and fraudulent representations of defendant. It alleges that the representations were not only false in fact, but were known to be false by the defendant when he made them. Consequently it makes a case of actual fraud; that is, fraud arising from circumstances of imposition.

Boyce's Exrs. v. *Grundy*, 3 Pet. 210 (28 U. S. bk. 7, L. ed. 655); *Parker* v. *Cotton Co.* 2 Black, 545 (67 U. S. 17: 813).

In the practical administration of their equitable powers, the national judiciary have constantly affirmed and steadily adhered to the doctrine in its negative form, that the equitable jurisdiction does not exist, and will not be exercised in any case or under any circumstances, where there is a certain, adequate and complete remedy at law.

Thompson v. *R. R. Co.* 6 Wall. 134–137 (73 U. S. bk. 18, L. ed. 765); *Knox* v. *Smith*, 4 How. 298 (45 U. S. 11: 983); *Bennett* v. *Butterworth*, 11 How. 669 (53 U. S. 13: 859); *Parker* v. *Cotton Co. supra; Oelrichs* v. *Spain*, 15 Wall. 211 (82 U. S. 21: 43); *Lewis* v. *Cocks*, 23 Wall. 466 (90 U. S. 23: 70); *Van Norden* v. *Morton*, 99 U. S. 378 (25: 458); *Guaranty Co.* v. *Water Co.* 107 U. S. 205 (27: 484); *Baker* v. *Biddle*, 1 Bald. 394. This case treats very fully of the whole doctrine.

If the fraudulent allegations are true, the bill makes a clear case for an action for deceit; and the judgment in such an action would be as fully adequate as can be the remedy by decree here.

A familiar illustration of the right to bring a common-law action for fraudulent representation, as furnished by text writers, is an action brought for falsely representing a third party to be solvent, and thereby inducing the plaintiff to part with his money.

Pasley v. *Freeman*, 2 Smith, Lead. Cas. 92; Bispham, Eq. p. 253. See *Litchfield* v. *Ballou*, 114 U. S. 190 (29: 132).

Mr. Justice **Gray** delivered the opinion of the court:

In the Judiciary Act of 1789, by which the first Congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that "Suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Act of Sep. 24, 1789, chap. 20, § 16, 1 Stat. at L. 82; Rev. Stat. § 723. Five days later, on September 29, 1789, the same Congress proposed to the Legislatures of the several States the article afterwards ratified as the Seventh Amendment of the Constitution, which declares that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." 1 Stat. at L. 21, 98.

The effect of the provision of the Judiciary Act, as often stated by this court, is that "Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp* v. *Babin*, 19 How. 271, 278 [60 U. S. bk. 15, L. ed. 633, 635]; *Ins. Co.* v. *Bailey*, 13 Wall. 616, 621 [80 U. S. 20: 501, 503]: *Grand Chute* v. *Winegar*, 15 Wall. 373, 375 [82 U. S. 21: 174, 175]; *Lewis* v. *Cocks*, 23 Wall. 466, 470 [90 U. S. 23: 70, 71]; *Root* v. *Railway Co.* 105 U. S. 189, 212 [26: 975, 983]; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573 [28: 246, 248]. In a very recent case th court said: "This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts." *N. Y. Guaranty Co.* v. *Memphis Water Co.* 107 U. S. 205, 214 [27: 484, 487]. [352]

Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or prevent-

ing an injury for which damages are not recoverable at law, as in *Watson* v. *Sutherland*, 5 Wall. 74 [72 U. S. bk. 18, L. ed. 580]; or where an agreement procured by fraud, is of a continuing nature, and its rescission will prevent a multiplicity of suits, as in *Boyce* v. *Grundy*, 3 Pet. 210, 215 [28 U. S. 7: 655, 657], and in *Jones* v. *Bolles*, 9 Wall. 364, 369 [76 U. S. 19: 784, 786].

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Parkersburg* v. *Brown*, 106 U. S. 487, 500 [27: 238, 243]; *Ambler* v. *Choteau*, 107 U. S. 586 [27: 322]; *Litchfield* v. *Ballou*, 114 U. S. 190 [29: 132].

In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this, as clearly brought out by *Lords Justices* Knight, Bruce and Turner in *Slim* v. *Croucher*, 1 D. F. & J. 518, 527, 528, was that such cases were within the ancient and original jurisdiction in chancery, before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery. Upon any other ground, such bills could not be maintained. *Clifford* v. *Brooks*, 13 Ves. 131; *Thompson* v. *Barclay*, 9 Law Jour. Ch. 215, 218. And we have not been referred to any instance in which an English court of equity has maintained a bill in such a case as that now be-
[353] fore us. In *Newham* v. *May*, 13 Price, 749, *Chief Baron* Alexander said: "It is not in every case of fraud that relief is to be administered by a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity."

The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate and complete remedy. The original agreement for the sale of a number of cattle, and not of any cattle in particular, does not belong to the class of contracts of which equity would decree specific performance. If the plaintiffs should be ordered to be reinstated in all their rights under that agreement, and permitted now to tender performance thereof on their part, the only relief which they could have in this suit would be a decree for damages to be assessed by the same rules as in an action at law. The similar contract with Mosty and the assignment thereof to the plaintiffs are in the plaintiff's own possession, and no judicial rescission of the assignment is needed. If the exchange of the contracts was procured by the fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action of deceit the plaintiffs might treat the assignment of the contract with Mosty as void, and, upon delivering up that contract to the defendant, recover full damages for the nonperformance of the original agreement. No relief is sought against Mosty, and he is not made a party to the bill. The obligation executed by the plaintiffs to the defendant is not negotiable, so that there is no need of an injunction. A judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled. There is therefore no ground upon which the bill can be maintained. *Insurance Co.* v. *Bailey*, [*supra*], and other cases above cited.

The comparative weight due to conflicting testimony, such as was introduced in this case, can be much better determined by seeing and hearing the witnesses than upon written depositions or a printed record.

This case does not require us to enter upon a [354]
consideration of the question, under what circumstances a bill showing no ground for equitable relief, and praying for discovery as incidental only to the relief sought, is open to a demurrer to the whole bill, or may, if discovery is obtained, be retained for the purposes of granting full relief, within the rule often stated in the books, but as to the proper limits of which the authorities are conflicting. It is enough to say that the case clearly falls within the statement of *Chief Justice* Marshall: "But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." *Russell* v. *Clark*, 7 Cranch, 69, 89 [11 U. S. bk. 3, L. ed. 271, 279]. See also *Horsburg* v. *Baker*, 1 Pet. 232, 236 [26 U. S. 7: 125, 127]; *Brown* v. *Swann*, 10 Pet. 497, 503 [35 U. S. 9: 508, 511].

The decree of the circuit court, dismissing the bill generally might be considered a bar to an action at law, and it is therefore, in accordance with the precedents in *Rogers* v. *Durant*, 106 U. S. 644 [27: 308] and the cases there cited,

Ordered that the decree be reversed, and the cause remanded, with directions to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to an action at law.

Mr. Justice **Bradley**, dissenting:

I dissent from the judgment in this case so far as it directs the bill to be dismissed by the court below for want of equitable jurisdiction. The complainant had been induced to give up a contract for cattle made to him by the defendant, and to accept in lieu of it an assignment from the defendant of a contract which he had from a third person who was insolvent, and whose insolvency was not known by the complainant, but was known by the defendant, though he asserted that the third person was entirely responsible. The bill seeks to abrogate and set aside the assignment and to restore to [355
complainant his original contract, on account of the fraud and misrepresentation practiced upon him. Having been induced to pay $15,000 in the transaction, and suffered a large amount of damages, he adds to the relief sought a prayer to have his damages assessed and decreed. This is the case made by the bill. I

think it is clearly within the scope of equity jurisdiction, both on account of the fraud, and from the nature of the relief asked by the complainant; namely, the cancellation of an agreement, and the reinstatement of a contract which he had been fraudulently induced to cancel. If the bill had prayed nothing else, it seems to me clear that it would have presented a case for equity. A court of law could not give adequate relief. The existence of the assignment and the cancellation of the first agreement would embarrass the plaintiff in an action at law. It is different from the case of a lost note or bond. Fraud is charged, and documents exist which in equity ought not to exist. I think the complainant is entitled to have the fraudulent transaction wiped out, and to be restored to his original status.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

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[361] FANNY D. WYLIE, *Plff. in Err.*,
v.
NORTHAMPTON NATIONAL BANK.

(See S. C. Reporter's ed. 361-373.)

Evidence to charge bank for securities stolen while on deposit—national bank may receive special deposits.

1. In an action against the Northampton National Bank by a special depositor to recover the value of securities stolen while deposited with the Bank, the action being based, (1) on the alleged negligence of the defendant in the original loss of the bonds; and (2) on the alleged negligence of the defendant in the execution of a supposed contract looking to their recovery; *held*, the first ground of the action being abandoned, (*a*) that there was no sufficient evidence to show the alleged contract between the plaintiff and the defendant under which the defendant was to act for the plaintiff in the negotiations for the recovery of the bonds; and (*b*) that there was no evidence to show lack of diligence on the part of the defendant in its efforts to recover the stolen property.

2. There being no evidence to charge the defendant the jury was properly instructed to return a verdict for defendant.

[No. 62.]

Argued Nov. 24, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The case is stated by the court.

Mr. **George H. Adams**, for plaintiff in error.

Messrs. **W. G. Peckham** and *Eliphalet Williams Tyler*, for defendant in error:

Hinckley's position, his knowledge and his action, was similar to that of the man mentioned in the following citation (*Atlantic State Bank* v. *Severy*, 82 N. Y. 307): "If the knowledge of a director is acquired in his official capacity the bank is presumed to have it; but if it is acquired as any private person might acquire it the bank is not chargeable. Leonard comes within the latter condition. The information which he had was not committed to him as a director, nor did he acquire it while engaged in its business. It did not belong to the plaintiff, and there can be no presumption that it was communicated to it. In behalf of the bank he did not act concerning the note or its purchase."

Alleghany C. W. v. *Moore*, 95 Pa. 408; *E. Ang. R. R. Co.* v. *Eastern Co. R. Co.* 21 L. J. N. S. C. P. 23; *Chem. Bank* v. *Kohner*, 8 Daly, 532; Ang. and Ames. Corp. § 309; *Bright* v. *M. C. Asso.* 33 La. Ann. 58.

While the later decisions make a bank liable for many acts of the cashier or president, or other executive officials, yet the rule is still to some extent observed that the acts should be within the scope of the general and customary authority of such officers. And it has not been held that a mere director has such executive power or such capacity to bind a bank, whether inside or outside of the bank's usual business. Directors usually have no function to perform for the bank, except to meet as a board, and as a board to ratify or disaffirm acts or propositions of the executive officials.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action at law originally com- [362]
menced by the plaintiff in error in the Superior Court of the City of New York, and removed by the defendant into the circuit court. The complaint alleged that, on the 26th day of January, 1876, the plaintiff was the owner of eight first-mortgage bonds of the Pacific Railroad Company of Missouri, for $1,000 each, with coupons attached, which at that time were in the custody of the defendant for safe keeping under an agreement by which the defendant agreed to keep the same safely and deliver them to her upon demand, but that on that day the defendant's Bank was broken into by burglars and a large amount of property taken by them therefrom, amounting in value to over $1,600,000, consisting chiefly of bonds, stocks, and other similar securities, with some money, the property in part of the Bank and of others, and including the plaintiff's bonds and coupons; and it is averred that the said loss by robbery occurred in consequence of a want of due care on the part of the defendant.

It is further alleged by the plaintiff that shortly after the said loss, "the plaintiff was intending and was about to enter in good faith upon negotiations and to take measures for the recovery of her said bonds and coupons from whomsoever then possessed the same; that thereafter, and about the time last mentioned, the defendant represented to the plaintiff that the
defendant was about to take measures for the [363]
recovery of the property so taken, and expected to recover all of said property in bulk, or the greater part thereof, from the persons taking the same as aforesaid, by means of rewards and other measures, and was undertaking, or about to undertake, negotiations with said person or persons, to the plaintiff unknown, for accomplishing the same; and the defendant then further represented that it expected to receive such restoration if it was allowed to act therein in behalf of the plaintiff and in behalf of other depositors and losers who were in the same position as the plaintiff; and the defendant further represented that it, the said defendant, was in a better position to negotiate for the restoration of said property as aforesaid, and could accomplish the same at less expense, than if the plaintiff and other individuals, owners and losers of said property, were to act in that respect independently.

"That thereupon, and at or about the time

last stated, the defendant requested the plaintiff to permit and authorize the defendant to act for her and in her behalf in the respects mentioned, and in such negotiations, for the recovery of her said bonds and coupons, with the bonds, stocks, securities, and other property of the defendant and other owners and losers of property as aforesaid; and further requested the plaintiff not to undertake negotiations with, or offer rewards or other inducements, to the persons who had taken or were in possession of said bonds or other property as aforesaid, for the return of the same.

"That thereupon, and relying upon such representations and all of them, the plaintiff complied with such requests of defendant, and did not undertake negotiations with or offer rewards or other inducements to such persons as aforesaid for the return of her said bonds and coupons, and permitted and authorized the defendant to act for her and in her behalf in the respects mentioned, and as requested in such and any negotiations for the recovery of her said bonds and coupons, with the bonds, stocks, securities, and other property of the defendant and other owners and losers of said property as aforesaid.

[364] "That thereupon the said defendant undertook to act in behalf of the plaintiff in the respects mentioned, and took certain proceedings and entered into certain negotiations with the persons who had taken said property or possessed the same as aforesaid, for the recovery of the same; that some time during the years 1879 and 1880, the defendant, acting as aforesaid, recovered and received from said persons the greater part of said stolen property, taken, as aforesaid, on the 26th day of January, 1876, including a large amount of the separate property of the defendant, amounting in all, in face or par value, to about $1,500,000; and thereupon the defendant settled and compounded with said persons for all claims arising or growing out of such taking or robbery as aforesaid.

"That the difference between the amount of property so recovered and the amount of property taken or stolen on January 26, 1876, as aforesaid, and all the property so taken and not recovered, was by the defendant allowed and agreed to be retained by and released to the said persons as a consideration or reward for the restoration of the remainder as aforesaid. That among the securities and property so allowed and agreed to be retained and so released by the defendant were the eight bonds of the plaintiff and all the coupons thereto belonging. That the plaintiff was not informed at the time, by the defendant, of the terms of said agreement or arrangement between the defendant and said persons, but all the proceedings of the defendant in those respects and for the restoration of such property were concealed from the plaintiff, and she has never consented to the action of the defendant therein.

"That by means of plaintiff's said property, together with other considerations, and by the total sacrifice of the plaintiff's said property, the defendant was enabled to recover, and did recover as aforesaid, a large amount of its own property and the property of its other depositors, and has reimbursed itself for the greater part of its losses in said robbery and for the expenses which the defendant incurred in respect to the matters herein mentioned.

"That the defendant, not regarding its promises and undertakings, did not take due care of the plaintiff's interest as aforesaid, but, on the contrary, sacrificed the same for its own advantage, and so negligently and carelessly conducted itself with respect to the plaintiff's said property and interest, and took so little care thereof, that, by and through the mere neglect and improper conduct of the defendant and its servants, and by the willful neglect of plaintiff's said interests, so committed to its charge, the plaintiff has wholly lost her said property," for the value of which she accordingly asks judgment. [365]

To this the defendant answered, admitting that securities to the amount in par value of about $1,600,000, belonging in part to the defendant and partly to its officers and other persons, were stolen from its vaults by armed burglars in January, 1876, and that among said securities were the bonds claimed by the plaintiff as plaintiff's property. The answer alleges that the bonds of the plaintiff, prior to the burglary, were held by the defendant in its vaults as a favor to the plaintiff, by permission of one of the defendant's officers, without the consent or agreement of the defendant, and were not on deposit with the defendant for any reward or consideration to the defendant, but were left on the special agreement made with the plaintiff, that the bonds should remain at the risk of the plaintiff, and the defendant should in no case be responsible therefor; and alleges that it had no corporate power to make any contract or agreement, either with reference to the safe keeping of the said bonds, or any such contract as that alleged in the complaint for their recovery, and that no such contract was in fact ever made, all the allegations of the complaint in that respect being denied. The answer further alleges that the defendant, "while having no duty or obligation to the plaintiff in the premises, nevertheless did use good faith and due care in all the transactions mentioned in the complaint, and the defendant committed no breach of trust, and was guilty of no breach of trust, fraud, carelessness or negligence whatever in any or all of said matters; but, on the contrary, defendant alleges that, at its own expense, defendant enabled plaintiff to recover four of the eight bonds, for the value of which plaintiff here sues defendant;" and that the plaintiff's failure to recover back the remaining four of the eight bonds was caused solely by the carelessness and negligence of the agents employed by the plaintiff and not by the defendant. [366]

By a pleading subsequently filed, and called a replication, the plaintiff admitted that since the commencement of the action she had recovered four of the bonds mentioned in the complaint by means of an action of replevin against one Henry G. Pearson, then the postmaster of the City of New York, and reduced her claim accordingly.

The cause came on for trial by a jury, and the plaintiff, having introduced evidence to maintain the issues on her part, rested her case, when, on a motion of the defendant, the court instructed the jury to return a verdict for the

defendant, which was done. Judgment was rendered thereon in favor of the defendant, to reverse which this writ of error is now prosecuted.

The question of law for our determination is whether there was sufficient evidence in support of the plaintiff's cause of action to require its submission to the jury.

The evidence offered by the plaintiff on the trial of the cause tended to prove the following facts:

The burglary occurred in January, 1876. Efforts were immediately made by the Bank to recover the lost property; and, about three weeks after the burglary, the officers and directors of the Bank caused a meeting to be held at the bank, of some of the losers, including depositors for safe keeping. Plaintiff did not attend this meeting, and it does not appear that she was represented there. At that meeting directors and officers of the Bank were present, and it was proposed to form a committee composed of bank officers and depositors to take measures to recover the stolen property. This was assented to by the Bank's officers, but was voted down, and the matter left as before, to the efforts of the Bank.

In 1877 the plaintiff in error married Dr. Wylie, of New York, who thereafter acted for her in the matter. In the same year Dr. Wylie was informed, through a patient, that he could [367] deal with Scott, one of the burglars, for the recovery of Mrs. Wylie's bonds. He did not at once act upon this, because he understood the Bank was acting for his wife. Shortly thereafter, Dr. Wylie stated this proposition to Warrener, the vice-president and manager of the Bank, and that he thought he could get back his wife's bonds. Warrener then requested Wylie not to negotiate independently of the Bank, and stated that the Bank was negotiating to get the securities back. To this request Wylie acceded.

On February 9, 1878, Wylie received from Hinckley, one of the prominent directors of the Bank, a letter representing that he was acting for the Bank, and inclosing the following paper, which he requested the plaintiff to sign:

"We, whose names follow, having suffered the loss of securities by the robbery of the Northampton National Bank in January, 1876, hereby agree to pay a *pro rata* proportion of the expenses incurred in obtaining them and returning them to us."

Hinckley wrote again, February 27, 1878, as he says, at the request of Warrener and Edwards, the president, urging Mrs. Wylie to sign the paper, and saying that they thought the property could be recovered "cheaper in bulk than in detail," and that they had "strong hopes of being able to effect a negotiation at no distant day, and would like to make one clean job of it." Thereupon, on March 21, 1878, Mrs. Wylie and her husband signed the paper as requested, and returned it to the Bank.

In October, 1877, Edwards, the president of the Bank, was notified by persons acting in behalf of Scott and Dunlap, two of the burglars then under sentence, that $100,000 of the best bonds had been put aside and money borrowed on them, and that the whole lot could be had for $8,000; whereupon efforts were made to effect this recovery. To the knowledge of Edwards and the vice president, Warrener, and upon consultation with them, Hinckley was allowed, however, to separately negotiate, through the same channel, for the return of $25,000 Union Pacific Railroad bonds, which were known to belong to him, on payment of $6,000. These $25,000 of bonds were a part [368] of the $100,000 lot, and upon delivery were locked up, and the transaction concealed until June, 1878. After the $6,000 was paid, the difficulties of negotiation increased, the persons holding the balance of $75,000 making exorbitant demands. While further negotiations for the $75,000 were proceeding, Hinckley, though acting as an officer of the Bank for all parties concerned, and acting with Edwards and Warrener, again attempted to make his private bargain for $19,000 more of Union Pacific bonds supposed to be in the same lot. The return of the $19,000 was offered upon payment of $10,000 to the parties holding them; which offer was refused, the price being considered too exorbitant. Further attempts were made to secure the return of the remaining $75,000, but the holders of the securities refused all offers made for their return, and the whole $75,000 were sent to Europe and negotiated or otherwise lost. On this subject, Hinckley wrote to Dr. Wylie on May 10, 1879: "This I do know, that * * * no part of the $75,000 left the country until some time in 1878, after I refused to pay $10,000 for the balance, $19,000, of my U. P.'s. It was my refusing to pay that sent them abroad. If I had accepted the offer, I have no doubt we could have got the whole $75,000 at 50 per cent of the market value." Hinckley also wrote to Dr. Wylie: "The offer was a specific one for $25,000 U. P. S. F. bonds. It came from the thieves, not from me, or anyone in my interest. If the offer had been to return the Missouri Pacifics, you would have been notified, and not I. Every effort was made to induce the holders to name a price at which they would return the $100,000, but to no purpose, although I have good reason to believe that if I had accepted the second offer of 50 per cent of the market value, something might have been done."

In January, 1879, Dr. Wylie notified various bankers abroad of the theft of the bonds, and subsequently certain of the coupons from said bonds were presented for payment, of which the plaintiff was notified by the railroad company, and she replevied and recovered the same. It was then ascertained for the first time, in June, 1879, that the Bank had not sent particulars of the robbery abroad further than that the robbery had occurred, and such a list of [369] bonds stolen, but the numbers of the bonds were not given; some circulars giving the numbers of the bonds and a general cable was sent to London, but no circulars were sent to Frankfort or elsewhere on the Continent.

In 1876 and 1877 indictments were found in Massachusetts against Scott and Dunlap, and also against Leary, Conners, and Draper, for this burglary. Scott and Dunlap were tried and convicted at Northampton; the others had not then been caught. Afterwards Draper was arrested and taken to Northampton, and remained there in jail untried about two and one half years, shortly before the expiration of which time, in 1880, Conners and Leary

were arrested and taken to Northampton jail. Negotiations were conducted between the Bank and Scott and Dunlap, then in state prison, and influence brought to bear upon them for the return of the property, and they finally stated to one of the directors that Leary had control of it. After Leary was arrested, Scott and Dunlap wrote a letter to him, which resulted in the greater portion of the property being recovered soon after Conners was taken to Northampton. Hinckley and Warrener went to New York to a safe deposit company there and brought it away. A little before or after this final recovery, Conners, Leary and Draper were all discharged at Northampton without trials. The amount of property stolen was recovered, except about $12,000 cash and $70,000 to $80,000 par value of bonds and securities. The bulk of the negotiable coupon bonds were recovered; also all non-negotiable bonds, and all negotiable securities except about $80,000.

Hinckley testified that a final recovery was not made by or through him, and not by or through the means mentioned in the 1878 and 1879 letters to Wylie. Everything was futile until the final recovery. The Bank or its officers did not agree that the plaintiff's bonds should be retained and released to the thieves, or any other person, as compensation for the restoration of the remainder. Of the coupons attached to the plaintiff's stolen bonds maturing prior to the commencement of this action, [370] twenty-eight have never been recovered. These coupons were each for $80.

The value of the plaintiff's bonds on January 31, 1882, was $1,080 for each bond, with unmatured coupons only attached. Of the plaintiff's bonds so stolen four have never been recovered by her.

The complaint in this case may be considered as embracing two distinct causes of action: the first, founded on the alleged negligence of the defendant in the original loss of the bonds, and the second, on negligence alleged to have occurred in the execution of the agreement for their recovery. It was decided in the case of the *National Bank* v. *Graham*, 100 U. S. 699 [Bk. 25, L. ed. 750] that it would "be competent for a national bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward; and it would be liable for a greater or less degree of negligence accordingly." In the present case it is conceded that there is no evidence of negligence on the part of the Bank resulting in the original loss by robbery, except the mere fact of the loss itself by that means. The plaintiff's case, therefore, upon this cause of action is without proof.

As to the second cause of action, the facts stated in the complaint seem to us to be sufficient if proven to constitute a legal liability on the part of the defendant. It would certainly be competent for a national bank to take measures for the recovery of its own property lost in the way described. If the loss, as in the present case, included the property of others, and it was deemed best, having reference to the bank's own interest, that these measures should be taken by the bank alone for itself and all concerned, it might lawfully undertake to act for others thus jointly concerned with itself as well as for itself alone; and want of proper diligence, skill and care in the performance of such an undertaking would be ground of liability to respond in damages for such failure. Much more would the bank be liable, in such a case, if, in the performance of such an undertaking it used the property of the plaintiff for the recovery of its own. This, it is alleged in the complaint in this case, the defendant did. There is a total want of evidence to this effect, [371] and that ground of complaint was very properly abandoned.

The plaintiff therefore, must stand upon the remaining allegations, which may be reduced to two: (1) that the Bank did make such an agreement to act as the plaintiff's agent in the recovery of her property; and (2) that it was guilty of a want of due care and diligence in the performance of its duty as such, whereby the loss occurred. On both of these points we think there was no evidence to charge the defendant sufficient to require it to be submitted to the jury. The meeting referred to in the evidence, called by the Bank, of those interested with itself in the recovery of the stolen property, resulted in no such agreement. The Bank had before that been taking such measures for that purpose in its own behalf, and incidentally for the others, as it deemed best. The proposal made at the meeting to put the matter in charge of a joint committee of the officers of the Bank and individual losers was rejected. The Bank continued thereafter to prosecute the matter as it had been doing from the beginning. The communications which subsequently took place between Dr. Wylie, the plaintiff's husband, and Mr. Warrener, the vice president and manager of the Bank, based on the information which the former had received from his patient, that he could deal with Scott, one of the burglars, for the recovery of his wife's bonds, and the reply made by Mr. Warrener requesting him not to institute an independent negotiation, on the ground that it might interfere with the success of those which the Bank was then prosecuting, do not tend to prove a contract by which the Bank assumed to act [as the plaintiff's agent in the matter which bound the Bank to take any other measures than such as it was then pursuing, or which obliged the plaintiff not to undertake any separate negotiations of her own. At the most, it can be considered only as a friendly understanding between two parties having like interests, in respect to the course deemed best for the interests of both.

But, even if it could be supposed that there was proof of a distinct agreement, such as is alleged, whereby the Bank agreed, in consideration of the plaintiff's desisting from any separate efforts on her own behalf to prosecute measures for the recovery of her property equally with that of the Bank and others, there is still an entire failure of evidence to establish as against the Bank any failure of performance [37 on its part. It seems to have acted with promptness, with diligence, with skill, and with success. The great bulk of the stolen property was in fact recovered through its exertions and instrumentalities. This recovery included one half in number of the bonds lost by the plaintiff, and no part of the plaintiff's property was used or sacrificed to save what was secured.

The particular circumstances in regard to the recovery by Hinckley of his Union Pacific Railroad bonds, which seem to form the chief matter of complaint on the part of the plaintiff, do not seem to us to warrant any inference against the Bank. Hinckley, although a director of the Bank, had an individual interest in the bonds; and the information which led to his negotiations and the recovery of a portion of them came to him directly because he was the only owner of bonds of that description included in the loss. He was, therefore, allowed by the Bank, without objection, to negotiate separately for their return. He recovered $25,000 by the payment of $6,000, but $19,000 additional he was unable to obtain, except upon payment of what he deemed to be an exorbitant demand, with which he was unwilling to comply. It is supposed that Hinckley's bonds were a part of the lot amounting in all to $100,000; it is also supposed that this lot included some of the plaintiff's bonds; and it is also supposed that, in consequence of Hinckley's refusal to continue negotiations for the recovery of the remainder of his own bonds, the holders secretly sent them to Europe, where they passed into the hands of innocent holders and became lost beyond recovery; but all this is mere matter of conjecture. There is absolutely in the case no evidence whatever, either that any part of the bonds of the plaintiff constituted a portion of this lot of $100,000, or that they could have been recovered, either without Hinckley's interference or if he had pursued his negotiations; or that the bonds were sent abroad by reason of anything done or omitted by him. Hinckley does, indeed, state, in a letter written by him [373] to the husband of the plaintiff, that he had reason to suppose that the whole lot of $100,000 might have been purchased for fifty cents on the dollar; but no facts are stated as the ground for this opinion, and there is no proof beyond the conjecture itself. Neither is there any reason to conclude that the Bank was responsible either for what Hinckley did or failed to do. There is no evidence to warrant the conclusion that anything the Bank could have done, beyond what was done, would have resulted more favorably to the plaintiff.

In our opinion, therefore, the court below was justified in its ruling upon the evidence, instructing the jury to return a verdict for the defendant.

The judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[445] LEVINA CAMPBELL ET AL., *Plffs. in Err.*,

v.

LACLEDE GAS-LIGHT COMPANY.

(See S. C. Reporter's ed. 445-449.)

State law as to record of federal land patent—effect of as evidence—weight of evidence.

1. It is proper for a State to pass a law, making the record of a patent from the United States in the offices of such State *prima facie* evidence of its contents.

2. This court affirms the decree of the Supreme Court of Missouri, deciding that the *prima facie* case made by the record of a patent, in the recorder's office of St Louis County, the original not being in the control of either party, was not overcome by the evidence in the case.

[No. 816.]

Submitted Nov. 15, 1886. Decided Dec. 13, 1886.

IN ERROR to the Supreme Court of the State of Missouri. *Affirmed.*

The case is stated by the court.

Mr. **Leverett Bell**, for plaintiffs in error.

Messrs. **C. Gibson** and **C. E. Gibson**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The writ of error in this case, directed to the Supreme Court of Missouri, brings up for review the following judgment: [446]

"Levina Campbell, Frank H. Murray and Annie L. Murray, his wife, and Charles J. January and Annie E. January, his wife, Respondents,
v.
The Laclede Gas-Light Company, Appellant, and the City of St. Louis.
} Appeal from the St. Louis Court of Appeals.

"Now at this day come again the parties aforesaid, by their respective attorneys, and, consenting that this court may proceed to render such judgment as to them may seem proper upon the record herein, it is therefore considered and adjudged by the court that the plaintiffs' cause of action was at the commencement of this suit absolutely barred by the Missouri Statute of Limitations, and that the plaintiffs are not entitled to the rights claimed by them under the Act of Congress approved June 6, 1874, entitled 'An Act for Obviating the Necessity of Issuing Patents for Certain Private Land Claims, and for Other Purposes;' and the judgment of the St. Louis Court of Appeals and the judgment of the St. Louis Circuit Court herein are reversed and held for naught; and it is ordered, adjudged and decreed that the plaintiffs take nothing by this action, and that said defendants shall recover of the plaintiffs its costs in this behalf expended, and have execution therefor."

The question on which the jurisdiction of this court depends is whether the title to the land in controversy passed from the United States by the Act of Congress of June 6, 1874, referred to in this judgment (18 U. S. Stat. at L. pt. 3, p. 62), in which case the Statute of Limitations was no bar, or by a patent issued March 26, 1824, to Pierre Chouteau, in which case it was a bar.

The question is still further narrowed because it depends upon whether the patent issued to Chouteau had the seal of the United States for the General Land-Office impressed upon it. The patent itself was not in evidence; but the defendant, who relied upon the Statute of Limitations, produced a certified copy of the patent from the United States to Chouteau from the office of the recorder of deeds of St. Louis [447] County, made in that office in 1847, in which copy a seal in due form appears, and the instrument is perfect in every respect. The law of Missouri on the subject of the recording of

patents for lands lying within that State is found in sections 3826 and 3827 of the Revised Statutes of that State. They are as follows:

"Section 3826. All patents for land lying within the State of Missouri, granted to any person or persons by the President of the United States or the governor of this State, may be recorded in the office of the recorder of the county in which the lands are situated.

"Section 3827. All copies of patents so recorded, or which may have heretofore been recorded, duly certified by the recorder under his official seal, shall be received in all courts in this State as *prima facie* evidence of the contents of such patents."

The record shows that the original patent was not in the possession or under the control of either party to this action. It is not denied that the copy produced from the office of the recorder of deeds makes a *prima facie* case of the transfer of the title from the United States to Chouteau in 1824. The plaintiff, however, undertook to impeach the validity of this copy by producing from the records of the General Land-Office in Washington City a copy of the patent as there recorded. This copy is without a seal, and to make sure that this was not an accidental omission of the officer making the copy from the records of the land-office, a letter of the commissioner of that office, written at the time the copy was made, is produced, in which he says that he himself has examined with care the record from which the copy was taken, and that no seal appears therein. He suggests, however, that while it is probable that the seal of the General Land-Office was affixed to the patent, there is no authority to correct the record of it in the absence of said patent.

The case was tried without a jury, and judgment rendered for the plaintiffs. This judgment was affirmed, as the record states *pro forma*, in the court of appeals, but was reversed by the supreme court, and judgment rendered for the defendant, as already cited.

[448] It might be a question of some doubt whether this is not merely a decision of all these courts as to a matter of fact, in regard to which this court has no supervision over the judgment of the Supreme Court of the State of Missouri. But as the question really is, at what time the Statute of Limitations began to run in favor of the defendant, and as that depends upon whether the instrument called the patent to Chouteau is a valid patent, and as we concur in the opinion of the Supreme Court of Missouri on that subject, we think its judgment ought to be affirmed.

That the State of Missouri had a right to pass the statute, which makes the record in the offices of that State of a patent from the United States *prima facie* evidence of the contents of that patent, does not seem to be doubted. Indeed, it was a very wise and needful provision, for without it the title to large quantities of land, which rested primarily in the patents from the United States, might be very difficult to establish by evidence of that title. By this statute parties were enabled to place this evidence in permanent form upon the records of the counties in which the land was situated, at the same time giving notice to all the world of their claim to such land. This record of the Chouteau patent being therefore authorized by a valid law, we see no reason why a transcript of it is not of as much actual value, as evidence of the original patent, as a transcript from a similar record made at Washington City. In each instance the record is but the copy of the same instrument, made by different persons, who must be supposed to be equally honest, equally careful, and therefore equally accurate in the record which they made of the original. If there is found to be a variance in the two copies thus produced, it would naturally be supposed that all that is found in either copy was in the original, and that any important matter found in one copy which was not found in the other was due to an accidental omission, rather than that it was an accidental insertion of matter not in the original paper. Counsel for defendant argues that it is fairly to be inferred that there was a seal to the original patent, and that its record was accidentally omitted, because this patent, like all others, contains in the *testimonium* the language of the President, that [449] "I have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed." Whatever force might be given to this language, as evidence, that there was a seal to the original, is lost by reason of the failure to incorporate either one of the transcripts in the record of the case as it comes to us.

The case of *McGarrahan* v. *Min. Co.* 96 U. S. 323 [Bk. 24, L. ed. 635], so far from sustaining the doctrine claimed by counsel for plaintiffs in error, that the Act of Congress making certified copies from the books of the Commissioner of the General Land-Office evidence equally with the originals (§ 891, Rev. Stat.) makes the copy in this case, with the seal omitted, conclusive against the record from the St. Louis office; that case recognizes the fact that there is nothing in the Statute, either express or implied, which forbids a party from showing by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, when it is shown that the record itself, or the transcript from it, is not a true copy; and it further holds that the party is not necessarily deprived of his rights on account of the defective record in the General Land-Office.

The words "evidence equally," as used in the Act of Congress, were not intended to mean that *in all* cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary. It could not have been intended to say that when the existence of the instrument is conceded, but a question arises as to some particular word or figure, the copy would be as convincing as the original.

On the whole, we are of opinion that the *prima facie* case made by the record of the patent in the recorder's office of St. Louis County is not overcome by what purports to be a copy of the same from the records of the General Land-Office in Washington, and that *the judgment of the Supreme Court of Missouri must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GERMANIA INSURANCE COMPANY OF NEW ORLEANS, *Plff. in Err.*,
v.
STATE OF WISCONSIN.

(See S. C. Reporter's ed. 473-477.)

Suit by State in its own courts—removable when—federal question must appear on the face of the record.

1. Under the Act of 1875 a suit by a State in one of its own courts can only be removed to the federal court on the ground that it is a suit arising under the Constitution or laws of the United States or treaties made under their authority.
2. In order that a suit may be removable for this cause it must appear on the face of the record that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.
3. In an action where the complaint discloses no such case, and where the only appearance of the defendant was special, to object to the service of the summons, the only question raised is as to the service, and the case is not removable.

[No. 948.]

Submitted Nov. 23, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin. *Affirmed.*

The case is stated by the court.

Mr. **F. W. Cotzhausen,** for plaintiff in error.

Mr. **H. W. Chynoweth,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court remanding a suit which had been entered in that court as a suit removed from a state court. The record shows a suit brought by the State of Wisconsin, in one of its own courts, against the Germania Insurance Company of New Orleans, an insurance company incorporated by the State of Louisiana, and having its principal office and place of business in New Orleans, to recover certain statutory penalties for doing business in Wisconsin without complying with the laws of [474] that State in reference to foreign insurance companies. The only process in the cause was served December 29, 1885, on L. D. Harmon, a citizen of Wisconsin, and described in the sheriff's return as "being then and there an agent of the said defendant."

On the 12th of April, 1886, the Insurance Company came, and entering "its special appearance in the action, * * * for the purpose of this motion only," moved the court "to vacate and set aside the pretended service of summons" as above stated, "and all and every proceeding in said action subsequent thereto, for want of jurisdiction and irregularity in said pretended service of process." In support of this motion an affidavit of the vice president and of the secretary of the Company was filed, to the effect that Harmon was never the agent of the Company, and that the Company had no agent in the State, and had had no agent, and had not transacted insurance business there for ten years then last past. Before any action was had upon this motion, the Company, on the same 12th of April, presented to the court its petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of Wisconsin, in which is set forth the motion to set aside the service of the summons in the action and the special appearance of the Company for the purposes of that motion only, and the grounds of the motion. The petition then states "that the suit arises out of a controversy between the parties in regard to the operation and effect of certain provisions of the laws of the State of Wisconsin, said to be in conflict with the Constitution of the United States in various particulars, and necessitating a construction thereof, among which subjects of controversy are the following, to wit:

"Whether the attempt of the State to prevent the Company from doing business in the way it was done was not in conflict with section 1, article 14, and with section 8, article 1, of the Constitution; and,

"Whether the aforesaid proceedings in said court, and the attempt to proceed against your petitioner by service of summons or process upon one not authorized to represent it, without appearance in court, constitute 'due process of law' within the meaning of the Constitution of the United States."

The state court refused to allow a removal, and thereupon the Company took a copy of the record to the circuit court, where proceedings were had on the 29th of May in accordance with the following docket entry:

"The State of Wisconsin
v.
The Germania Insurance Company of New Orleans.

"And comes the defendant, specially appearing by Cotzhausen, Sylvester, Scheiber & [475] Sloan, for purposes of pending motion only, and moves the court for an order docketing this cause, which motion was granted *ex parte;* and the defendant, appearing specially for the purposes of this pending motion, gives notice that on the 7th day of June, A. D. 1886, at the opening of court on that day, or as soon thereafter as counsel can be heard," the plaintiff will be required to show cause "why the pending motion to set aside the pretended service of summons and all subsequent proceedings in said cause should not be taken up, heard and considered."

On the 24th of June the circuit court remanded the cause; whereupon, this writ of error was sued out.

A suit by a State in one of its own courts cannot be removed to a Circuit Court of the United States under the Act of 1875, unless it be a suit arising under the Constitution or laws of the United States or treaties made under their authority; *Ames* v. *Kansas,* 111 U. S. 449 [Bk. 28, L. ed. 482]; and a suit cannot be said to be one arising under the Constitution or laws of the United States until it has in some way been made to appear on the face of the record that "some title, right, privilege or immunity, on which the recovery depends, will [476] be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction." *Starin* v. *New York,* 115 U. S. 257 [29 : 390]. This record shows no such thing, for, as the case now

stands, the right of recovery depends alone on the question whether service of summons has been made on a person who was at the time an agent of the Company within the State on whom process might legally be served, so as to bind the Company and bring it within the jurisdiction of the court. This is a mixed question of law and fact; and in no way dependent on the construction of the Constitution or any law of the United States. If decided in one way, the suit will be at an end and the Company relieved from all necessity of appearing to defend. If in another, the Company must appear or suffer the consequences of a default. As yet no suit arising under the Constitution or laws of the United States has been *brought*, within the meaning of that term as used in the statute. There is nothing in the complaint which discloses any such case, and, until the Company submits itself to the jurisdiction of the court for the trial of the suit, it cannot be permitted to allege any new matter. All further proceedings have been stopped by the Company on its own motion until it can be determined whether any suit at all has in law been begun so as to require the Company to appear and defend. The case stands, therefore, on the summons, the alleged service, the complaint, the special appearance of the Company for the purposes of its motion to vacate the service, and the petition for removal, which must be limited in its statements to such as are consistent with the special appearance which has been entered. No new matter in the nature of a defense to the action can be introduced. The only question which can be considered in the case as it now stands is whether Harmon, on whom this process was served, was in fact an "authorized agent." The suit, therefore, does not, as yet, "really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court," and it was properly remanded.

The order to that effect is consequently affirmed.

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[477] PEOPLE'S INSURANCE COMPANY OF NEW ORLEANS, LOUISIANA, *Plff. in Err.*,

v.

STATE OF WISCONSIN.

[No. 951.]

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin. *Affirmed.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The material facts in this case are substantially like those in *Germania Insurance Co.* v. *Wisconsin*, just decided, and the questions for determination are the same. The order remanding the suit is affirmed on that authority.

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[341] JOHN HALSTED, *Plff. in Err.*,

v.

SARAH A. BUSTER AND MARY A. McGEE.

(See S. C. Reporter's ed. 341-343.)

Jurisdiction—dependent on citizenship—duty of plaintiff to show jurisdiction—amendment.

1. Where in the circuit court judgment was for the defendants in a case where the jurisdiction depended on citizenship, and the plaintiff brought the case to this court, and the citizenship on which the jurisdiction depended does not appear in the record, the judgment will be reversed, but at the costs of the plaintiff in error; it being his fault that the citizenship of the parties was not shown.

2. If the citizenship of the parties was such as to give jurisdiction, it will be competent for the court below to allow the necessary amendment.

[No. 59.]

Argued Nov. 23, 1886. Decided Dec. 13, 1886.

IN ERROR to the District Court of the United States for the District of West Virginia. *Reversed.*

The case is sufficiently stated by the court.

Mr. **A. Burlew**, for plaintiff in error.

Messrs. **J. F. Brown** and *W. Mollohan*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court. [342]

This record does not show that the circuit court had jurisdiction of the suit, which depends alone on the citizenship of the parties. In the declaration it is stated that Halsted, the plaintiff, is a citizen of New York, but nothing is said of the citizenship of the defendants. Neither is there anything in the rest of the record to show what their citizenship actually was. For this reason the judgment is reversed, but as the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear, the reversal will be at his cost in this court. *Hancock* v. *Holbrook*, 112 U. S. 229 [Bk. 28, L. ed. 714]. If the citizenship of the defendants was, in fact, such at the commencement of the suit as to give the circuit court jurisdiction, it will be in the power of that court, when the case gets back, to allow the necessary amendment to be made and then proceed to trial. This whole subject was recently considered at the present term in *Continental Life Insurance Co.* v. *Rhoads* [*ante*, 390,] and it is only necessary to refer now to the opinion in [343] that case and the authorities there cited for the reasons of this judgment.

Reversed, at the cost of the plaintiff in error.

T. P. WINCHESTER, Trustee; W. S. STALEY; E. B. McHENRY, Receiver of the Assets of the BANK OF WEST TENNESSEE; [450] THE HERNANDO INSURANCE COMPANY; BEN MAY; S. S. JOBE, Admr. of S. M. JOBE, Deceased; and TAYLOR, JOY & COMPANY for Use of W. F. TAYLOR, *Plffs. in Err.*,

v.

J. B. HEISKELL ET AL.

(See S. C. Reporter's ed. 450-453.)

Bankruptcy—when assignee is bound by proceedings in state court affecting assets—jurisdiction.

Pending an action in a state court involving the title to certain lands, the defendant made an assignment in bankruptcy, and the assignee was made a party to the proceedings. The defendant's title was established and a lien declared in favor of his attorneys for their fees, of which an account was taken in chancery and for which the property was sold to them.

In a subsequent action brought in a state court to enforce the lien of a trust deed, executed by the defendant pending said proceedings, it is held:

1. That the state court had jurisdiction to declare and enforce said lien for fees, notwitstanding the proceedings in bankruptcy,
2. That the assignee was bound by the proceedings in the state court, he having appeared and litigated his rights there.
3. That the immunity claimed by plaintiffs in error under section 711 R. S., conferring upon the courts of the United States exclusive jurisdiction in bankruptcy proceedings, from the operation of the decree of the court below, gives this court jurisdiction of this writ of error.
4. That the question here is not whether the decree in the former proceedings binds the plaintiffs in error, but whether the state court had jurisdiction to bind the parties and those whom they represented.

[No. 1148.]

Submitted Nov. 29, 1886. Decided Dec. 13, 1886.

IN ERROR to the Supreme Court of the State of Tennessee.

On motion to dismiss, with which is united a motion to affirm under Rule 6, clause 5. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Henry Craft, T. B. Turley** and **L. W. Humes,** for defendants in error, in support of motions.

Mr. **B. M. Estes,** for plaintiffs in error, *contra:*

Let it be assumed that the defendants are senior mortgagees or incumbrancers, and that the plaintiffs are junior mortgagees. Can it be doubted that a junior mortgagee, who is not a party to the proceedings under which the senior incumbrancer forecloses his lien and obtains title, can, if such proceedings are void, attack the title set up thereunder, and have it declared void, or maintain his ejectment suit in equity to recover the property?

Jones v. *Perry*, 10 Yerg. 59; *Almony* v. *Hicks*, 8 Head, 89; *Kerr* v. *Kerr*, 8 Lea, 228.

A sale made under foreclosure of a senior mortgage is wholly inoperative as to the rights of a junior mortgagee who was not a party to the suit.

Vanderkemp v. *Shelton*, 11 Paige, 28; *Brainard* v. *Cooper*, 10 N. Y. 356; 1 Jones, Mort. § 782.

The plaintiffs in error were not parties to or bound by the proceedings and decree of the state court.

Freem. Judg. § 156; *Boro* v. *Harris*, 13 Lea, 36, 44.

The Chancery Court of Shelby County had no jurisdiction to ascertain and liquidate the lien of the defendants, because of the bankruptcy of Townsend and the proceedings in the United States District Court.

Sec. 711, R. S. See also *Claflin* v. *Houseman*, 93 U. S. 130 (Bk. 23, L. ed. 833); *McHenry* v. *La Société etc.* 95 U. S. 58 (24: 370).

The record shows that the land was conveyed and delivered to the assignee and that it remained in his actual possession until after the defendants had obtained their decree vesting title in them.

Townsend was adjudicated a bankrupt more than a year before the Supreme Court of Tennessee declared the lien in favor of the defendants. When the lien is declared the attorney and client first assume antagonistic relations, and when the parties are *sui juris* such declaration of lien is simply the basis of a suit which the attorney must institute to enforce.

Perkins v. *Perkins*, 9 Heisk. 97; *Brown* v. *Bigley*, 3 Tenn. Ch. 618; *Hunt* v. *McClanahan*, 1 Heisk. 504; *Guild* v. *Borner*, 7 Baxt. 266.

If the jurisdiction of the state court was interdicted by the statute, no consent or act of the assignee could give it.

See Freem. Judg. § 20; *Dicks* v. *Hatch*, 10 Iowa, 380; *Moore* v. *Ellis*, 18 Mich. 77; *Fleischman* v. *Walker*, 91 Ill. 318; *Agee* v. *Dement*, 1 Humph. 332; *White* v. *Buchanan*, 6 Cold. 33; *Ferris* v. *Fort*, 2 Tenn. Ch. 147, 150.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts disclosed by the record are in brief as follows:

On the 16th of February, 1869, Annie L. Jones and others, the widow and heirs at law of William E. Jones, deceased, filed their bill in the Chancery Court of Shelby County, Tennessee, against D. H. Townsend, to set aside and cancel a sheriff's deed purporting to convey certain lands to him, and to be quieted in their title to the property. The defendants in error, Heiskell, Scott & Heiskell, were employed by Townsend to defend this suit, which they did successfully, and at the December Term, 1876, obtained a decree of the supreme court of the State establishing his title to the property. On the 18th of June, 1875, while this suit was pending, Townsend conveyed the land in dispute to George W. Winchester, in trust to secure certain debts owing by him, and for which Ben. May was bound as indorser. On the 30th of November, 1875, Townsend filed his petition in bankruptcy, and on the 12th of January, 1876, T. P. Winchester was duly appointed his assignee. [451]

In the decree of the supreme court establishing the title of Townsend to the land appears the following:

"And it being suggested to the court that, pending the proceeding in this court, the title of the said Townsend has been assigned to Thomas P. Winchester, assignee in bankruptcy, it is, with the consent of the said Townsend by his counsel, ordered that the said Winchester be made a party to this decree, and by consent, this cause is remanded to the Chancery Court of Shelby County to take * * * an account and make report of the reasonable counsel fee of the counsel, Heiskell, Scott & Heiskell, for which a lien is hereby declared on the premises in controversy, the said Winchester asking that the account be taken below."

Under this order the cause was remanded, the account taken in the chancery court, the amount due ascertained, the lien declared, and the property sold to Heiskell, Scott & Heiskell for its satisfaction.

On the 12th of February, 1880, the present appellants filed this bill in the Chancery Court of Shelby County against Heiskell, Scott & Heiskell, to enforce the lien of the deed of trust executed by Townsend to George W. Winchester, trustee, claiming that their title under this deed is superior to that of the defendants under their purchase at the sale which had been ordered in the former case. In their bill they allege that they are not bound by the decree in the original suit, because "neither they nor the

interest in said land that they represented were before the court when said decree was pronounced, and they had no representative before said court. The suit was not revived or reinstated in their names or in the name of the trustee after Townsend's bankruptcy and the assignment of his assets in bankruptcy." This is the substance of the allegations of the bill on this branch of the case. The hearing was originally had before a commission of referees appointed under a Statute of Tennessee, and in their report it is said, among other things: "This proceeding in the chancery court, on the reference as to the amount of the fee, etc., is not [452] such a matter in bankruptcy as is contemplated by section 711 of the Revised Statutes of the United States, 1874, especially under the circumstances of this case." The report of the referees was confirmed by the supreme court. In its first decision no reference was made to the question of the jurisdiction of the state court in the original suit to adjudicate as to the lien for fees, in view of the provisions of section 711 of the Revised Statutes; but, on a petition for rehearing and a suggestion of this omission, the decree was modified as follows.

"The court being of the opinion that this court had jurisdiction in the case of *Annie L. Jones* v. *D. H. Townsend*, mentioned and set forth in the record, to declare the attorneys' lien in favor of the defendants in this case on the tract of land described in the pleadings, and that the Chancery Court of Shelby County, Tenn., had jurisdiction to enforce said lien on said property by the proceedings, decrees, and sale, as shown in the record, notwithstanding the bankruptcy of D. H. Townsend and the bankrupt proceedings in the District Court of the United States for the Western District of Tennessee, as shown in the record, and notwithstanding the provisions of the 711th section of the Revised Statutes of the United States, and notwithstanding the provisions of the sections of said Revised Statutes embraced in Title 61, 'Bankruptcy,' the court adjudges that the authority exercised by the state courts in said proceedings is not repugnant to the said laws of the United States. In construing said laws of the United States, the court is of the opinion that, under the circumstances of the case as shown by the record, the said state courts had the jurisdiction to declare and enforce said liens on the land in question; and that under the said proceedings the defendants acquired a good and valid title to the land in controversy, and that the title is not and was not void and a cloud on the complainants' right and title, and the court doth so order and decree."

Upon this state of facts the appellees have moved: (1) to dismiss the writ of error for want of jurisdiction; or (2) to affirm under Rule 6, clause 5.

[453] One of the questions presented by the bill was as to the binding effect of the decree in the original case upon the complainants in this suit. Objection was not made in the pleadings to the jurisdiction of the court over the subject-matter of the action on account of the exclusive jurisdiction of the courts of the United States, under section 711 of the Revised Statutes, "of all matters and proceedings in bankruptcy," but it clearly was at the trial before the referees, and it was directly presented to and decided by the supreme court. An immunity was claimed by the appellants under this statute from the operation of the decree of the state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases. We thus have jurisdiction, but as the decision of the state court upon this question was clearly right, we do not care to hear further argument. The assignee in bankruptcy appeared in the state court and litigated his rights there. This he had authority to do, and the judgment in such an action is binding on him. This we have many times decided, *Mays* v. *Fritton*, 20 Wall. 414 [87 U. S. bk. 22, L. ed. 389]; *Doe* v. *Childress*, 21 Wall. 642, 647 [88 U. S. 22: 549, 551]; *Scott* v. *Kelly*, 22 Wall. 57 [89 U. S. 22: 729]; *Eyster* v. *Gaff*, 91 U. S. 521 [23: 403]; *Burbank* v. *Bigelow*, 92 U. S. 182 [23: 543]; *Jerome* v. *McCarter*, 94 U. S. 737 [24: 137]; *McHenry* v. *La Société Francaise*, 95 U. S. 58 [24 : 370]; *Davis* v. *Friedlander*, 104 U. S. 570 [26 : 818]. The question here is not whether that decree thus rendered binds these appellants, but whether the state court had jurisdiction so as to bind those who were parties to the suit, and those whom the parties in law represented.

The motion to dismiss is denied, and that to affirm granted.

Affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

SAME CASE. On petition for rehearing.

Submitted Jan. 25, 1887. Decided Jan. 31, 1887.

Mr. Chief Justice **Waite** delivered the opinion of the court.

This petition is denied, but inasmuch as the petitioners think that the points on which they relied for a reversal of the judgment were not clearly understood, we will restate what was decided.

1. We held that, as the suit of *Townsend* v. *Jones* was pending when Townsend filed his petition in bankruptcy, and when he made his assignment to Winchester, the assignee, Winchester, as such assignee, had the right to appear in that suit and have the amount due Heiskell, Scott & Heiskell determined. It may be that, according to the practice in Tennessee, if he had not appeared, Heiskell, Scott & Heiskell would have been compelled to bring a new suit to have the amount of their lien ascertained; but as he did appear and did ask to have the matter adjudicated in that suit, he was bound by what was done. As the court had declared the lien, it was within its jurisdiction to ascertain, with the consent of all the parties, the amount that was due under the lien and make the necessary order for its enforcement as against those who were parties to that suit. About this we have no doubt.

2. We said: "The question here is, not whether that decree thus rendered binds these appellants (plaintiffs in error), but whether the state court had jurisdiction so as to bind those who were parties to the suit, and those whom the parties in law represented." The assignee having voluntarily made himself a party to the suit, and the court having at his request settled the amount of the lien, he was bound by what was done, and so were all whom he in law rep-

resented in the litigation. That certainly includes the general creditors of the bankrupt, but whether it does those claiming under the trust deed from Townsend, before his bankruptcy, to George W. Winchester, trustee, we did not then and do not now decide.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

339] EDWARD D. DONNELLY AND JOHN F. CULLINANE, EXRS. of PATRICK CULLINANE, Deceased, *Appts.*,

v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 339-341.)

Cause of action.

1. A creditor who receives the obligation of his debtor for his debt, and sells such obligation for less than its nominal value, cannot sue on the original debt to recover the difference.
2. *Looney* v. *District of Columbia*, Bk. 28, followed.

[No. 57.]

Submitted Nov. 19, 1886. Decided Dec. 13, 1886.

APPEAL from the Court of Claims. *Affirmed.*

The following is the statement of the case by *Mr. Chief Justice* Drake of the Court of Claims:

The claimant had four contracts with the board of public works of the District of Columbia for the improvement of streets, under which he did a large amount of work. In regard to one piece of that work, the macadamizing of 4½ Street S. W., a controversy arose between him and the board, which delayed the settlement between them of a final balance due him on account of all the work done under the four contracts. After considerable negotiation the following agreement was arrived at, and signed and sealed by the claimant and all the members of the board:

Whereas, differences have existed between the Board of Public Works of the District of Columbia and Patrick Cullinane, in reference to the contract of said Cullinane, for improving Four-and-a-Half Street, in the City of Washington, it is agreed to adjust the same by deducting from the total amount due said Cullinane the sum of fifteen thousand dollars in consequence of the character of the work, in the judgment of the board, and the amount equitably chargeable against the Metropolitan Railroad Company, which said amount is to be hereafter fixed between said board and said company; bonds to be issued to said Cullinane for
[340] the balance due him.

Witness our hands and seals this thirteenth day of September, A. D. eighteen hundred and seventy-three.

PATRICK CULLINANE	[seal.]
H. D. COOKE	[seal.]
ALEX. R. SHEPHERD	[seal.]
JAMES A. MAGRUDER	[seal.]
ADOLF CLUSS	[seal.]
H. A. WILLARD	[seal.]

In pursuance of this agreement bonds of the District of Columbia to the amount of $113,950 were delivered to and accepted by the claimant, which he hypothecated in part, and sold in part, at much below their par value.

He now sues to recover $68,000, which he alleges he lost by the depreciation of the bonds; and in order to lay a foundation for a recovery, he avers that the above writing did not fully express the actual agreement arrived at between him and the board; and he invokes the equitable jurisdiction vested in this court in cases against the District, to reform that writing, so as to make it express that actual agreement. His averment is that there was omitted, by mistake, therefrom a stipulation which was agreed upon, that the bonds given to him in pursuance of that agreement "should be at par, or equivalent to cash, and if not, they (the board of public works) would pay in cash the difference between the actual value and their face value."

Mr. **V. B. Edwards**, for appellants.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed on the [341]
authority of *Looney* v. *District of Columbia*, 113 U. S. 258 [Bk. 28, L. ed. 974]. It having been found as a fact by the court below that no mistake had been made in reducing the contract to writing, no questions are presented in this court on that branch of the case.

Affirmed.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY, *Plff. in Err.*, [454]

v.

D. W. McCLUNG.

(See S. C. Reporter's ed. 454-464.)

Freight, due carrier on dutiable goods paid to deputy collector—collector, not liable at suit of carrier—notice—suit removable—authorities distinguished.

1. Under section 10 of the Act of June 10, 1880, providing for the preservation of carriers' liens for freight on dutiable goods delivered to customs officers, it is not the duty of a collector to collect or receive such freight for the lienholder.
2. A collector of customs is not chargeable, at the suit of a carrier, for freight paid to his deputy, unless it appears that in receiving such freight the deputy acted under his authority.
3. An action to charge the collector with freight thus paid to his deputy differs from an action for damages for a failure to give the notice required by the statute. It amounts to a waiver of the notice, and a ratification of the action of the deputy in receiving the freight.
4. Such an action against a collector, when brought in a state court, is removable under section 643 R. S.

[No. 45.]

Argued Nov. 12, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. H. Holding**, *E. W. Kittredge* and *Ramsey, Maxwell & Matthews*, for plaintiff in error:

The deputy collector acting as cashier was,

by virtue of his position and continuous action in the premises, the agent of the defendant, who was responsible for his conduct and, under the circumstances disclosed, estopped to deny his agency.

Secs. 2630, 2632, 3148, R. S. See also *Dignan* v. *Shields*, 51 Tex. 322; *Badger* v. *Gutierez*, 111 U. S. 734 (Bk. 28, L. ed. 581); *Ogden* v. *Moxwell*, 3 Blatchf. 319; *McIntyre* v. *Trumbull*, 7 Johns. 35.

The duty to withhold the delivery of the goods until the freight was paid, which under the decision of *Mason* v. *Pearson*, 9 How. 259, (50 U. S. bk. 13, L. ed. 130), is an absolute duty, is one which devolved upon the collector officially, and which he had the right to perform by his deputy.

The question whether the act of the deputy, regarding him as an agent, was within the scope of his authority was determined by the course and manner in which he was accustomed to conduct his principal's business.

Martin v. *Webb*, 110 U. S. 7 (Bk. 28, L. ed. 49).

The performance of his duties in respect to numerous transactions in a particular manner, for a period of six months, should conclusively establish a course of business sanctioned by his principal, and for which his principal should be held responsible.

Messrs. **Benjamin Butterworth** and *Chaning Richards*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case presents the following facts: D. W. McClung held the office of Collector of Customs and Surveyor of the Port of the City of Cincinnati, under the laws of the United States, and J. L. Wartman was employed by him, with the approval of the Secretary of the Treasury, as deputy collector of customs. As such, deputy Wartman acted as the cashier of the collector. Section 10 of the Act of June 10, 1880, chap. 190, 21 Stat. at L. 175, is as follows:

"That whenever the proper officer of the customs shall be duly notified in writing of the existence of a lien for freight upon imported goods, wares or merchandise in his custody, he shall, before delivering such * * * merchandise to the importer, owner or consignee thereof, give reasonable notice to the party or parties claiming the lien; and the possession by the officers of customs shall not affect the discharge [455] of such lien, under such regulations as the Secretary of the Treasury may prescribe; and such officer may refuse the delivery of such merchandise from any public or bonded warehouse or other place in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight thereon had been paid or secured; but the rights of the United States shall not be prejudiced thereby, nor shall the United States or its officers be in any manner liable for losses consequent upon such refusal to deliver. If merchandise so subject to a lien, regarding which notice has been filed, shall be forfeited to the United States and sold, the freight due thereon shall be paid from the proceeds of such sale in the same manner as other charges and expenses authorized by law to be paid therefrom are paid." This is part of "An Act to Amend the Statutes in Relation to Immediate Transportation of Dutiable Goods."

The Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company was a common carrier, and as such designated by the Secretary of the Treasury for the purpose of receiving and transporting dutiable goods from the port of arrival to the port of destination under this Act of Congress. As such carrier, so designated, this Company carried to Cincinnati large quantities of dutiable goods, the freight and charges upon which amounted in the aggregate to $8,477.50, and placed them in the custody and control of McClung as collector of customs and surveyor of the port, and, as is claimed, notified him in writing of its lien as carrier for such freight and charges. Wartman, as deputy collector, had charge, under McClung, of the collection of customs payable at the Port of Cincinnati, and of the delivery of imported merchandise to the consignees thereof. He received the freight and charges due the Company from the consignees of these goods at the same time that he received the duties, and delivered the goods to the consignees without notifying the Company. The charges were never paid by him either to the Company or to McClung.

Such being the conceded facts, this suit was brought against McClung in the Superior Court of Cincinnati. In the petition it is averred that McClung was collector, etc.; that the Railroad Company had carried and delivered the goods to him under the Act, charged with a lien thereon for freight, of which due notice [456 was given to him in writing, as provided in the Act; and "that it became and was the duty of the defendant, as such officer, to refuse to deliver the said goods and merchandise until such freight thereon had been paid to the common carrier." It is then averred that the consignees paid the charges due the Company to the defendant, "and the defendant then and there received" the same "for the account and benefit of the said * * * Company, and the defendant then and thereupon caused the said goods and merchandise to be delivered to the consignees, * * * without notice to the Railroad Company, whereby its lien for said freight was lost;" and that "the defendant, though often requested, has not paid said" money to the plaintiff, but the same, "with interest from September 8, 1881, is now due and unpaid from the defendant to the plaintiff."

Summons in the action was served on McClung, March 21, 1882, and on the 7th of November following he filed in the Circuit Court of the United States for the Southern District of Ohio, his petition, under section 643 of the Revised Statutes, for a writ of *certiorari* to the state court, requiring that court to send to the circuit court the record and proceedings in the cause, on the ground that "At the time the said acts charged in such petition are alleged to have been done, he was, and still is, an officer of the United States, appointed and acting under the authority of the revenue laws of the United States, * * * and all his acts in connection with the receipt and delivery of the merchandise described in said petition were done by him under color of his said office." Upon this petition a writ of *certiorari* was issued and the record and proceedings removed. Upon the entry of the cause in the circuit court the Railroad Company moved that it be remanded, "for the reason that this court has no jurisdic-

tion of the person or subject matter of the action." This motion was denied November 15, 1882, and on the 12th of February, 1883, McClung answered the petition in the suit, denying that he had been notified of the lien, or that it [457] had ever become his duty to refuse to deliver the goods until the freight was paid, and also denying that he had ever received the freight for the benefit of the Company.

Upon the trial it was shown that the freight and charges were paid to Wartman at the same time with the duties, and that, upon such payment, the goods were delivered to the consignees, without notice to the carriers. The plaintiff also offered further evidence "tending to prove that it had been the general usage and custom prevailing at the custom office of Cincinnati for ten years prior to the appointment of the defendant, and was the general usage and custom at the said office after the defendant's appointment, on March 18, 1881, and down to the 8th of September, 1881, for the consignees of imported goods brought to the Port of Cincinnati by all the common carriers who are authorized under said Act to transport imported merchandise to the port of its destination, to pay the freights due to such common carrier at the office of the collector and of the cashier deputy of the surveyor of the port when a * * * notice in writing of the existence of a lien thereon in favor of the carrier had been given to the deputy collector at such office; and that such payments were exacted and required by the deputy collector as a precedent condition to the delivery of such goods by the surveyor of the port to the owners and consignees thereof; and that such freights were paid, together with the duties due upon such imported goods, to such deputy collector, sometimes in money, but most generally in checks, which included duties due to the government and the freights due for the carriage of said goods, and which checks were drawn by the consignees in favor of the surveyor of the port by name, or of the 'collector' or 'surveyor' of customs at the Port of Cincinnati, which checks were indorsed and collected by such deputy collector for the collector or surveyor in his official capacity, and were collected in the usual course of business by such deputy collector; and that, upon the receipt of such money or checks in payment of duties and freight, the goods were, by the order of said deputy, with the acquiescence of the surveyor of the port, delivered to the respective consignees; and that the deputy collector, in his [458] official capacity, accounted with and paid over the freights so collected to the common carrier of such imported goods, from time to time, as the same were demanded."

There was also evidence tending to prove that the payments in this case were made in accordance with this custom and upon the demand of Wartman.

McClung was sworn as a witness in his own behalf, and testified that Wartman was acting as deputy when he came into office, and attending to the receipt of duties, and was continued in the same service by him; that he was never authorized to sign or indorse checks, and that he, McClung, was not aware that he had ever done so. He also testified that he had no knowledge whatever of the fact that Wartman was receiving freight moneys until September 6, 1881, which was after all these payments were made, and that there was not kept in the office any account of moneys received for freights.

At the close of the testimony the court charged the jury, among other things, as follows:

"In order to authorize a recovery against the defendant for failing to give the seasonable notice to the plaintiff required by the statute, before delivering the goods to the owners or consignees, an averment that the freights due plaintiff and for which it had a lien were owing and unpaid is necessary. There is no such averment in the plaintiff's petition in this case; on the contrary, it distinctly avers that the consignees did pay the freights to the defendant; and, while it does not say in express terms that it authorized such payments to be made, by demanding and suing for the same, as it has done, ratifies and confirms the payments, and claims that the money was received for its account and benefit, and demands judgment therefor. This is in fact the *gravamen* of its complaint, the theory upon which its suit rests; and the court instructs that you are here to try this case upon the hypothesis that the freights due from the consignees to the plaintiff for the carriage of the goods in question were paid before the goods were delivered by the defendant to the consignees, and that the defendant was therefore under no legal duty to give the plaintiff notice of his intention to make such delivery."

"It was competent for the parties, by express [459] contract, or by a tacit understanding resulting from an established course of business, for the benefit and convenience of both parties, to agree that the defendant should receive the freights due the carrier for the account of the latter, and upon receipt thereof deliver the goods to the owners or consignees, and that such receipts by him should be in lieu of the notice which the law required him to give the carrier in the contingency described by the statute. It may be that such tacit or implied agreement existed between these parties in this case. This is the question for you to determine. The defendant was under no official or legal obligation to undertake to thus act for the plaintiff. If he did so, he was but acting in his private capacity and not in the discharge of any official duty. It not being an official duty, his deputy could not thus act by reason of his official relations to his superior, and the defendant would not be liable for such extra-official action unless he had in some way authorized his deputy so to act, or unless he has so acted as to estop him from denying that the deputy was in the specific matter complained of acting by his authority for him."

"If defendant had knowledge of this custom, acquired from observation from the business and books of his office, or through other sources, and acquiesced therein, and permitted the plaintiff to make its collections through his deputy in the belief that he was acting for and as his agent, or by his acts or declarations represented or held him out as his agent in the matter, the plaintiff and defendant, both understanding and tacitly or otherwise agreeing that the freights due the plaintiff should be paid in this way, in lieu of the notice which the statute in the contingency described required the defendant as collector to give to the plaintiff, he

would be liable to the plaintiff for all sums so paid to the deputy for the plaintiff's use."

"If the deputy acted without authority from the defendant, and the defendant did not know of his said action, nor hold him out to the plaintiff as his agent, nor do nor say anything to mislead the plaintiff nor its officers nor agents, nor undertake nor assume to collect plaintiff's freight, he would not be liable to plaintiff's demand, and your verdict ought to be in his favor."

[460]

To all this the Railroad Company excepted. There were other instructions to which exceptions were also taken, but they were all substantially embraced in the above, and it is unnecessary to repeat them here.

The jury returned a verdict for the defendant upon which a judgment was entered, and the case is now here for review. The errors assigned are:

1. That the court overruled the motion to remand; and,

2. That it instructed the jury as above stated.

The removal was under section 643 of the Revised Statutes, which provides, among other things, for the removal of "a civil suit * * * commenced in any court of a State against an officer appointed under or acting by authority of any revenue law of the United States, * * * on account of any act done under color of his office." This is a suit against an collector of customs, an officer appointed under the revenue laws of the United States, for an act alleged to have been done by him in the delivery of dutiable goods placed in his hands by virtue of his office subject to a carrier's lien. His liability, if any there is, grows out of his official duty to keep the goods and deliver them to the consignees thereof when the import duties are paid and the carrier's lien discharged. The allegation is that the collector, instead of notifying the carrier, as the law required, delivered the goods to the consignees on receiving himself the moneys due for the carrier's charges. This suit is for the money so received. Clearly, then, according to the allegations of the petition, the suit is for an act done by the collector under color of his office. This is not seriously denied; but the claim is that—as the defendant insists, and the court below has decided, that it was not the official duty of the collector to collect the carrier's money and, therefore, that he is not liable for the acts of his deputy in that behalf—the suit is really one that could not be removed. But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable; and certainly the right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done.

[461]

We agree entirely with the court below in the view it took of the character of the suit which has been brought. It is not for damages for delivering the goods without notice to the carrier, but for the charges collected on the delivery. That is the case made, both by the petition and upon the trial. The whole effort on the part of the Company, so far as the record discloses, was to show that it was, and had been for years, the general usage in Cincinnati for consignees to pay the carrier's charges upon dutiable goods carried, and held in the custom house for the payment of duties, to the cashier deputy of the collector; and that such payments were exacted and required by the deputy as a condition precedent to the delivery, he accounting to the carriers for the money received on this account. The claim was that these payments had been made pursuant to this custom, and that the collector was bound by the acts of the deputy, and liable for his defaults. If the suit had been to recover damages for the delivery without notice, this proof might perhaps have come from the other side to show that the carriers had, by long usage, made the deputy their agent to collect their charges, and that, as the payment had in this case been made to the deputy in accordance with that custom, no notice was required. We are clear, therefore, that the whole case turns upon the question whether the collector is liable for these collections of the deputy.

[462]

Section 2630 of the Revised Statutes gives authority to every collector of customs to employ, with the approval of the Secretary of the Treasury, "Such number of persons as deputy collectors as he shall deem necessary, and such deputies are declared to be officers of the customs." There can be no doubt that the collector is answerable for all the acts of his deputies in the performance of their official duties under him. The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the collector. If it was, the collection by the deputy was an official act, and the principal officer is liable accordingly.

What, then, was the duty of the collector under this statute? Clearly, to take the goods from the carrier when brought, and not to deliver them to the consignees without first giving seasonable notice to the person or persons who had notified him in writing of the existence of a lien in their favor thereon for freight. The statute neither made it his duty to collect the freight, nor authorized him to receive it for the lienholder. Payment to him would not have been a payment to the carrier, so as to discharge the consignee from liability for the freight, unless the carrier had made him his personal agent for that purpose, in which case he would receive the money not as collector, but in his private capacity as the representative of the person to whom the money was due. The money in his hands on this account would not be in any sense public moneys, for which he was officially liable to the government, but private moneys, collected in a private capacity, for which he was accountable only to the person from whom he received his authority. So, too, if he had received the freight without authority, and the carrier had sued him for it, he would be liable because the carrier, by suing, would have ratified his act and accepted his agency in the premises. But his liability in that case would not be official as collector, but private as the agent of the carrier.

[463]

It follows that the payment of the freight to the deputy was not in law a payment to McClung, unless the deputy, in making the collection, was acting under authority from him, not in his official, but in his private capacity. For this purpose it is not sufficient that Wartman,

to whom the payments were made, was the official deputy of McClung as collector. It must appear that he was his private agent in this behalf. That question was fairly submitted to the jury under proper instructions; and the verdict was against the Company, and to the effect that McClung had not authorized Wartman to receive the freight moneys on his account. That concludes this point.

As the alleged exactions of the deputy were not within the scope, either actual or apparent, under the law, of the authority of the collector's office, the case is not within the principle which, under some circumstances, makes the officer liable for the illegal and wrongful acts of his deputy, of which *Ogden* v. *Maxwell*, 3 Blatchf. 319, and *McIntyre* v. *Trumbull*, 7 Johns. 35, cited in the brief of counsel for the Company, are examples. And, besides, here the exactions, if any, were not from the Company, but from the consignees, who alone can complain. If they were made without the authority of the Company to whom the freight belonged, the Company is under no obligation to accept the payment thus exacted in discharge of its debt for the freight, and may still proceed against the consignees for its recovery.

If this were a suit for delivering the goods without notice to the Company, a different rule would apply. As it was the duty of the collector, as collector, to notify the Company before delivery, and not to deliver until proof to his satisfaction had been produced that the freight had been paid or secured, it would have been a breach of official duty for the deputy to [464] make the delivery before the notice, and the act of the deputy would have been in law the act of his principal. Such a case would be within *Ogden* v. *Maxwell* and *McIntyre* v. *Trumbull*, and others of like import, which are very numerous. But, as has already been shown, this suit is not of that character. It is for the money paid, and not for delivery without payment.

It follows that there is no error in the record, and the judgment is consequently affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[526] SHIRLEY C. ASHBY, *Appt.*,
v.
SIDNEY M. HALL AND HENRY M. PARCHEN.

(See S. C. Reporter's ed. 526–530.)

Public lands—town sites—Act of March 2, 1867—when occupant of lot entitled to right of way over alley after entry—power vested in Legislature of territory—limits of—Legislature could not, under said Act, close streets, etc., by new survey.

*1. The entry in the Land-Office of a portion of the public lands in the Territory of Montana, settled upon and occupied as a town site, under the Act of Congress of March 2, 1867, "for the relief of the inhabitants of cities and towns on the public lands," being "in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated," it was held that the occupant of a lot in the town which had been surveyed and platted into streets, alleys, blocks and lots, continued to possess after such entry the same right of way over an adjoining alley which he had previously possessed as appurtenant to his lot.

2. The interests which the occupants possessed previous to the entry, either in the land occupied by them or in rights of way over adjoining streets and alleys, were secured by it.

3. The power vested in the Legislature of the Territory was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title in the nature of a conveyance; but they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established.

2. The Legislature of the Territory could not, under the authority conferred by the above Act of Congress, change or close the streets, alleys and blocks of the town by a new survey. Whatever power it may have over them does not come from the Town Site Act, but, if it exists at all, from the general grant of legislative power under the organic Act of the Territory.

[No. 87.]

Argued Nov. 10, 1886. Decided Dec. 13, 1886.

APPEAL from the Supreme Court of the Territory of Montana. *Affirmed.*

The case and facts are given in the opinion.

Messrs. **Eppa Hunton** and *Jeff. Chandler*, for appellant:

The owner of the fee, the United States, made no dedication until the town was platted into lots, streets and alleys by the county judge, or by his adoption of a previous plat.

Field v. *Manchester*, 32 Mich. 279; *Shanklin* v. *Evansville*, 55 Ind. 240; *Livermore* v. *Maquoketa*, 35 Iowa, 358.

The fact that the owners of adjacent lots, in their conveyances, described this space of ground as an alley does not affect the question, because they could not estop themselves or the county judge, not being owners of the fee in the so-called alley.

1 Dill. Mun. Corp. § 498; *Baugan* v. *Mann*, 59 Ill. 492.

No counsel appeared for appellees.

Mr. Justice **Field** delivered the opinion of [527] the court:

This case comes from the Supreme Court of Montana. It was a suit to abate an obstruction in an alley in the City of Helena, in that Territory. The plaintiffs are the owners of certain lots in a block bordering on the alley, over which they claim a right of way; an easement which they or their predecessors used and enjoyed from 1866 to 1871, when the defendant caused the obstruction complained of.

In the pleadings and in the findings several facts are assumed to be well known, upon which no information is given, as; that the lands within the City of Helena were, in 1869, entered in the local land-office, by the probate judge of the county, under the Town Site Act; and that there was an addition to the original limits of Helena, known as Scott's Addition, within which are the lots owned by the plaintiffs. It would have facilitated the examination of the case if these facts had been stated with some particularity, rather than assumed to be within the knowledge of the court.

The case was brought in one of the district

*Head notes by *Mr. Justice* FIELD.

courts of the Territory, and was by stipulation of the parties, tried without a jury. The facts as found, so far as they are material, are substantially as follows: In 1866 Scott's Addition to Helena was laid out, surveyed and platted into streets, blocks, lots and alleys. The alleys ran through the center of the blocks, and were sixteen feet in width. The lots of the plaintiffs adjoined one of these alleys, the passage in which was obstructed by a fence placed across it by the defendant. The title to the ground occupied by the town, including the streets and alleys, was in the United States until the entry of the town site in 1869. The original occupants of the lots recognized the existence of the alley, as did their grantees and successors in interest until such entry, and received their deeds bounded thereon. The principal use of the alley was to take in wood and hay for the adjoining occupants, and for the ingress and egress of their cows. The plaintiffs and their predecessors in interest had made valuable improvements upon the lots, to which they held a possessory right at the time of the [528] entry of the town site. Some time afterwards a new survey and a map of the town were made, by direction of the probate judge as trustee, and were approved by the county commissioners. The survey and map did not show the alley in question, and no proceedings were taken to correct them in that particular; and they were filed with the clerk and recorder of the county. In 1871, the defendant entered upon and occupied the land embracing the alley in question; and in 1872 he received a deed of the same from the probate judge, no adverse claim having been presented.

From the facts, of which the above is a brief statement, the district court found as a conclusion of law that, at the time of the entry of the town site by the probate judge, the plaintiffs and others, as adjacent lot owners, had a subsisting and valid right in the alley, and to the use thereof; that the probate judge entered the same in connection with the town site in trust, with the usual rights and interests therein; that his subsequent conveyance thereof to defendant was void and inoperative; and therefore the nonpresentation of an adverse claim to defendant's application for the ground was immaterial.

The court accordingly adjudged that the plaintiffs were entitled to a right of way over the sixteen feet of ground adjoining their lots, and to the use of it as an alleyway without let or hindrance from the defendant or any one acting under him; and declared that the fence erected across it was a nuisance, to be removed by the sheriff of the county, and that the defendant and his servants be forever enjoined from erecting any fence or other obstruction upon the ground. This decree was affirmed, on appeal, by the Supreme Court of the Territory, and from the judgment of the latter court the case is brought here.

The Act of Congress of March 2, 1867, "For the relief of the inhabitants of cities and towns upon the public lands" (14 Stat. at L. 541, chap. 177), the substance of which has been carried into the Revised Statutes (§ 2387), provided that "Whenever any portion of the public lands have been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the agricultural preemption laws, it shall be lawful, in case such town shall be incorporated, for the corporate au- [529] thorities thereof, and if not incorporated, for the judge of the county court for the county in which such town may be situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated." It also provided that any act of said trustee, not made in conformity with the rules and regulations mentioned, should be void.

As thus seen, the Act required the entry of land settled upon and occupied, to be in trust "For the several use and benefit of the occupants thereof according to their respective interests." The very notion of land settled upon and occupied as a town site implies the existence of streets, alleys, lots and blocks; and for the possession of the lots, and their convenient use and enjoyment, there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterwards at the disposal of the government, except as subject to such easement.

That portion of the town known as Scott's Addition, within which is the alley in controversy, was laid out and platted into streets, alleys, blocks and lots, as early as 1866; and the lots were occupied, in conformity with that survey and plat, when the entry was made. The right of way, and all appurtenances to the lots, which were held by the occupants under their possessory claims, continued after the entry, and the receipt of their deeds or other evidences of title, as before, with the additional support arising from the change of their possessory claims to estates in fee.

The power vested in the Legislature of the Territory in the execution of the trust, upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of [530] the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy. Under the authority conferred by the Town-Site Act, the Legislature could not change or close the streets, alleys and blocks of the town by a new survey. Whatever power it may have had over them did not come from that Act, but, if it existed at all, from the general grant of legislative power under the organic Act of the Territory.

The plaintiffs taking the lots they occupied, with the right of way appurtenant thereto, that

is, over the alley on which the lots were situated, which they had previously enjoyed, the action of the probate judge in conveying the alley to the defendant was illegal and void. The intrusion of the defendant thereon was therefore a trespass, and the fence erected by him, to bar the passage through it, was a nuisance to be abated.

The judgment of the court below is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[401] CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, *Appt.*

v.

F. W. SCHALICKE.

(See S. C. Reporter's ed. 401-407.)

Patent for improvement in concrete pavements—action for infringement—essentials of complainant's device.

In an action for the alleged infringement of reissued letters patent No. 4364, for an improvement in concrete pavements, *held*, that, as the essential feature of complainant's device was that the pavement should be laid in separate sections so that each section might be removed separately, or heave separately, because of the frost, the patentee disclaiming the formation of such blocks without the interposition of anything between the blocks while in the process of formation, while the defendant laid his pavement in one mass and then merely marked the surface to the depth of one sixteenth of an inch for purpose of ornamentation, there was no infringement.

[No. 940.]

Submitted Dec. 6, 1886. Decided Dec. 20, 1886.

APPEAL from the Circuit Court of the United States for the District of California. *Aff'd.*

The case is stated by the court.

Mr. **M. A. Wheaton**, for appellant.

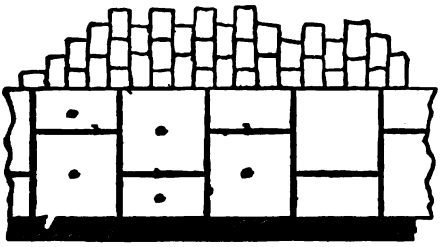
Mr. **Manuel Eyre**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court.

This is a suit in equity, brought by the California Artificial Stone Paving Company, a California corporation, against F. W. Schalicke, to recover for the infringement of reissued [402] letters patent No. 4364, granted to John J. Schillinger, May 2, 1871, for an improvement in concrete pavements, on the surrender of original letters patent No. 105559, granted to him July 19, 1870. The specification and drawings of the reissued patent are as follows:

"Figure 1 represents a plan of my pavement. Figure 2 is a vertical section of the same. Similar letters indicate corresponding parts.

1



2

This invention relates to a concrete pavement, which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections. With the joints of this sectional concrete pavement are combined strips of tar paper, or equivalent material, arranged between the several blocks or sections in such a manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

In carrying out my invention, I form the concrete by mixing cement with sand and gravel, or other suitable material, to form a plastic compound, using about the following proportions: One part, by measure, of cement, one part, by measure, of sand, and from three to six parts, by measure, of gravel, with sufficient water to render the mixture plastic; but I do not confine myself to any definite proportions or materials for making the concrete composition. While the mass is plastic, I lay or spread the same on the foundation or bed of the pavement, either in molds or between movable joists of the proper thickness, so as to form the edges of the concrete blocks, *a*, *a*, one block being formed after the other. When the first block has set I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set [and, since the concrete in setting shrinks, the second block, when set, does not adhere to the first, and so on], and, when the pavement is completed, each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips, *b*, of tar paper, or other suitable material, in the following manner: After completing one block, *a*, I place the tar paper, *b*, along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is completed, interposing tar paper between the several joints, as described. The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately, from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. The paper, when placed against the block first formed, does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed, after the same has been set up in its place between the joints. [In such cases, however, where cheapness is an object, the tar paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case, the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks.]

[403]

[404]

What I claim as new, and desire to secure by letters patent, is:

1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth."

On the first of March, 1875, Schillinger filed in the Patent Office a disclaimer, in which he disclaimed the matter above enclosed in brackets; and stated also that he disclaimed "the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."

The only defense set up in the answer is non-infringement. After a hearing, on proofs, the circuit court dismissed the bill, on the ground that the defendant's pavement did not infringe either one of the two claims of the patent.

This patent has been construed by several circuit courts since the disclaimer was filed. In *Schillinger* v. *Gunther*, 14 Blatchf. 152, in the Southern District of New York, in February, 1877, the defendant's pavement had a bottom layer of coarse cement, on which was laid a course of fine cement, divided into blocks by a trowel run through that course while plastic. It possessed the advantage of Schillinger's invention, because any blocks in the upper course could be taken up without injury to the adjoining blocks. Concrete pavement having been before laid in sections, without being divided into blocks, the invention of Schillinger was held to consist in dividing the pavement into blocks, so that one block could be removed and repaired without injury to the rest of the pavement, the division being effected by either a permanent or a temporary interposition of something between the blocks. It was held that the effect of the disclaimer was to leave the patent to be one for a pavement wherein the blocks are formed by interposing some separating material between the joints; that to limit the patent to the permanent interposition of a material equivalent to tar paper, would limit the actual invention; that using the trowel accomplished the substantial results of the invention in substantially the same way devised by Schillinger; that the only difference in result was that the defendant's method left an open joint; that having a tight joint was not a material part of Schillinger's invention; and that the mode of operation involved in using the trowel was within the first claim of the reissue as it stood after the disclaimer.

[405]

In the same suit (17 Blatchf. 66), in August, 1879, it was held that the disclaimer took out of the first claim of the reissue only so much thereof as claimed a concrete pavement made of plastic material laid in detached blocks, without interposing anything between the joints in the process of formation, leaving the claim to be one for such a pavement laid in detached blocks, when free joints are made between the blocks, by interposing tar paper or its equivalent.

In *California Arti. S. P. Co.* v. *Molitor*, 7 Sawy. 190, in the District of California, in May, 1881, the defendant's pavement was made by cutting a lower course into sections with a trowel, to a greater or less depth, according to the character of the material, making a joint, and doing the same with an upper course, the upper joint being directly over the lower joint. Into the open joint, in each case, was loosely put some of the partially set material from the top of the laid course, answering the purpose of tar paper. A blunt and rounded joint marker, which was said to be $\frac{1}{16}$ or $\frac{1}{8}$ of an inch in depth, was then run over the line of the joints, marking off the block. The pavement was weaker along the line of the joint than in any other place. This was held to be an infringement.

In *California Arti. S. P. Co.* v. *Freeborn*, 8 Sawy. 443, in the District of California, in January, 1883, it was held, that, where nothing was interposed in the joint between a newly laid block and one laid before, but, after the material in the newly laid block had partially set, a blunt and rounded joint marker, $\frac{1}{16}$ of an inch in depth, was run along the line between the newly laid block and the one laid before, there was no infringement.

[406]

In *Schillinger* v. *Greenway Brewing Co.* 21 Blatchf. 383, in the Northern District of New York, in July, 1883, it was held that the second claim of the reissue was infringed by a concrete pavement which had an open cut made by a trowel entirely through two courses of material, the line of cut in the upper course being directly over the line of cut in the lower course; and that the interposition of the trowel, though temporary, was an equivalent for the tar paper, even though the joint was left open after the trowel was removed, and was not made tight.

In *Kuhl* v. *Mueller*, 21 Fed. Rep. 510, in the Southern District of Ohio, in June, 1884, it was held that the use of any marker was an infringement, which made a cut ordepression having the effect to cause the pavement to break by upheaval, or cracking, from any cause, along the line of the cut or depression; and that, as the blocks from the pavements laid by the defendant showed clear, distinct and complete lines of division, there was infringement, whether those lines were produced by a trowel or by a marker.

The evidence in the present case shows that the defendant, during the process of making his pavement, marked off its surface into squares. But the question is whether he, to any extent, divided it into blocks, so that the line of cracking was controlled, and induced to follow the joints of the divisions, rather than the body of the block, and so that a block could be taken out, and a new one put in its place, without disturbing or injuring an adjoining block. The specification makes it essential that the pavement shall be so laid in sections "that each section can be taken up and relaid without disturbing the adjoining sections." Again, it says that the joint between the blocks "allows the several blocks to heave separately, from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks." This is essential; and in all the cases where infringement has been held to have been established, there have been blocks substantially separate, made so by the permanent or temporary interposition of a separating medium or a cutting instrument, so that one block could upheave or be removed without disturbing the adjoining

[407]

blocks. The patentee, in the disclaimer, expressly disclaimed "the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."

It appears that the defendant laid his pavement in strips from the curb of the sidewalk inward to the fence, in one mass, and then marked the strip crosswise with a blunt marker, which is made an exhibit, to the depth of about one sixteenth of an inch. But it is not shown that this produced any such division into blocks as the patent speaks of, even in degree. There were no blocks produced, and, of course, there was nothing interposed between blocks. The mass underneath was solid, in both layers, laterally. So far as appears, what the defendant did was just what the patentee disclaimed. The marking was only for ornamentation, and produced no free joints between blocks, and the evidence as to the condition of the defendant's pavements after they were laid shows that they did not have the characteristic features above mentioned as belonging to the patented pavement.

Without affirming or disaffirming the constructions given to the patent in the particular cases cited from the circuit courts, we are of opinion that, under any construction which it is possible to give to the claims, the defendant in this case has not infringed.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[481]

GREENWICH INSURANCE COMPANY,
Plf. in Err.,
v.
PROVIDENCE AND STONINGTON STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 481-484.)

Construction of insurance policy—to continue in force until terminated by notice from insured—payment for one month, not notice.

An agreement written upon the margin of an insurance policy provided that the policy should continue in force from the date of its expiration until notice was given to the insurer of its discontinuance, the assured to pay for such privilege *pro rata* for the time used. The payment by the assured for an additional month's insurance did not operate as notice, under this agreement, that the insurance was to be discontinued at the end of the month for which payment was made.

[No. 30.]

Submitted Nov. 8, 1886. Decided Dec. 20, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The case is stated by the court.

Mr. **William Allen Butler,** for plaintiff in error.

Mr. **Wheeler H. Peckham,** for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action on a policy of insurance, brought by the defendant against the plaintiff in error, to recover for the loss of the steamboat Rhode Island. It appeared on the trial that, on the 5th of April, 1880, the Providence and Stonington Steamship Company effected with the Greenwich Insurance Company a policy of marine insurance, numbered 2661, for $10,000, upon The Rhode Island, for the term of six months from date, with an agreement written in the margin as follows: "This policy to continue in force from the date of expiration until notice is given this Company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used." [482] The policy having been given in evidence, it was thereupon admitted by defendant's counsel that the steamer "Rhode Island" named in the policy was lost by a peril of the sea by running ashore on Bonnett's Point, in Narragansett Bay, November 6, 1880, and thereby suffered damage beyond the amount of the insurance, and that the plaintiff thereafter gave due notice and proof of the loss and interest. The amount of the insurance money and interest to the date of trial was thereupon proved to be the sum of $11,338.18.

The defendant's counsel then gave in evidence a letter written on behalf of the plaintiff to, and received by, the defendant on the day it bore date, which was as follows, to wit:

"Providence & Stonington Steamship Co.,
Treasurer's Office
"NEW YORK, Oct. 9, 1880.

"*The Greenwich Ins. Co., New York:*

"Gents: Herewith please find our check for sixty-six $\frac{67}{100}$ dolls., being one monthly premium, from Oct. 5 to Nov. 5, '80, on insurance on strs. Massachusetts & Rhode Island, as specified in your policies Nos. 2661 & 2662.

"Yours resp'y, C. G. BABCOCK, *Treas.*"

Plaintiff's counsel admitted that the letter was accompanied by the check of the plaintiff for $66.66, and that no other or further notice was given by the plaintiff to the defendant before the happening of the loss. The evidence being closed, the defendant's counsel prayed the court to rule and decide:

First. That the privilege written on the margin of the policy was wholly for the benefit of the assured, and gave them the option of continuing the policy in force after the date of expiration named in it without doing any act or thing; that the only notice or act on the part of the assured called for by the privilege was notice of the time of discontinuance whenever the assured should elect to give such notice, and make payment for the time used under the privilege.

Second. That in the absence of any such act or notice on the part of the assured the policy [483] and the risk continued from day to day under the terms of the privilege.

Third. That it was competent for plaintiff to make the time, which was left indefinite and uncertain by the terms of the privilege, definite and certain, and to fix the time to be used under the privilege by proper notice or act for that purpose.

Fourth. That the act of the plaintiff, on October 9, 1880, after date of expiration of the policy had passed, and the policy was in force under the privilege only, in paying one month's premium, and specifying the period of one

month, beginning October 5, 1880, and ending November 5, 1880, as the time for which payment was made, was in law an election to continue the risk in force for that month, and that the legal effect of the transaction was to continue the policy in force until November 5, at noon, and no longer.

And thereupon defendant's counsel prayed the court to direct a verdict for the defendant. This was refused, and the court directed the jury to find a verdict for the plaintiff.

This is the whole case; and the only question is whether the sending of the check for an additional month's insurance was, in legal effect, a notice of the discontinuance of the policy after that time. The agreement written in the margin of the policy was that the policy should continue in force from the date of its expiration until notice was given to the Insurance Company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used. It did not specify when, or how often, such *pro rata* payments should be made. The plaintiff might have waited a year before making a payment, unless the Insurance Company had demanded an earlier payment. The plaintiffs elected to make a monthly payment, and made it. It seems to us very clear that the mere making of such a payment was not, and did not amount to, a notice to discontinue the policy, or an election to have it continued in force for the month for which the payment was made, and no longer. The plan adopted by the plaintiffs, to pay from month to month, was a reasonable one and favorable to the Insurance Company. It would have been a less favorable one to have deferred any payment [484] longer, and a more favorable one to have paid for a longer time, when they did make a payment. But in whatever manner they chose to arrange their payments, it did not affect the terms of the policy. That continued in force by the terms of it, until the plaintiffs gave notice of its discontinuance. To say that a mere payment for a specified time would amount in law to such a notice, would make it dangerous for them to make any payment at all until they met with a loss. Even if in making a payment they should make an express stipulation or proviso that it was not intended as a notice of discontinuance, such a stipulation would be of no avail, if the defendants are right in the position they take. This, we think, would be an unreasonable construction of the contract and of the acts of the assured done in pursuance of it.

We cannot say that such a contract is a desirable one for insurers to make. Ordinarily, on an insurance for a specified time or adventure, such as a year for example, or a voyage, they get their premium in advance for the risk of the whole period or adventure; and if a loss happen ever so soon after the insurance is effected, no abatement of the premium is made. This gives them the benefit of average losses in determinate times or adventures, which is the solid basis on which all insurance rests. But the Insurance Company saw fit to make the contract in the form they did; and having made it, they are bound by its terms. And according to that contract, we think that they continued to be liable for a loss, although it happened after the time covered by the premiums already paid, the assured being only liable to pay *pro rata* for the time used, and not yet paid for.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EVA JANE WOLVERTON ET AL., by Guardian and Next Friend, AND MARGARET J. WOLVERTON DANIELS, *Plffs. in Errr.*, [485]

v.

ERASTUS A. NICHOLS ET AL.

(See S. C. Reporter's ed. 485-491.)

Adverse claims to placer mine—Statute of the United States as to—Civil Code of Montana as to actions for determining right to possession of real estate.

1. An adverse claimant to a placer mine, who has executed an instrument by which he agrees to convey the premises in dispute, at some future time, to a tenant in possession may, under the Code of Montana and sections 2325 and 2326, R. S., maintain an action in the courts of Montana to determine the right to the possession of the premises in dispute.

2. Where the plaintiffs in their petition assert claim to a certain tract, and the defendants in their answer admit that they have applied for a patent for the same tract, the conflict as to the right of possession sufficiently appears. If defendants did not wish to contest plaintiffs' claim they should have disclaimed.

[No. 67.]

Argued and submitted Nov. 30, 1886. Decided Dec. 20, 1886.

IN ERROR to the Supreme Court of the Territory of Montana. *Reversed.*

The case is stated by the court.

Mr. Edward O. Wolcott, for plaintiffs in error.

Messrs. **Walter H. Smith, Wm. Herbert Smith** and *F. C. Ford*, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Montana. The suit was brought in the District Court of that Territory to settle the controverted right to a patent from the United States for a placer mine, under sections 2325 and 2326 of the Revised Statutes of [48 the United States. It is therein enacted that a person who has located and set up a claim for mineral lands, and who desires to get a patent for it, shall file in the proper land-office an application for such patent, showing a compliance with the laws on that subject, and a plat and field notes of the claim, and shall post a copy of such plat, with a notice of the application for the patent, in a conspicuous place on the land, for sixty days. If no adverse claim for the same is filed with the register within sixty days from this publication, and if the papers are otherwise in proper form, the patent shall issue; but where an adverse claim is filed during the period of publication, it shall be upon oath of the person making the same, showing the nature, boundaries and extent of his claim, and "It shall be the duty of the adverse claimant, within thirty days after filing his claim,

to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment."

In the case before us the defendants, Nichols and Fuller, having made their application for a patent for a placer mine, the plaintiffs in error, the widow and heirs of Nelson Wolverton, filed the requisite claim in the register's office, adverse to that of Nichols and Fuller, in due time, and afterwards, in compliance with the Act of Congress, instituted the present suit in the District Court of Montana to determine the right of possession. Upon the trial of this case before a jury, the plaintiffs made what appears to be satisfactory proof that Nelson Wolverton had in his lifetime taken the necessary steps to establish his claim to the mine, or to that part of it now in contest, and had been dead about two years when these proceedings were commenced. In the course of the production of the plaintiffs' evidence it was developed by cross-examination that Mrs. Wolverton, acting for herself and as guardian of the two children of her deceased husband, had executed and delivered the following instrument:

"Know all men by these presents, that I, Margaret J. Wolverton, widow of Nelson Wolverton, deceased, for myself, and as guardian [487] for Eva Jane Wolverton and William Arthur Wolverton, infants under the age of twenty-one years, for and in consideration of the sum of one dollar to me in hand paid by the Colorado and Montana Smelting Company, and the further consideration of said company prosecuting to a successful conclusion the cause of J. R. Clark, administrator of the estate of Nelson Wolverton, deceased, *et al. v.* Silas F. King, now pending in the District Court in and for Silver Bow County, have covenanted and agreed, and by these presents do covenant and agree, to convey, by a good and sufficient deed of conveyance, duly acknowledged, all that certain land bounded and described as follows: Beginning at a point on the easterly extremity of certain placer mining claims belonging to the estate of the said Nelson Wolverton, and located in Independence Mining District, Silver Bow County, Territory of Montana, in Township No. 3 North, Range No. 8 West of the principal meridian, which said point is due east from the most southerly point of a certain fence running westerly therefrom along the general course of said Silver Bow Creek; thence in a due west line from said point, touching the most southerly point of said fence, a distance of about thirteen hundred feet, to a point on the westerly extremity of placer mining claim number two hundred and thirty; thence from said point due south along the westerly boundary of said last-named placer claim to the most southerly boundary thereof; thence along the most southerly boundary of said placer mining claim, and placer mining claims numbers 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 and 242, in an easterly direction, to the southeast corner of said placer mining claim number two hundred and forty-two; thence in a northerly direction from said corner to the point or place of beginning; it being intended to convey all that part of said placer mining claims numbered from two hundred and thirty to two hundred and forty-two, both inclusive, which lies south of the most southerly point of the fence first above mentioned: To have and to hold the same unto the said The Colorado and Montana Smelting Company, their successors and assigns, for their own benefit and behoof forever.

"In witness whereof I have hereunto placed my hand and seal this 12th day of May, eighteen [488] hundred and eighty-one.

"MARGARET J. WOLVERTON, [Seal.]
"MARGARET J. WOLVERTON, [Seal.]
As guardian for Eva Jane Wolverton and William Arthur Wolverton.

"In presence of CALEB E. IRVINE."

It was proved that the Colorado and Montana Smelting Company, who had held this property for two years under a lease, or as tenants of the Wolvertons, were now in the actual control and possession of the property mentioned in this instrument. An attempt was also made to show that they had performed the condition mentioned in it, and were entitled to the conveyance which that instrument provided should be made when this was done. Thereupon, at the suggestion of defendant's counsel, the court ordered a nonsuit. This judgment was affirmed in the Supreme Court of the Territory, and is the subject of consideration here.

The ground upon which this nonsuit was ordered is that the plaintiffs were not in the actual possession of the property at the time of the trial, and that under the Statute of Montana, section 854 of the Code of Civil Procedure, this was an absolute necessity to the successful prosecution of this action. That section is in the following words:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

But whatever may be the effect of that statute in an ordinary action which has no direct relation to the proceedings under the Act of Congress which we have referred to, we are of opinion that, as applicable to such a case, the construction given by the court is entirely too restricted. The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land-office, and the present suit is but a [489] continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patent. The Act of Congress requires that the certified copy of the judgment of the court shall be filed in the land-office and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties.

It appears from the evidence that at the time these proceedings took place in the land-office the smelting company was in possession as the tenant of the Wolvertons, and that the contract by which Mrs. Wolverton undertook upon certain conditions, to convey all the right of the Wolverton heirs to the smelting company was made after the commencement of those proceedings. It might very well be maintained

that, having thus commenced such proceedings, at a time when the possession was in the Wolvertons, they could be conducted to a termination in their name. But however that may be, it is quite clear, upon the testimony before us, that Mrs. Wolverton had not completely parted with her interest and that of her children in the land in controversy, at the time of the trial. The language of the instrument, by which this is supposed to have been done, is that she will thereafter convey the lands described. This conveyance has never been made. The whole thing rests in promise or covenant to do it in the future. This covenant also is that it shall be done by a good and sufficient deed of conveyance. These words have always been held to mean a conveyance of a good title, and though in point of fact the legal title was in the United States, as it is yet, still the parties understood very well that they were dealing with regard to a class of claims which the United States by statute and otherwise had always recognized, and the meaning of the covenant was that she should convey such an interest in the property as would enable the other parties, if they chose, to obtain the patent from the government. She, therefore, was interested to defeat the claim of the defendants, who were seeking to get that patent; it was her duty and her interest to contest their claim and have the right [490] to the patent decided in favor of the claims which she set up as being derived from her late husband. This was necessary to enable her to make that "good and sufficient conveyance" which this covenant required, and which had never been made, and if she had stood by and permitted the defendants to obtain the patent from the United States she would have been unable to comply with her contract to convey a good and sufficient title to the smelting company. In fact, so far as regards the right of possession, which alone is in controversy in this suit, the interest, the claim and the rights of the plaintiffs, the Wolvertons, and of the smelting company, are in privity with each other and are identical. And, inasmuch as this is a contest provided for by the Statutes of the United States in order that the officers of the land department may be informed which of the two contestants before it is entitled to the patent, we see no reason why the plaintiffs here should not have been permitted to have the verdict of a jury on that question in this suit. And, since such possession as the smelting company had was a part of and in subordination to the title of the Wolvertons, the judgment in this case between the parties to this suit would have settled the question which the Act of Congress required to be settled. We are of opinion, therefore, that, so far as regards this, the main ground on which the court below directed a nonsuit, that court erred.

Something is said in the brief about the fact that the plaintiffs have failed to show that the possession of these parties conflicted. On that point it is sufficient to say that the plaintiffs, in their petition, asserted a claim to the southeast quarter of the southeast quarter of section 23, in Township 3 North, Range 8 West of the principal meridian of Montana, and that the defendants, in their answer, admit that they have applied for a patent for the same land exactly. If they did not desire to have the question of the right of possession to any part of these forty acres submitted to a jury on the ground that they did not claim it, they should have made a disclaimer. Apart from this, so far as relates to the evidence on the subject, we are of opinion that there was sufficient to go to the jury to show that the plaintiffs' claim did include a part of that claimed by the defendants in this action. [491

For these reasons the judgment of the Supreme Court is reversed, and the case remanded for further proceedings.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

HERMAN GILBERT AND JACOB SCHARTZEL, JR., *Plffs. in Err.*, [491]
v.
MOLINE PLOW COMPANY.

(See S. C. Reporter's ed. 491–494.)

Action on guaranty—letter of credit—evidence.

In an action on a written guaranty in which the guarantors stated that they would "satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators," the original order, given by the principal prior to the guaranty, and which was not referred to in the guaranty, was inadmissible for the purpose of showing that the guarantors had been released by the giving of credit by the plaintiff different from that contemplated. The guaranty was complete in itself, and no additional agreement as to the character of the credit to be given could be imported into it by parol.

[No. 72.]

Argued and submitted Dec. 3, 1886. Decided Dec. 20, 1886.

IN ERROR to the Supreme Court of the Territory of Dakota. *Affirmed.*

The case is stated by the court.

Mr. H. K. Whiton, for plaintiffs in error.

Mr. **R. D. Mussey**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Dakota. The action was [492] brought by the Moline Plow Company, as plaintiff, against Herman Gilbert and Jacob Schartzel, defendants. It was tried before a jury, and verdict rendered for the plaintiff. This judgment, on appeal to the Supreme Court of the Territory, was affirmed. The suit was founded on the following instrument in writing, signed by the defendants:

"SIOUX FALLS, D. T., March 9, 1878.

"Moline Plow Co., Moline Ill.

"Sirs: We, the undersigned, are acquainted with Peter Gillman, of this place (formerly of Fond Du Lac, Wis.), and have no hesitation in indorsing him as an honest, capable business man and deserving of confidence and credit. We think your informant, in regard to Mr. Gillman's business ability and capacity, was in error, if not selfish and malicious. We will satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators.

"WM. B. DICK.
"H. GILBERT.
"JACOB SCHARTZEL."

It seems that on January 21, 1878, Peter Gillman had sent an order to the Moline Plow

Company requesting them to forward him certain goods in which they were dealing, and specifying the terms of payment, with which they declined to comply on the ground that they were not sufficiently advised of his responsibility. After obtaining the above instrument, signed by the defendants, Gillman inclosed it to the Plow Company with the following letter:

"SIOUX FALLS, D. T., March 9, 1878.
"Moline Plow Co., Moline, Ill.
"Sir: Will you accept my order under the recommend inclosed; if so, ship me the breakers as ordered; also the cultivators, and about 6 vibrating harrows. Hoping we will get better acquainted, I am sorryabout such a report as stated to you, and I know you will think so much more of me. (Too late in season for harrows.)
"I remain, yours, PETER GILLMAN.
"If you accept my order, please ship the goods at once, and oblige "P. G."

[493]

The plaintiffs accepted the guaranty, notified Gillman that it was accepted, and forwarded the goods. The dealings between these parties under this guaranty continued during the spring, the last shipment being made about May 24, 1878. On July 28, following, a settlement was made, and for the balance found due from Gillman to plaintiffs two notes were given, one payable September 15, 1878, and the other November 15, 1878.

An attempt was made by the defendants to show that credits were given in this transaction which released them from the liability of their letter of credit or guaranty. To establish this they insisted that the original order given by Gillman in January was to be taken as a part of, or an explanation of, their letter of credit. The court held that the letter of credit was complete within itself, and that the defendants could not import into it by parol any additional agreement as to the time and character of the credit to be given to Gillman, and instructed the jury to that effect. This is the principal error relied upon to reverse the judgment, which we think is no error.

The instrument sued on contains no reference to the previous letter of Gillman to the Plow Company, nor any restriction as to the terms on which they held themselves liable for his orders, except that they shall be given "this spring." The language used is, "We will satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators." The letter from Gillman dated March 9, referring to his previous order, is in fact a new order of that date, and evidently made under and in pursuance of the guaranty of the defendants. All the goods delivered to Gillman by the plaintiffs for which suit is now brought against the defendants were delivered during that spring, and were delivered after the receipt of this guaranty. The court was right therefore in not permitting the defendants to explain or qualify that guaranty by the parol testimony which they offered. Nor do we see anything in the testimony, as found in the bill of exceptions, to discharge the defendants from the obligation incurred by the letter of credit, or guaranty, whichever it may be.

[494]

An error is assigned by the brief, on the admission in evidence on the part of the plaintiffs of a letter-press copy of a letter of the Moline Plow Company to Gillman, signed by Lobdell, the witness, on the part of that Company. It is a reply to the letter received from Gillman of March 9, 1878, inclosing the guaranty, and reads as follows:

"PETER GILLMAN, Esq., Sioux Falls D. T.
"Yours of the 9th is at hand and satisfactory. We will ship your goods in a day or so, and hope they will arrive promptly.
"LOBDELL."

The objection was made that it was a letter-press copy and not the original. Without deciding whether a letter-press copy can always be introduced in place of the original, as is contended by the counsel for the defendants in error, it is sufficient to say that Lobdell, the witness, had previously testified, without objection, that he had acknowledged the receipt of the letter of guaranty and order by a letter to Gillman, in which he told him that the goods would be shipped in a few days. The introduction of this copy was, therefore, wholly immaterial. And even without such proof the acknowledgment of the letter of Gillman was unnecessary to fix the liability of the defendants, and could have worked no prejudice.

These are all the assignments of error worthy of attention, and the judgment of the Supreme Court is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*, [566]

v.

E. J. McLAUGHLIN, EXR. of JOHN M. O'NEIL, Deceased.

(See S. C. Reporter's ed. 566-581.)

Liability to employee for negligence of fellow servant under Iowa Statute—constitutionality of Act—conflict with Fourteenth Amendment to Constitution of United States.

While an employee of a railroad company was engaged in the removal of a lamp bracket from a car, standing upon a side track, he was thrown from a ladder, and injured by a car and locomotive being run upon the side track, through the opening of a switch. He recovered judgment for $15,000. Upon the trial and upon the writ of error here it was insisted by the Railroad Company that the employee was guilty of negligence which contributed to his injury, in not observing the approaching engine and car, and that the Statute of Iowa permitting a recovery in such a case was in violation of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall "deny to any person, within its jurisdiction, the equal protection of the laws," and that the Railroad Company was not guilty of negligence. The defendant in error insisted that the switchman, the fireman upon the engine, and the engineer were all guilty of negligence. These questions were presented by exceptions to certain instructions given and refused, and this court being equally divided upon the questions, the judgment below stands affirmed.

[No. 64.]

Argued Nov. 29, 30, 1886. Decided Dec. 20, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Iowa. *Affirmed.*

An action was brought in the Circuit Court of Clinton County, Iowa, by the defendant in error's testator. Upon the petition of the plaintiff in error, alleging that it was a foreign Corporation, and that from prejudice and local influence it would not be able to obtain justice in the state court, the cause was transferred to the United States Circuit Court. The defendant in error (plaintiff below) alleged in his petition that, while in the employment of the plaintiff in error (defendant below) as a coach builder, and specially employed to put on and remove lamp brackets on a car at the time, and while properly and not negligently performing his duties on one of the defendant's cars, standing on one of the defendant's side tracks, the plaintiff being at a height of six or seven feet from the ground on a ladder which was inclined against the car, his position became suddenly dangerous by reason of the shifting of certain switches and running an engine and a car on the track where he was at work. That the switchman saw plaintiff in this position, which became dangerous by said acts, and although said switchman could easily have prevented collision and injury of plaintiff by the exercise of ordinary care and caution in either apprising plaintiff of the sudden approach of said engine, or turning the brake on said car, or causing the engineer to stop the car, he failed to do so, but carelessly and heedlessly caused said collision to take place to plaintiff's injury. That the fireman upon the said engine saw that plaintiff was exposed to danger and peril, and permitted said collision to take place, although by the exercise of ordinary care he could have prevented the same by notifying the engineer. That the engineer in charge of the engine thrown upon said track was ordered to stop his engine by reason of plaintiff's peril, and could easily have obeyed said instruction, but heedlessly and carelessly refused to inform himself of such peril, and with a negligent disregard of consequences hurried said engine on to a collision. That the facts rendering plaintiff's position perilous by reason of the movements of said engine and cars were to plaintiff entirely unknown, although due care and caution were exercised by him.

The defendant below denied the allegations of the petition, and alleged that the plaintiff was guilty of negligence which contributed to his injury in this; he failed to notice or listen for the approach of engine or cars, and failed to get off the ladder when the engine and car which caused the injury approached the line of cars where plaintiff was at work, in plain sight of plaintiff with the bell ringing to warn persons of their coming.

The case was submitted to a jury. It was shown that the plaintiff was required, in the performance of his duty as an employee of the Railway Company as a repairer of cars, to perform work on and about its trains. At the time of the injury he was acting under the direct orders and instructions of his superior. He stood upon a ladder, and at the time of the injury was facing westwardly while the engine which caused the injury came from the east. Before he exposed himself in his work of repairing, he found from examination of the switches that four switches must be turned east of him before a car could enter the track on which he was working, and the employees when required to turn such switches could plainly see him on the ladder. From his position on the ladder the plaintiff could not see the nearest switch, the turning of which threw the car and engine on to the track causing the injury, because the lever was on the north side obscured by the standing cars. Just before the accident, plaintiff with a hammer was breaking screws which held the lamp bracket, with his face within four or five inches of the cars. There were from twenty to thirty trains each way per day, and two switch engines in the yard all day, keeping up a clatter and constant ringing of bells.

O'Neil didn't know of the approach of the engine. He stated he could have heard the click of the engine going over the switches if he had been listening. The tracks are straight at that place and the cut-offs are diagonally across. The plaintiff had been upon the ladder probably two minutes when the car was struck. He had drawn two screws, and broken two off, making some noise but not a great deal. His feet were about six feet from the ground. To look eastward, the direction the engine came from, he would have to step down or lean back some ways; otherwise his line of vision would be obstructed by the cars. He received no warning. Had the engine and car intended to pass northward, plaintiff could not have discovered any change of the switch which would have allowed them to pass upon the track where he was stationed. The engine could not have come upon the track where the plaintiff was stationed, without a change in the switch which was concealed from his view, and if he had seen the engine with the cars upon the main track, and heard the bell ringing, he would not have considered it a warning to get down, as he would have assumed that they were going on the other track, and expected to be warned of a change in the switch, and exposure thereby to danger. Plaintiff testified that if the bell of the engine that struck the cars had been ringing as it came up, he most certainly would have heard it. There was nothing to prevent switchmen, engineers and firemen, coming in and crossing over the switches bearing to the northward, from seeing plaintiff at his work standing upon the ladder. The switchman saw the plaintiff on the ladder at a distance from the point where the striking cars caused the injury; "thought he would get down; didn't pay much attention to it." The fireman saw the plaintiff when about thirty feet from the point where the car was struck; did not state the fact to the engineer, but "just said whoa; was going to tell him to stop, that there was a car repairer on a ladder on the side of the car; but before I could say any more he got the signal on his own side of the switch engine to come ahead." When the engineer heard the word "whoa," he turned his engine back, and the car would hardly have struck unless, upon the signal he received to go ahead, he had turned her ahead again. The engineer knew it was the duty of the fireman to warn him of danger, and he obeyed his signal to stop by reversing the lever. He did not inquire why the fireman ordered him to stop, but sent the engine ahead on the signal of the switchman. The switch engine went on to the track where plaint-

it was stationed, about twenty times each day, to put away or to get away cars. Two switch engines were used in the yard in the day time.

The court gave to the jury instructions of which the following were excepted to:

"4. Under the Statute of the State of Iowa every corporation operating a railway is liable for all injuries caused to, and the consequent damages sustained by, the employees of such corporation in consequence of the neglect of a coemployee in the performance of his duty to the company; that is to say, the negligence of an employee in the discharge of the duties of his position in the employ of the company is deemed to be the negligence of the corporation, and will render the company liable for any injuries caused thereby to any of its other employees, unless the person injured is himself guilty of negligence contributing to the accident.

"14. It is claimed on part of the plaintiff that the switchman on the south side saw O'Neil's danger in time sufficient to have averted the danger.

"On part of defendant it is claimed that this switchman did not see O'Neil in time; and under such circumstances as that, it was his duty [575] either to have stopped the engine or warned the plaintiff of the danger. Has the plaintiff by a fair preponderance of evidence satisfied you that this switchman had knowledge of plaintiff's danger in time sufficient to have averted the accident either by stopping the engine or through a warning to the engineer, or by notifying plaintiff of the coming danger, so that he could have avoided the accident?

"It is not sufficient for it now to appear that possibly the switchman might have done so if he had known all the facts that are now made apparent. The true inquiry is, Was this switchman, acting under the light and knowledge he then had, wanting in the exercise of ordinary care in not stopping the engine or in not notifying plaintiff of his danger? Did he or not have knowledge of the danger to which plaintiff was exposed in time sufficient to enable him by the use of ordinary care to have caused the engine to be stopped, or to warn the plaintiff so that he might have gotten down from the ladder before the cars came in contact?

"15. It is further claimed on behalf of plaintiff that the fireman, Riggs, was negligent in not notifying the engineer of the peril to which plaintiff was exposed. There is evidence tending to show that Riggs saw the plaintiff upon the ladder and knew of his position, and that there was danger of an injury being caused to him if he did not get down before the cars came in contact; that Riggs gave a signal to the engineer to stop in time to prevent the cars coming into contact, which signal the engineer obeyed by shutting off the steam and reversing the engine.

"On the part of plaintiff it is claimed that Riggs should have notified the engineer of the necessity for stopping the engine; namely, that there was a man in a dangerous position; and it is claimed that Riggs had time sufficient to have so done, so that the engineer could have prevented the cars coming in contact.

"On part of defendant it is claimed that Riggs did all that could reasonably be expected of him; that he gave the proper signal to stop the engine, and that in obedience thereto the engineer reversed his engine and brought it nearly to a stop, and then, before Riggs had time to ascertain the necessity for any further action on his part, the engineer, in obedience to a signal from the switchman, which could not have been reasonably foreseen by Riggs, gave a forward motion to the engine, and that it was beyond the power of Riggs to again notify the [576] engineer to stop in time to prevent the accident.

"16. It was the duty of Riggs, if he saw the plaintiff was in a dangerous position, and that there was risk of an accident if the cars were brought into contact before plaintiff should get down from the ladder, to take such action as was reasonably within his power to stop the engine and prevent the cars from coming into contact.

"When human life or limbs are in peril, ordinary prudence requires that all reasonable means should be used by those who are aware of the danger to avert the same, and avoid injury to the person exposed thereto.

"Riggs himself testifies that he saw plaintiff upon the ladder; knew that he was in a dangerous position if the cars were brought into contact, and saw, as the engine approached the standing cars, that the plaintiff remained upon the ladder.

"Under these circumstances, was or was it not his duty to notify the engineer, who had control of the engine, of the nature of the danger to be avoided, or was his duty discharged when he gave the signal to stop by crying out 'Whoa'?

"Did he or did he not have sufficient time to give such information to the engineer, if you find the same should have been given?

"It is for you to determine what ordinary prudence, when human life and limb were in danger, required of Riggs under the facts and circumstances known to him at that time, and whether Riggs did or did not do all that ordinary prudence required of him, and all that he had a fair opportunity to do, in the exercise of ordinary care, and in the brief time in which he was required to think and act?

"17. It is further claimed on part of plaintiff that the engineer did not exercise ordinary care and prudence on his part, in that, after receiving the signal to stop from the fireman, and after, in obedience thereto, reversing his engine and bringing the same nearly to a stop, he then, in obedience to a signal from the switchman on the north side of the track, gave a forward motion to the engine and brought the cars into contact, without first ascertaining the reason why the signal to stop was given by [577] the fireman. On part of defendant it is claimed that the switchman and fireman have a right to signal the engineer, and that it is the duty of the latter to obey such signals; and if the switchman gave the signal without fault on his part, there would not be negligence on part of engineer in obeying the signal thus given.

"18. That the engineer is bound to obey signals given by the switchmen is doubtless true, as a general proposition, but by this can only be meant that the engineer is bound to obey if there is no good reason why he should not obey.

"Suppose he received a signal from a switchman to move forward when he sees that if he does

he will cause an accident, would it not then be clearly his duty to disobey the signal? Suppose that the instant he receives the signal from the switchman to move forward his fireman notifies him that there is a man on the track in danger, and that he must stop. It cannot be doubted that in such cases the engineer must disobey the signal from the switchman. Take it in this case. Suppose the engineer knew that the plaintiff was on the ladder, exposed to danger if the cars were brought into contact, and the switchman gave the signal to move forward, would it be acting with reasonable prudence to obey the signal, or would it not be clearly the duty of the engineer to disobey the same? But it is in evidence that the engineer in this case did not know in fact that the plaintiff was in danger. He had received a signal from his fireman, on the left of his engine, requiring him to stop, and he obeyed it by shutting off steam and reversing the engine.

"What inference did the engineer draw from the signal given him by the fireman to stop? Did he or did he not infer therefrom that there was some sufficient reason known to the fireman why the engine should be stopped? Was he not bound to so infer, and if he did, what was it his duty to do when he received the signal from the switchman on the other side of the track to move forward? Did or did not ordinary care and prudence require of him to ascertain from his fireman the reason of the order to stop given by the fireman on his left, before he obeyed the order to move forward given him by the switchman on his right?

[578] "The engineer himself testifies that the signal 'whoa' given by the fireman was given somewhat sharply, indicating the necessity for promptly stopping the engine; and he further testifies that from the distance from the engine to the stationary cars he supposed the order to stop was given by the fireman, not because the cars were close enough for coupling, but for some other cause or a reason unknown to him, and that he started the engine forward upon receiving the signal from the switchman without making any inquiry of the fireman whether he could safely do so, or without inquiring why the fireman had ordered him to stop the engine.

"In so doing, did or did not the engineer exercise the care which ordinary prudence demanded of him?

"19. If, under the instructions given you, you find that none of the employees of the Company were guilty of negligence causing the accident, then your verdict must be for defendant; and you need not consider any of the questions submitted to you.

"If, however, you find that the defendant was negligent in any of the particulars alleged against it, and that such negligence was the immediate cause of the injury to plaintiff, you will then consider whether the defense of contributory negligence set up by the defendant has been made out and sustained by a fair preponderance of the evidence, the burden of the issue in this respect being upon the defendant; or, in other words, in order to defeat plaintiff's recovery on the ground of contributory negligence on his part, you must be fully satisfied from the evidence that plaintiff was guilty of negligence which proximately contributed to the injury complained of.

"21. Extraordinary care was not required of him. He was expected to do the work he was sent to attend to, and he could only be required [579] to exercise the care and watchfulness that were compatible with the discharge of his duty to the Company.

"Plaintiff testifies that he did not see or hear the engine when it was approaching, and it is claimed that his failure to notice its approach is proof of his negligence, on the theory that if he had kept his senses on the alert he would either have seen or heard the engine in time to have avoided the accident.

"On the part of plaintiff it is claimed that his failure to notice the approach of the engine was due to the fact that the work he was engaged in doing so occupied his attention that, without fault upon his part, he failed to notice the coming of the engine, either by sight or sound.

"You will consider all the evidence introduced in the case tending to show what work the plaintiff was required to do; the position he occupied upon the side of the car; the direction in which his face was turned whilst at work upon the ladder; the character of the work upon which he was actually engaged, and the demands, if any, which this work made upon his attention; the distance from where the plaintiff was at work to the point where the engine came upon track No. 2; the number of cars, if any, between that upon which plaintiff was at work and the approaching engine, and all facts shown by the evidence adduced by either party which tend to throw light upon the question; and from this evidence you will determine whether the defense of contributory negligence, as alleged by the defendant, has been established by a fair preponderance of evidence, the burden of establishing the same being, as already stated, upon the defendant.

"22. If the evidence, under the instructions given you, fails to establish the fact that the plaintiff was wanting in the exercise of proper care and watchfulness whilst engaged in repairing the way-car of defendant, then the defense of contributory negligence is not made out, and on this issue, you should then find for plaintiff; but, on the other hand, if you find that the failure of plaintiff to notice the approach of the engine was due to a want of ordinary care and watchfulness on part of plaintiff, you will then consider and determine whether the defendant had knowledge of the dangerous position of plaintiff and of his failure [580] to notice the approach of the engine in time to have avoided the injury to plaintiff by the exercise of reasonable care on its part; the rule of law being that, although the plaintiff may have negligently exposed himself to an injury, yet if the defendant, after discovering the exposed situation and danger negligently incurred by the plaintiff, can, by the exercise of reasonable care on its part, prevent any injury to plaintiff it is bound so to do, and a failure to exercise such reasonable care, after knowledge of the danger to which plaintiff may be exposed, will render the defendant liable for a resulting injury, notwithstanding the fact that plaintiff may have been in the first instance negligent on his part. Under such circumstances plaintiff's negligence is not deemed to be a proximate cause of the injury.

"If then you find from the evidence that the

plaintiff, through his failure to notice the approach of the engine in time to get down from his exposed situation on the side of the way-car, was guilty of negligence contributing to the cause of the injury complained of, then your verdict must be for the defendant; unless you further find that, after discovering the fact that plaintiff was at work upon the way-car in such a manner as to expose him to danger in case the cars were brought into contact, the defendant could, by the exercise of proper care, have prevented the accident, and that having knowledge of the danger to which plaintiff was exposed the defendant failed to exercise proper care, thereby causing the accident, in which case your verdict should be for the plaintiff.

"That is to say, if you find from the evidence that the switchman, Wilde, and the fireman, Riggs, or either of them, saw the plaintiff in his exposed position, and knew the danger to which he would be exposed if the cars were brought into contact whilst the plaintiff was on the ladder, then it was the duty of such switchman or fireman, as already explained to you, to take such reasonable means as were fairly within his power, to prevent bringing the cars into contact, after he knew that plaintiff had failed to notice the approach of the engine.

"If by the use of such means on part of those in charge of the engine, the accident could have been prevented, and you find that [581] they have failed to use such means after having knowledge of the plaintiff's exposed position and failure to notice the approach of the engine, and that in consequence of such failure the accident was caused, then the fact that the plaintiff failed to notice the approach of the engine would not defeat his right of recovery."

The plaintiff in error also excepted to the refusal of the court to give the following:

"Conceding to all the testimony its greatest probative force, it is not sufficient to warrant the jury in finding the defendant or any of its servants guilty of any negligence whereby the plaintiff received his injuries. The undisputed and uncontradicted evidence shows that the plaintiff was guilty of negligence which directly contributed to his injury. You are therefore instructed to find for the defendant."

The plaintiff recovered judgment for $15,000, and upon the writ of error to review that judgment here, it was insisted by the Railroad Company that the employee was guilty of negligence which contributed to his injury, in not observing the approaching engine and car, and that the Statute of Iowa permitting a recovery in such a case was in violation of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall "deny to any person, within its jurisdiction, the equal protection of the laws." The defendant in error insisted that the switchman, the fireman upon the engine, and the engineer, were all guilty of negligence. These questions were presented by exceptions to the foregoing instructions given and refused.

While the case was here pending the death of the defendant in error was suggested, and his executor entered his appearance.

Messrs. **Charles A. Clark** and **N. M. Hubbard**, for plaintiff in error:

Three questions are involved: (1) Can any negligence be imputed to the defendant or its servant, by reason of which the plaintiff was injured? (2). Is not the plaintiff guilty of negligence which directly contributed to his injury? (3.) Is not the law of Iowa which makes railway companies liable for the negligence of one employee by reason of which another employee in the same grade of employ is injured repugnant to, and violative of, the last clause of the first section of the Fourteenth Amendment to the Constitution of the United States? These questions all arise on instructions asked by defendant and refused by the court, and on instructions given by the court on its own motion. The court should have instructed the jury that the testimony was not sufficient to warrant it in finding the defendant or any of its servants guilty of any negligence, whereby the plaintiff received his injury. It should have instructed the jury that the plaintiff was guilty of negligence which directly contributed to his injury, and could not therefore recover. The fireman gave his signal to stop the engine in time; it was obeyed by the engineer, and if the switchman had not signaled to come ahead the engine and car would have been fully stopped. There is no pretense of wantonness on the part of the fireman, nor was he guilty of negligence in not anticipating that his order to stop would be countermanded. He acted with reasonable prudence in the emergency.

It is said that the plaintiff's attention was necessarily absorbed by his work, and the inference is drawn therefore that he did not need to be watchful, or look out for his own safety. It is enough to say that inattention is one of the very first definitions of negligence.

Miller v. *R. R. Co.* 25 Mich. 291.

Where the plaintiff has been guilty of neglect he cannot recover, unless the negligence of the defendant is such as to imply a disregard of consequences or a willingness to inflict the injury.

Lafayette & I. R. R. Co. v. *Adams*, 26 Ind. 76; *R. R. Co.* v. *Hutchinson*, 47 Ill. 409; *Brownell* v. *Flagler*, 5 Hill, 283; *Rathbun* v. *Payne*, 19 Wend. 399.

It is only in cases where negligence of the plaintiff is remote, and not proximate to the injury, that the defendant is liable for mere neglect.

Dowell v. *Navigation Co.* 85 Eng. Com. L. Rep. 5 E. & B. 194; *Tanner's Exrs.* v. *R. R. Co.* 60 Ala. 621; *Murphy* v. *Deane*, 101 Mass. 455.

That the Statute of Iowa is in conflict with the last clause of the Fourteenth Amendment of the Constitution is within the decision of the court in *County of Santa Clara* v. *R. R. Co.* 18 Fed. Rep. 385.

Mr. **William A. Foster**, for defendant in error:

Where the facts are in dispute, if different minds may draw different conclusions therefrom, the question is proper to be submitted to a jury.

D. & M. R. R. Co. v. *Van Steinberg*, 17 Mich. 99; *Briggs* v. *Taylor*, 28 Vt. 180; *Isbell* v. *R. R. Co.* 27 Conn. 393; *Park* v. *O'Brien*, 23 Conn. 347; *Ireland* v. *Plank R. Co.* 13 N. Y. 533; *R. R. Co.* v. *Stout*, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745); *Patterson* v. *Wallace*, 1 McQ. H. of L. Cas. 748.

Whether there was neglect on the part of the

switchman was a question properly submitted to the jury.

R. R. Co. v. *Stout, supra.*

Whether sufficient warning was given to the engineer by the fireman, to stop the engine, was properly submitted to the jury.

Lombard v. *R. R. Co.* 47 Iowa, 494.

The instruction that although plaintiff may have negligently exposed himself to an injury, yet if the defendant, after it discovered the exposed station and danger negligently incurred by the plaintiff, could, by the exercise of reasonable care on its part, prevent any injury to plaintiff, a failure to exercise such reasonable care will render the defendant liable for the resulting injury, notwithstanding the fact that plaintiff may have been, in the first instance negligent on his part, correctly stated the law.

Shearm. & Redf. Negr. § 86, 25 and notes; *Railway* v. *Still*, 19 Ill. 499; *Morris* v. *R.R. Co.* 45 Iowa, 29; *Lombard* v. *R. R. Co. supra; Moore* v. *R. R. Co.* 47 Iowa, 688.

By the Code of Iowa, 1873, section 1307, chapter 5, it is provided that everyone operating a railway shall be liable to employees, etc. By section 1288 of the same chapter, this provision is applied to all lessees or other person owning or operating such railway. It thus appears that the statutory liability is not specially applicable to liabilities of corporation railways, but is general and applies to individuals as well; in fact applies alike to all engaged in the hazardous business of operating railways. The Constitution of Iowa provides (§ 30, art. 3): "All laws shall be general and of uniform operation throughout the State." This statute has been held by the Supreme Court of Iowa, to operate uniformly upon all persons under the circumstances therein contemplated, and to be constitutional.

McAunich v. *Miss. & M. R. R. Co.* 20 Iowa, 338; *Deppe* v. *Chic. R. I. & P. R. Co.* 36 Iowa, 52; *Bucklew* v. *R. Co.* 64 Iowa, 603.

The *Santa Clara County Case*, 18 Fed Rep. 385, simply held that a statute which permitted a citizen to deduct from the value of his land, when it was listed for taxation, any incumbrance that might be upon it, and forbidding a railroad corporation under the same circumstances from making the same deduction, was a violation of the constitutional provision. That decision has no application to the case in hand.

Mr. Chief Justice **Waite** announced that the judgment of the court below was

Affirmed by a divided court.

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[502] CHARLES H. BROOKS, *Plff. in Errr.*,

v.

EDWARD S. CLARK.

(See S. C. Reporter's ed. 502-513.)

Removal of causes—joint suit against partners—judgment by default against resident defendant—cause, not removable on petition of nonresident defendant—Statutes of Pennsylvania—construction of—practice.

1. A joint action on a joint liability against two defendants is not separable for purpose of removal from a state court, even after judgment by default against one of the defendants who is a citizen of the same State as the plaintiff.

2. In a joint action brought under a Statute of Pennsylvania against two partners, judgment was obtained by default against one of the defendants. The other, who was a nonresident, voluntarily entered his appearance "in the same suit." Upon his petition for removal it is held that the cause is not removable; said proceeding being auxiliary to the original suit, from which it is not separable.

3. It *seems* that a different rule would apply had the plaintiff proceeded against said nonresident by bringing another suit under a certain other Statute of Pennsylvania.

[No. 787.]

Submitted Nov. 17, 1886. Decided Dec. 13, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Frank P. Prichard** and **John G. Johnson**, for plaintiff in error:

An original joint cause of action does not become separated into several controversies, simply because the defendants sever in their pleadings and defenses. A careful examination of the case on this subject will show that they group themselves into three classes, viz: First.—Where no judgment has been entered, but separate defenses have been raised by the defendants. In such cases one defendant cannot remove, because the plaintiff can still elect to treat the controversy as joint.

Louisville & N. R.R. Co. v. *Ide*, 114 U. S. 52 (Bk. 29, L. ed. 63), is an example of this class.

Second.—Where the plaintiff has entered an interlocutory judgment by default against one defendant. In such cases the other defendant cannot remove, because the final judgment will still be joint, and the defendant against whom the interlocutory judgment was entered remains interested in and will be affected by the final judgment.

Putnam v. *Ingraham*, 114 U. S. 57 (Bk. 29, L. ed. 65), is an example of this class.

Third.—Where a final judgment has been rendered against one defendant. In such cases the other defendant can remove, because the defendant against whom final judgment has been entered, has been thus removed from the controversy, and is no longer interested in or affected by the result of the controversy with his codefendants.

Yules v. *Vose*, 99 U. S. 539 (Bk. 25, L. ed. 355), is an example of this class.

Under Act of March 28, 1835, section 2, P. L. 89, and the supplemental Act of March 11, 1836, section 14, P. L. 76, if the defendant does not file an affidavit of defense, the plaintiff's counsel moves in open court for judgment, and when that is pronounced prepares an assessment of damages based upon the copy or affidavit of loan filed, and this assessment he files with the prothonotary, who signs and files it of record. This is a final judgment without any writ of inquiry or damages, it having been so decided by the Supreme Court of Pennsylvania in *Sellers* v. *Burk*, 47 Pa. 344.

McClung v. *Murphy*, 2 Miles, 177.

Under the common law as it was recognized and enforced in Pennsylvania, there could not be, in an action against two defendants on a

joint cause of action, two separate final judgments, unless it affirmatively appeared on the record that they were upon entirely different issues.

Williams v. *M'Fall*, 2 Serg. & R. 280; *Ridgely* v. *Dobson*, 3 Watts. & S. 118-128.

This common-law rule, as stated in the above decisions, worked considerable hardship. This led to the enactment of two statutes in Pennsylvania.

Act of April 6, 1830, P. L. 277; Act of April 4, 1877, P. L. 52.

The judgment of the circuit court amounts to this: That a controversy with a defendant who was not served until after the suit had been finally ended as to his codefendant—a controversy in which the jury will be sworn to try the issue as against him alone, a controversy in which the judgment will be for or against him alone, and will not affect any other person—is yet not a separable controversy, because it arises in a suit in which another person was originally a joint defendant. It is submitted that this judgment cannot be sustained without overturning the doctrine of the *Removal Cases*, and the other decisions of this court which have furnished a guide to the profession in interpreting the Act of 1875.

Mr. **Pierce Archer**, for defendant in error:

The case of *Putnam* v. *Ingraham*, 114 U. S. 57 (Bk. 29, L. ed. 65), 1884, is precisely the case in hand. If the law of that case prevails, then further argument is unnecessary.

In both cases were asserted joint liability as partners, separate defenses set up, wholly severable as to the nonresident defendant, with judgment by default against one defendant.

This is the latest definition of the Act. There are many others, all in harmony with it.

The Act of 1875 says: "In which there shall be a controversy which is wholly between citizens of different States" from the plaintiff's State.

Removal Cases, 100 U. S. 457 (Bk. 25, L. ed. 593; *Blake* v. *McKim*, 103 U. S. 336 (26: 563).

The contract and suit are joint, and defendants are not all citizens of other States than plaintiff, and suit cannot be removed.

Hyde v. *Ruble*, 104 U. S. 407 (Bk. 26, L. ed. 823), affirmed in *Winchester* v. *Loud*, 108 U. S. 130 (27: 677), and *Ayers* v. *Watson*, 113 U. S. 594 (28: 1093).

The defendants must all be citizens of other States than plaintiff's *locus*.

Removal Causes, and *Blake* v. *McKim*, *supra*; *Steinwald* v. *Lewis*, 106 U. S. 158 (Bk. 27, L. ed. 691).

It must be a separate and distinct cause of action, capable of separation into parts. If joint when begun, cannot remove.

Fraser v. *Jennison*, 106 U. S. 191-5 (Bk. 27, L. ed. 131); *Ayres* v. *Wiswall*, 112 U. S. 192-3 (28: 695); Field, Fed. Courts, 173.

If joint liability is claimed and one is a Pennsylvania citizen, the circuit court has not jurisdiction. Even if not served he may appear and plead to jurisdiction.

Per Drummond, *J.*, *Lovejoy* v. *Washburn*, 1 Biss. 416.

"Where contract is joint as well as several, omission to serve does not confer jurisdiction." *Id.* 418.

Here Leeds Miller's executor is not served.

Railroad Co. v. *Letson*, 2 How. 556 (43 U. S. bk. 11, L. ed. 377); *Shields* v. *Barrow*, 17 How. 141 (58 U. S. 15: 161).

In *Putnam* v. *Ingraham*, *supra*, in Connecticut, Ingraham sued Putnam and Earle of New York, and Morgan of Connecticut, as partners, Putnam, Earle & Co. Putnam and Earle defended, and said it was Morgan's private debt before any partnership formed. Morgan defaulted, and judgment was rendered against him (pp. 58, 59). The court said, the fact that Morgan has not answered, but is in default, is unimportant. Judgment is allowed by statute separately, for default, but the suit is still on joint causes of action—default no difference—separate defense does not make separate cause of action. The only controversy is as to the right of plaintiff to recover against defendants.

L. & N. R. R. Co. v. *Ide*, 114 U. S. 52 (Bk. 29, L. ed. 63); *St. Louis & S. F. R. Co.* v. *Wilson*, 114 U. S. 60 (29: 66).

Separate answers and separate defenses do not make separable controversies; and if one defendant is of the plaintiff's State, the cause is not removable.

Joint contractors—joint contract—not divisible. *L. & N. R. R. Co.* v. *Ide*, *supra*.

As to the local Statutes of Pennsylvania, as it was said in *Boyd* v. *Gill*, 19 Fed. Rep. 148, "If a joint recovery is claimed upon a cause of action which justifies a joint recovery, then the 'controversy' is between the plaintiff and all the defendants."

The same local statute existed in Connecticut, in *Putnam* v. *Ingraham*, *supra*, of several liability in joint actions.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. pt. 3, 470, for the review of an order of the circuit court remanding a case which had been removed from the Court of Common Pleas, No. 1, of the County of Philadelphia, Pennsylvania. The facts are these: [503]

On the 31st of December, 1884, Edward S. Clark sued out of the court of common pleas a writ of summons against "Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leeds Miller, deceased, trading as Brooks, Miller & Co.," returnable on the first Monday of January then next. Before the return of the writ Josiah D. Brooks indorsed thereon as follows:

"I accept service of within writ. Josiah D. Brooks."

On the 12th day of January, 1885, Clark filed an "affidavit of loan" in accordance with the provisions of a Statute of Pennsylvania, showing that the suit was brought for $15,000 balance due to him on the 31st of December, 1876, for moneys lent the firm of Brooks, Miller & Co., on which interest had been paid to October 30, 1884. Appended to this affidavit was what purported to be "a copy of account from defendant's books," showing the loan and cash paid for interest. By a Statute of Pennsylvania it was lawful for the plaintiff, "on or at any time after the third Saturday succeeding" the return day of the writ, "on motion, to enter a judgment by default, * * * unless the defendant shall previously have filed an affida- [504]

vit of defense, stating therein the nature and character of the same." Josiah D. Brooks did not file an affidavit of defense within the time thus limited, and accordingly on the 26th of January, 1885, the following entry was made in the cause:

"And now, on motion of Pierce Archer, Esq., the court enters judgment against the defendants for want of an affidavit of defense."

On the same day an assessment of damages was also filed in the cause, as follows:

"I assess damages as follows:

Real debt	$15,000 00
Int. from 10, 30, 84 to 1, 24, 85	210 00
	$15,210 00

"J. KENDERDINE,
pro Proth'y."

This, according to the law and practice in Pennsylvania, was a final judgment in the action against Josiah D. Brooks for the amount of damages so assessed, and, accordingly, in the docket entries this appears:

"Jan'y 26, 1885. Judg't for want of aff. of defense against Josiah D. Brooks only.

"*Eo die.* Dam's assessed at $15,210.00."

On the third of February, 1885, Charles H. Brooks voluntarily caused to be indorsed on the original summons, then in court, the following:

"I accept service of the writ for Charles H. Brooks, with like force and effect as if the writ had been issued ret'd to the first Monday of [505] April and had been served on or before the first Monday of March, A. D. 1885.

"JOHN G. JOHNSON,
"*Att'y., Ch. H. Brooks.*"

On the second day of May, 1885, Charles H. Brooks filed in the cause his affidavit of defense, in which he set forth, in substance, that, until the 31st of December, 1879, he was a member of the firm of Brooks, Miller & Co.; that previous to that time Clark had deposited moneys with the firm, and on that day there was due him $15,000, for which he held the firm's due bill; that on that day Josiah D. Brooks and Miller purchased the interest of Charles H. Brooks in the firm, paying him therefor $21,749.40, and assuming all the debts; that the partnership was thereupon dissolved, and Clark duly notified; that immediately on the dissolution, Josiah D. Brooks and Miller formed a new partnership, and continued the old business; that Clark was duly notified of the assumption by the new firm of all the debts of the old, and with this knowledge gave up the due bill of the old firm which he held, and took another for the same amount from the new firm in full satisfaction and discharge of the original indebtedness; and that the new firm paid the interest as it thereafter accrued until the time mentioned in the affidavit of loan; to wit, October 30, 1884. On this state of facts, Charles H. Brooks insisted, by way of defense, that he was discharged from all liability.

Immediately on filing this affidavit of defense Charles H. Brooks presented a petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of Pennsylvania, the material parts of which are as follows:

"The petition of Charles H. Brooks, defendant above named, who was sued with Josiah D. Brooks, as surviving partners, etc., respectfully represents: that the controversy in this suit is between citizens of different States; that your petitioner was at the time of the commencement of this suit, and still is, a citizen of the State of New York, and that the said plaintiff, Edward S. Clark, was then, and still is, a citizen of the State of Pennsylvania, and that the [506] matter and amount in dispute in the said suit exceeds, exclusive of costs, the sum or value of five hundred dollars."

On the 23d of May, 1885, the suit was entered by Charles H. Brooks in the circuit court, and, on the 8th of September following, Clark moved that it be remanded. Afterwards, on the 8th of October, this motion was granted, "it appearing by inspection of the record that the defendants are not both citizens of another State than the plaintiff, and that said Josiah D. Brooks is a citizen of Pennsylvania."

To reverse that order this writ of error was brought.

The action as originally brought was a joint [509] action on a joint liability of Josiah D. Brooks and Charles H. Brooks as partners, and, according to *Putnam* v. *Ingraham*, 114 U. S. 57 [Bk. 29, L. ed. 65], it was not separable, for the purposes of removal prior to the judgment against Josiah D. Brooks, even after his default. The question we now have to consider is, therefore, whether the judgment against Josiah D. Brooks takes the case out of that rule.

A Statute of Pennsylvania, passed April 6, [510] 1830, provided as follows:

"In all suits now pending or hereafter brought in any court of record in this Commonwealth, against joint and several obligors, copartners, promisors or the indorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process or judgment, shall not be a bar to recovery *in another suit* against the defendant or defendants, not served with process." 1 Brightly's Purd. Dig. 11th ed. 953, § 43.

Another statute, passed April 4, 1877, enacted as follows;

"Where judgment has been or may hereafter be obtained in any court of record of this Commonwealth, against one or more of several codefendants, in default of appearance, plea or affidavit of defense, said judgment shall not be a bar to recovery *in the same suit* against the other defendants, jointly or jointly and severally liable as co-obligors, copartners or otherwise." *Id.* 954, § 49.

By another statute, passed August 2, 1842, it was provided that in all actions instituted against two or more defendants, in which judgment may be entered on record at different periods against one or more of the defendants, by confession or otherwise, the entries so made "Shall be considered good and valid judgments against all the defendants, as of the date of the respective entries thereof, and the day of the date of the last entry shall be recited in all subsequent proceeding by *scire facias* or otherwise, as the date of judgment against all of them, and judgment rendered accordingly."

And "When an entry of judgment * * * shall be made on the records of any court against two or more defendants, at different

periods, such entries shall operate as good and valid judgment against all the defendants; and the plaintiff may proceed to the collection of the money due thereon, with costs, as if the entries had all been made at the date of the latest entry." *Id.* §§ 45, 46.

This is a proceeding in the original suit and on the original cause of action. If a judgment [511] shall be rendered against Charles H. Brooks, it will be a judgment in the original action, the same in all respects, except as to date, that it would have been if he had been served with process and had put in the same defense before the judgment against Josiah D. Brooks. He voluntarily appeared "in the same suit" by accepting service of the original summons, but with an extension of time to put in his personal defense. Had the same thing been done before the judgment against Josiah D. Brooks, there could have been no removal on the petition of Charles H. Brooks, or on the petition of all the defendants, because the suit would have been against the two defendants, one of whom was a citizen of the same State with the plaintiff, and a separate defense by one. This, it has often been held, would not show or create a separable controversy, within the meaning of the Removal Act. *Hyde* v. *Ruble*, 104 U. S. 407 [26: 823]; *Ayres* v. *Wiswall*, 112 U. S. 187, 198 [28: 693, 695]; *Louisville & N. R. R. Co.* v. *Ide*, 114 U. S. 52 [29:63]; *Putnam* v. *Ingraham*, 114 U. S. 57 [29:65]; *St. Louis etc. R. Co.* v. *Wilson*, 114 U. S. 60 [29:66]; *Pirie* v. *Tvedt*, 115 U. S. 41 [29: 331]; *Starin* v. *New York*, 115 U. S. 248, 259 [29: 388, 391]; *Sloane* v. *Anderson*, 117 U. S. 275 [29: 899]; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280 [29: 898]; *Core* v. *Vinal*, 117 U. S. 347 [29: 912]; *Plymouth Min. Co.* v. *Amador Canal Co.* 118 U. S. 265 [*ante*, 232]. It is true there is now no longer any controversy upon the original cause of action with Josiah D. Brooks, against whom a final judgment has already been rendered, but neither was there in *Putnam* v. *Ingraham*, *supra*, with the defendant Morgan, who was in default and made no defense. In this respect the two cases differ only in degree, and not in kind. In this case the proceedings had gone one step further than in the other, and the default of Josiah D. Brooks had been fixed by the judgment. In principle, however, the cases are alike.

Much reliance was had in argument on *Yulee* v. *Vose*, 99 U. S. 539 [25:855]. The petition in that case was filed under the Act of July 27, 1866, 14 Stat. at L. 306, chap. 288, where only the separate controversy of the petitioning defendant could be removed, and the plaintiff was allowed to proceed against all the other defendants in the state court, as to the remain- [512] ing controversies in the suit, the same as if no removal had been had. Under that statute the suit could be divided into two distinct parts—one removable and the other not. That which was removable might be taken to the Circuit Court of the United States, and that which was not removable would remain in the state court for trial without any reference whatever to the other. The removal had the effect of making two suits out of one. Not so with the Act of 1875. Under that, it was held in *Barney* v. *Latham*, 103 U. S. 205 [26: 514], that if a separable controversy exists, a removal for such cause takes the whole suit to the circuit court, and leaves nothing behind for trial in the state court.

In *Yulee* v. *Vose* there were several causes of action embraced in the suit—some joint against Yulee and all the other defendants, and one against Yulee alone as the indorser of certain promissory notes. Upon a trial, judgment had been rendered in favor of all the defendants upon all the causes of action. This judgment was affirmed by the highest court of the State, as to all the causes of action, except that against Yulee alone as indorser. As to that it was reversed and the cause sent back for a new trial. It was under these circumstances that it was said "it appeared that the controversy, so far as it concerned Yulee, not only could be, but actually had been, by judicial determination, separated from that of the other defendants;" and a removal of this controversy, thus actually separated from the rest of the case, was directed upon the petition of Yulee, filed after the case had been sent back for trial as to him alone, and before the trial or final hearing, which was in time under that statute. Upon this removal only the separate controversy with Yulee was carried to the circuit court, and the judgment in that would have no connection whatever with the other parts of the case, which remained undisturbed in the state court, where the record continued, so far as they were concerned.

In the present case, however, and under the present law, as ruled in *Barney* v. *Latham*, *supra*, the whole original suit, including the judgment against Josiah D. Brooks, must be taken to the circuit court, because this is a proceeding under the Pennsylvania Statute, in that suit, to obtain a judgment therein against Charles H. Brooks. If the removal should be [513] allowed and a judgment rendered in favor of Charles H. Brooks, the circuit court would be compelled to carry into execution the judgment of the state court against Josiah D. Brooks, which would in no sense be a judgment of the circuit court, but of the state court alone. As Charles H. Brooks made himself a party to the "same suit," he voluntarily subjected himself to the obstacles which were in the way of removing his controversy to the circuit court, and must be governed accordingly. *Fletcher* v. *Hamlet*, 116 U. S. 408 [Bk. 29, L. ed. 679]. Had the plaintiffs proceeded against him under the other statute and brought another suit, the case would have been different, because that would have been a separate and distinct action to which there was no other defendant but himself; but this proceeding is merely auxiliary to the original suit, and in all respects a part of that suit, from which it cannot be separated. If a judgment shall be rendered against Charles H. Brooks, that judgment and the judgment already existing against Josiah D. Brooks "will be treated as one on the *scire facias* or execution." *Finch* v. *Lamberton*, 62 Pa. 370.

The order remanding the case is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[499] GEORGE THACKRAH, *Appt.*,

v.

EMIL HAAS, ANTHONY GODBE, LONDON BANK OF UTAH (Limited), AND ROYAL MINING COMPANY OF UTAH.

(See S. C. Reporter's ed. 499-502.)

Transfer of property fraudulently extorted from intoxicated person—complainant unable to repay consideration—equity will grant relief—provision for repayment in decree.

1. Equity will grant relief where the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render him incapable of transacting business.

2. Where the complainant without any fault of his own is unable to repay the consideration of a fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision in the decree for its repayment.

[No. 86.]

Submitted Dec. 9, 1886. Decided Dec. 20, 1886.

APPEAL from the Supreme Court of the Territory of Utah. *Reversed.*

Statement of the case by *Mr. Justice* **Gray**:

This suit was brought on December 16, 1880, by Thackrah against Haas, Godbe, the London Bank of Utah (Limited) and the Royal Mining Company of Utah.

The complaint alleged that on September 17, 1880, the plaintiff was owner of certain interests, property and rights in the Mining Company, equal to 80,000 shares of its capital stock, and then of the value of $80,000 (as to 75,000 shares in his own right, and as to the remaining 5,000 as trustee), and for the same was entitled to have 80,000 shares issued to him whenever the stock should be issuable; that on that day, and for two months before and a month afterwards, the plaintiff was continuously in a state of intoxication to such a degree as to have his mental faculties thereby so impaired as to render him not in his right mind, and wholly incapacitated to transact any business or enter into any contract; that all the defendants, at the time of the transfer hereinafter mentioned, knew that the plaintiff was and for two months had been in that condition; that while he was in that condition the Bank through its officers pursued, harassed and goaded him as to a debt of his to the Bank, in order to extort from him a transfer to Haas of his interest in the Mining Company; and the plaintiff was greatly worried by other creditors to whom he owed small amounts, and was greatly excited and annoyed by this conduct of the Bank and other creditors, as the defendants knew; that while in this condition the plaintiff was, as he [500] believes, encouraged in his drunkenness and furnished with intoxicating drinks by the agents of Haas, with the knowledge of the Bank; that on September 17, 1880, Haas and the Bank, well knowing the plaintiff's condition and his incapacity for business, fraudulently imposed upon and extorted from him, for the grossly inadequate sum of $1,200, a transfer or assignment in writing to Haas of the whole of the plaintiff's interests aforesaid in the Mining Company; that Godbe and the Bank were the real parties in interest for whom the transfer was procured, and that they now held the shares, or Haas held the same for them; that of this sum of $1,200 the sum of $750 was retained by the Bank and applied to the payment of the plaintiff's debt to it, and the remaining $450 was applied by his wife in paying his small debts; that the plaintiff, on recovering from his intoxication, gave notice to all the defendants of his intention to bring this suit as soon as he should be able to repay to Haas the sum of $1,200; but that the plaintiff, although he had used every effort to obtain money for that purpose, had been unable to obtain it, and had not now the pecuniary ability to repay that sum; that the only available means to which he could look for raising it were the interests and shares aforesaid in the Mining Company, fraudulently forced from him by the pretended transfer; and that if the plaintiff were now able to repay the $1,200 to Haas, he could not do so, because Haas had left the Territory to reside elsewhere.

The complaint concluded by praying judgment that the transfer to Haas be declared void, and be canceled; that the 80,000 shares of stock and said interests therein be adjudged to be the plaintiff's property; that so much thereof be sold by order of the court as should be sufficient to yield $1,200 and interest from the date of the transfer, and that sum be paid to Haas; that the Mining Company be directed to issue the rest of those shares and interests to the plaintiff, and be restrained from issuing them to any other person; and that the other defendants restore to the plaintiff any certificates thereof in their hands, and be restrained from receiving any more, and account to him for any part that they had disposed of.

The defendants severally demurred to the complaint as stating no cause of action; the de- [501] murrers were sustained and the complaint dismissed by the courts of the Territory and the plaintiff appealed to this court.

Mr. **E. D. Hoge**, for appellant;

The contract was utterly void.

Dexter v. *Hall*, 15 Wall. 9 (82 U. S. bk. 21, L. ed. 73); *Gore* v. *Gibson*, 13 Mees. & W. 623.

If not void, the contract was certainly voidable.

2 Pom. Eq. Jur. § 949; *French* v. *French*, 8 Ohio, 214; *Barrett* v. *Buxton*, 2 Aik. 167.

The inadequacy of consideration is so gross as to lead to a presumption of fraud.

Moore v. *Moore*, 56 Cal. 89; *Hough* v. *Hunt*, 2 Ohio, 495.

Equity will interpose and annul the contract.

Stewart v. *Liepenard*, 26 Wend. 255; 1 Story. Eq. Jur. §§ 234, 237, 238.

The rule that upon the rescission of a contract the parties must be put *in statu quo* does not apply where the contract is void *ab initio*.

Sanches v. *McMahon*, 35 Cal. 218. See also *Martin* v. *Roberts*, 5 Cush. 126; *Reynolds* v. *Waller's Heirs*, 1 Wash. (Va.) 164; *Grymes* v. *Sanders*, 93 U. S. 55 (Bk. 23, L. ed. 798).

The rule of *statu quo* is satisfied if the judgment asked for will accomplish the same result.

Harris v. *Equitable L. Assur. Society*, 64 N. Y. 196; *Judge of Probate* v. *Stone*, 44 N. H. 593.

(No counsel appeared for appellees.)

Mr. Justice **Gray** delivered the opinion of the court:

No opinion of the court below and no brief or argument for the appellees having been submitted to us, it is not easy to conjecture the ground upon which the demurrers were sustained.

By the Statutes of Utah, there is, for the enforcement or protection of private rights and the redress or prevention of private wrongs, but one form of action, commenced by complaint, to which the defendant may demur or answer. If there be no answer, the relief cannot exceed that demanded in the complaint; in any other case, the court may grant any relief consistent with the case made by the complaint and embraced within the issue. Compiled Laws of Utah, 1876, §§ 1226, 1247, 1268, 1374.

The complaint in the present case is in the nature of a bill in equity against a Mining Corporation, a Bank, and two individuals, alleging that while the plaintiff was in such a state of intoxication as not to be in his right mind or capable of transacting any business or entering into any contract, the defendants, knowing his condition, fraudulently extorted from him, for the sum of $1,200, a transfer to one of those persons, for the benefit of the other and of the Bank, of his interests, worth $80,000, in shares to that amount in the Mining Corporation; and praying for a cancellation of the transfer, for a sale of enough of the interests transferred to repay the $1,200, for the issue of the rest by the Mining Company to the plaintiff, for the restoration to him by the other defendants of any certificates in their hands, and for an account and an injunction. It cannot be doubted that this was such a case of fraud as entitled him to [502] relief in equity. 2 Pom. Eq. Jur. §§ 914, 949.

The complaint further alleges, and the demurrer admits, that the greater part of this sum of $1,200 was retained by the Bank and applied to the payment of a debt previously due to it from the plaintiff, and (it would seem before he recovered from his intoxication) the rest of that sum was applied by his wife to the payment of his small debts, and he had no means available to raise money to repay the $1,200, except the interests in the Mining Company, which he had been induced by the defendants' fraud to make a transfer of. The plaintiff, without any fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision, in the final decree, for the repayment of that sum out of the property recovered. *Reynolds* v. *Waller*, 1 Wash. (Va.) 164; *Allerton* v. *Allerton*, 50 N. Y. 670; *S. C.* more fully stated, in *Harris* v. *Equitable L. Assur. Society*, 64 N. Y. 196, 200.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM L. HUSE ET AL., *Appts.*, [543]
v.
JOSEPH O. GLOVER ET AL.

(See S. C. Reporter's ed. 543-550.)

Constitutional law—effect of admission of Illinois—freedom of navigation of Illinois River—not bound by United States Ordinance—may improve navigation and exact tolls for use of artificial facilities—charge according to tonnage, valid—tonnage duties defined—review of authorities.

1. The State of Illinois upon her admission became entitled to and possessed of all the rights of dominion which belonged to the original States.

2. The provision of article 4 of the Ordinance of 1787, providing that the navigable waters leading into the Mississippi and St. Lawrence should be common highways, and forever free, does not bind the State of Illinois, and does not impair the powers which said State could have exercised over its rivers had said provision no existence.

3. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject to the right of Congress to interpose when such highways are the means of interstate and foreign commerce.

4. The exaction of reasonable tolls by a State as compensation for the use of artificial facilities for the improvement of navigation, is not an impost upon such navigation, or an interference with its freedom.

5. A tonnage duty within the meaning of the constitutional prohibition is a tonnage charge upon a vessel, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country.

6. The charges imposed by the canal commissioners of Illinois for the passage of vessels through the locks constructed by the State at Henry and at Copperas Creek on the Illinois River, are not open to objection because prescribed according to the tonnage of the vessels.

[No. 89.]

Argued Dec. 10, 1886. Decided Dec. 20, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **G. S. Eldredge**, for appellants:

The attention of this court does not seem to have been called, in the late case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678 (Bk. 27, L. ed. 442), to the fact that the State of Illinois, in the acceptance of the Act of Congress under which it was authorized to organize, expressly covenanted with respect to the Ordinance of 1787, that it should not be revoked "without the consent of the United States." It would seem that this was equivalent to an express adoption of the particular provisions of that ordinance with respect to the navigable watercourses to which such a degree of importance had been attached.

Had the State of Illinois, without the consent of Congress, the lawful right to assume exclusive control over the Illinois River, and to erect dams across it and thus force steamers and other vessels, before then navigating the river in its natural state as such public channel of interstate commerce, to pass through locks con-

NOTE.—*Constitutional law; interstate commerce; regulation of; power of Congress; how far exclusive.* For a full discussion, see Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, 158, note.

structed at these dams, and pay tonnage duties and other impositions, in order to enjoy the privilege of navigating it, which they had before enjoyed without restriction?

Unless there has been some specific delegation of power to the State by Congress, authorizing the erection of dams and other structures, and the imposition of tolls and other impositions upon the navigation of the river, such a recognition of power by the State over the commerce of the country cannot be maintained.

Gibbons v. *Ogden*, 9 Wheat. 89 (22 U. S. bk. 6, L. ed. 44); *The Daniel Ball*, 10 Wall. 557 (19: 999); *The Montello*, 20 Wall. 430 (22: 391); *Henderson* v. *Mayor*, 92 U. S. 259 (23: 543); *Cooley* v. *Port Wardens*, 12 How. 299 (13: 996); *Gilman* v. *Phila.* 3 Wall. 715 (18: 96).

The Legislature has not only assumed to impose a tonnage duty within the meaning of the Act of Congress, but a direct tax upon the cargoes, aimed specifically at the particular character of the freight transported.

These imposts fall directly within the case of the *State Freight Tax*, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146), so far as they relate to the ice being transported by the complainants down the river, to be distributed at different commercial points without the limits of the State of Illinois. As said by the court in *Telegraph Co.* v. *Texas*, 105 U. S. 464 (26: 1068), in commenting upon the *State Freight Tax Case*, in this the court should apply the rule announced in *Brown* v. *Maryland*, 12 Wheat. 419 (6: 678), that where the burden of taxation falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing, rather than on him who is charged with the duty of paying it into the treasury.

The court further says in the *Telegraph Company Case, supra*, taxes on vessels according to the measurement without any reference to the value were declared to be taxes on tonnage.

State Tonnage Tax Cases, 12 Wall. 204 (79 U. S. bk. 20, L. ed. 370); *Peete* v. *Morgan*, 19 Wall. 581 (22: 201); *Cannon* v. *N. O.* 20 Wall. 577 (22: 417); *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238 (24: 118); *Co. of Mobile* v. *Kimball*, 102 U. S. 691 (26: 238); *Moran* v. *N. O.* 112 U. S. 73 (28: 655).

The impositions assumed to be laid upon the vessels of the complainants and their cargoes are direct taxes upon the vessels as instruments of interstate commerce, and upon the cargoes as subjects of interstate commerce, without reference to either the value of the vessels or cargoes, for the privilege of navigating the Illinois River, a public highway of the United States over which Congress has exclusive jurisdiction.

This case does not rest upon the same principles as those of *Packet Co.* v. *Keokuk*, 95 U. S. 80 (Bk. 24, L. ed. 377); *Packet Co.* v. *St. Louis*, 100 U. S. 423 (25: 688); *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 (26: 1169); *Vicksburg* v. *Tobin*, 100 U. S. 430 (25: 690); *Trans. Co.* v. *Parkersburg*, 107 U. S. 691 (27: 584), and other kindred cases which support a charge for use of artificial channels, wharves and like improvements, made by the State, and which the State in the exercise of its local authority has the undoubted right to make, and which do not operate as a restraint upon navigation of the navigable rivers or waters of the United States by such vessels as were accustomed to navigate them in their natural condition. None of this class of cases is applicable to the case at bar.

It is admitted that the complainants were engaged in interstate commerce; that the cargoes of ice transported in their vessels were subjects of interstate commerce. It is admitted that facilities for navigating the river were not increased by the construction of locks and dams, but were impeded seriously, and that they were subjected to heavy losses.

Mr. **George Hunt**, *Atty-Gen. of Illinois*, for appellees:

The charges for passing through the locks, based upon the tonnage, are not in conflict with that clause of the Constitution which prohibits the States from imposing tonnage taxes, duties or imposts.

Packet Co. v. *Keokuk*, 95 U. S. 80 (Bk. 24, L. ed. 377); *Packet Co.* v. *St. Louis*, 100 U. S. 423 (25: 688); *Vicksburg* v. *Tobin*, 100 U. S. 430 (25: 690); *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 (26: 1169).

A State may improve navigable waters.

Palmer v. *Cuyahoga Co.* 3 McLean, 226; *Jolly* v. *Drawbridge Co.* 6 McLean, 237; *Veazie* v. *Moor*, 14 How. 568 (55 U. S. bk. 14, L. ed. 545); *Improvement Co.* v. *Manson*, 43 Wis. 255.

And it may collect tolls for the use of the improvements.

Canal. & Nav. Co. v. *Parker*, 29 La. Ann. 430; *Canal Co.* v. *Lawrence*, 2 Hun, 163; *Thames Bank* v. *Lovell*, 18 Conn. 500; *McReynolds* v. *Smallhouse*, 8 Bush, 447; *County of Mobile* v. *Kimball*, 102 U. S. 691 (Bk. 26, L. ed. 238).

Mr. Justice **Field** delivered the opinion of the court: [544]

This case comes from the Circuit Court for the Northern District of Illinois. It was heard there and decided on demurrer to the bill of complaint. The substance of the bill is this: That by various Acts of her Legislature, commencing with one passed in February, 1867, the State of Illinois adopted measures for improving the navigation of Illinois River, including the construction of a lock and dam at Henry, and at Copperas Creek on the river. She created a board of canal commissioners, and invested it with authority to superintend the construction of the locks and dams, to control and manage them after their construction, and to prescribe reasonable rates of toll for the passage of vessels through the locks. By a clause in one of the Acts it was provided that all tolls received for the use of the locks, not necessary to keep the same in repair, and to pay the expenses of their collection, should be "paid quarterly into the state treasury as part of the general revenue of the State." Laws of Ill. of 1872, 213, 214.

The works were constructed at an expense of several hundred thousand dollars, which was principally borne by the State. It is represented that a small portion was contributed by the United States. Those at Henry were completed in 1872; those at Copperas Creek in 1877; and the commissioners prescribed rates of toll for the passage of vessels through the locks, the rates being fixed per ton, according to the tonnage measurement of the vessels and the amount of freight carried.

The complainants, citizens of Illinois, composing the firm of Huse, Loomis & Co., are engaged, and have been, since their organization in 1864, in cutting ice at Peru and at other points on the Illinois River, and in transporting it on that river, and thence by the Mississippi and other navigable streams to St. Louis, Memphis, and other southern markets; and in connection therewith are carrying on a general transportation business, using constantly from three to six steamboats, and from thirty to sixty barges, varying from 125 to 1,000 tons, all licensed and [545] registered under the Act of Congress. They allege in the bill that prior to the construction of the dam across the Illinois River at Henry, they were able to navigate the river without interruption, except such as was incident to its ordinary use in its natural state; that the dams at that place and at Copperas Creek are impediments to the free navigation of the river; that while an additional depth of water is created above them, no practical advantage ensues to the complainants, for they encounter below the dams the same stage of water they would have without them; that the dams are so constructed as to wholly impede, except at extreme high water, the navigation of the river by steamboats and other vessels which were previously accustomed to navigate it, unless they pass through the locks; that from the construction of the lock and dam at Henry in 1872 to the spring of 1878, they have paid as duties or charges upon the tonnage measurement of their steamboats and other vessels about $3,000, and for tolls imposed upon the cargoes of ice transported by them about $5,000; that upon subsequent shipments similar charges have been exacted, as also for the passage of their boats and barges through the lock at Copperas Creek. And they allege that they are advised and believe that the imposition of the tolls and tonnage duties mentioned is in violation first, of the provision of article four of the ordinance for the government of the territory of the United States northwest of the Ohio River, passed July 13, 1787, which provides that "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor;" and, second, of the article of the Constitution of the United States which prohibits the imposing of a tonnage duty by any State without the consent of Congress. Art. 1, § 10. They therefore pray that the defendants, who are canal commissioners, and all persons acting under them, may be restrained from exacting any tonnage duties or [546] other charges for the passage of their steamboats or barges, and other vessels used by them in navigating the Illinois River, or from interfering in any manner with the free and uninterrupted navigation of the river by them in the usual course of their business.

The questions thus urged upon the consideration of the court below are pressed here; but they are neither new nor difficult of solution. The opinion of that court presents in a clear and satisfactory manner the full answer to them, and nothing can be added to the force of its reasoning. In affirming its conclusions we can do little more than repeat its argument. *Huse* v. *Glover*, 11 Biss. 550.

The fourth section of the ordinance for the government of the northwestern territory was the subject of consideration in *Escanaba, etc., Trans. Co.* v. *Chicago*, 107 U. S. 678 [27: 442]. We there said that the ordinance was passed before the Constitution took effect; that although it appears by various Acts of Congress to have been afterwards treated as in force in the territory, except as modified by them, and the Act enabling the people of Illinois Territory to form a Constitution and state government, and the resolution of Congress admitting the State into the Union, referred to the principles of the ordinance, according to which the Constitution was to be formed, its provisions could not control the powers and authority of the State after her admission; that whatever the limitation of her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union; that on her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States; that the language of the resolution admitting her was that she is "admitted into the Union on an equal footing with the original States in all respects whatever;" and that she could, therefore, afterwards exercise the same powers over rivers within her limits as Delaware exercised over Blackbird Creek, and Pennsylvania over Schuylkill River. *Pollard* v. *Hagan*, 3 How. 212 [11: 565]; *Permoli* v. *Municipality of N. O.*, *Id.* 589 [11: 739]; *Strader* v. *Graham*, 10 How. 82 [13: 337].

We also held in that case that, independently of these considerations, the terms of the [547] ordinance were not violated because the navigable streams were subject to such crossings as the public necessities and convenience might require. The rivers did not change their character as common highways, if the crossings were allowed under reasonable conditions, and so as not unnecessarily to obstruct them. The erection of bridges with dams and the establishment of ferries for the transit of persons and property are consistent with the free navigation of the rivers; and in support of this doctrine we referred to the case of *Palmer* v. *Comrs. of Cuyahoga County*, 3 McLean, 226, where *Mr. Justice* McLean, speaking of the provision of the ordinance, said: "This provision does not prevent a State from improving the navigableness of these waters by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation; nor does the ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance."

Since the decision in the *Escanaba Case* we have had our attention repeatedly called to the terms of this clause in the Ordinance of 1787.

A similar clause as to their navigable rivers is found in the Acts providing for the admission of California, Wisconsin and Louisiana. The clause in the Act providing for the admission of California was considered in *Cardwell* v. *American Bridge Co.* 113 U. S. 205 [28; 959]. We there held that it did not impair the power which the State could have exercised over its rivers had the clause not existed; and that its object was to preserve the rivers as highways equally open to all persons without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of toll for their navi-
[548] gation. The same doctrine we have reiterated at the present term of the court in construing a similar clause in the Act for the admission of Louisiana. *Hamilton* v. *Vicksburgh, S. & P. R. R. Co.* 119 U. S. [*ante*, 393.] As thus construed, the clause would prevent any exclusive use of the navigable waters of the State—a possible farming out of the privilege of navigating them to particular individuals, classes or corporations, or by vessels of a particular character. That the apprehension of such a monopoly was not unfounded is evident from the history of legislation since. The State of New York at one time endeavored to confer upon Livingston and Fulton the exclusive right to navigate the waters within its jurisdiction by vessels propelled in whole or in part by steam.

The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and
[549] expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad and many other works in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned. *Spooner* v. *McConnell*, 1 McLean, 337; *Kellogg* v. *Union Co.* 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; *McReynolds* v. *Smallhouse*, 8 Bush, 447.

By the terms tax, impost and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements. The fact that if any surplus remains from the tolls, over what is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenue of the State, does not change the character of the toll or impost. In prescribing the rates it would be impossible to state in advance what the tolls would amount to in the aggregate. That would depend upon the extent of business done; that is, the number of vessels and amount of freight which may pass through the locks. Some disposition of the surplus is necessary until its use shall be required, and it may as well be placed in the state treasury, and probably better than anywhere else.

Nor is there anything in the objection that the rates of toll are prescribed by the commissioners according to the tonnage of the vessels, and the amount of freight carried by them through the locks. This is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries, and in no sense is a duty of tonnage within the prohibition of the Constitution. A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition [550] was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels.

In *Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377], that city was authorized by its charter to make wharves on the banks of the navigable river upon which it is situated, and to collect and regulate wharfage, the rates being proportioned to the tonnage of the vessel; and the court held that the charge was not subject to the objection that it was a duty of tonnage within the prohibition of the Constitution. It said: "A charge for services rendered, or for conveniences provided, is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service." And in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 [27: 584], speaking of a charge of wharfage according to the tonnage of a vessel, and a duty of tonnage

prohibited by the Constitution, the court said: "They are not the same thing; a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf." And again, "The fact that the rates (of wharfage) charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the Constitution and the Acts of Congress." *Cannon* v. *New Orleans*, 20 Wall. 577 [22: 417]; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 [26: 1169].

It is unnecessary to pursue the subject further. *We do not see any objections that would justify a disturbance of the decree below, which is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[495] MOSES C. BIGNALL, *Plff. in Err.*,
v.
JAMES H. GOULD.

(See S. C. Reporter's ed. 495–498.)

Bond—"penal sum," a penalty—"liquidated damages"—discharge in bankruptcy.

1. The "penal sum" named in a bond given to secure the obligee's discharge from a large number of claims against him, held by certain third parties severally, is held to be simply a penalty, although it is also described in the bond as "liquidated damages."

2. The plaintiff having been discharged in bankruptcy after the breach and before action brought, it is held that he can recover nominal damages only.

[No. 88.]

Submitted Dec. 7, 1886. Decided Dec. 20, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action, brought in September, 1881, by a citizen of Missouri against a citizen of New York upon the following bond, signed and sealed by the defendant:

"*Know all men*, that I, James H. Gould, of Seneca Falls, New York, am held and firmly bound to Moses C. Bignall in the penal sum of ten thousand dollars lawful money, liquidated damages, to the payment of which I bind myself, my heirs, executors, administrators and assigns, firmly by these presents.

"Sealed with my seal at the City of St. Louis and State of Missouri this 7th day of April, A. D. 1879.

"The condition of this obligation is such that whereas, on the first day of April, 1878, the said Moses C. Bignall became unable to pay and satisfy all his just debts and liabilities; and whereas, the Gould Manufacturing Company, of Seneca Falls aforesaid, was one of the creditors of the said Moses C. Bignall; and whereas, the said Gould Manufacturing Company, Mrs. Hannah B. Gould, of Seneca Falls, and Angus McDonald, of Rochester, New York, became the assignees by purchase of a large number and amount of the said debts and claims then existing against the said Moses C. [496] Bignall; and whereas, said last named parties or either of them may deem it to their interest to become the assignees of other of said debts and claims now existing against said Moses C. Bignall:

"*Now, therefore*, if the said Gould Manufacturing Company, the said Hannah B. Gould, and the said Angus McDonald, shall acquit, release and discharge the said Moses C. Bignall, within one year from the date hereof, of all and singular the debts and claims aforesaid that have been assigned to them, or that may hereafter be assigned to them, or either of them, by good and sufficient release in writing, to be made by them, and to be delivered by them to said Moses C. Bignall, then this obligation to be void; otherwise, it shall remain in full force and virtue."

The petition alleged that the defendant executed the bond at its date; that the plaintiff was then owing to divers persons debts amounting to about $50,000, including one to the Gould Manufacturing Company of about $7,000; and that Hannah B. Gould held assignments from different persons of many of those debts, to the amount of about $26,000 (a list of ten of which was annexed, varying from $147.23 to $8,117.00), and Angus McDonald held assignments of like debts to the amount of about $6,000 (a list of thirteen of which was annexed, varying from $9.80 to $1,445.52); that there had been a breach of the bond, in that more than a year had elapsed since its execution, yet neither the Gould Manufacturing Company nor Gould nor McDonald had acquitted, released or discharged the plaintiff from any of those debts, and that by reason of this breach the plaintiff had been damaged in the sum of $10,000.

The answer admitted these allegations, except that it denied that the plaintiff had been damaged in the sum of $10,000 or any other sum; and alleged that the plaintiff, under proceedings in bankruptcy pending at the date of the bond, had since obtained a certificate of discharge, whereby all his debts mentioned in the petition were discharged. The plaintiff filed a replication, denying all the allegations of the answer.

Upon a trial by the court, a jury having been duly waived, the plaintiff proved that the assets which came to the hands of his assignee in bankruptcy amounted to $23,109.54, and no more, of which $17,439.11 was collected of the Gould Manufacturing Company, and that the only dividend paid was on March 14, 1882, of 46 $\frac{8}{100}$ cents on the dollar. The plaintiff admitted in open court that he obtained a certificate of discharge on May 6, 1880, under pro- [497] ceedings in bankruptcy begun on April 25, 1878. The defendant relied on this admission, and introduced no evidence. No other testimony was given nor admissions made at the trial, save those contained in the pleadings.

The plaintiff asked the court to declare the following propositions of law as applicable to this case: "1. The bond sued on is a liquidated bond, and the breach being admitted by the defendant, the plaintiff is entitled to recover the liquidated sum, $10,000. 2. If the bond is not a liquidated bond, still, under the issues and

NOTE—*Penalty; liquidated damages.* See Dennis v. Cummins, 3 Johns. Cas. 297, note in L. ed.

the evidence, the plaintiff is entitled to recover more than nominal damages, notwithstanding his discharge in bankruptcy." The court refused thus to declare the law, and rendered judgment for the plaintiff, and assessed his damages at one cent only. The plaintiff excepted to the ruling and action of the court, and sued out this writ of error.

Messrs. **H. M. Pollard** and **S. N. Taylor**, for plaintiff in error:

The following authorities support the view that the will of the parties is clearly expressed in the bond that $10,000 should be the exact and liquidated damages in case of a breach of the conditions of the bond.

Lowe v. *Peers*, 4 Burr. 2225; *Leary* v. *Laffin*, 101 Mass. 334; *Cotheal* v. *Talmage*, 9 N. Y. 551; *Bagley* v. *Peddie*, 16 N. Y. 469; *Clement* v. *Cash*, 21 N. Y. 253; *Noyes* v. *Phillips*, 60 N. Y. 408; *Hamaker* v. *Schroers*, 49 Mo. 406; *Watts* v. *Sheppard*, 2 Ala. 425; *Williams* v. *Green*, 14 Ark. 315; *Hamilton* v. *Overton*, 6 Blackf. 206; *Christdee* v. *Bolton*, 5 Car. & P. 240; *Streeter* v. *Rush*, 25 Cal. 71; *Tingley* v. *Cutler*, 7 Conn. 291; *Gobble* v. *Snider*, 76 Ill. 158; *Downey* v. *Beach*, 78 Ill. 53; *Sparrow* v. *Paris*, 7 H. & N. 594; Field, Damages, 155; 1 Sutherland, Dam. 475-520.

There is a marked distinction between being released by act of the creditor, and a release by operation of law. In the latter case a new promise revives the debt, while the former is a final extinguishment of the debt.

Valentine v. *Foster*, 1 Met. 520; *Way* v. *Sperry*, 6 Cush. 241; *Smith* v. *Richmond*, 19 Cal. 476.

(No counsel appeared for defendant in error.)

[498] *Mr. Justice* **Gray** delivered the opinion of the court:

By the rules now established at law as well as in equity, the sum of $10,000, named in this bond, is a penalty only, and not liquidated damages. As observed by *Lord* Tenterden in a similar case, "Whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages; for the sum" in question "is described in the same sentence as a penal sum and as liquidated damages." *Davies* v. *Penton*, 6 B. & C. 216, 222; *S. C.* 9 D. & R. 369, 376. The object of the bond is to secure the obligee's discharge from a large number of claims against him, held by certain third persons severally, amounting in all to something like $39,000, and varying from more than $8,000 to less than $10 each. A failure of either of those persons to release any one of those claims would be a breach of the bond; and for any such breach a just compensation might be estimated in damages. The sum of $10,000 must therefore be regarded as simply a penalty to secure the payment of such damages as the obligee may suffer from any breach of the bond. *Watts* v. *Camors*, 115 U. S. 353 [Bk. 29, L. ed. 406]; *Boys* v. *Ancell*, 5 Bing. N. C. 390; *S. C.* 7 Scott, 364; *Thompson* v. *Hudson*, L. R. 4 H. L. 1, 30; *Fisk* v. *Gray*, 11 Allen, 132.

Upon the evidence introduced and the admissions made by the plaintiff at the trial, it does not appear that he suffered any damage whatever. Although there was a technical breach of the bond at the expiration of a year from its date, by the third persons therein named having failed to release the plaintiff from any of the debts held by them, yet, within a month afterwards, and before this action was brought, he was legally discharged from all those debts by obtaining a certificate of discharge in bankruptcy. This discharge was not the less complete and effectual because the creditors had not received payment in full, nor because the plaintiff might, if he saw fit, by new promises to them, waive the discharge and revive so much of the debts as had not been satisfied by the dividends paid by the assignee in bankruptcy.

Judgment for nominal damages affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

LOUIS P. SUTTER ET AL., *Appts.*, [531]

v.

ISAAC ROBINSON, AND JULIUS ROSENTHAL, Admr of ABRAHAM ROBINSON, Deceased.

(See S. C. Reporter's ed. 531-542.)

Letters patent construed and limited to apparatus claimed — process, not within — equivalents — file wrapper as evidence — practice.

1. Letters patent No. 216398, for an improved apparatus for resweating tobacco, do not sustain a claim for a process of steaming tobacco by means of steam, or steam and a body of hot water, nor by any process whatever, but must be limited to the apparatus; the precise improvement covered thereby being the substitution of a wooden vessel for holding the tobacco for a metallic one.

2. In such an apparatus, the use of the cases, boxes or packages in which the tobacco was originally packed is not equivalent to the use of the wooden tobacco holder covered by said letters patent.

3. A patentee cannot insist upon a construction of his patent which will include what the Patent Office was expressly required him to abandon and disavow as a condition of the grant.

[No. 87.]

Argued Dec. 9, 10, 1886. Decided Dec. 20, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Thomas A. Banning** and *Ephraim Banning*, for appellants.

Messrs. **John W. Munday**, and *Edmund Adcock*, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by Isaac Robinson and Abraham Robinson against the appellants to restrain an alleged infringement of letters patent granted by the United States to Abraham Robinson on June 10, 1879, for an improved apparatus for resweating tobacco. The defenses relied on are, that the patent is invalid for want of novelty, and a denial of the alleged infringement. The specifications and claims of the patent, with reference to accompanying drawings, are as follows:

"Figure 1 is a top or plan view of an apparatus embodying my improvements, and figure 2 is a vertical central section of the steam receiver and tobacco holder.

"Like letters of reference indicate like parts.

"It is usual to soften the leaves of tobacco, as is well known, in order to prepare them for being manufactured into cigars and other manufactured goods, and to bring out a good and uniform color. This has been done heretofore in various ways, and, among others, by dampening the leaves and exposing them to heat while in that condition.

"The object of this invention is to provide improved means for exposing the leaves to the action of steam for the purposes above set forth; and to that end my invention consists of a tobacco holding vessel made of wood sufficiently porous to permit the steam to percolate through it, in combination, substantially as [532] hereinafter described, with a steam generating apparatus and a steam receiving chamber surrounding the vessel for containing the tobacco.

"I am aware that the general structural plan of the apparatus hereinafter described is old, and I do not, therefore, here intend to claim the same independently of a tobacco receiving vessel made of wood sufficiently porous to permit the steam to percolate through it, as and for the purposes set forth, the said wooden vessel constituting, as I believe, an improvement upon the apparatus heretofore in use; for the reason that, in employing wood instead of metal in the construction of the said vessel, the tobacco is prevented from being tainted, and may be kept continually moist by the action of the steam instead of being merely heated and sweated by it, or steamed only by the generation of steam in the same vessel containing the tobacco; it being obvious that if the tobacco receiving vessel be made of metal, as heretofore in devices of this class, the steam in an outer surrounding vessel would merely heat the tobacco and sweat it without imparting new moisture to it. Neither do I here intend to claim the process, as such, of steaming tobacco.

"In the drawings A represents an ordinary boiler for generating steam. B is a tank or vessel for receiving the steam generated by the boiler A. C is a tight wooden vessel for receiving the tobacco to be treated. This vessel should be provided with a tight-fitting cover, *a*. I make the vessel C of wood, as an essential feature of my invention, in order that the steam may sweat or percolate through it from the tank B, and so that the tobacco will not be tainted by contact with metal. The vessel C is enough smaller than the tank B to be suspended in the latter and leave an annular space, *b*, between the two, as well as a space underneath the bottom of the vessel C, as shown. The space *b* should also be covered. In order to provide a cover for the space *b*, and also suspend the vessel C firmly in the tank B, I employ an annular rim or lid, *c*, having an upwardly turned flange, *c'*, fitted to the vessel C, and a downwardly turned flange, *c''*, fitted to the tank B, screws or other fastenings passing through the flanges into the parts to which they are fitted; [533] but it is not essential that these flanges should be continuous or extend entirely around the vessels. Neither is it essential that the flanged portions of the lid *c* should be continuous, or in the same piece with the remaining part of the said lid. It is, in fact, much the easier way to make the flanged portions separately from the lid proper, and I have represented them as made in that manner.

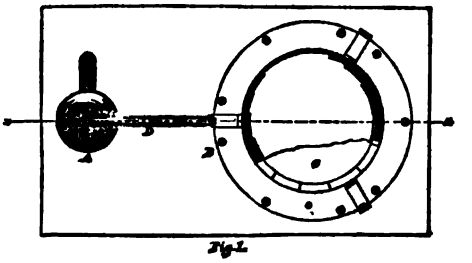

Fig. 1.

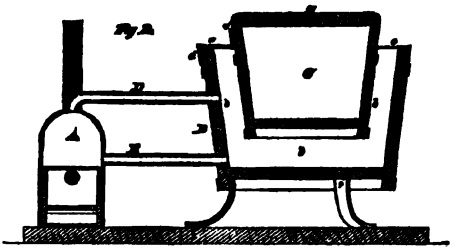

Fig. 2.

"I do not, however, here intend to be restricted to any particular way of applying the lid *c* and suspending the vessel C, as both may be done in various suitable ways; but I deem [534] the manner shown to be the best.

"D is a steam pipe leading from the upper part of the boiler A into the upper part of the space *b*, and E is a water pipe leading from the lower part of the said space into the lower part of the boiler. To use this apparatus for the purpose for which it is intended, the water in the boiler should be heated until steam is generated. The tobacco to be treated should be placed in the vessel C and covered, the tobacco being then in the condition in which it exists when taken from the cases or packages in which it may have been packed by the producers or shippers.

"The water, as well as the steam, will enter the space *b* and produce a sufficient temperature in the vessel C to sweat the tobacco therein, the steam producing moisture in the vessel C by sweating or percolating through it from the space *b*, in addition to the moisture originally in the tobacco before it was confined in the vessel. The steam which enters the space *b*, through the pipe D, finding a lower temperature in the said space than in the boiler, becomes condensed, and is added or returned to the volume of water which flows from the said space into the boiler, and thus keeps the latter supplied. A circulation of water and steam is also kept up to a certain extent.

"In a building where steam is supplied through pipes, the steam may be conducted into the space *b* from the boiler which supplies the steam, wherever the boiler may be situated. The tobacco should be exposed to this treatment from three to eight days, according to the result desired to be produced, and it will thus be rendered soft and pliable, and of a uniform and dark color, without being in any way injured. The tobacco prepared in this manner may be manufactured into various articles, like cigars and cigarettes.

"I deem it preferable to make the tank B, as well as the tank C, of wood, so as to prevent tainting the tobacco, and so as to render the apparatus capable of treating large quantities of tobacco at the same time, and without making the apparatus heavy and expensive, and to em- [535] ploy a boiler wholly detached from the tank B, excepting by the steam and water pipes connecting the same, thus enabling me to make the outer or larger tank of wood without exposing it to danger from fire. A detached boiler amply sufficient to be employed in connection with very large tanks will be comparatively simple and cheap.

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is:

"1. The apparatus, substantially as described, for treating tobacco, to wit: The tight vessel or tank B, the tight vessel C, made of wood and suspended in the tank B, and a steam generator or heater, all combined and operating together, substantially as and for the purposes specified.

"2. The combination of the boiler A, the tight tank B, made of wood, the tight vessel C, made of wood and suspended in the tank B, and the pipes D and E entering the tank B and the boiler, all arranged and operating substantially as and for the purposes specified."

On the hearing in the circuit court it was found upon the evidence, that the device used by the defendants differed from that of the complainants, as described in the patent, only in this respect, that the defendant's tobacco holder is not made tight so as to exclude moisture except through the pores of the wood; the defendants using the ordinary tobacco cases in which the leaf tobacco comes packed, to hold the tobacco during the process of resweating. It was contended on the part of the defendants that this was a substantial difference, because the complainants' claim required their tobacco holder to be tight, while that of the defendants was not. In disposing of the case upon this point, the judge holding the circuit court, in his opinion, said: "The essential feature of complainants' invention consists in subjecting the mass of leaf tobacco to moisture and heat in a comparatively close wooden box for a sufficient time to have it undergo the process of resweating, and it is no answer to complainants' charge of infringement of their patent to say that defendants' box is not quite so tight as that complainants deem desirable or necessary for the most satisfactory operation of their device." *Robinson* v. *Sutter*, 10 Biss. 100; *S. C.* 8 Fed. Rep. 828.

The issue as to novelty, upon the proof, was [536] also decided against the defendants, for the reason that the two devices relied upon—one described in the Oppelt patent of June 16, 1874, and the other in the Wenderoth patent of July 16, 1878—both use metal tanks and a metal tobacco holder. It was shown that contact with metal taints and injures the tobacco operated upon, and that the free admission of steam wets and to some extent cooks the tobacco; and the conclusion of the circuit court was that "The porous wooden tobacco holder devised by Robinson seems, from the proof, to stimulate that slow fermentation and action in the constituent elements of the leaf which is required to make the whole mass homogeneous."

Upon a showing made by the defendants, a rehearing of the cause was granted, and further proofs taken. Upon that hearing it was made clearly to appear, from the testimony, that the artificial resweating of tobacco had been effected long prior to the application for the complainants' patent, by means of the application of steam in a chamber adapted for that purpose, applied to the tobacco while in the ordinary tobacco cases in which the leaf tobacco comes packed, just as the defendants were found to have practiced. The case, however, was decided against the defendants upon another ground, as appears from the opinion of the judge holding the circuit court. *Robinson* v. *Sutter*, 11 Fed. Rep. 798. He said: "The distinctive feature of complainants' device for resweating tobacco is the water tank in the bottom of their outer chamber, so that, by keeping this water at the proper temperature, the atmosphere of the outer chamber can be kept warm and humid, whereby the process of resweating will be induced and carried on to whatever extent shall be deemed desirable." The devices used prior to Robinson's invention, and proven as anticipations, which would avoid his patent for want of novelty, were found not to meet that point in the description of the complainants' device, inasmuch as the outer tank in each, into which the steam entered for the purpose of heating and moistening the tobacco, had specific provision made in it for drawing off the water formed by condensation of the steam, instead of being arranged so as to hold [537] a body of water in order to equalize and maintain the temperature of the vapor in the room or tank.

The defendants had also introduced in evidence, as an anticipation, a patent granted in 1865 to one Huse. His invention is described in his specification as follows:

"I take the tobacco by preference, after it has been desiccated and packed in the usual manner in hogsheads or cases, and which it is well known are not by any means so close as to exclude steam. I place these hogsheads or cases, or both, in a chamber of convenient size, and which can be closed up steam tight, and I then introduce heat and moisture by means of steam apparatus, such as generally employed for heating buildings, the coils or congeries of pipe being arranged in any suitable manner for a proper distribution of the heat. Some of the pipes, about one half of them, are to be pierced with very small holes, to permit the escape of steam into the chamber. It will be found best to raise and maintain the temperature at about 150 degrees Fahrenheit, and for about forty-eight hours for tobacco which has been well desiccated, a longer time being required when treated before it has been well dried. At the end of the time specified, the tobacco should be examined, and, so soon as nicotine is well developed, which will be indicated by the evolution of ammonia, the steam must be shut off, the chamber opened, the hogsheads or cases opened, the tobacco all opened and shaken and thoroughly dried, which is best done in an open and well ventilated room; and after it has been well dried the tobacco will be found to be thor-

oughly cured and ready for use, and further fermentation so completely stopped that it can be repacked and kept for any desired length of time.

"In this way I avoid all the evil consequences of the method heretofore practiced, while at the same time it will enable the planter to put his crop of tobacco in market in a comparatively short space of time.

"What I claim as my invention, and desire to secure by letters patent, is the process, substantially as herein described, of curing tobacco, which process consists in subjecting it to the action of artificial heat and steam to induce the [538] required fermentation until nicotine is evolved, and then stopping the further progress of fermentation by opening the packages and thoroughly drying every part substantially as described."

In respect to this, the circuit court said: "As for the Huse patent of 1865, it was only a box heated with steam coils, in which the tobacco was to be placed and heated by the radiation of heat from the pipes and the introduction of live steam." 11 Fed. Rep. 798.

There was, accordingly, a decree entered in favor of the complainants for an injunction, and for the recovery of $3,309.30 damages found by the master. The defendants have brought the present appeal.

It sufficiently appears from the evidence that if the essential and sole characteristic of the complainants' invention consists in a substitution of a close wooden box, to hold the tobacco while being subjected to the process of resweating, for metal tobacco holders previously in use, either the practice of the defendants in using as a tobacco holder the ordinary tobacco cases in which the leaf tobacco comes packed, during the process of resweating, is not an infringement, or, if it be so held, the complainants' invention was anticipated by others long prior to its date. This is shown by the Huse patent, and it is proven to have been employed by others, particularly by Louis Specht in the tobacco factory of August Beck & Co., in Chicago.

It only becomes important, therefore, to consider the ground finally taken in support of the decree, which involves the question whether the appellees are entitled to claim the water tank in the bottom of the outer chamber, and the use of water in it, whereby the atmosphere of the outer chamber can be kept warm and humid, so that the process of resweating may be induced and carried on to any desirable extent. In this connection it becomes important to consider the proceedings in the patent office in the granting of the patent, as shown by the file wrapper. It appears from the transcript of the record in the case that the defendants offered in evidence a copy of this file wrapper and contents, which was objected to as incompetent and not sufficiently verified. No ruling [539] of the circuit court seems to have been made upon the objection, and the paper, although described as, marked, "Defendants' exhibit, copy of the file wrapper and contents of the Robinson patent," is not certified as a part of the evidence, and is not contained in the transcript. It does not, therefore, appear that the paper was ever before the court below, or considered by it in the hearing of the case. In this court, however, on the hearing, by consent of parties, the file wrapper and contents were ordered to be made a part of the record. From that paper it appears that the original specification, on which the application for a patent was based, declared that the petitioner had invented certain new and useful improvements in the method as well as apparatus for steaming leaf tobacco. In setting out the object of the invention, he said: "The object of this invention is to provide suitable means whereby the leaves may be subjected to the process of sweating by means of steam or water under the influence of heat, and to that end my invention consists of that process and in the apparatus by means of which I carry on the said process, substantially as hereinafter specified."

It was also stated, that "B is a tank or vessel for containing water and receiving the steam generated by the boiler A;" and that "steam may also be generated in the space by filling the latter partly with water, and by applying heat directly to the bottom of the tank B. A good result will be accomplished by keeping the water hot, though not to a degree sufficient to generate steam to any appreciable extent." The claims were set out as follows:

"First. The method or art, substantially as described, of treating tobacco; to wit, by placing the leaves in a tight vessel surrounded or partly surrounded by a chamber for containing water, and subjecting the tobacco to heat by heating the water in the said chamber, and keeping it to the proper temperature by means of heat applied to the said chamber continuously during the operation of sweating the leaves, substantially as and for the purpose specified.

"Second. The method or art, substantially as specified, of treating tobacco; to wit, by placing the leaves in a tight vessel surrounded by a steam and water tight chamber, and by [540] introducing steam into the said chamber, substantially as and for the purpose specified.

"Third. The apparatus, substantially as described, for treating tobacco; to wit, the tight vessel or tank B, the tight vessel C, made of wood and suspended in the tank B, and a steam generator or heater, all combined and operating together, substantially as and for the purpose specified.

"Fourth. The combination of the boiler A, the tight tank B, made of wood, the tight vessel C, made of wood and suspended in the tank B, and the pipes D and E entering the tank B and the boiler, all arranged and operating substantially as and for the purpose specified."

This application was filed on the 28th of February, 1879, and rejected by the patent office on the 6th of March, 1879.

Thereupon the applicant filed certain amendments to his specification, by striking out everything that related to the method or process for steaming leaf tobacco, and all that had reference to the use of water under the influence of heat, as contained in the tank B, and the first two claims. Amendments were also made by inserting other parts of the specification as it now stands; amongst others, the following: "I make the vessel C of wood, as an essential feature of my invention, in order that the steam may sweat or percolate through it from the tank B, and so that the tobacco will not be tainted

by contact with the metal." And also the following: "The steam producing moisture in the vessel C, by sweating or percolating through it from the space *b*, in addition to the moisture originally in the tobacco before it was confined in the vessel."

On the 10th of April, 1879, the examiner informed the applicant that he "should specifically set forth that the structural plan of the device is old, and that the improvement consists alone in making the vessel C of wood instead of metal, and sufficiently porous to permit the steam to percolate through it."

Thereupon the applicant filed an amendment [541] by inserting the following: "I am aware that the general structural plan of the apparatus hereinbefore described is old, excepting that the vessel C for receiving the tobacco has not, so far as I am aware, heretofore been made of wood, but of metal. The making of the vessel C of wood, and sufficiently porous to permit the steam to percolate through it, constitutes the essential feature of this invention. When metallic vessels are employed to receive the tobacco, it is liable to be tainted, and in such cases is merely heated, but not subjected to the moistening influence of steam or vapor percolating through the vessel containing the tobacco, as when this vessel is made of wood sufficiently porous to admit of that result. I do not, therefore, here intend to claim the general structural plan of the said apparatus independently of a vessel. C, made of wood, sufficiently porous to allow the steam to percolate through it."

On the 24th of April, 1879, the examiner wrote to the applicant as follows: "The specification should be amended by omitting all statements that the applicant has an improved process or is the inventor of such. * * * The statement of invention, and reference to the state of the art, both require correction, as the invention is an improved apparatus only."

Thereupon further amendments were made, resulting in the specification and claims as they now stand, and the patent was granted.

A comparison of the patent as granted with the application very conclusively establishes the limits within which the patentee's claims must be confined. He is not at liberty now to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant. *Shepard* v. *Carrigan*, 116 U. S. 598 [Bk. 29, L. ed. 723], and cases there cited. It appears, therefore, distinctly that the patentee has no claim for a process of steaming tobacco by means of steam, or steam and a body of hot water, nor by any process whatever. His invention must be limited to the apparatus, and as to that he was expressly required to state that its structural plan was old and not of his invention. What is meant by the structural plan of the apparatus is the arrangement of the vessels for holding the tobacco, for confining [542] the steam and water, and for supplying the steam; and the precise improvement which is alone the subject of the patent is the substitution of a wooden vessel for holding the tobacco while being resweated in place of a metallic one. So that the ultimate question in the case is reduced to this, whether, in such an apparatus, the use of the cases, or boxes, or packages, in which the tobacco leaves are originally packed by the producer is equivalent to the wooden tobacco holder mentioned in the complainants' specification. If it is not, there is no infringement; if it is, as we have already seen, it had been anticipated for many years by the practice of other persons. It is expressly described in the Huse patent of 1865, where the inventor states, as follows: "I take the tobacco, by preference, after it has been desiccated and packed in the usual manner in hogsheads or cases, and which it is well known are not by any means so close as to exclude steam. I place these hogsheads or cases, or both, in a chamber of convenient size, and which can be closed up steam tight, and I then introduce heat and moisture by means of steam apparatus, such as generally employed for heating buildings, the coils or congeries of pipe being arranged in any suitable manner for a proper distribution of the heat. Some of the pipes, about one half of them, are to be pierced with very small holes to permit the escape of steam into the chamber." And the same thing was done at the establishment of August Beck & Co., in Chicago, before the date of Robinson's application, and by several others.

For these reasons we are of opinion that the decree below was erroneous. *It is, therefore, reversed, and the cause remanded, with instructions to dismiss the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HORACE H. ELDRED, *Plff. in Err.*, [513]
v.
BELL TELEPHONE COMPANY OF MISSOURI.

(See S. C. Reporter's ed. 513-523.)

Corporations—surrender of stock to effect consolidation—whether a sale—evidence—recital in deed, not an estoppel to one not a party.

1. The plaintiff in error, who was the principal promoter of the Bell Telephone Company of Missouri, surrendered to said Company certain shares of its stock for the purpose of effecting the consolidation of the American District Telegraph Company with said Telephone Company. In an action brought by him against the Telephone Company to recover the value of said stock, it is held that the transaction cannot be construed as a loan of the stock to the defendant to be returned *in specie* or accounted for in value, nor as a sale of the stock at what it was reasonably worth.

2. The defendant is not estopped by a recital to the effect that it had purchased said stock, contained in the act of agreement of consolidation between itself and the other corporation, as found in its minute book, because the plaintiff is not a party to the deed, and because the recital is an innocent misdescription of the transaction.

[No 84.]

Argued Dec. 7, 8, 1886. Decided Dec, 20, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Millard R. Powers** and *L. B. Valliant*, for plaintiff in error:

A party may assume an obligation by put-

ting himself in a position which requires the performance of duties.

Webster v. *Upton*, 91 U. S. 68 (23: 386); *Routsong* v. *Pacific R. R.* 45 Mo. 236.

The stock was used by the defendant for its sole use and benefit. No express agreement to pay is necessary.

Toledo, W. & W. R. R. Co. v. *Chew*, 67 Ill. 378; *Routsong* v. *Pacific R. R. supra.*

The defendant is estopped from denying its liability.

Wood v. *Whelen*, 93 Ill. 153; *Peoria & S. R. R. Co.* v. *Thompson*, 103 Ill. 202; *Bradley* v. *Ballard*, 55 Ill. 413.

Mr. **Henry Hitchcock**, for defendant in error.

[514] *Mr. Justice* **Matthews** delivered the opinion of the court:

The plaintiff in error, who was plaintiff below, being a citizen of the State of New York, brought his action at law in the Circuit Court of the United States for the Eastern District of Missouri against the Bell Telephone Company of Missouri, a corporation of that State, to recover $25,000, the price and value of 250 shares of the capital stock of the defendant Corporation, of the par value of $100 per share, the personal property of the plaintiff, advanced, furnished and delivered to the defendant at its special instance and request, to be by the defendant accounted for to the plaintiff. The defendant filed an answer containing a general denial of the allegations of the petition. The case came on for trial before a jury; evidence on both sides was heard, which is fully set out in a bill of exceptions, and the judge instructed the jury to find a verdict for the defendant, which was done. The judgment rendered thereon is sought to be reversed by the present writ of error.

The question presented is whether there was sufficient evidence in support of the plaintiff's cause of action to require its submission to the jury. It is conceded that there was no express agreement between the parties under which the defendant was bound to pay for the shares in question. The plaintiff's claim to recover was based entirely upon the supposition of a contract to be inferred from the acts of the parties. The undisputed facts on which this claim is founded are as follows:

In October, 1879, the plaintiff, Eldred, had some correspondence with the National Bell Telephone Company of Boston, with reference [515] to acquiring the right to operate telephonic exchanges in Kansas City and St. Louis. The arrangement which resulted from that correspondence required the organization of a corporation under the laws of Missouri, and the acquisition by it of certain outstanding contracts between the National Bell Telephone Company and the Kansas City Telephonic Exchange, and also of a contract between the former and the American District Telegraph Company of St. Louis. Accordingly, the plaintiff, on December 3, 1879, organized under the laws of that State the Bell Telephone Company of Missouri, the nominal capital stock of the Corporation being fixed at $400,000, in shares of $100 each. This stock was to be issued as full paid to the plaintiff and others named by him as associates, in consideration of the transfer to said Corporation of the rights expected to be acquired by him from the National Bell Telephone Company upon the conditions required by it. The plaintiff associated with himself four personal friends, Messrs. Kent and Storke, of New York, and Durant and Smith, of St. Louis, it being necessary, under the laws of Missouri, to have five stockholders as incorporators, agreeing to give them certain proportions of his interest in the rights to be acquired by him and transferred to the Corporation. The proportions were to be as follows: Storke 750 shares, Kent 250 shares, Smith 20 shares, and Durant 750 shares, out of 4,000, Eldred himself retaining the remaining 2,230 shares. No money was paid or to be paid by any of these incorporators for their interests. In the organization of the Company, the capital stock was subscribed for and taken up in the manner and proportions just stated, and certificates of stock for these amounts, respectively, were made out with the intention of delivering them to the subscribers. Before any such delivery was made, however, on the 19th day of December, 1879, the transaction took place by which the rights of the American District Telegraph Company were secured to the Bell Telephone Company of Missouri. To accomplish that it became necessary to make a consolidation, under the laws of Missouri, of the Bell Telephone Company of Missouri, as already organized, with the American District Telegraph Company. The latter was a corporation of Missouri, with a capital stock consisting of 500 shares of $50 each, 263 of which the plaintiff, Eldred, owned and controlled. According to the [516] plan of consolidation agreed on, it was necessary to issue to the owners of the capital stock of the American District Telegraph Company 250 shares of the stock in the Bell Telephone Company of Missouri.

The plaintiff, in his examination in chief, in answer to a question as to what steps were taken to effect this consolidation, made the following statement:

"We met several times, and I remember that at that time there seemed to be some difficulty about the consolidation of the two Companies in consequence of the statute of the State having been changed. There were several meetings held, and I believe the attorneys who had charge of the matter finally made the consolidation under both of the statutes, which necessitated considerable delay. On coming together, we had issued 4,000 shares of stock, and we wished to consolidate with the American District Telegraph Company, of which I was then president. I was president of both Companies. Therefore, it became necessary to provide for some shares to take up the stock of the American District Telegraph Company. These gentlemen, with whom I had been already associated, four in number, at that time were all personal friends of mine, and I gave them this stock. All the business was like a family operation. Two of the parties were in New York, Mr. Kent and Mr. Storke; and Durant, Smith, and myself were here. Previous to my coming to St. Louis, I had obtained proxies for the purpose of voting the stock of Mr. Storke and Mr. Kent, they not being present, and as I had agreed with them in regard to the proportion of stock which I was to give them, I did not feel authorized to act for them without authority,

and therefore I said that I would advance the 250 shares necessary to make up the capital stock of the American District Telegraph Company out of the proportion which was to be issued to me. I think that was the way it was done. We had some trouble about the minutes under the existing statute, and I think they were fixed up by the attorneys afterwards, after I left the city, or about that time."

A consultation was held between Eldred, the plaintiff, and Durant and Smith, two of his [517] associates, on December 19, 1879, at the office of the Bell Telephone Company in St. Louis, as to how the arrangement should be consummated. The plaintiff's own statement, on cross examination as a witness in the case, of this conference, is as follows:

"All that I remember about that particular portion of it is that it was at no meeting of the board; so far as my recollection goes, Mr. Durant was the only person present, and we found by figuring up the stock that we hadn't enough shares to take in the American District Telegraph Company of St. Louis. These gentlemen in interest were all personal friends of mine. Some of them were in New York, and I had no authority to make any concessions for them, and I therefore agreed with Mr. Durant, who was vice president and general manager of the Company, to advance 250 shares of the stock of the Bell Telephone Company of Missouri, so that we might take up the entire capital stock of the American District Telegraph Company." In answer to the question, "You say that you agreed. What did Durant say?" he said: "Mr. Durant didn't have much to say about it; I was the owner of the property, and he acquiesced generally in all I did."

On the same day a meeting of the stockholders of the Bell Telephone Company of Missouri was held at its office, at which the three persons named, Durant, Eldred, and Smith, were present. Eldred was chairman of the meeting, and a preamble and resolution offered by Durant were unanimously adopted, and are as follows:

"*Whereas*, the National Bell Telephone Company (a corporation duly organized under the laws of the State of Massachusetts) has, by agreement with H. H. Eldred, granted the said Eldred certain valuable rights, concessions, and franchises under what are known as the Bell telephone patents and other patents owned and controlled by the said company, said agreement being contained in a written proposition duly accepted by the said Eldred, and to be fully set forth in contracts to be duly executed by the said National Bell Telephone Company, pursuant to said agreements; and whereas, the said rights, concessions, and franchises, so acquired by said Eldred, were by him transferred [518] to the parties hereinafter named, with interests in the proportion hereinafter set forth, as follows: H. L. Storke, 750; George H. Kent, 250; E. A. Smith, 20; George F. Durant, 750; H. H. Eldred, 2,230; total 4,000; said parties being the owners of said interests at the time of the incorporation of this Company, and being the sole incorporators of this Company; and whereas, said exclusive rights, concessions, and franchises constitute property rights of great value to this Corporation under its charter:

"*Resolved*, That in consideration of the complete assignment to this Corporation in due form, of all the rights, title and interest of said parties in said exclusive rights, concessions and franchises, so that the same may be fully possessed, enjoyed and enforced as by said Eldred, this Corporation hereby allots and sets apart to said parties 4,000 full-paid shares of its capital stock, constituting the authorized capital stock of said Company, to each of said parties a proportionate part of said 4,000 shares, according to his interest in said rights, concessions and franchises, and according to the subscription of each to the capital stock of this Company, and constituting a full payment of said subscription: H. L. Storke, 750 shares; George H. Kent, 250 shares: E. A. Smith, 20 shares; George F. Durant, 750 shares; H. H. Eldred, 2,230 shares; and, in consideration of the agreement of H. H. Eldred to surrender to this Company 250 shares of stock so allotted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis, a certificate of 1,980 shares shall be issued to said Eldred, and the 250 shares so surrendered shall be retained in the possession of this Company, subject to issuance hereafter for said purpose of consolidation; and the officers of the Company are directed to issue in due form certificates of stock to said parties above named, and to do and perform all acts necessary and proper for the full acceptance on the part of this Company of the aforesaid agreements and propositions of the National Bell Telephone Company in the execution of contracts or otherwise."

Accordingly, the original certificate for 2,230 shares of stock, made out to Eldred but never [519] delivered, was destroyed, and another certificate prepared for 1,980 shares, which was delivered to and received by Eldred.

It further appears from the evidence that the plaintiff advanced to the defendant $6,000 in money for the purpose of meeting the expenses of starting, which was afterwards repaid by it to him, and for the rights acquired from other sources than the American District Telegraph Company of St. Louis the Bell Telephone Company of Missouri subsequently paid the Western Union Telegraph Company, which was in fact their owner, the sum of $75,000.

The implied contract relied upon by the plaintiff in this case is of that class in which the promise of the defendant is to be inferred from the acts and conduct of the parties. The contract assumed to be thus proven is that, in consideration of 250 shares of its capital stock owned by the plaintiff and advanced by him to the defendant, at its instance and request, to be used for its benefit and advantage, and accepted by the defendant and so used, the defendant undertook and promised to pay the reasonable value thereof. The facts and circumstances relied on to justify this assumption do not seem to us to warrant it. It is a misconception of the transaction, as we view it, to construe it either as a loan of stock by the plaintiff to the defendant, to be returned either *in specie* or accounted for in value, or as a sale of stock by the plaintiff to the defendant at what the stock was reasonably worth. In truth, the dealing supposed to result in this bargain does not appear to have taken place between the plaintiff and the defendant, but between

the plaintiff and his associates, corporators in the original corporation before the consolidation. It was an arrangement having reference to the relative rights and interests of the corporators themselves, and consisted in the readjustment of the relative proportions, *inter sese*, according to which they should hold the capital stock of the Company. There had been an agreement by which the 4,000 shares should be allotted among them, so that the plaintiff might have 2,230; the new agreement was that that allotment should be so changed as that the [520] plaintiff would have but 1,980; the 250 shares in question being surrendered out of the original allotment for another and different use in the reorganization of the Company, so as to take in other stockholders and other interests. The plaintiff in his testimony distinctly states that when it became apparent that 250 shares of the stock were required for this purpose, he did not feel at liberty to call upon his associates for a contribution, as he had promised them the number of shares specifically designated. It is difficult to see how this does not also exclude the liability he now seeks to enforce against the Corporation, which is but another mode of compelling his associates now to make that contribution, which he says he did not feel at liberty then to exact. The benefit conferred, assumed to be the consideration for the promise to return or repay which is sought to be enforced, was not in fact conferred upon the existing Corporation sued as a defendant; the only difference in its situation, resulting from the transaction, is that the stockholders of the American District Telegraph Company, instead of Eldred, became the owners of the 250 shares surrendered by the plaintiff, for which they paid by a transfer of the rights and property of the District Telegraph Company. The real benefit and advantage growing out of the transaction inured exclusively to the original corporators in the first Bell Telephone Company of Missouri, including the plaintiff himself, as it was the means whereby that corporation was enabled successfully to accomplish the object of its incorporation, but against them, as has already been shown, the plaintiff makes no claim. To enforce his claim against the existing Corporation is not only to compel his original associates to contribute, but also the stockholders of the District Telegraph Company, who became, by virtue of the transaction, stockholders in the defendant Corporation; but they made no such bargain as that. The transaction, whatever it was, was reduced to writing at the time and put on record, as a part of the proceedings of the stockholders of the Bell Telephone Company of Missouri, in the recitals and resolution already set out, and is correctly characterized in them as an agreement on the part of the plaintiff to surrender to the Company 250 shares [521] of the stock previously allotted to him, for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis, the 250 shares so surrendered to be retained in the possession of the Company, subject to be issued thereafter for that purpose. There is nothing whatever in this statement to suggest or to warrant the conclusion that there was any sale of this stock by the plaintiff to the Company, or any loan or advance of it for its uses, for which it was expected any return or payment should be made.

The plan for the organization of the Company, both in its general outlines and in its details, was the plaintiff's own scheme, of which he continued to have control until its consummation, as he himself testifies. The original plan was that he was to retain 2,230 shares out of 4,000 of the capital stock of the new Company; but it was an essential part of his undertaking to acquire the property and franchises of the American District Telegraph Company of St. Louis. He became satisfied that the best way to accomplish that was by the consolidation of the two companies as actually effected, and to insure this it became necessary for him to diminish the relative quantity of his interest in the capital of the consolidated Company; and to this end, and for this consideration, as actually and fully expressed in the resolution adopted by the stockholders, of whom he was chief, he agreed to surrender to the Company 250 shares of the stock previously intended for himself. He asked no one to contribute; he certainly did not contemplate the return of the stock in kind, for that was impossible; it is not a reasonable inference, from the facts and circumstances, that he expected any payment. It is clear, beyond doubt, that those with whom he was dealing had no reason to believe the existence of any expectation of that kind on his part. It was certainly treated and considered at the time as a part, and a necessary part, of the arrangement by which the plaintiff himself performed his own engagements with the National Bell Telephone Company for the purpose of putting into successful operation the scheme which he had organized by the formation of the Bell Telephone Company of Missouri.

The plaintiff as a part of his case, read in evidence from the minute book of the Bell Tele- [522] phone Company of Missouri the Act and agreement of consolidation between it and the American District Telegraph Company of St. Louis, in which it is recited that the party of the first part, the Bell Telephone Company of Missouri "has purchased and is now owner of 250 shares of its capital stock;" and this recital is relied upon as an admission that the transaction was one of purchase and sale, and not a voluntary surrender of the right to unissued stock. The recital, however, has no effect as an estoppel, the plaintiff being no party to the deed which contains it, and acquiring no rights on the faith of it; and it is in fact an innocent misdescription of a transaction, the real nature of which fully and unambiguously appears from the other record of the same Company, where it speaks of and records the transaction as it occurred and when it took place, being made, indeed, for that very purpose.

We are, therefore, of opinion that the jury would not have been warranted in drawing the conclusion of fact, from the evidence in the case, that there was any such agreement as that sued on, and that the relation of the parties, as shown in the circumstances of the transaction, was not such as, in contemplation of law, to give rise to any such liability.

The ruling of the Circuit Court was, therefore, correct and its judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[522] LOT C. WHITFORD, *Plff. in Err.*,

v.

COUNTY OF CLARK.

(See S. C. Reporter's ed. 522-525.)

Evidence—error to read deposition when witness in court.

1. It was error for the court below to allow, against objection, a deposition taken *de bene esse* under section 863, R. S., to be read when it was made to appear, before the reading, that the witness was himself actually present in court ready and able to testify in the case if called.

2. When the Statutes of the United States make special provisions as to the competency or admissibility of testimony in the courts of the United States, they must be followed and not the laws or the practice of the State in which the court is held, when they are different.

[No. 82.]

Argued Dec. 6, 7, 1886. Decided Dec. 20, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Reversed.*

This action was commenced in the court below by the plaintiff in error against the defendant in error to recover upon certain interest coupons which had been detached from bonds alleged to have been issued by the defendant in aid of the construction of the Missouri & Mississippi Railway.

See *U. S.* v. *Clark County*, Bk. 24, 545; *Id.* 628.

Defendant pleaded *nil debet;* that plaintiff never owned the bonds or any of them; that none of the coupons sued on were the deed of the County, that they were never delivered by the County, that no consideration was ever received by the County; that the plaintiff was not the holder of the coupons for value; that the coupons had always been the property of the County; that they came immediately to the possession of the plaintiff from the agent of the County, and had then been long due and dishonored.

The case was tried by the court, a jury having been waived, and resulted in judgment for the defendant.

The case is further stated in the opinion.

Messrs. **Clinton Rowell, John B. Henderson** and *H. A. Clover*, for plaintiff in error.

Messrs. **M. G. Reynolds, W. H. Hatch,** *Thos. J. C. Fagg* and *James M. Lewis*, for defendant in error.

[523] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

In this case the trial was by the court, a jury having been waived. The record presents a special finding of facts and certain exceptions to the rulings of the court on the admissibility of testimony. Upon the facts as found we should have had no hesitation in affirming the judgment, but in the rulings excepted to there was error. As part of the evidence on which the findings were made, the court, against the objections of Whitford, the plaintiff in error, allowed a deposition of N. T. Cherry, taken *de bene esse* under section 863 of the Revised Statutes, to be read, when it was made to appear before the reading that the witness was himself actually present in court ready and able to testify in the case if called. From the opinion filed on the decision of a motion for a new trial (*Whitford* v. *Clark County*, 18 Fed. Rep. 837), it appears that the court held the rule on this point "to be that when a deposition in a civil action has been duly taken, because the witness resides more than one hundred miles distant, said deposition is admissible, subject, however, to the right of the adverse party to place him on the witness stand if present. Such is understood to be the true rule, although decided cases are not fully in accord." But by section [524] 865 of the Revised Statutes it is expressly provided, that "Unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause." This was first enacted in the Judiciary Act of September 24, 1789, chap. 20, section 30, 1 Stat. at L. 90, and it has been in force from that time until now. In *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 617 [30 U. S. bk. 8. L. ed. 248], it was said, in reference to this provision, that "the Act declares expressly that, unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove that the witness has removed within the reach of a *subpœna* after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this would rest upon the party opposing the admission of the deposition in evidence. It is, therefore, a deposition taken *de bene esse.*" And in *The Samuel*, 1 Wheat. 15 [4:24], *Chief Justice* Marshall said a deposition taken under the statute *de bene esse* "can be read only when the witness himself is unattainable." See also *Harris* v. *Wall*, 7 How. 693 [12:875], and *Rutherford* v. *Geddes*, 4 Wall. 224 [18:344]. It thus appears to have been established at a very early date that depositions taken *de bene esse* could not be used in any case at the trial if the presence of the witness himself was actually attainable, and the party offering the deposition knew it or ought to have known it. If the witness lives more than one hundred miles from the place of trial, no *subpena* need be issued to secure his compulsory attendance. So, too, if he lived more than one hundred miles away when his deposition was taken, it will be presumed that he continued [525] to live there at the time of the trial; and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side. But if it be overcome, and the party has knowledge of his power to get the witness in time to enable him to secure an attendance at the trial, he must do so, and the deposition will be excluded. Such was this case. While the witness lived more than one hundred miles from the place of trial when his deposition was taken, he was actual-

ly in court, ready and able to testify when his testimony was needed at the trial. His deposition, therefore, was not admissible. The rulings of the circuit courts have uniformly been the same way, so far as we know. While some have gone beyond the decision in *Patapsco Ins. Co.* v. *Southgate*, none have fallen short of it. *Lessee of Penna* v. *Ingraham*, 2 Wash. C. C. 487, decided in 1811; *Lessee of Brown* v. *Galloway*, Peters, C. C. 294, decided in 1816; *Pettibone* v. *Derringer*, 4 Wash. C. C. 219, decided in 1818; *Russell* v. *Ashley*, Hemp. 549; *Weed* v. *Armstrong*, 6 McLean, 44.

As to depositions taken under a *dedimus potestatem* in accordance with section 866 of the Revised Statutes, this provision of section 865 does not apply, for it is expressly so enacted in that section. When the Statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the State in which the court is held when they are different. *Potter* v. *National Bank*, 102 U. S. 165 [26: 112]; *King* v. *Worthington*, 104 U. S. 50 [26: 654]; *Bradley* v. *U. S.* 104 U. S. 443 [26: 825]; *Ex parte Fisk*, 113 U. S. 721 [28: 1120].

The judgment is reversed and the cause remanded, with directions for a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[625] EDMUND L. COPE, ET AL., *Appts.*,
v.
VALLETTE DRY DOCK COMPANY.

(See S. C. Reporter's ed. 625-630)

Admiralty—salvage—dry dock, not a subject of jurisdiction—"salvage" and "ships and vessels" defined, and authorities reviewed.

1. A dry dock is not a navigable structure intended for transportation, and it is not, therefore, a subject of salvage service.
2. A libel against a dry dock for salvage is not within the admiralty jurisdiction.

[No. 80.]

Argued and submitted Dec. 6, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **J. R. Beckwith**, for appellants:

Personal property, which is not an instrument or vehicle of commerce may be the subject of a salvage service. "*In the Matter of a Whale*," 2 Hagg. Adm. 438, salvage was allowed for the rescue of a dead whale. The Federal Admiralty Courts of Massachusetts have repeatedly allowed salvage for whales.

Ghen v. *Rich*, 8 Fed. Rep. 159; *Taber* v. *Jenny*, 1 Sprague, 315; *Bartlett* v. *Budd*, 1 Low. Dec. 228; 3 Black Book of the Admiralty, 489. See also *50,000 Feet of Timber*, 2 Low. Dec. 64; *23 Bales of Cotton*, 9 Ben. 48.

It seems clear, both from authority and upon principle, that to become charged with a lien for salvage, it is only necessary that the property saved be personal or chattel property sunken in the sea, or afloat and adrift upon navigable waters, or cast ashore from the seas, within the dominion of admiralty, subjected at the time of rescue to danger of becoming lost to the owner or liable to be destroyed by the accidents or perils of the sea or navigation.

Mr. Alfred Goldthwaite, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a libel for salvage filed in the District Court for the Eastern District of Louisiana by the owners of the steam tug Col. L. Aspinwall, her master and crew, and the owner of the steam tug Joseph Cooper, and her crew, against the Vallette Dry Dock Company of New Orleans, to recover salvage for salving the Company's dry dock at Algiers, opposite New Orleans, from sinking and becoming a total loss. According to the allegations of the [626] libel, the said dry dock was run into by the steamship Clintonia, which did not obey her helm, and by the force of the collision a large hole was broken into the side of the dock, extending below the water line, and it began to fill with water, and commenced sinking, and would have sunk but for the exertions of the libelants, who hastened to its relief and applied their suction pumps in pumping out the water with which it was being filled, and thus at large expense and much trouble saved her from destruction. The libel alleges that the Vallette dry dock is a large floating vessel and water craft and artificial contrivance, used and capable of being used as a means of transportation in water, and was of great value, having cost upwards of $200,000, and was largely and profitably engaged in the business of docking vessels for repairs in the Mississippi River, and the libelants claim that their services were of the greatest merit, deserving a reward of at least $5,000.

The respondents pleaded, first, *res judicata*, alleging that a similar libel for the same cause had been formerly filed in the same court and dismissed for want of jurisdiction. This plea was overruled. Their second plea was to the effect that the case is not one of admiralty and maritime jurisdiction; that the assistance rendered by the libelants to the dry dock was not a salvage service; that the dry dock is not devoted to the purpose of transportation and commerce, nor intended for navigation; that it is nothing more than pieces of lumber fastened together and placed upon the water to receive vessels for repair, and having engines used, not for the purpose of locomotion from one place to another (of which, by its own resources, it is incapable), but solely to lower and elevate said dock, in order to receive vessels for repair; that it was always solely employed in the business of docking and repairing vessels; that at the time of the alleged salvage services it was moored and lying at its usual place where it had been located ever since the year 1866. Proofs being taken, the district court dismissed the libel upon the plea to the jurisdiction; and on appeal to the circuit court, the same decree was made.

The facts found by the circuit court substantially corroborate the plea. They describe the [627] dry dock as a structure contrived for the pur-

pose of taking ships out of the water, in order to repair them, and for no other purpose. They state that it consisted of a large oblong box, with a flat bottom and perpendicular sides; that in the year 1866 it had been put in position by being permanently moored by means of large chains to the right or Algiers bank of the Mississippi River, and was sparred off from the bank by means of spars, to keep it afloat. When it was desired to dock a steamboat or other vessel, it was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam or otherwise. It was not designed for navigation and could not be practically used therefor. The circumstances of the collision and rescue were substantially as stated in the libel. As a conclusion of law, the circuit court found that the services of the libelants were not salvage services, and that neither that court nor the district court had jurisdiction of the case.

We have no hesitation in saying that the decree of the circuit court was right. A fixed structure, such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a dry dock. A sailor's floating bethel or meeting house moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category. It can hardly be contended that such a structure is susceptible of salvage service. A ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service. "Salvage is a reward or recompense given to those by means [628] of whose labor, intrepidity, or perseverance a ship or goods have been saved from shipwreck, fire, or capture." 2 Bell, Com. 688, 7th ed. "Salvage," says Kent, "is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture." 3 Kent, 245. *Lord* Tenterden defines it as "the compensation that is made to those persons by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss." Abb. Shipping, 554. *Sir* Christopher Robinson defines salvage as follows: "Salvage, in its simple character, is the service which those who recover property from loss or danger at sea render to the owners, with the responsibility of making restitution, and with a lien for their reward." *The Thetis*, 3 Hagg. Adm. 14, 48. This definition is adopted by Maclachlan, in his treatise on Merchant Shipping, chap. XIII, p. 526. *Sir* John Nichol, in *The Clifton* 3 Hagg. Adm. 117, 120, says: "Now salvage is not always a mere compensation for work and labor; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued—whether it were in imminent peril, and almost certain to be lost if not at the time rescued and preserved; thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied; lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a remuner- [629] ation *pro opere et labore*."

If we search through all the books, from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

It is true that the terms "ships and vessels" are used in a very broad sense, to include all navigable structures intended for transportation. In a recent case decided by the Court of Appeal in England, which arose upon that part of the Merchant Shipping Act (17 and 18 Vict. c. 104, § 458) giving jurisdiction to justices of the peace in certain cases of salvage, "Whenever any ship or boat is stranded, or otherwise in distress, on the shore of any sea or tidal water situate within the limits of the United Kingdom," it was held (overruling *Sir* Robert Phillimore) that the word "ship" would include a hopper barge used for receiving mud from a dredging machine and carrying it out to deep water, though it had no means of locomotion of its own, but was towed by other vessels; it had a bow, stern and rudder, and was steerable. *Lord Justice* Brett said: "The words 'ship' and 'boat' are used; but it seems plain to me that the word 'ship' is not used in the technical sense as denoting a vessel of a particular rig. In popular language, ships are of different kinds; barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water, built in a particular form, and used for a particular purpose. In this case, the vessel, if she may be so called, was built for a particular purpose; she was built as a hopper barge; she has no motive power, no means of progression within herself. Towing alone will not conduct her; she must have a rudder; and, therefore, she must have men on board to steer her. Barges are vessels in a certain sense; and as the word 'ship' is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper barge is a 'ship.' * * * This hopper barge is used for carrying men and mud; she is used in navigation; for to dredge up and carry away mud and gravel [630] is an act done for the purposes of navigation.

Suppose that a saloon barge, capable of carrying 200 persons, is towed down the River Mersey in order to put passengers on board of vessels lying at its mouth; she would be used for the purposes of navigation, and I think it equally true that the hopper barge was used in navigation." *The Mac*, 7 Prob. Div. 126; overruling *S. C. Id.* 88.

Perhaps this case goes as far as any case has gone in extending the meaning of the terms "ship" or "vessel." Still, the hopper barge was a navigable structure used for the purpose of transportation. We think no case can be found which would construe the terms to include a dry dock, a floating bridge, or meeting house, permanently moored or attached to a wharf.

There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo they clearly come under the head of wreck, flotsam, jetsam, ligan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel some authorities are against the claim, and others are in favor of it. Decisions in favor of the claim in reference to rafts of timber found floating at sea were made by *Judge* Betts in the New York District (*A Raft of Spars*, 1 Abb. Adm. 485), and by *Judge* Lowell in the Massachusetts District (*50,000 Feet of Timber*, 2 Lowell, 64), and against it by *Chief Justice* Taney in the United States Circuit Court for the District of Maryland (*Tome* v. *4 Cribs of Lumber*, Taney, Dec. 533), and by the English Court of Exchequer, in *Palmer* v. *Rouse*, 3 Hurl. & N. 505. Perhaps the decisions in the last two cases were affected by local custom or statutory provisions. None of these cases, however, throw any light on the subject in hand. The case of *Salvor Wrecking Co.* v. *Sectional Dry Dock Co.* reported in 3 Central Law Journal, 640, and the note appended thereto, may be referred to for an interesting discussion of the question. *Judge* Dillon, in that case, held that a dry dock is not a subject of salvage service.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[581] WARREN H. MACE, *Plff. in Err.*,

v.

EDWARD MERRILL.

(See S. C. Reporter's ed. 581-584.)

Jurisdiction—grant of public lands to State—controversy between parties claiming under State—no federal question involved—preemption claim.

1. Where two parties claim lands which Congress has granted to a State, one claiming a right to purchase of the State, and the other claiming under an alleged location under the laws of the State, prior to the grant by Congress, no federal question is involved and this court is without jurisdiction.

2. The plaintiff in error, who seeks to establish a right to purchase from the State, set up a claim under the preemption laws, but did not rely upon it. It seems that this claim may possibly be asserted in another suit.

[No. 76.]

Submitted Dec. 6, 1886. Decided Jan. 10, 1887.

IN ERROR to the Supreme Court of the State of California. *Dismissed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. T. Britton, A. B. Browne** and **W. H. Smith,** for plaintiff in error.

Mr. **Edward B. Merrill,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit begun by Mace, the plaintiff in error, against Merrill, the defendant in error, in the District Court of Los Angeles County, California, pursuant to a reference by the Surveyor-General of the State, under section 3314 of the Political Code of that State, which is as follows: [582]

"When a contest arises concerning the approval of a survey or location before the Surveyor-General, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the State, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the State, he must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record book in his office."

The record shows that the S. E. ¼, Sec. 21, T. 2 S., R. 13 W., S. B. M., was listed to the State of California by the Secretary of the Interior on the 21st of March, 1876, as part of the 500,000 acres of land selected by the State under section 8 of the Act of Congress approved September 24, 1841, chap. 16, 5 Stat. at L. 455, for the purpose of internal improvements. On the 17th of November, 1874, Mace applied to the Surveyor-General of the State for the purchase of this tract. His application was on file when the land was listed. Merrill, the defendant in error, also claimed the same tract from the Surveyor-General. His claim was based on an alleged location of the tract under the laws of California, and a payment therefor to the State in school warrants on the 22d of June, 1857. Such being the case, he insisted that the title of the State inured to his benefit under the provisions of sections 1 and 3 of the Act of July 23, 1866, chap. 219, 14 Stat. at L. 218, "To quiet land titles in California." Mace set up no title in himself under any statute or authority of the United States. His application was to the State, and he claimed under state authority only. It is true that if the State had the right to sell he might have the right to buy, but that right to buy would come, not from the United States, but from the State. The court below [583] decided that the State could not sell because it had already sold to Merrill, and that all the title it had was held in trust for him. Mace, in his petition, did indeed aver that he entered into the possession of the land in 1869,

with the intention of acquiring title from the United States by preemption, and that in 1873 he filed in the proper office his declaratory statement and offered the necessary proof; but his claim in this case is not based on any such right, the prayer of his petition being only that it may be adjudged that he "has the better right to purchase." If his rights under the preemption laws are superior to the title of Merrill under the State's selection, it may perhaps be made a subject of litigation in another suit, where his title can be set up against that of Merrill; but in this suit, which is only to establish his right to buy from the State, no such questions can arise. His right to buy has no connection whatever with his claim of preemption; for, as he says in his petition, "He made application to the Surveyor-General of the State of California under the provisions of Title Eight of the Political Code of the State, to purchase, * * * which said application was in all respects made in conformity with the requirements of the Code aforesaid, and which application has been ever since the date last aforesaid, and now is, on file in the office of the Surveyor-General aforesaid;" and "the plaintiff is the owner of a school land warrant, and under which he claims the benefit of the location of said quarter section." Had this suit been instituted by Mace to establish a right superior to that of the State, growing out of his preemption claim, and to charge the State as his trustee on that account, the case would have been different; for then he would have set up a right under the preemption laws of the United States and, with a decision against him, he might be in a condition to have a review by this court. Instead of that, however, he has contented himself with seeking to buy from the State that which, it has been decided, the State had no right to sell.

It is possible, also, that, by the practice in California, Mace might have contested the title of the State before the Surveyor-General, and had the case referred to the district court for the purpose of determining that title, and having a trust declared in his favor under the listing which had been made. The cases of *Tyler* v. *Houghton*, 25 Cal. 26, and *Thompson* v. *True*, 48 Cal. 608, indicate that this might be done, but such, as we have seen, is not the purpose of this suit. For all the purposes of the present inquiry, the right of the State to have the lands listed under the Act of 1841 must be considered as admitted, and the litigation confined to the contest between the parties as to which has the better right to buy from the State. According to the respective claims of the parties, Merrill did buy in 1857 and Mace made application to buy in 1874. Both claim under the State. If Merrill actually did buy, as he says he did, the title of the State inured to his benefit under the Act of Congress as soon as it passed from the United States. If he did not, then, so far as the record discloses, Mace might have had the right to buy when he made application for that purpose. The determination of this question, as the case comes here, involves no federal right in Mace which has been denied him by the decision of the court below. We consequently have no jurisdiction, and the cases of *Romis* v. *Casanova*, 91 U. S. 379 [Bk. 23, L. ed. 374]; *McStay* v. *Friedman*, 92 U. S. 723 [23: 767], and *Hastings* v. *Jackson*, 112 U. S. 283 [28:712], are directly to that effect. Indeed, the case of *Hastings* v. *Jackson* is strikingly like this in its material facts.

[584]

The writ of error is dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

IRON MOUNTAIN AND HELENA RAILROAD COMPANY ET AL., *Plfs. in Err.*, [608]
v.
ALBERT H. JOHNSON.

(See S. C. Reporter's ed. 608-613.)

Forcible entry and detainer—Statute of Arkansas—recovery of part of a railroad—common-law rule.

1. Under the Statute of Arkansas relating to forcible entry and detainer, part of a railroad may be recovered by a contractor, who has been, by force and violence, turned out of possession after its completion and before payment.
2. In such an action questions relating to the validity and construction of the contract are immaterial.
3. It seems that upon the facts presented forcible entry and detainer would lie at common law.

[No. 88.]

Argued Dec. 10, 1886. Decided Jan. 10, 1887.

IN ERROR to the District Court of the United States for the Eastern District of Arkansas. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Walter H. Smith** and **John F. Dillon**, for plaintiffs in error:

The directors had no authority to authorize any stipulation delegating to the plaintiff the right to possess, use and operate the defendant's railroad. If they did so the act was *ultra vires*, and the plaintiff had no right to hold the road—to operate and use it. The road so in his possession is not "lands, tenements or other possessions" within the meaning of the Arkansas Statute of Forcible Entry and Detainer.

See *Rees* v. *Lawless*, Litt. (Ky.) Sel. Cas. 184.

The whole class of decisions—such, for instance, as those in which it is held that statutes providing for the redemption of real estate do not apply to railroads; *Hammock* v. *Loan & T. Co.* 105 U. S. 77 (Bk. 26, L. ed. 1111); that statutes providing for the sale of real estate on execution do not apply to railroads, *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 112 (16: 38); Morawetz, Corp. 2d ed. section 1125, and cases there cited; that mechanics' lien statutes are inapplicable to railroads, unless clearly so expressed, or, when applicable at all, that the lien attaches to the whole road and not to a specific part of it (2 Wood, R. § 208, and cases there cited)—these cases, we say, are grounded upon the one underlying principle that the roadbed or right of way of a railroad company is not real estate in the usual sense of the word, in its hands, for its uses, but is merely an appurtenance to the franchise.

Messrs. **A. H. Garland**, *J. C. Tappan* and *John J. Hornor*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the District Court of the United States for the Eastern District of Arkansas.

The suit was commenced by an action of forcible entry and detainer brought by Johnson, the present] defendant in error, against the Iron Mountain and Helena Railroad Company, and the St. Louis, Iron Mountain and Southern Railway Company was, in the progress of the case, made a defendant on its own petition. The action was to recover possession of eighteen miles of a railroad which Johnson had built for the defendant, and from which he had been ejected by force and violence by the Iron Mountain and Helena Railroad Company. On the trial before a jury Johnson recovered a verdict on which a judgment was entered for restitution to the possession of the road. To reverse this judgment the present writ of error is brought.

Although there is some controversy about the validity and effect of the contract under which Johnson constructed and held possession of this eighteen miles of road, part of a larger road of the defendant, the main facts on which his right to recover depend are simple and not much controverted. Whatever may be the truth about the validity and construction of the contract under which he built the road for the Company, it is fully established that, after he had built it, and before they had paid him for it, he was in possession of it, using it by running his own locomotives over it; and that while thus in peaceable possession and claiming a right to hold it until he was paid for building it, he was by force and violence turned out of this possession by the Railroad Company, its officers and agents.

The Statute of Arkansas relating to forcible entries and detainers is to be found in chapter LXVII, Mansfield's Digest, as follows:

"Sec. 3346. No person shall enter into or upon any lands, tenements or other possessions, and detain or hold the same, but where an entry is given by law, and then only in a peaceable manner.

[610] "Sec. 3347. If any person shall enter into or upon any lands, tenements or other possessions, and detain or hold the same with force and strong hand, or with weapons or breaking open the doors and windows or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession, or by entering peaceably and then turning out by force, or frightening by threats or other circumstances of terror the party to yield possession—in such case every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this Act."

"Sec. 3368. Nothing herein contained shall be construed to prevent any party from proceeding under this Act by filing his complaint and causing an ordinary summons to be issued without filing the affidavit or giving the obligation hereinbefore required; and in all cases, when the judgment shall be for the plaintiff, the court shall award him a writ of restitution to carry such judgment into execution."

The main objection relied upon by plaintiff in error to the recovery of the plaintiff below is that a railroad is not real estate, nor such an interest in real estate that it can be recovered by actions applicable to that class of property. It is argued that a railroad is a complex kind of incorporeal hereditament, the possession of which is not authorized to be changed by an action of forcible entry and detainer. We do not think this objection would be a good one if in the State of Arkansas that action were left as it was at common law. The statute of that State, however, which we have just quoted, materially enlarges the extent and operation of this action. The language of both sections 3346 and 3347 makes it applicable to "lands, tenements or other possessions," and declares that "If any person shall enter into or upon any lands, tenements or other possessions, and detain or hold them with force and strong hand, or with weapons, * * * or frightening by threats or other circumstances of terror the party to yield possession, in such case every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this [611] Act."

We do not see any reason in the nature of the possession of a section of a railroad which takes it out of the language of this statute, or out of the general principle which lies at the foundation of all suits of forcible entry and detainer. The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are *in statu quo*, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title, or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims.

It occurs to us that this principle is as fully applicable to the possession of a railroad, or a part of a railroad, as to any other class of landed interests; and in fact that, of all owners or claimants of real estate, large corporations, with vast bodies of employees and servants ready to execute their orders, are the last persons who should be permitted to right themselves by force. The language of the presiding judge in his charge to the jury in this case meets our entire approval, and we quote from it as follows:

"The law will not sanction or support a possession acquired by such means, but will, on the contrary, when appealed to in this form of action, compel the party who thus gains possession to surrender it to the party whom he dispossessed, without inquiring which party owns the [612]

property or has the legal right to the possession. If the law was otherwise, force, the exhibition and use of deadly weapons, and threats of personal violence, would speedily take the place of lawful and peaceful methods of gaining possession of property. The law compels a defendant, found guilty of a forcible entry and detainer, to restore the possession. After he has restored the possession so forcibly and wrongfully acquired, he can then proceed in a lawful manner to assert his claim to the property; but he cannot have his legal rights to the property, or its possession, adjudged or determined in the action of forcible entry and detainer, when, by his own admission or the proof in the case, he is shown to be guilty of a forcible entry and detainer. If, therefore, you find that the plaintiff built the eighteen miles of road in controversy, and had been in the quiet and peaceable possession of the same from the time of its completion, claiming the right to such possession under the contract, and that, while so in the quiet and peaceable possession of the road, Bailey, the president of the defendant corporation, with a force of men acting in the name and on behalf of the defendant corporation, by force and strong hand, or with weapons, or by threatening to kill, maim or beat, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, drove the plaintiff's agents or employees out of his cars and off the road with the declared purpose of retaining the possession of the same, then the defendant corporation is guilty of a forcible entry and detainer within the meaning of the statutes of this State, and the plaintiff is entitled to your verdict."

In this view of the case nearly all the questions raised by counsel for plaintiff in error, in regard to the contract under which Johnson built this eighteen miles of road, and held possession of it, and his right to hold possession, are immaterial. The jury must have found, under this charge, that he was in the peaceable and quiet possession of the property, and was ejected from it by the force and violence and [613] wrong doing of the Iron Mountain and Helena Railroad Company. They were not bound to inquire any further, nor are we bound to answer other questions.

The judgment of the District Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

[613] In the Matter of MRS. E. J RALSTON and Her Husband.

(See S. C. Reporter's ed. 613-615.)

*Practice—refusal of clerk of state court to transmit copy of record—no writ of error—this court has no jurisdiction—*mandamus *does not lie—allowance of* supersedeas*—validity of—vacation of—whether judge of state court can allow writ of error to this court.*

1. It is not the duty of the clerk of a state court to transmit a copy of the record of a case, determined in such court, to this court, until there is a writ of error to which it can be annexed and with which it can be returned.

2. Where no writ of error has in fact been issued, this court is without jurisdiction of the suit, and cannot by *mandamus* require the clerk of the state court to transmit to it a copy of the record.

3. A *supersedeas* allowed by a justice of this court under a mistaken supposition that a writ of error had been issued, has no legal effect; but this court is without jurisdiction to vacate the order.

4. A *supersedeas* cannot be allowed except as an incident to an appeal actually taken, or a writ of error actually sued out.

5. It *seems* that it is very doubtful whether the clerk of a state court can issue a writ of error to this court on the allowance of a judge of the state court.

[No. 5, Orig.]

Petition filed Oct. 25, 1886. Rule granted, Nov. 8, 1886. Argued, and motion to vacate supersedeas *submitted Dec. 20, 1886. Decided Jan. 10, 1887.*

ORIGINAL. Petition for *mandamus*, and motion to vacate order allowing *supersedeas. Denied.*

The facts are given in the opinion.

Mr. **S. Prentiss Nutt,** for petitioner.

Mr. **James Lowndes,** in support of motion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a writ of *mandamus* requiring the clerk of the Supreme Court of the State of Louisiana to transmit to this court a true copy of the record in that court of a judgment in the suit of the British and American Mortgage Company against Mrs. E. J. Ralston and her husband, omitting therefrom certain portions not material to the federal question involved. [614] From the showing made it sufficiently appears that the judgment was rendered April 5, 1886, and that on the 31st of May, 1886, the Chief Justice of the state court allowed a writ of error to this court, "on furnishing bond, with security, according to law, for one thousand dollars, not to operate as a *supersedeas.*" No writ was, however, issued in fact, but the order of allowance, with the petition therefor, was filed in the office of the clerk of the state court, "and a demand made on the clerk * * * for a copy of the record." According to the statements in the petition, the clerk refused to give such a transcript unless it should include everything used on the trial in the state court, but the petitioner wanted only such parts of the record as were necessary to present the single question of which this court had jurisdiction.

After the allowance of the writ by the Chief Justice of the state court, on application of the petitioner, *Mr. Justice* Woods, the associate justice of this court allotted to the Fifth Circuit, made this order, evidently supposing that a writ of error had actually been issued:

"A writ of error having been allowed in this case and a bond given and duly approved, without an allowance of *supersedeas*, though the right of *supersedeas* is claimed by Mrs. E. J. Ralston, the plaintiff in error, it is ordered that further proceedings to enforce executory process in execution sought to be enforced in this case in the Supreme Court of Louisiana, or in the district court from which the case was appealed to said Supreme Court of Louisiana, be suspended until the further order of the Supreme Court of the United States."

From this statement it is apparent that we have no authority over the clerk in the matter about which the *mandamus* is asked. As no writ of error has in fact been issued, we have

no jurisdiction of the suit. *Mussina* v. *Cavazos*, 6 Wall. 358 [73 U. S. bk. 18, L. ed. 811]; *Bonduran, Tutrix* v. *Watson*, 106 U. S. 278 [26: 447]. Waiving the question whether the clerk of the state court could issue the writ on the allowance of the Chief Justice of that court, which, to say the least, has never yet been held by this court, *McDonogh* v. *Millaudon*, 3 How. 693 [11:787], it is sufficient to say that he never has done so, and, so far as this record shows, he [615] has never been asked to do it. Certainly it has been the prevailing custom from the beginning for the clerk of this court, or the clerk of the circuit court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court. Consequently, the simple lodging of the allowance with him cannot be considered as a demand for the writ; and besides, this proceeding is not to require him to issue the writ, but to furnish a transcript to be annexed to and returned with the writ (R. S. § 997), which it is not his duty to give until there is a writ to which it can be annexed and with which it can be returned. *The application for the* mandamus *is consequently denied.*

Pending these proceedings for *mandamus* the British and American Mortgage Company has filed a motion to vacate the *supersedeas* allowed by *Mr. Justice* Woods. But, as no writ of error has ever been issued, that order has no legal effect. A *supersedeas* cannot be allowed except as an incident to an appeal actually taken, or a writ of error actually sued out. We, however, are as much without jurisdiction to vacate the order of the Justice as he was without jurisdiction to grant it.

Consequently, the motion to vacate must be denied, although the order as it stands is of no validity.

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[631] JAMES L. SHARP, *Appt.*,

v.

CHRISTOPH RIESSNER AND CHARLES E. MEIER.

(See S. C. Reporter's ed. 631-637.)

Letters patent for improvement in hydro-carbon stoves—construction of first claim.

1. The first claim of letters patent No. 177334, for an improvement in hydro-carbon stoves, must be confined to the use of a perforated top plate to the cylinder having the functions and mode of operation set forth in the specification.

2. Said first claim is not infringed by a stove in which the hot air cylinder rests on three equidistant struts, extending from its base to the wall of the water chamber.

[No. 98.]

Argued Dec. 16, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Arthur v. Briesen**, for appellant.

Mr. **B. F. Lee**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought for the alleged infringement of letters patent No. 177334, granted to Abner B. Hutchins, May 16, 1876, for an improvement in hydro-carbon stoves. The specification and drawings are as follows:

"The object of this invention is to produce a stove which can safely and easily be heated by the combustion of a hydro-carbon or oil in a similar manner to that in common use in illuminating lamps.

The invention consists of the following devices: The vessel or chamber containing the oil or hydro-carbon is submerged in water, so as to always keep the said oil vessel or chamber cool, and thereby free from explosive or other [632] accident. The water vessel is covered with a perforated metal plate, which forms the base of the hot air cylinder, on the top of which the culinary or other vessels to be heated are placed. Vertical tubes or flues are placed in the hot air cylinder in such positions as to act as chimneys for the burners. Mica windows are placed in the sides of these flues or chimneys in such positions as as to enable the operator to observe the flame of the burner and to regulate the same as circumstances may require.

The invention will be readily understood by reference to the accompanying drawings, of which figure 1 is partly an elevation and partly a vertical section of the improved stove. Figure 2 is partly a plan and partly a section of the same. In this view the half of the top plate only is removed, so as to disclose the construction of the hot air cylinder and the flues or chimneys. Figure 3 is a sectional plan of the stove, taken just below the top plate of the water chamber, and showing a part of the top plate of the oil vessel or reservoir broken out.

The base of the stove consists of a vessel, A, resting, for convenience, on short legs *a*. This vessel is intended to contain water, and has a top plate, A′, which is preferably made of cast metal, and strong enough to support all the parts of the stove which are above it. This plate A′ is annular in form if the stove is of general cylindrical construction (which is preferable to other forms), the central opening in the said plate being nearly equal in area to the sectional [634] area of the hot air cylinder C, which rests upon it. Concentrically arranged around this central opening is a series of perforations, a^1, through which atmospheric air passes down into the top part of the vessel A, and thence up through the hot air cylinder and its chimneys.

The reservoir or vessel B, in which the oil or hydro-carbon is put for use in this stove, is placed within the vessel A, and the bottom of the vessel A may likewise constitute the support for the bottom of the vessel B, and there will be an intervening chamber, B′, between the sides of the vessel B and its inclosing vessel A, and the sides of the vessel A will extend up one or two inches (more or less) above the top of the vessel B. While in use the annular chamber B′ will be filled with water, and water will also cover the top of the vessel B, which said vessel and its contained fluid will thereby be always kept at a low temperature, and accident from the ignition or explosion of the oil or hydro-carbon will thus be rendered impossible by this water covering. A tube, *b*, extends from the vessel B up through one of the perforations or apertures a^1, and serves as a means

of filling the vessel B. A suitable screw cap closes the top end of this tube. A pipe or valve, a^3, leads from the chamber B to the outside of A, for the purpose of drawing off the water when it becomes heated, or when the occasion

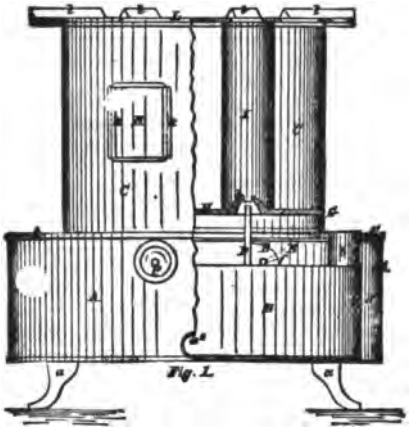

Fig. 1.

[633]

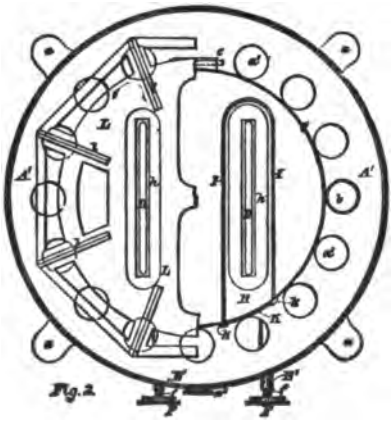

Fig. 2.

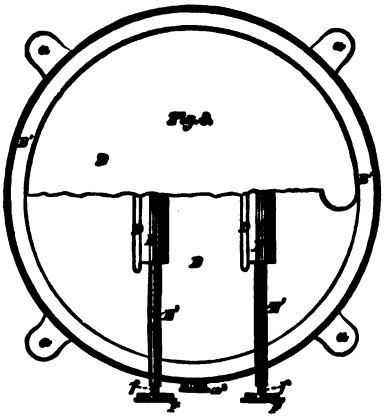

Fig. 4.

requires it. Water may easily be poured into the vessel A through the apertures a^1.

The wick tubes D are attached to the top of the vessel B, and the wick used to conduct the oil from B to the flame is operated in the usual manner of illuminating lamps. The rollers for moving the wicks up and down are inclosed in casings or housings E, and are operated by the thumb wheels F, the stems *f* of which pass through tubes E′, that are attached tightly to the ends of the housings E, and pass through the side of the vessel A. Care must be taken to have all of the parts of D E E′ that lie within the water way of A perfectly water tight, so as to prevent the leakage of the water either into the vessel B or outside of A.

The hot-air cylinder C is preferably built of sheet metal, and is hinged to its base plate A′ [635] by the hinge *c* at the back side of the stove, so as to permit the top parts of the stove to be tipped back out of the way of trimming the wicks, or for other purposes. A finely perforated diaphragm, G, covers the central opening of the base plate A′ below the hot-air cylinder, for the purpose of properly controlling the air currents that pass up from the chamber of A into the hot-air cylinder. A diaphragm H, within the hot-air cylinder C, and near its base, is fixed, by riveting or otherwise, to the sides of the said cylinder. Portions of this diaphragm are formed into conical flame caps *h*, for controlling and confining the flame within its proper limits in a manner similar to that in common use in illuminating lamps.

Above the diaphragms, H, tubes or chimneys I confine the hot gases and products of combustion from the flames of the burners within proper limits for the efficient action of the burners. These tubes or chimneys I extend from the diaphragm H to the top of the hot-air cylinder and are preferably made of sheet metal. The shell of the hot-air cylinder C forms one side of each of these chimneys, and in this side, which is common to both the cylinder and the chimney, a small mica window, K, is placed, so as to enable the operator, from without, to see and regulate the flame of the burners by turning the thumb wheel F, as required. For simplicity of construction I cut apertures in the side of the hot-air cylinder, suitable for the windows K, and through these apertures portions of the metal of the chimney plates are extended, which said portions are bent over in the form of grooves, *k*, as in figures 1 and 2, for the reception of the mica plates that are to form the windows.

The top of the hot-air cylinder is covered with a cast metal plate, L, that serves as a rest for whatever vessel is to be heated on this stove. The plate L is perforated with apertures over the chimneys, and also over the hot wells of the cylinder C, as well as in the portions lying outside of the cylinder, thus permitting all of the heat generated to reach the vessel on top of the plate L, and thereby be utilized. The intense heat imparted to the plates of the chimneys I and plate L, and reflected thence back upon the hot gases passing through and about [63 these parts, will be quite sufficient to consume all of the smoke, and there will, in consequence, be no emission of unpleasant odors from imperfect combustion. The top surface of the plate L is provided with ridges *l*, that keep the vessels placed thereon from obstructing the openings in the said plate."

The claims are these:

"1. The water vessel A, with its perforated top plate A′ and hot-air cylinder C, hinged at *c* to plate A′, and top perforated plate L, all ar-

ranged and connected together substantially as and for the purpose set forth.

2. The chimneys I, having one of their sides formed by the hot-air cylinder C, to which they are connected by the groove clips *k*, that also receive the mica windows K, as and for the purpose set forth."

It is contended that the defendants infringe the first claim. The circuit court dismissed the bill (15 Fed Rep. 919), holding that there was no infringement. The plaintiff has appealed.

One of the elements in the first claim is the "perforated top plate A′," being the top plate to the water vessel A. It is described as annular in form, if the stove is cylindrical, with a central opening. The specification then says: "Concentrically arranged around this central opening is a series of perforations, *a*′, through which atmospheric air passes down into the top part of the vessel A, and thence up through the hot-air cylinder and its chimneys." In the defendant's stove the hot-air cylinder rests on three equidistant struts, which extend from the base of the cylinder to the wall of the water chamber, and thus the weight of the cylinder and of the utensils upon it is thrown against such wall instead of on the bottom of the water chamber. Of course, there is an open space between every two of the struts, through which spaces air passes freely. The circuit court held that the arrangement of the three struts was not the plaintiff's perforated top plate A′, because the struts did not perform the office which required the plate with perforations, [597] that office being, as described in the specification, to cause the air to pass "down into the top part of the vessel A, and thence up through the hot-air cylinder and its chimneys." We are of opinion that the first claim of the plaintiff's patent must be confined to the use of a perforated top plate to the cylinder, having the functions and mode of operation set forth in the specification, and that, as the defendants do not have such a perforated top plate, or any equivalent for it, they do not infringe.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[604] EDWARD IVINSON, *Appt.*,

v.

CHARLES H. HUTTON AND JOSEPH CAREY ET AL., Copartners as CAREY BROTHERS.

(See S. C. Reporter's ed. 604-606.)

Release of mortgage on margin of record—parol evidence, inadmissible to contradict or qualify—construction of contract.

1. Parol evidence is inadmissible to contradict or qualify the entry of its discharge on the margin of the record of a mortgage.

2. Upon the facts found by the court below, the evidence in question, if given full effect, would not impeach the validity of the discharge, it not being within a special agreement set up in defense.

[No. 69.]

Argued Dec. 2, 1886. Decided Jan. 10, 1887.

APPEAL from the Supreme Court of the Territory of Wyoming. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **J. M. Wilson and S. Shellabarger,** for appellant:

It is impossible to deny that both these instruments were in the minds of the parties at the date of the release, and the question met by the rejected evidence was strictly and clearly a latent ambiguity.

Patch v. *White*, 117 U. S. 210 (Bk. 29, L. ed. 860), and cases cited.

It is always competent to put the court, by parol evidence, into the positions of the parties at the time the contract was made. This is especially true of instruments like a release, which is only a receipt in its nature.

See *Thorington* v. *Smith*, 8 Wall. 1 (75 U. S. bk. 19, L. ed. 361); *Confederate Note Case*, 19 Wall. 548 (22: 196); *Bradley* v. *Washington, etc. S. Packet Co.* 13 Pet. 89 (10: 72); *U. S.* v. *Peck*, 102 U. S. 64 (26: 46).

Mr. **W. W. Corlett,** for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Supreme Court of the Territory of Wyoming. The suit was brought by Edward Ivinson, the appellant, in the District Court of the Second Judicial District of that Territory, to foreclose a mortgage on certain real estate, made to him by Charles H. Hutton. To the bill Joseph M. Carey and R. Davis Carey are made defendants, upon an allegation that they claim some interest in the property. The defendants made a joint answer, in which they all set up a full release of the mortgage and satisfaction of the debt by Ivinson before the defendants Carey obtained their interest in the property; and whether this be true or not is the only point in the case.

It is not denied that when the defendants, the Careys, were about to let Hutton have $10,000 on this land, and take absolute deeds of conveyance for it, they required that the title to it should be made clear and relieved of Ivinson's mortgage. Thereupon Ivinson made [605] an entry on the margin of the record of the mortgage, as follows:

"I hereby acknowledge satisfaction in full of the debt for which this mortgage was given to secure, and hereby discharge and cancel the same, this sixth day of October, 1877.

"E. IVINSON.

"Attest: J. W. Meldrum, *Register of Deeds.*"

The Supreme Court of the Territory, from which this appeal is taken, made a finding of facts by which we are to be governed in the decision of this appeal. From this finding it appears that in April, 1873, Hutton made his promissory note to Edward Ivinson for $13,582.54, with interest, and that on the same day he executed the mortgage which is the foundation of this foreclosure suit to secure the payment of the note. Subsequent to this, Ivinson asserted that a mistake had been made in computing the balance due him in the settlement on which the note and mortgage were given, and that they should have been for $17,618.66, instead of the sum actually put in the mortgage and note, making a difference of $4036.12. Ivinson brought a suit to correct this mistake, which finally came to the Supreme

Court of the United States where he prevailed, obtaining a decree for the correction of the mistake in the note and mortgage. These proceedings lasted from August, 1873, to March, 1879.

Pending this controversy, however, Ivinson and Hutton made a written agreement to adjust their differences, other than this controversy, but it was expressly agreed that the controversy, then pending in this court, was left out of the settlement by the following language: "Provided always, that nothing herein contained shall be construed in anywise to affect the rights of the parties hereto in said suit between them now depending in the Supreme Court of the United States."

This agreement was made on the 31st of May, 1877, and is marked Exhibit D in the record before us. On the 6th day of October, 1877, Ivinson, Hutton, and Joseph M. Carey were at [606] the court house in Laramie City, for the purpose of concluding a loan of $10,000, which Carey was about to make on behalf of himself and brother to Hutton, to enable him to pay his debts, including a judgment in favor of Creighton against Ivinson and Hutton, amounting to nearly $6,000. This loan was to be secured by real estate, part of which was covered by Ivinson's mortgage. Before paying over the money to Hutton, Carey required of Ivinson and Hutton that Hutton's property should be released from all incumbrances, and Ivinson entered on the margin of the record of his mortgage the discharge which we have already transcribed.

The court then further finds as follows:

"That said discharge was not made in accordance or in pursuance of the agreement of the 31st of May, A. D. 1877, above recited, marked Exhibit D, but was an absolute, unqualified release and cancellation of the mortgage. The court further finds that the value of the property mortgaged was not less than twenty thousand dollars.

"4. On the trial of the case in the district court the testimony of eight witnesses; to wit, Edward Ivinson, M. C. Brown, J. M. Carey, Charles H. Hutton, Stephen W. Downey, Walter Sinclair, H. B. Rumsey, and J. W. Blake, which had been taken before J. W. Meldrum, master in chancery, was read in evidence. To so much of said evidence as was intended to vary, explain, or contradict or qualify the entry of the discharge on the margin of the record of the mortgage by Ivinson the defendant excepted as incompetent. This court holds that said exception was well taken, and that parol evidence was not competent for that purpose or to prove that the discharge was made in accordance with Exhibit D.

"5. But the court further holds that if said parol testimony was properly admitted for said purpose, that it is not sufficient, that it does not prove any qualification or modification of the discharge as entered on the record, nor that said discharge was made in accordance with the agreement of the 31st of May, marked Exhibit D.

"6. This court makes no finding upon the [607] question whether the $4,036.12 was paid by Hutton at the time of the discharge of the mortgage or at any other time, holding the decision of that question unnecessary to the determination of this suit."

On these findings the bill of complaint of Ivinson was dismissed. The conveyances of the property in controversy, which were made by Hutton to the Careys, are absolute deeds on their face, and both the Careys and Hutton insisted in their answer that the note and mortgage were absolutely discharged and satisfied according to the terms of the indorsement made by Ivinson on the record of the mortgage This is also the finding of the Supreme Court of the Territory. The argument used in opposition to this is that the supreme court and the court below erred in rejecting the evidence mentioned in the fourth finding of fact, and it is insisted that because of the error in this respect the entire decree should be reversed. But, in point of fact, this testimony was read in evidence in the lower court, notwithstanding the objection of the plaintiff, and was considered for what it may possibly be worth also in the supreme court; for that court, in its fifth finding, says that if said testimony was properly admitted for the purpose claimed, that it is not sufficient and does not prove any qualification or modification of the discharge as entered on the record, nor that said discharge was made subject to the agreement of the 31st of May, marked Exhibit D. It will be seen that the controversy mainly hinged upon the question whether the discharge on the margin of the record of the mortgage made by Ivinson was made subject to this written agreement with Hutton; namely, that the controversy concerning the $4,036.12 involved in the suit then pending in the United States Supreme Court was excepted out of the adjustment of their differences, evidenced by Exhibit D, and that this question should be governed by the final decision of that suit.

On this issue the court distinctly finds that said discharge was not made in accordance with or in pursuance of that agreement, but was an absolute and unqualified release and cancellation of the mortgage, and that, if said parol testimony was properly admitted, it does not prove that the discharge was made in ac- [608] cordance with the agreement above referred to. It is, therefore, entirely immaterial whether the supreme court was right in holding that the exception to the parol evidence taken in the court below was error, since it further holds that, giving full effect to that evidence, it does not prove anything to impeach the force and effect of the language of the discharge and release of the mortgage and note.

We do not think, on the finding of facts made by the Supreme Court, that there is any doubt of the correctness of its final decree, and it is, therefore, affirmed.

[637] COLBURN BARRELL ET UX., *Plffs. in Err.*,

v.

CHARLES E. TILTON.

(See S. C. Reporter's ed. 637-643.)

Foreclosure of mortgage—sale under latter of two decrees, valid—action for possession—validity of mortgage cannot be questioned—wife joined as codefendant—power of wife to mortgage her property to secure debt of husband.

1. Under the Laws of Oregon, a wife may be joined as codefendant with her husband in an action for the possession of real property occupied by both.

2. In an action by one holding under a sale on foreclosure to recover possession of the premises, the validity of the mortgage foreclosed cannot be questioned.

3. A sale under foreclosure is not invalid because made under the latter of two decrees, differing only in the manner of describing the property, both having been entered at the same term.

4. It seems that section 5, article XV, of the Constitution of Oregon, providing that the property of a married woman shall not be subject to the debts or contracts of the husband, does not restrict the power of a wife to mortgage her property to secure a debt due from her husband.

[No. 79.]

Argued Dec. 6, 1886. Decided Jan. 10, 1887.

IN ERROR to the Circuit Court of the United States for the District of Oregon. *Affirmed.*

Statement by *Mr. Justice* **Field**:

This was an action for the possession of a tract of land containing thirteen acres and a quarter of an acre in Multnomah County, Oregon. The plaintiff is a citizen of New York and the defendants are citizens of Oregon. In the complaint they are alleged to be husband and wife, though they are not sued as such, and no averment founded upon that relationship is made; they are sued simply as parties in occupation of the premises.

[638] The complaint alleges that the plaintiff is the owner in fee of the land and lawfully entitled to its possession, describing it; that the defendants are in its possession and wrongfully withhold it from him; and that the property is of the value of $13,000.

The defendant, Colburn Barrell, answered the complaint, setting up that the plaintiff deraigns title through a conveyance from William S. Ladd and wife, citizens of Oregon, bearing date on the 28th day of September, 1882, which was executed collusively, with the sole intent of giving the federal court jurisdiction of the action, and with the understanding that at some future time the land or its proceeds should be reconveyed to them. The defendant further answered that he defended only for two acres and three eighths of an acre of the land, and as to that he denied the ownership of the plaintiff, or that the plaintiff had any right to the possession thereof, and alleged that he is the owner himself and entitled to its possession; that as to the other part of the tract described in the complaint, consisting of eleven acres, he was merely a tenant of Aurelia J. Barrell. The answer also set up that the plaintiff deraigns title through an instrument purporting to be a conveyance absolute, executed by the defendants to Ladd, bearing date on the 18th of January, 1877, and that such conveyance was intended as a mortgage to secure the payment to him of $3,850, with interest, which sum the defendant is ready and willing to pay.

The defendant, Aurelia J. Barrell, demurred to the complaint, on the ground that, as the wife of Colburn Barrell, she was improperly joined with him in the action; and that the complaint did not state facts sufficient to constitute a cause of action, because, she being sued as the wife of her codefendant, there were no allegations in the complaint of a cause of action for which she, as such, was responsible.

The court overruled the demurrer, and Aurelia answered, setting up, as in the answer of Colburn Barrell, the collusive character of the conveyance of Ladd and wife to the plaintiff on the 28th of September, 1882, under which he asserts title to the premises; and, further, that she defended merely for eleven acres, as to which she denied the ownership of the plaintiff, or his right of possession, and alleged that she is the owner herself and rightfully entitled to its possession. She also set up, as in Colburn Barrell's answer, the conveyance by the defendants to Ladd, through whom the plaintiff claims the eleven acres, dated January 18, 1877, and avers that such conveyance was intended as a mortgage on her separate estate as security for the payment of the sum owed by her husband to Ladd, with interest thereon. [639]

To these answers the plaintiff replied, traversing their material averments, except that it is admitted that the conveyance of the defendants to Ladd on the 18th of January, 1877, was intended as a mortgage to secure the payment of a debt by Colburn Barrell to him, and stated that in December, 1879, he instituted a suit in the Circuit Court of Oregon for Multnomah County against the defendants, for the purpose of having that conveyance declared to be a mortgage, and for a decree foreclosing the same, and for a sale of the premises; that in that suit the defendants appeared and defended, setting up all the facts contained in their separate answers in this case; that such proceedings were had therein that, on the 19th of March, 1880, a final decree was rendered, declaring the conveyance to be a mortgage, and that its condition had been broken, and decreeing that the property be sold, and that the defendants and all persons claiming under them be barred and foreclosed of all right and interest in it; that under this decree the property was sold by the sheriff of Multnomah County after due advertisement, and in the manner directed, and at such sale William S. Ladd became the purchaser; that the sale was confirmed, and, on the 25th of August, 1880, the sheriff executed a deed of the property to him; that no part of the property has been redeemed, and that no appeal has been taken from the decree, which remains unreversed, and that the plaintiff is the immediate grantee of Ladd.

On the trial of the case, the plaintiff introduced the conveyance executed by the defendants to William S. Ladd, of the property described in the complaint, dated the 18th of January, 1877, and a certified transcript of the record of the suit brought by him against them in the state court to have the conveyance adjudged to be a mortgage, and for its foreclosure, and the sale of the premises, showing the decree and order for the sale, and the confirmation of [640]

the sale. The plaintiff also introduced the conveyance by the sheriff to William S. Ladd, bearing date on the 25th of August, 1880, and also a deed of the premises by Ladd and wife to the plaintiff on the 28th of September, 1882. No evidence was offered as to the alleged collusive purpose in the execution of this deed, to give the federal court jurisdiction of the action.

The transcript of the record of the suit showed what purported to be a final decree, entered on the 19th of March, 1880, and subsequently a second decree, also purporting to be a final decree, entered on the 23d of March, 1880. The two decrees differed only in the manner in which the property to be sold was described. The difference arose in this way: At the request of counsel, it was referred to a referee to examine and report upon the propriety of offering the property for sale in parcels, so as to enhance the proceeds therefrom. The referee reported a scheme dividing the property into parcels, and the court directed it to be sold accordingly, upon the condition that after it had been sold in parcels, if anyone should bid more for it as a whole, it should be sold to him. In the first decree the metes and bounds of the seven parcels are given separately. In the second, the metes and bounds of the several parcels are given separately, and of the whole as one tract. The process under which the sale was made was a copy of the last decree. When the transcript was offered in evidence, counsel objected to its admissibility, on the ground that the record showed that the final decree was made and entered on the 19th of March, 1880, and that the court had no jurisdiction to enter the second decree, under which the sale was made. The court overruled the objection, and the defendants excepted. The defendants then offered in evidence a copy of the judgment lien docket of the state circuit court, showing that the decree was docketed on the 19th of March, 1880. No other evidence having been produced, the court instructed the jury that the sheriff's deed conveyed the estate of the defendants to the grantee therein, William S. [641] Ladd, and that the conveyance from Ladd and wife to the plaintiff vested the estate in him, and, therefore, that the verdict must be for the plaintiff. To this instruction counsel excepted. The jury accordingly gave a verdict for the plaintiff, upon which judgment was entered; and to review that judgment the defendants have brought the case here on a writ of error.

Messrs. **W. W. Upton** and *W. W. Chapman*, for plaintiffs in error.

Messrs. **S. Shellabarger** and *J. M. Wilson*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court, as follows:

Of the numerous points made by the defendants below, the plaintiffs in error here, only three require notice. The others are either immaterial or unsupported by the record. The three are these:

1. The ruling of the court on the demurrer of Aurelia to the complaint;

2. The ruling of the court that the decree of the state court was conclusive as to the right of Aurelia to mortgage the property for the debt of her husband; and,

3. The ruling sustaining the validity of the sale under the decree of the state court, entered on the 23d of March, 1880.

1. The objection taken by the demurrer of Aurelia is that, being the wife of Colburn Barrell, she cannot be joined with him as a co- [642] defendant in an action for the possession of real property, of which both are alleged to be in the occupation. It is founded on the theory that, by the common law, her identity is so merged in his that she cannot have possession of such property independently of him. If there be any such rule of the common law, upon which we affirm nothing, it has been abolished in Oregon. By a Statute of that State, approved on the 21st of October, 1880, all laws which impose or recognize any civil disabilities of the wife, not imposed or recognized as to the husband, were repealed, except that the right to vote and hold office was not conferred upon her. And "for any unjust usurpation of her property or natural rights," she was declared to have the same right to appeal to the courts of law and equity for redress that the husband has. In that State she can hold property jointly with him, or separately from him. There would seem, therefore, to be no sound reason why, if in possession with him of property which rightfully belongs to another, she may not be jointly sued with him for its recovery. In the present case she claimed the larger part of the land in controversy as her separate property.

2. The second objection, that the decree of the state court in the suit by Ladd against the defendants does not bar the right of Aurelia to the property, is founded upon her supposed inability to mortgage her property to secure a debt of her husband under section five of article XV of the State Constitution, which declares "That the property and possessory rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband." But that clause merely preserves the property of the wife from its compulsory subjection to his debts or contracts. It was not designed to control her voluntary disposal of it, and in the absence of other restrictions she could mortgage it to secure the payment of a debt owing by him.

The objection, however, is entirely disposed of by the decree in the state court. The rights of the parties under the conveyance of the defendants to Ladd, of January 17, 1877, were fully considered and determined in that case. The conveyance was adjudged to be a mort- [643] gage. The rights of the defendants in the property were foreclosed, and the property was ordered to be sold, and was sold, and the sale was confirmed by the court. The conveyance to Ladd as the purchaser at such sale transferred all the estate of the defendants in the property. The question as to her ability to mortgage the property cannot be raised again in this case; it has been finally adjudged against her present contention.

3. The two decrees in the suit in the state court do not conflict in the matters adjudged. The latter decree differs from the first merely in giving the boundaries of the property to be sold as one tract, and also the boundaries of each of the seven parcels into which it was divided. This addition to the original decree

could be made by the court during the term in which that decree was rendered. The court could lose jurisdiction over it only by the adjournment of the term with no motion pending respecting it. When the second decree was made, it would, as stated by the learned district judge, have been a better course, "more orderly and convenient," as he expresses it, "to have referred to the first one, and stated in what particular the latter was intended to modify, supplement or supersede the former." But this was not essential; a comparison of the two decrees discloses the additions made to the first one.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[584] *Ex Parte:*

In the Matter of STEPHEN P. MIRZAN, *Petitioner.*

(See S. C. Reporter's ed. 584-586.)

Habeas corpus—*court refuses to issue—Act of March 3, 1885—discretion.*

This court will not issue a writ of *habeas corpus*, even if it has the power to do so, in cases where it may as well be done in the circuit courts, in the absence of special circumstances making direct action necessary or expedient.

Motion for leave to file submitted Dec. 20, 1886. Decided Jan. 10, 1887.

ON motion for leave to file a petition for a writ of *habeas corpus. Denied.*

The petitioner, a citizen of the United States, being, in the year 1880, charged with murder at Alexandria, in Egypt, was there tried without indictment by a grand jury before the Minister of the United States sitting alone, and was by him convicted and sentenced to be hung. The sentence was subsequently commuted to imprisonment for life by the President, the petitioner being removed to the Penitentiary of New York at Albany where he is now confined. It is now sought to question the validity of the proceedings which led to his conviction and confinement.

Messrs. **Lorenzo Ullo and Frederick W. Whitridge,** for petitioner.

No opposing counsel.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. As since the Act of March 3, 1885, 23 Stat. at L. 437, an appeal lies to this court from the judgments of the circuit courts in *habeas corpus* cases, this court will not issue such a writ, even if it has the power—about which it is unnecessary now to express an opinion—in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action or intervention by this court necessary or expedient. In this case there are no such special circumstances, and the application may as well be made to the Circuit Court for the Northern District of New York as here. Our right to exercise this discretion is shown by the principles on which the decisions in *Ex parte Royall*, Nos. 1 and 2, 117 U. S. 241 [Bk. 29, L. ed. 868], and *Ex parte Royall*, 117 U. S. 254 [29:872], rest. This practice was suggested by us and followed in *Wales* v. *Whitney*, 114 U. S. 564 [29:277].

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, [561]

v.

MARK PAINE.

(See S. C. Reporter's ed. 561-566.)

Joinder of legal and equitable defenses in state court—upon removal, admissions in equitable defense bind defendant—amendment.

1. In the courts of the United States, to legal actions legal defenses only can be interposed. This rule applies to an action removed from a state court in which legal and equitable defenses may be united.

2. Upon such removal the defendant may amend by striking out his equitable defense. If he fails to amend, an admission contained in said defense binds him to the same extent it would have done in the state court.

3. In an action to recover the value of timber alleged to have been taken from plaintiff's land, an admission in the answer, of the execution of a deed to him and its delivery to its own land commissioner, by the defendant as former owner, is sufficient proof of title in the plaintiff, although there is no evidence of the delivery of the deed; such delivery being presumed after the lapse of months.

4. A mere equitable claim, which a court of equity may enforce, will not sustain an action at law for the recovery of land or anything severed therefrom.

5. An instruction requested by the defendant, relating to a license given by it, when owner of the lands, to a lumber company to cut the logs in question, was properly refused, there being no evidence of the plaintiff's knowledge of it.

[No. 90.]

Argued Dec. 13, 1886. Decided Jan. 10, 1887.

IN ERROR to the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **W. P. Clough,** for plaintiff in error:

At the close of his case the plaintiff had failed to show that the title to the logs was in him.

To sustain an action of trover ownership must be of the legal title. This rule has been repeatedly applied by this court in cases of ejectment, and there is no distinction between ejectment and trover in this respect.

Watkins v. *Holman*, 16 Pet. 25 (41 U. S. bk. 10, L. ed. 873); *Hickey* v. *Stewart*, 3 How. 750 (11:814); *Agricultural Bank* v. *Rice*, 4 How. 225 (11:949); *Smith* v. *McCann*, 24 How. 398 (16:714).

The allegations of the answer were insufficient to make out the plaintiff's title for the purpose of an action in trover.

The equitable defense set up in the answer formed no part of the pleadings after the removal of the cause to the court below.

Messrs. **Eugene M. Wilson and** *M. F. Morris,* for defendant in error.

Mr. Justice **Field** delivered the opinion of [562] the court:

This case was brought by Paine, the plaintiff

below, against the Northern Pacific Railroad Company for taking and converting to its own use 6,180 pine saw logs, alleged to be his property, and of the value of $10,442.

The defenses set up are legal and equitable, a proceeding permissible by the laws of Minnesota, in which State the action was brought. The legal defenses were two: first, a denial of the ownership of the logs by the plaintiff, and of the conversion of them by the defendant, and of their value beyond $7,882; second, that the logs were cut by the Knife Falls Lumber Company, a corporation of the State, with the knowledge and consent of the plaintiff, and were by that company sold and delivered to the defendant prior to the commencement of this action.

The equitable defense was substantially this. that in 1880 the defendant was the owner of the lands from which the logs in controversy were cut, and that its land commissioner, under whose charge the sales of its lands were conducted, and his clerk, conspired with the plaintiff to defraud the Company by procuring a sale [563] of the lands to be made, nominally to him, but really for the benefit of the three, at a price representing only a small fraction of the actual value of the property; that, in execution of this fraudulent purpose, the land commissioner made out a contract of sale, in the form commonly used by the Company, promising for the price named to convey the lands to the plaintiff; and that the Company, upon receiving in its preferred stock at par the amount of the consideration mentioned, and being ignorant of the facts and of the character and value of the lands, and relying upon its commissioner to protect its interests, executed a conveyance of the lands in the usual form to the plaintiff, and placed it in the hands of the commissioner for delivery to him; that the lands thus sold were pine timber lands, and the Company was ignorant of their character and value until April, 1881, when it repudiated and disaffirmed the sale, and filed a bill in the Circuit Court of the United States for the District of Minnesota for its annulment, and the reconveyance to it of the lands, offering at the same time to return to the plaintiff the cost of the preferred stock received; which bill is now pending and undetermined.

The relief prayed in the answer was: first, that the plaintiff take nothing by his action; second, that the alleged purchase of the lands in the name of Paine be adjudged void as against the defendant; third, that an account be taken of the cost of the shares of preferred stock received in payment for the lands, and that on the repayment by the Company of such cost, the plaintiff be decreed to release and reconvey the lands to the Company.

The plaintiff filed a replication, denying the allegations of fraud and fraudulent combination stated in the equitable defense, and any license or assent by him to the lumber company to cut the logs.

The case was then removed, on application of the defendant, from the state court to the Circuit Court of the United States. In that court the equitable defense could not be made available. In the courts of the United States, to legal actions legal defenses only can be interposed. If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If [564] his equitable grounds are deemed sufficient, he may thus stay the further prosecution of the action at law, or be furnished with matter which may be set up as a legal defense to it. Upon the removal, therefore, of the action to the circuit court, the equitable defense could not be considered. It would have been entirely proper for the defendant to have amended his answer by striking out that portion embracing this defense. But he did not take that course, and the plaintiff relied upon its allegations as evidence. If the pleadings are construed as in the state court, there was an admission by them of an important fact in the case; namely, of title by a deed from the former owner of the lands. In the state courts, where an answer sets up several distinct defenses, a denial in one is held to be qualified by an admission in another. Thus, in *Derby* v. *Gallup*, 5 Minn. 119, where the action was replevin for unlawfully taking the plaintiff's goods, and the answer contained two defenses: (1), a general denial of the allegations of the complaint; and (2), a justification of the taking under a levy upon execution,—it was held that the answer admitted the taking, for the purposes of the trial, and to that extent the second defense affected the first. In *Scott* v. *King*, 7 Minn. 494 the same doctrine was declared, the court holding that a general denial in one defense, inconsistent with special matter alleged in a second defense, is to be considered as modified thereby. See also *Zimmerman* v. *Lamb*, Id. 421. The admission of the execution of a deed by the former owner, and thus of title in the plaintiff, if it could be used, obviated the want of other proof on that point. In order that the plaintiff might recover, it devolved on him to prove, not merely the value of the logs taken, but that he owned them, or was entitled to their possession. It is not contended that he acquired any title to them except as annexed to the lands from which they were cut. Standing timber is a part of the realty and goes with its title or right of possession. When severed from the soil its character as realty is changed; it has become personalty, but the title to it continues as before.

The right, therefore, to recover for what is severed from the freehold depends upon the right to the freehold itself. If the plaintiff is [565] in possession, he is presumed to be lawfully so, having the right of possession, and, therefore, entitled to what is severed. If he is out of possession, he must show a title to the land, or right to its possession. A mere equitable claim, which a court of equity may enforce, will not sustain an action at law for the recovery of the land or anything severed from it. *Halleck* v. *Mixer*, 16 Cal. 574; *Mather* v. *Trinity Church*, 3 Serg. & R. 509; *Harlan* v. *Harlan*, 15 Pa. 507.

In the case at bar, no proof was offered by the plaintiff of his title to the land from which the logs in controversy were cut, or of his ownership in any other way, he relying upon the admission to that effect contained in the paragraph of the answer setting up the equitable defense. This defense was not, as already stated, available in the action at law after the removal of the case to the Circuit Court of the United States, and the answer might have been

there amended by striking it out; but so long as it remained a part of the pleadings, the fact admitted by it in the state court must be considered as still admitted in the federal court. No hardship can follow from this rule, for the defendant, by amending his answer after the removal of the cause, can always avoid this result; in many cases it will obviate the inconvenience of making proof of a fact within the knowledge of the parties.

The objection that there was no evidence of a delivery of the deed, which the answer alleges was executed and placed in the hands of the land commissioner of the Railroad Company for that purpose, is not well taken. It will be presumed after the lapse of months, as in the present case, that the delivery was made as directed; if not, it was for the defendant to show it; the proof, if the fact were so, being in its power. The prayer of the special defense is for a cancellation of the contract of sale, and a *reconveyance* of the land to the defendants.

It only remains to consider the refusal of the court to give the instruction requested with reference to the parol license from the Railroad Company, at the time the owner of the lands, [566] to the lumber company to cut the logs in question, and the alleged knowledge of the plaintiff that it was acting upon the license. The license was proved, but the court held that there was no evidence of the plaintiff's knowledge of it. The instruction requested was as follows:

"If the jury believe that the Northern Pacific Railroad Company gave a license to the Knife Falls Lumber Company to cut logs upon the lands described in the complaint, while the said Railroad Company was the owner of the said lands, and that the said lumber company cut the logs described in the complaint, acting under such license, and that the plaintiff knew of the existence of such license, and knew that the said lumber company was cutting such logs, acting under the said license, and made no objection to such cutting; in such case the jury would be at liberty to find that the said cutting was by the license and permission of the plaintiff, and if the jury does so find, it should find a verdict for the defendant."

The instruction was properly refused for the want of evidence of the plaintiff's knowledge of the license. And by the conveyance of the lands to the plaintiff the license from the original owner was necessarily terminated.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[551]

AUGUST W. GOETZ, JR., ET AL., *Plfs. in Err.*,

v.

BANK OF KANSAS CITY.

(See S. C. Reporter's ed. 551-561.)

Negotiable paper—action on discounted drafts—want of consideration—relation of bank to acceptor—what degree of bad faith will defeat recovery—collateral security—evidence—admissibility of newspaper articles and declarations of agent.

1. A bank in discounting commercial paper does not guaranty the genuineness of documents attached to it as collateral security.

2. The indorsement by a bank of the words, "for collection," on invoices accompanying bills of lading attached as collateral security to drafts discounted, implies no guaranty of the genuineness of said bills.

3. After discounting a draft, a bank stands toward the acceptor in the position of an original lender, and cannot be affected by a want of consideration from the drawer, or by the failure of such consideration.

4. The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it is made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer.

5. In an action by a bank on drafts discounted by it, newspaper articles, touching the conduct of the drawer in a previous transaction, are inadmissible to charge its officers with bad faith in discounting said drafts.

6. The testimony of the president of the bank, explanatory of the conduct of its officers when certain other drafts came back protested, was admissible.

7. Evidence of declarations of an agent as to past transactions of his principal are inadmissible, as mere hearsay.

[No. 63.]

Argued Nov. 24, 29, 1886. Decided Jan. 10, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **F. W. Cotzhausen,** for plaintiffs in error:

"If the maker or acceptor proves that there was fraud or illegality in the inception of the instrument, the owner must then respond by showing that he acquired it *bona fide*, for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity."

Bailey v. *Bidwell*, 13 Mees. & W. 73; *Stewart* v. *Lansing*, 104 U. S. 509 (Bk. 26, L. ed. 868); Dan. Neg. Inst. § 815, 3d ed.; *Duerson* v. *Alsop*, 27 Gratt. 248; *Smith* v. *Sac County*, 11 Wall. 139 (78 U. S. 20:102); *Clark* v. *Pease*, 41 N. H. 414.

"The holder of a negotiable instrument, who has taken it without reasonable caution, and under circumstances which ought to have excited the suspicion of a careful and prudent man, must be held to have taken it subject to all the defenses of prior parties."

Gill v. *Cubitt*, 3 Barn. & C. 466.

"A person, who takes a bill under circumstances calculated to excite suspicion and, having the means of knowledge, willfully abstains from making any inquiries, must be considered as a holder with notice of the fraud, if any exists."

Jones v. *Gordon*, L. R. 2 App. Cas. 616. See also *Re Carew*, 31 Beav. 39; *Hoare* v. *Dresser*, 7 H. L. Cas. 290; *Hamilton* v. *Vought*, 34 N. J. Law, 187; *Edwards* v. *Thomas*, 66 Mo. 485; Story, Prom. Notes, § 197, 4th ed.

But express notice of the defect is not necessary.

Angle v. *N. W. Mut. Life Ins. Co.* 92 U. S. 330 (Bk. 23, L. ed. 556).

Circumstantial evidence is admissible.

Edwards v. *Thomas*, 66 Mo. 486; *Carroll* v. *Hayward*, 124 Mass. 120.

It is not necessary that a party should know of the specific fraud, or know all circumstances

of it. If he suspected a fraud, and chose not to ask, lest he should know, he had sufficient notice.

Dan. Neg. Inst. 799, 3d ed.; *Oakeley* v. *Oddeen*, 2 Fost. & F. 656; *Raphael* v. *Bank of England*, 17 C. B. 161; 1 Pars. Bills, 259; Story, Bills, 225, 4th ed.

Messrs. **Oliver H. Dean**, *William Warner*, *James Hagerman* and *Finches*, *Lynde & Miller*, for defendant in error:

The rule announced in *Goodman* v. *Simonds*, 20 How. 343 (61 U. S. bk. 15, L. ed. 934), defining the rights of the holder of negotiable paper, has become firmly established as a part of the commercial law of this country.

This doctrine was fully considered again in *Murray* v. *Lardner*, 2 Wall. 110 (69 U. S. bk. 17, L. ed. 857), and is restated in the following language:

"The possession of such (negotiable) paper carries the title with it to the holder. 'The possession and title are one and inseparable.'

The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world.

Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

The burden of proof lies on the person who assails the right claimed by the party in possession.

Such is the settled law of this court, and we feel no disposition to depart from it."

See also *Hotchkiss* v. *Nat. Banks*, 21 Wall. 354 (88 U. S. bk. 22, L. ed. 645); *Collins* v. *Gilbert*, 94 U. S. 753 (24:170); *Shaw* v. *R. R. Co.* 101 U. S. 557 (25: 892); *Swift* v. *Smith*, 102 U. S. 442 (26:193); *Belmont Branch Bank* v. *Hoge*, 35 N. Y. 67; *Welch* v. *Sage*, 47 N. Y. 143; *Hamilton* v. *Marks*, 63 Mo. 167.

The indorsement by the Bank of the bills and some of the accompanying papers is no guaranty of their genuineness.

Sweeney v. *Easter*, 1 Wall. 166 (68 U. S. bk. 17, L. ed. 681); *White* v. *Nat. Bank*, 102 U. S. 659 (26: 251); *First Nat. Bank of Chicago* v. *Reno Co. Bank*, 1 McCrary, 491; *S. C.* 3 Fed. Rep. 257. See also *The Sally Magee*, 3 Wall. 451 (70 U. S. 18: 197); *Conard* v. *Atlantic Ins. Co. etc.* 1 Pet. 386 (26 U. S. 7: 189).

The declarations of the defendant Bank's president, having been made after the event, and not being shown to be any part of the *res gestæ*, can in no way bind the defendant as admissions.

Bank v. *Steward*, 37 Me. 519; *Luby* v. *R. R. Co.* 17 N. Y. 131; *Packet Co.* v. *Clough*, 20 Wall. 528 (87 U. S. bk. 22, L. ed. 406); *Haeleton* v. *Union Bank of Columbus*, 32 Wis. 84; *Randall* v. *N. W. Telegraph Co.* 54 Wis. 140; *McDermott* v. *Han. & St. Jo. R. R. Co.* 73 Mo. 516; *Adams* v. *H. & St. Jo. R. R. Co.* 74 Mo. 553.

The court properly directed a verdict for the defendant in error.

Oscanyan v. *Arms Co.* 103 U. S. 262 (Bk. 26, L. ed. 540); *Welch* v. *Sage*, 47 N. Y. 147; *Belmont Branch Bank* v. *Hoge*, 35 N.Y. 67; *Birdsall* v. *Russell*, 29 N. Y. 249; *Goodman* v. *Simonds*, 20 How. 365 (61 U. S. 15:941); *Murray* v. *Lardner*, 2 Wall. 121 (69 U. S. 17:859); *Goodman* v. *Harvey*, 4 Ad. & E. 870.

Mr. Justice **Field** delivered the opinion of the court: [553]

In October, 1861, the plaintiffs in error, Goetz and Luening, were partners in the business of buying and selling hides on commission, at Milwaukee, Wisconsin. At that time one Du Bois was a dealer in hides at Kansas City, Missouri. On the tenth of that month Du-Bois telegraphed to them from Kansas City, inquiring what they could sell four hundred green, salt hides for; and what they would advance on a bill of lading of the shipment. The firm answered by telegram, stating the market price of light hides on that day, and that they would pay a draft "for two thirds value, bill of lading attached." On the same day, the firm sent a letter to Du Bois, repeating the message, and adding that if the hides were in good condition and number one they could sell them readily: that their commission was 2½ per cent; and that they would sell all hides that he might ship to the market at Milwaukee. Upon this understanding, and during the same month, Du Bois drew upon the firm five drafts, amounting in the aggregate to $9,395, which were accepted, and, with the exception of the fifth one, were paid. The fifth one, which was for $2,000, was protested for nonpayment. To each of the drafts were attached a bill of lading and an invoice of the shipment. The bill of lading purported to have been issued by the Chicago and Alton Railroad Company, stating that it had received hides, giving the number and estimated weight, to be transported on the road from Kansas City to Milwaukee, and marked and consigned as follows: "To shipper's order. Notify Goetz and Luening, Milwaukee, Wis." The invoice purported to give the net weight in pounds of the hides shipped, [554] and the market price at Milwaukee, and their estimated aggregate value, referring to the sight draft for two thirds of the amount.

The drafts were made payable to Thornton, the cashier of the Bank of Kansas City, and were cashed as drawn, the Bank paying their full face, less the usual rate of exchange on Milwaukee. The amount, as each was cashed, was passed to the credit of DuBois, and was checked out by him in the usual course of business, within a few days.

The drafts were sent by the Bank to its correspondent at Chicago, indorsed "for collection" on its account, and by him were forwarded to Milwaukee. The invoices of some of the shipments were indorsed in the same way. The bills of lading were indorsed by Du Bois, per J. MacLellon, his clerk.

The signatures to the bills of lading proved to be forgeries, on which account Goetz and Luening refused to pay the fifth draft. The Bank thereupon brought an action against them for the amount, in the Circuit Court of the United States. They defended, and set up as a counterclaim the sums they had paid on the four drafts. At the same time, they commenced an action in the state court against the Bank to recover the money paid on those four drafts. The latter action was removed, on ap-

plication of the Bank, to the Circuit Court of the United States, where the two actions were consolidated and tried as one, the same questions being involved in both. The trial resulted, by direction of the court, in a verdict for the Bank, by which it recovered against the firm the amount claimed on the unpaid draft, and defeated the claim of the firm for the return of the money paid on the other four drafts.

The contention of Goetz and Luening was substantially this: that they accepted the drafts in the belief that the bills of lading were genuine; that their genuineness was asserted by the indorsement of the Bank on the invoices accompanying them; that the bills of lading were forgeries; that no shipments as stated therein had been made; and that Du Bois bore in the community such a reputation for dishonesty, having been charged at other times with forging bills of lading attached to drafts drawn by him, that the Bank was guilty of culpable neg-
[555] ligence, amounting to bad faith, in discounting these drafts on the faith of the bills of lading presented by him, without inquiring as to their genuineness.

The testimony offered by the firm respecting the character of Du Bois was of great length, but it would serve no useful purpose to discuss it. It is sufficient to say that it consisted of a mass of loose statements, general charges of criminality, with vague references in some instances to reported particulars, sensational articles in newspapers, surmises, insinuations, rumors, beliefs and suspicions, which might make men cautious in their dealings with him, but they were altogether of too indefinite and uncertain a character to interdict all transactions with him in the ordinary course of business.

Besides, testimony was produced by the Bank highly favorable to the standing and character of Du Bois. He is shown to have been a man of great enterprise and capacity, and, just before opening business with the Bank, to have been a member of the government of Kansas City, representing his ward in the common council, and spoken of as a prominent candidate for its mayoralty. He was a member and director of the board of trade of the city, and one of its committee on arbitration, to which business disputes of its members were referred for settlement. He had been a captain in the Union Army, and bore the reputation of a brave and gallant officer. He was received in the best society of the city and was generally popular. He commenced business with the Bank in March 1881, and drafts by him, cashed by the Bank, amounted from $20,000 to $100,000 a month. Those drafts were always accompanied by bills of lading, and not until after the discovery of the forgery of the bills of lading in this case was it known that in any of these transactions he had been guilty of dishonest conduct.

Under these circumstances it is not surprising that, when the drafts on the merchants in Milwaukee were presented for discount, the Bank made no inquiry as to the genuineness of the bills of lading attached to them. A bank in discounting commercial paper does not guaranty the genuineness of a document at-
[556] tached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. The indorsement by the Bank on the invoices accompanying some of the bills, "for collection," created no responsibility on the part of the Bank; it implied no guaranty that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts if the drafts were not paid by the drawees, and that the Bank transferred them only for that purpose. If the drafts should be paid the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn.

The Bank, after discounting the drafts, stood towards the acceptors in the position of an original lender, and could not be affected in its claim by the want of a consideration from the drawer for the acceptance, or by the failure of such consideration. This has been held in numerous cases and was directly adjudged by this court in *Hoffman* v. *Bank of Milwaukee*, 12 Wall. 181 [79 U. S. bk. 20, L. ed. 366], which in essential particulars is similar to the one at bar. There the bank had discounted drafts drawn by parties at Milwaukee on Hoffman & Company, commission merchants of Philadelphia, to which were attached bills of lading purporting to represent shipments of flour. Hoffman & Company accepted and paid the drafts. The bills of lading proved to be forgeries, and Hoffman & Company sued the bank to recover the money paid. It was contended that they had accepted and paid the drafts in the belief that the accompanying bills of lading were genuine, and that, had they known the real facts, they would not have accepted and paid the drafts, and could not have been compelled to do so, in which case the loss would have fallen on the bank; that is, that they paid the drafts under a mistake of facts. But the court answered "that money paid as in this case by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorser in discharge of his legal obligation as such, is not a payment by mistake, nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the con-
[557] sideration was illegal, or that the facts and circumstances which impeach the transaction as between the acceptor and the drawer were known to the payee or subsequent indorsee at the time he became the holder of the instrument;" that, supposing the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached, that fact would not benefit them, as the bills of exchange were in the usual form, and contained no reference whatever to the bills of lading, and it was not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, or that they had made any representation upon the subject to induce the plaintiffs to contract any such liability; that undoubtedly the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to them, but that they were not a part of those instruments, and could not be regarded in any more favorable light than as collateral security accompanying the bills of exchange; and that

proof that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business.

The case of *Robinson* v. *Reynolds*, decided by the Queen's Bench, and, on error, in the Exchequer Chamber (2 Q. B. 196), is also similar, in essential particulars, to the one at bar. An action of assumpsit having been brought by the indorsee of a bill of exchange against the acceptors, they pleaded that the drawer was in the habit of delivering goods in Ireland to the City of Dublin Steam Company to be carried to Liverpool, consigned and deliverable there to his order, and of taking from the company a receipt for the goods, bill of lading, or document, which, by the custom of merchants, when indorsed for value, passed the property in the goods, and entitled the indorsee to have them delivered to him; that the drawer used to obtain advances from the National Bank of Ireland on indorsing to it such document, and drawing and delivering to it a bill of exchange on the defendants or other person to whom the goods were deliverable; that the bank used to forward the indorsed document to Liverpool, and to have it presented to defendants (or such other person), and on the faith thereof, the defendants (or such other person) used to accept the bill of exchange; that the drawer, pretending to act in pursuance of such usage, fraudulently indorsed and delivered to the bank a document in the usual form, to which the signature of the agent of the steam company was forged, purporting that the goods mentioned in it had been delivered to the steam company, which was false; and the drawer at the same time indorsed the bill of exchange in controversy to the bank, which advanced him the amount on the faith of the document; that the bank indorsed the document and had it presented to the defendants with the bill of exchange, and requested them to accept the bill of exchange on the faith of, and in consideration of, the delivery of the document, which was delivered as a true one; that the defendants, in consideration of the goods mentioned in the document, and in consideration and on the faith of it, and in ignorance of its being forged, accepted the bill of exchange for and at the request of the bank; and that thus the consideration for the acceptance, which defendants had been induced to make under the mistake into which they had been led by the conduct and indorsement of the bank, wholly failed. The plea did not allege that the bank knew the document to be forged or represented it to be genuine; and on that ground, after verdict for the defendants, the plaintiffs, representing the bank, obtained a rule *nisi* for a new trial, or for judgment *non obstante veredicto*. After argument the Queen's Bench made the rule absolute. In giving its decision *Lord* Denman said: "The plea does not show that the plaintiffs made any representation which they knew to be false; nor that they warranted the bill of lading to be genuine, nor does it disclose that the defendants accepted the bill of exchange on which the action is brought upon the faith of any assertion by the plaintiffs, further than their indorsement upon it that the bill of lading, which turned out to be forged, was genuine. On the contrary, it appears by the other averments in the plea that the drawer of the bill was the correspondent of the defendants, and that it was upon his authentication of the bill of lading, as referring to goods which he professed to have consigned to them, that they acted." Judgment was accordingly ordered for the defendant, *non obstante veredicto*.

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The case having been taken to the Exchequer Chamber, the judgment of the Court of Queen's Bench was affirmed Tindal, *Chief Justice*, in delivering the opinion of the court, said: "The sole ground on which the defendant relies is that the acceptance was not binding on account of the total failure or insufficiency of the consideration for which it was given, the document, on the delivery of which the acceptance was given, having been forged, and there never having been any other consideration whatsoever for the acceptance of the defendants. And this would have been a good answer to the action, if the bank had been the drawers of the bill. But the bank are indorsees, and indorsees for value; and the failure or want of consideration between them and the acceptors constitutes no defense; nor would the want of consideration between the drawer and acceptors (which must be considered as included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea. Admitting that the bill was accepted by the drawee at the request of the bank, and on a consideration which turns out to be utterly worthless, the case is the same as if the bill had been accepted without any value at all being given by the bank to the defendants; and on that supposition the defendants would still be liable as acceptors to the bank, who are indorsees for value, unless not only such want of consideration existed between the drawer and acceptors, but unless the indorsees had notice or knowledge thereof. For the acceptance binds the defendants conclusively, as between them and every *bona fide* indorsee for value; and it matters not whether the bill was accepted before or after such an indorsement."

Many other cases to the same purport might be cited. *Craig* v. *Sibbett*, 15 Pa. 240; *Munroe* v. *Bordier*, 8 C. B. 862; *Thiedemann* v. *Goldschmidt*, 1 De Gex, F. & J. 4; *Hunter* v. *Wilson*, 19 L. J. Exch. 8; *Leather* v. *Simpson*, L. R. 11 Eq. Cas. 398.

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The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it is made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer.

The main position of the plaintiffs in error is therefore untenable. It only remains to say a few words respecting the exceptions to the rejection and admission of testimony.

1. Articles from newspapers touching the conduct of Du Bois in drawing drafts, with alleged fictitious bills of lading attached, on a house in Buffalo two years before, were excluded as having no connection with the transactions in controversy, and it not appearing that the officers of the Bank ever saw them; and we think the exclusion was correct. The story of his conduct two years before in a dif-

ferent transaction, however bad or even criminal it may have been, did not show, or tend to show, bad faith in the officers of the Bank in discounting the drafts in this case.

2. The testimony of one of the plaintiffs and of one of his attorneys was offered as to declarations of the president of the Bank, made several days after the last draft had been discounted, to the effect that the Bank had become largely involved in certain wool transactions with Du Bois as early as July or August, 1881, and would have broken off its relations with him if it had not been that this wool matter remained unsettled. The testimony was excluded, and rightly so. The declarations had no bearing upon the good faith of the officers of the Bank in the transactions in this case; and, if they had, being made some days after those transactions, they were not admissible as part of the *res gestæ*, any more than if made by a stranger. Evidence of declarations of an agent as to past transactions of his principal are inadmissible, as mere hearsay. *Luby* v. *Hudson River R. R. Co.* 17 N. Y. 133; *Adams* v. *Hannibal & St. J. R. R. Co.* 74 Mo. 553.

3. The testimony of the president of the Bank, explanatory of the conduct of its officers when certain drafts came back protested, was admissible. The witness had testified, upon examination by the plaintiffs, that the Bank never had any knowledge of a forged bill of [561] lading by Du Bois until October 31, 1881; and that it was not a fact that he had purposely remained ignorant of the facts and circumstances attending the protests of certain other drafts of Du Bois, to which bills of lading were attached, which the Bank had discounted; and that he could only explain why no particular pains were taken in the matter by stating what the usage of the Bank was in such matters. As the witness was about to state such usage, the counsel of the plaintiffs interrupted him, and called his attention to the question put, whether any special pains had been taken, but the court said: Let him state the usage as to such papers. The witness then answered as follows: "No, sir; I did not take any special pains, for the reason that it is a matter of very common occurrence. A merchant will ship a lot of grain to New York, the drafts come there, and for some reason a commission merchant won't pay them; it may be that he is not in a position to do it; it may be he thinks they are drawn for too much, and he refuses to pay; the drafts come back, or are held under directions of the Bank for settlement or other arrangement. That is a very common occurrence on shipments with bills of lading attached." There could be no just objection to the court's receiving this explanation.

We see nothing in the other exceptions which requires notice.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHICAGO AND ALTON RAILROAD COMPANY, *Plf. in Err.*, [615]
v.
WIGGINS FERRY COMPANY.

(See S. C. Reporter's ed. 615-624.)

Constitutional law—decisions of state courts upon general law, not reviewable by this court—state courts, not charged with knowledge of laws of other States—rule applies in this court on appeal from state courts—contract—ultra vires.

1. The decision of a state court holding a contract valid or void upon principles of the general law of the land, independent of anything peculiar in the jurisprudence of another State, cannot be reviewed by this court as within article IV, section 1 of the Constitution, which requires full faith and credit to be given in each State to the public acts, records and judicial proceedings of every other State.

2. A state court is not charged with knowledge of the laws of another State, such laws being only known to it as facts, to be proved as such.

3. Whatever was matter of fact in the court below is so treated by this court in the exercise of its appellate jurisdiction.

4. In an action brought by the defendant in error in a state court of Missouri, to recover damages for an alleged breach of a contract by the defendant, an Illinois corporation, in not employing the plaintiff to transport persons and property across the river at St. Louis, it is *held*, that it is not enough to give this court jurisdiction to say in the pleadings, or elsewhere in the course of the proceedings, that the contract was beyond the powers of the Company under its charter as construed and given effect by the law and usage of Illinois. The record must show that the acts presented for adjudication made it necessary for the court to give effect to the charter in view of some peculiar jurisprudence of Illinois rather than the general law of the land.

[No. 5.]

Argued Oct. 22, 25, 1886. Decided Jan. 10, 1887.

IN ERROR to the Supreme Court of the State of Missouri.

Motion to dismiss heard with the case on its merits. *Dismissed.*

The history and facts of the case appear in the opinion of the court.

Mr. **C. Beckwith,** for plaintiff in error:

The plaintiff in error is a corporation created by and organized under laws of the State of Illinois, authorizing it to transport persons and property to and from St. Louis, Missouri. The Acts of incorporation are contained in the record and are expressly declared to be public Acts. They are alleged in the petition, admitted in the answer, and were offered and read in evidence without objection. No question arises as to their authentication, and all federal courts are required to take judicial notice of them.

The interpretation of such Acts is as much a part of the same as if it were, by express language, incorporated therein. The interpretation of the public Acts of the State of Illinois by the courts of that State is not required to be authenticated, but judicial notice thereof will be taken in the same manner and to the same extent as if the interpretation formed part of the Acts themselves.

The plaintiff in error claims that by the public Acts of the State of Illinois, as interpreted by its courts (of which interpretation this court is required to take judicial notice), it was not allowed to surrender and was prohibited from surrendering its power to transport persons and property to and from St. Louis, Missouri, or to employ others so to do, as the exigencies and

convenience of the public might require; and that it was not allowed to make, and was prohibited from entering into any contract undertaking perpetually to employ any person or persons, and particularly the defendant in error, to transport persons and property to and from St. Louis, Missouri, to the exclusion of any other person or persons.

The plaintiff in error further claims that by the public laws of the State of Illinois, as interpreted by its courts, it was required to make such arrangements as the public exigencies and convenience might require, to transport persons and property across the Mississippi River, with all companies or persons authorized by the Legislature of that State to perform such services, and at any and all places where the exigencies and convenience of the public might so require.

If the claim of the plaintiff in error in respect of the laws of the State of Illinois, and the interpretation thereof, is correct, it follows that the contract sued upon was *ultra vires* and void. Further, the plaintiff in error insists upon its right to have full faith and credit given in the State of Missouri to these Acts of the State of Illinois, as interpreted by its courts.

See *Murdock* v. *Memphis*, 20 Wall. 598 (87 U. S. bk. 22, L. ed. 429); *Green* v. *Van Buskirk*, 5 Wall. 307 (72 U. S. 18: 599); *S. C.* 7 Wall. 139 (74 U. S. 19: 109); *Crapo* v. *Kelly*, 16 Wall. 610 (83 U. S. 21: 430); *Embry* v. *Palmer*, 107 U. S. 3 (27: 346).

If from the record it appears that the right was necessary to be considered, no particular form of its assertion was required.

Oscanyan v. *Arms Co.* 103 U. S. 261 (Bk. 26, L. ed. 539); *Murray* v. *Charleston*, 96 U. S. 432 (24:760).

Under the Laws of Illinois, its courts can require a specific performance of the duty which the plaintiff owes to the public (*Chicago & N. W. R. Co.* v. *People*, 56 Ill. 378; *Chicago & R. I. R. R. Co.* v. *Coal Co.* 68 Ill. 489); and under the laws of Missouri, damages, it is claimed, can be recovered for so doing. By the laws of Illinois the plaintiff in error is not allowed to discriminate unjustly in favor of the defendant in error, or against other ferry companies; but, by the laws of the State of Missouri, the plaintiff in error is obliged to make such discrimination or pay damages for not so doing.

Messrs. **Henry Hitchcock**, and *G. A. Finkelnburg*, for defendant in error:

The fact that defendant below claimed that a certain construction should be placed by the Missouri court upon public Acts of Illinois does not make the denial of such claim by that court a federal question, nor confer upon this court jurisdiction to review such decision.

Hoyt v. *Sheldon*, 1 Black, 521 (66 U. S. bk. 17, L. ed. 66); *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 144 (68 U. S. 17: 576); *Lawler* v. *Walker*, 14 How. 153 (55 U. S. 14: 366); *Commercial Bank* v. *Buckingham*, 5 How. 342 (46 U. S. 12: 181). See *Chicago & A. R. R. Co.* v. *Wiggins Ferry Co.* 108 U. S. 23 (27: 637).

This court has no jurisdiction to review the decisions of state courts construing state statutes admitted to be valid, even though erroneously construed, unless a construction is given by the state court to such statute which would make it repugnant to the Constitution or Statutes of the United States.

Commercial Bank v. *Buckingham*, *Lawler* v. *Walker*, *Hoyt* v. *Sheldon*, and *Bridge Proprietors* v. *Hoboken Co. supra*.

This court has repeatedly held that the question whether a given contract is or is not void as against public policy is not a federal question; also, that it has no jurisdiction to review the decision of a state court founded upon principles of general law alone; also, that where a decision of the highest court of a State in a case is made on its settled pre-existent rules of general jurisprudence, such decision is not reviewable in this court.

Delmas v. *Ins. Co.* 14 Wall. 81 U. S. 666 (bk. 20, L. ed. 759); *Tarver* v. *Keach*, 15 Wall. 89 U. S. 68 (21: 82); *New York Life Ins. Co.* v. *Hendren*, 92 U. S. 287 (23: 710); *Bethel* v. *Demaret*, 10 Wall. 77 U. S. 537 (19: 1007); *Bank of West Tennessee* v. *Citizens' Bank*, 14 Wall. 81 U. S. 9 (20: 514); *Palmer* v. *Marston*, 14 Wall. 10 (*Id.* 826); *Sevier* v. *Haskell*, 14 Wall. 12 (*Id.* 827.)

Mr. Chief Justice **Waite** delivered the opinion of the court: [616]

The federal question which it is claimed arises on this record is whether the Supreme Court of Missouri in its judgment gave "full faith and credit" "to the public acts, records, and judicial proceedings" of Illinois.

The facts are these: The Wiggins Ferry Company was incorporated by the State of Illinois in 1853, and given the exclusive and perpetual right of maintaining and operating a ferry across the Mississippi River between its own lands in East St. Louis, on the Illinois side, and St. Louis in Missouri. It owned Bloody Island and substantially controlled two miles and a half of ferry landing on the Illinois shore. [617]

The Chicago and Alton Railroad Company is likewise an Illinois corporation, having authority to own and operate a railroad between Chicago and Bloody Island, opposite the City of St. Louis, and to "take, use, and make arrangements for the transportation of freight and passengers carried or to be carried upon said railroad, or otherwise, * * * to St. Louis, Missouri, and for this purpose to construct, own and use such boat or boats as may be necessary."

The Alton and St. Louis Railroad Company was also an Illinois railroad corporation, authorized to construct and operate a railroad from Alton, Illinois, to any point opposite St. Louis. On the 28th of April, 1864, this company entered into a contract with the Wiggins Ferry Company, by which, among other things, the Ferry Company agreed "to furnish and maintain good and convenient wharf boats and steam ferry boats to do with promptness and dispatch all the ferrying required for the transit of passengers and freight coming from or going to said railroad (or the assignee hereinafter mentioned) over the river," at reasonable rates of ferriage; and the railroad company covenanted and agreed that it would "always employ the said ferry to transport across the said river all persons and property which may be taken across the said river, either way, to or from the Illinois shore, either for the purpose

of being transported on said railroad, or having been brought to the said river, Mississippi, upon said railroad. So that the said Ferry Company, its legal representatives or assigns, owners of the said ferry, shall have the profits of the transportation of all such passengers, persons and property, taken across said river either way by said railroad company; and that no other than the Wiggins Ferry shall ever, at any time, be employed by the said party of the second part, or the assignee herein mentioned, to cross any passengers or freight coming or going on said road."

[618] And it was also agreed and understood that the Alton and St. Louis Company should have the right to transfer and assign the agreement to the Chicago and Alton Company, in which event all the covenants, stipulations and agreements therein contained should be as binding on the said Chicago and Alton Company as on the Alton and St. Louis Company.

On the same day that the contract was entered into the Alton and St. Louis Company transferred to the Chicago and Alton Company all its right, title and interest in and to the lands, tenements and easements mentioned therein, and the Chicago and Alton Company became bound to the Ferry Company in all respects the same as the Alton and St. Louis Company was.

This suit was brought by the Ferry Company in a state court of Missouri against the Chicago and Alton Company to recover damages for not employing the Ferry Company for the transportation of persons and property across the river, as by the contract it was bound to do. The Railroad Company set up by way of defense, among other things, that "it had no power or authority to make or enter into any agreement whatever, perpetually obliging itself * * * not to cross persons and property, nor not to employ others to do so in the manner alleged in the petition; and that, if the provisions of said articles of agreement contain, by construction, any such provision, the same were and are in violation of the laws of the State of Illinois, and contrary to the public policy thereof, and are void and of no effect."

The answer further alleged that the Railroad Company, at the time of the transfer of the contract to it, "was a public, common carrier as a railroad company, duly incorporated by law, with power and right to construct and operate its railroad, and to transport persons, [619] passengers, freight and property to and from the City of St. Louis, in the State of Missouri, across and over said river, and on or over its railroad, as the public interest required; that it was and still is the legal right and duty of defendant to furnish and supply the mode and means of transportation needed and required from time to time by the public welfare for passengers and property to and from said city over said river, and to, on, and over defendant's railroad; that the public welfare and the necessities of shippers of property and freight to and over said railroad, and to and from said city, required that certain freights and property, to be transported by defendant to and from said city, should be transported by it to and from said city across said river, and to and from and along defendant's railroad, in the cars in which it might be, and over and across said river, without breaking bulk and without being removed from such cars, and without being taken by hand or by wagons or other appliances, in packages, from or to the cars, from or to ferry boats, to be ferried across said river; and that since said assignment other and improved modes of transportation across said river, without breaking bulk, and at other points on said river opposite the City of St. Louis, were and have been provided and established, and it was and became the duty of defendant, as such common carrier, to accommodate the public by the use of such other modes of transportation; and that any provision of said contract which would prohibit defendant from using the same for the benefit and convenience of the public was and is against public policy and void, and defendant was not and is not bound thereby."

Upon the trial the statutes under which the Railroad Company was incorporated and from which it derived its corporate powers were offered in evidence. They confer upon the Company all the usual powers of railroad corporations, and, either expressly or by implication, subject it to corresponding obligations to the public. No testimony was offered, so far as the record discloses, to show that the courts of Illinois had decided, or that it had been established by law or usage in that State, that this Corporation, or any other having similar powers, could not make such a contract as had been entered into.

After the evidence was all in, the Railroad Company asked the court to rule, among other things, as follows:

"If, at the time the contract sued on was made and was assigned to defendant, the plaintiff was a common ferry, incorporated under the laws of Illinois, with power to have and use a ferry within limits opposite to a portion only of the City of St. Louis, and the Alton [620] and St. Louis Railroad Company was a common carrier, incorporated under the laws of Illinois, in evidence, with authority and franchise to have and to use a railroad in said State to a point opposite to the City of St. Louis, Missouri, and defendant was a common carrier, incorporated under the laws of Illinois, in evidence, with franchises and authority to have and use a railroad from Chicago, by way of Alton, in said State, to the Mississippi River, opposite to said City of St. Louis, and carry persons and property to and from St. Louis, and to and from and over such railroad, and to have or use boats for such purpose, then the provisions of said contract between plaintiff and the Alton and St. Louis Railroad Company, that said railroad company would always employ plaintiff or its ferry to transport across the Mississippi River all persons and property which might be taken across said river, either way, to or from the Illinois shore, either for the purpose of being transported on its railroad, or having been brought to said river on said road, so that plaintiff, its representatives or assigns, should have the profits of the transportation of all such persons, passengers and property taken across the river either way, by said Alton and St. Louis Railroad Company, and that no other than plaintiff (or its ferry) should ever, at any time, be employed by said Alton and St. Louis Railroad Company, or the assignee therein mentioned.

Chestnutwood v. *Hood*, 68 Ill. 189; *People* v. *Hulburt*, 46 N. Y. 118; *People* v. *Smith*, 45 N. Y. 772; *Sharp* v. *Speir*, 4 Hill, 79; *Beatty* v. *Knowler*, 29 U. S. 4 Pet. 152 (7:813); *Vanhorn* v. *Dorrance*, 2 U. S. 2 Dall. 316 (1:396); *Doe* v. *Shunn*, 1 Blackf. 336; *Farrington* v. *Morgan*, 20 Wend. 207.

It was contended in *Welch* v. *Post*, *supra*, that the question had been settled by the Supreme Court of Illinois in *Martin* v. *People*, 87 Ill. 524, that "town" and "village" are the same; but the court decided that no such point was involved; hence, there has never been but one decision in Illinois on that point and that was that "town" and "village" are not the same.

The federal courts will follow the highest court in a State in the construction given by such state court to its own Constitution and statutes.

Tioga R. R. Co. v. *Blossburg, etc. R. R. Co.* 87 U. S. 20 Wall. 137 (22:331); *Fairfield* v. *Gallatin Co.* 100 U. S. 47 (25:544); *South Ottawa* v. *Perkins*, 94 U. S. 260 (24:154); *State R. R. Tax Cases* and *Elmwood* v. *Marcy*, 92 U. S. 576, 289 (23:663, 710); *Weightman* v. *Clark*, 103 U. S. 260 (26:393).

And this is the case even where, as in this case, the state court has rendered its decision construing the state statute after the United States Circuit Court has made a prior decision construing it the other way.

Moores v. *Nat. Bank*, 104 U. S. 625 (26:870).

And the Supreme Court of the United States will also recede from a former decision to follow the subsequent decision of the state court construing its own statutes.

Leffingwell v. *Warren*, 67 U. S. 2 Black, 599 (17:261); *Fairfield* v. *Gallatin Co. supra*.

If, then, the power to issue bonds was not given under said section 10 of the Act of 1869, the vote taken could only have authorized a donation to be paid by taxation as provided by section 11 of the said original charter of said railroad company, passed in 1867. But the power to vote a donation under either of the said Acts of 1867 or 1869 did not carry the power to pay the donation in bonds.

Bissell v. *Kankakee*, 64 Ill. 249; *Shaeffer* v. *Bonham*, 95 Ill. 368; *Lippincott* v. *Pana*, 92 Ill. 24.

And if these bonds were void for want of power to issue them, then subsequent payment of interest is no ratification of them.

Flack v. *Hughes*, 67 Ill. 384; *Lippincott* v. *Pana* and *Shaeffer* v. *Bonham*, *supra*.

An absolutely unanswerable reason why these bonds are void was stated by the Supreme Court of the United States in the case of *Concord* v. *Savings Bank*, 92 U. S. 625 (23:628), where the court says, referring to the proviso in the "separate section" of the Constitution of Illinois above quoted, "This article, in our opinion, makes a clear distinction between subscriptions to the capital stock of a railroad company * * *, and donations or loans of credit to such corporations. The latter are prohibited under all circumstances."

Plaintiff in error insists that it is not estopped by the former judgment between these parties on coupons detached from the same bonds, because to make said judgment binding as *res judicata* there must be complete identity of parties and subject matter of litigation.

Cromwell v. *County of Sac*, 94 U. S. 351 (24:195).

And if in the second suit there be, as in this case, a new and wholly different cause of action (a different lot of coupons are sued upon), and a defense based upon a materially new and different state of facts, then the former judgment is no estoppel.

Cromwell v. *County of Sac*, *supra*; *Gould* v. *Evansville & C. R. R. Co.* 91 U. S. 526 (23:416).

Where the face of commercial paper itself carries a defect, the purchaser must make inquiry and is chargeable with notice of whatever that inquiry would have or might have led to.

Wade, Notice, § 90, citing *Ayer* v. *Hutchins*, 4 Mass. 370; *Hall* v. *Hale*, 8 Conn. 336; *Goodman* v. *Simonds*, 61 U. S. 20 How. 343 (15:934).

Messrs. **James A. Connolly** and **T. C. Mather**, for defendant in error:

The Supreme Court of Illinois in deciding the case of *Martin* v. *People*, 87 Ill. 528, clearly shows that the charters of "incorporated towns" and of "villages" are, in all their material and distinguishing characteristics, the same. This is proof that the Legislature could have had no motive or reason for using the words otherwise than merely as interchangeable.

All that can be said of the case of *Welch* v. *Post*, 99 Ill. 471, in this connection is that it is not competent for the courts or Legislature, by a change in their rulings or constructions, to deprive parties of their rights, acquired whilst the legislative or legal constructions were favorable to the validity of such rights.

Gelpcke v. *Dubuque*, 68 U. S. 1 Wall. 206 (17:525); *Butz* v. *Muscatine*, 75 U. S. 8 Wall. 583 (19:493); *Olcott* v. *Supervisors*, 83 U. S. 16 Wall. 690 (21:386); *Chambers Co.* v. *Clews*, 88 U. S. 21 Wall. 324 (22:520); *Elmwood* v. *Marcy*, 92 U. S. 289 (23:710); *Mitchell* v. *Burlington*, 71 U. S. 4 Wall. 270 (18:350); *Havemeyer* v. *Iowa Co.* 70 U. S. 3 Wall. 294 (18:38); *Lee Co.* v. *Rogers*, 74 U. S. 7 Wall. 181 (19:160).

While there was no decision of the Illinois Supreme Court upon the point in controversy at the time the bonds were issued, there was an unbroken line of legislative construction arising from special Acts of incorporation in which the words "village" and "incorporated towns" had been interchangeably used.

This is not a case where the United States Supreme Court is called upon to follow the latest decision of the state supreme court and ignore the earlier one and the legislative construction referred to.

The Welch judgment cannot affect the rights of defendant in error, especially as it cannot be shown which one of the seven bonds was involved in that litigation, nor that defendant in error knew anything about it.

Carroll Co. v. *Smith*, 111 U. S. 556 (28:517); *Warren Co.* v. *Marcy*, 97 U. S. 96 (24:977).

There seems to be no restriction as to the place of payment in the law under which these bonds were issued, and therefore the authority of this court is that they can be made payable elsewhere.

Lynde v. *The County*, 83 U. S. 16 Wall. 6 (21:272); *Thomson* v. *Lee Co.* 70 U. S. 3 Wall. 327 (18:177); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 178 (17:520).

Mr. Justice **Bradley** delivered the opinion of the court: [68

This is a suit brought by C. N. Jordan against

the Town of Enfield to recover the amount of twenty-two interest coupons for $50 each, made by the Town on the first of January, 1871, and payable in January and July, 1881, 1882 and 1883. The defendant pleaded nonassumpsit, and on the trial a jury was waived, and the cause was tried by the court, consisting of the circuit and district judges. A finding of the facts was made, and the judges being divided in opinion as to certain questions of law arising thereon, judgment was rendered in favor of the plaintiff, in accordance with the opinion of the presiding judge. The principal question of law was whether an "incorporated town," as Enfield was, had power to make a donation of its bonds to the railroad company. Questions of estoppel were also raised, as hereafter noticed.

The facts found by the court, in accordance with an agreed statement presented by the parties, are substantially as follows:

1. That the Town of Enfield was incorporated under an Act of the General Assembly of the State of Illinois, approved March 15, 1869. This Act is set out in full, and is entitled "An Act to Extend the Corporate Powers of the Town of Enfield." It is an ordinary town charter, making the town a corporation by the name and style of "The Town of Enfield." Its territorial limits were then prescribed, being one mile square, and the usual corporate powers were conferred. A town council, consisting of five trustees, together with a police magistrate, a treasurer, and a town constable, were directed to be elected annually, on the first Monday of May. The powers given to the town council were similar to those usually conferred upon municipal bodies; as, the power to levy and collect taxes; to appoint a clerk, supervisor of streets, and other officers; to appropriate moneys to pay the debts and expenses of the Town; to make regulations for securing the general health; to provide a supply of water; to make sidewalks, and to open, grade, pave and repair streets; to establish markets, to regulate the public grounds; to organize a fire department; to regulate the police, etc.

[682] The findings next set forth at large an Act of Assembly of Illinois, incorporating the Illinois Southeastern Railway Company, approved February 25, 1867. This Act authorized the company to construct a railroad from a point on the Illinois Central Railroad, by way of Fairfield in Wayne County, to the Ohio River. The route designated would naturally pass in the neighborhood of Enfield, and the railroad, when built, did pass through the Town. The seventh section authorized counties through which the road might pass to donate to the company any sum not exceeding $100,000, and to give its bonds therefor. The ninth section authorized any town in any county under township organization to donate not to exceed $30,000; but such donation was payable only by taxation, no authority being given to issue bonds. This section related, not to incorporated towns, but to townships forming the territorial subdivisions of counties. The eleventh section authorized "any incorporated city or town" through or by which the railroad might run to make donations not exceeding $10,000, on the same terms, propositions, conditions, and under the same restrictions, as provided for townships.

The findings next set forth an amendment to the railroad charter, approved February 24, 1869, by the tenth section of which authority was given to "Any village, city, county or township organized under the township organization law, or any other law of the State, along or near the route of the railway, * * * or anywise interested therein," to subscribe to the stock of the railroad company, or make donations to it to aid in the construction and equipment of its road, provided such subscription or donation was sanctioned by an election of the people. This section gave power to issue bonds for such subscriptions or donations; but towns are not included therein by name.

The court further found that, on the first of January, 1871, the Town of Enfield issued and delivered to the officers of the Springfield and Illinois Southeastern Railway Company, a company formed by consolidation with the Illinois Southeastern Railway Company, the bonds and coupons now in controversy, copies of which are attached. That said bonds and coupons were issued by said Town by virtue of the power (if any) contained in the Acts aforesaid, [683] approved February 25, 1867, and February 24, 1869; and that afterwards said bonds and coupons came to the plaintiff through mesne transfers from said Springfield and Illinois Railway Company; and that the bonds were registered in the state auditor's office.

The findings further set forth copies of the order of the town council of Enfield, made June 10, 1870, appointing judges of election to be held in the Town on the 11th of the same month, and a copy of the returns of the vote at said election for the purpose of determining whether the Town would donate the sum of $7,000 to the Springfield & Illinois Southeastern Railway Company, the result of which was —for donation sixty-four votes, against it, one vote; and that this was the only election held in relation to said donation.

The court further found that at the June Term, 1880, of that court, judgment for the plaintiff against the defendant was rendered upon coupons then due, detached from the same bonds from which the coupons now sued on were taken. It was also admitted by the plaintiff that the Enfield town bond represented by Post in the case of *Welch* v. *Post*, 99 Ill. p. 471, was one of the series of seven bonds in controversy in this suit, but which bond it was the plaintiff disclaimed any knowledge.

Upon these facts the judges who tried the cause have certified a difference of opinion upon the following questions, to wit:

1. Whether the incorporated Town of Enfield had power to vote and issue the bonds and coupons in controversy under any of the provisions of the Acts above specified.

2. More particularly, whether said Town had said power under the tenth section of the amendment of the railway company's charter, approved February 24, 1869.

3. Whether said Town was not estopped from further defense by the litigation theretofore had between it and plaintiff.

4. In case there was power in the Town under said laws to vote and issue said bonds and

coupons, whether one of said bonds and the [684] coupons thereto belonging were void in the hands of plaintiff in this suit by reason of one Post having litigated it in the state courts of Illinois.

1. As to the first question, it is clear that the Town derived no authority to issue the bonds from anything contained in its own charter. But, by the eleventh section of the Act incorporating the railway company, power is given to any incorporated city or town through or by which the railroad might run to make donations to the company, and to pay the same by taxes assessed by the county clerk at the request of the company. No authority, however, was given to issue bonds in payment of such donations. The tenth section of the amending Act, approved February 24, 1869, contains the only authority which can be invoked for that purpose. But that section does not mention towns by name. It declares "That any village, city, county, or township * * * along or near the route of said railway or its branches, or that are in anywise interested therein, may in their corporate capacity subscribe to the stock of said company, or make donations to said company, to aid in constructing and equipping said railway;" with a proviso for holding an election on the subject, and authorizing the issue of bonds in payment, "said bonds to be signed, in case of a village, by the chairman of the board of trustees thereof; in case of a city, by the mayor thereof," etc. The Town of Enfield is not a township, nor a county, nor a city. If it is within the purview of the Act it must be because it is a village. The question then arises, Is the incorporated Town of Enfield a village within the meaning of the Act?

This question depends upon the use of the words "town" and "village" in the laws of Illinois. The general and popular distinction between them in English speech will not carry us far towards a solution. The dictionaries tell us that the word town signifies any walled collection of houses. (Johnson.) But that is its antique meaning. By modern use, it is said to be applied to an undefined collection of houses, or habitations; also to the inhabitants; emphatically to the metropolis. (Richardson.) Again, a town is any collection of houses larger than a village; or any number of houses to which belongs a regular market, and which is not a city. [685] (Johnson, Webster, Ogilvie.) The same authorities define a village as a small collection of houses in the country, less than a town. According to this distinction, the law, in giving power to "any village, city, county or township" to make donations and issue bonds to the railroad company, confers the power upon bodies of higher and lower degrees of municipal organization than towns, and leaves them out. This is an incongruity which we can hardly suppose was intended. The Supreme Court of Illinois, in a recent decision against the power, to which we shall presently refer, is obliged to say, "Why incorporated towns were omitted in that Act cannot now be known."

In seeking aid from collateral sources, we shall probably derive more light from the political use of the terms "town" and "village" in this country, than from general lexicography. In New England and New York towns are the political units of territory into which the county is subdivided, and answer, politically, to parishes and hundreds in England, but are vested with greater powers of local government. In Delaware the counties are divided into hundreds, the words town and village being indiscriminately applied to collections of houses. In Maryland and most of the Southern States, the political unit of territory is the county, though this is sometimes divided into parishes and election districts for limited purposes. The word "town" is used in a broad sense to include all collections of houses from a city down to a village. Thus, in Virginia, by an Act passed in 1778, on the death or removal of "any one of the trustees and directors of the several towns within this State, not incorporated," provision is made for filling the vacancy; by Act of 1793, "electors of towns entitled to representation in the House of Delegates" are authorized to vote at their respective court houses for representatives in Congress; by Revised Code of 1819, "trustees of the respective unincorporated towns of this Commonwealth" are empowered to make by-laws to prohibit horseracing in the streets of the town; by the Revised Code of 1849, in the chapter entitled "Of Towns," the council and [686] board of trustees of any town, heretofore or hereafter established, may cause to be made a survey and plan of the town, showing each lot, public street, etc., to lay out, alter, improve and light the streets, and to adopt various municipal regulations relating to public grounds, markets, health, nuisances, supply of water, fire departments, etc. Most of these towns were nothing but villages. The close connection between Virginia and Kentucky and the early settlement of Illinois renders this use of the word "town" in the mother State apposite to the question under consideration.

In New Jersey, Pennsylvania, Ohio, Indiana, Michigan and Illinois, the subdivisions of a county, answering to the towns of New England and New York, are called townships, though the word "town" is also applied to them in Illinois. In these States the words "town" and "village" are indiscriminately applied to large collections of houses less than a city.

These results are gathered from an examination of the laws and constitutions of the States named; and we should have no hesitation in saying that in Illinois an incorporated town and an incorporated village were one and the same thing, were it not for the decision of the Supreme Court of that State to the contrary in the case of *Welch* v. *Post*, 99 Ill. 471, already alluded to, which decision was made in relation to the identical bonds in question in this suit.

That case arose upon a bill filed in the Circuit Court of White County by citizens, property owners, and taxpayers of the Town of Enfield against the village and county collectors of taxes and the unknown holders of the bonds, to restrain the collection of taxes for their payment, on the ground that there was no authority of law to issue them. The bill prayed that the bonds might be declared null and void in whosesoever hands they might be. A decree was taken for confessed in April Term, 1877; but at the October Term, 1879, one Post, of New York, presented a petition, stating that he was the owner of one of the bonds, and praying that the cause might be reinstated, which

was done. The cause was then tried upon an agreed statement of the facts (much the same as in the present case), and the circuit court decided against the plaintiffs, and dismissed the bill. This decree was reversed by [687] the supreme court in June, 1881. The ground of this judgment, as stated in the opinion of the court, was that the Town of Enfield had no authority to issue the bonds; that no such authority was given in the charter of the Town, because none was expressed, and the making of donations to railway corporations, and issuing interest-bearing bonds in payment thereof, is not among the usual or implied powers possessed by municipal corporations; that it was not given by the Act of 1867, incorporating the railway company, because the donations authorized by that Act to be made by incorporated cities or towns, were directed to be paid by taxation, and no authority was given to issue bonds; that it was not given by the amending Act of February 24, 1869, because that Act only gives the power to villages, cities, counties and townships, and does not mention incorporated towns, and the Act cannot be extended by implication. The court says: "Keeping in mind, as must be done, there is no implied authority in municipal corporations to make donations to railway companies, and to issue interest-bearing bonds in payment, it must appear there is express enabling legislation to that effect before municipal corporations can properly assume to exercise such extraordinary powers. No such authority is to be found anywhere in any public or private law of this State, applicable to the Town of Enfield, at the time that Corporation undertook to and did issue the bonds held and owned by the respondent; and having been issued without authority of law, such bond constitutes no valid obligation that can be enforced against the Municipality."

Two justices, Dickey and Sheldon, dissented from this opinion, and adhered to an earlier ruling of the court made in 1877, in the case of *Martin* v. *People*, 87 Ill. 524, in which it was adjudged that the terms "towns and villages" are used synonymously in the laws of Illinois. The proceeding in that case was instituted by the collector of Cook County, for the collection of certain special assessments levied by the Town of Lake upon the real estate within its bounds, the mode of collection pursued being that pointed out in article IX of the Act entitled "An Act to Provide for the Incorpora- [688] tion of Cities and Villages," approved April 10, 1872, conferring upon all cities, towns and villages which might adopt it (as all were authorized to do) municipal powers of a very comprehensive character. It was contended on the part of the defendants that, as to towns, the Act was unconstitutional and void because "towns" are not mentioned in the title, but only "cities" and "villages." The Supreme Court of Illinois, however, did not concur in this view, but held that an incorporated town and incorporated village, in the laws of that State, are one and the same thing The court says: "The word 'town,' as found in our statutes, is not always used in the same sense. In the Act relating to township organization, it is provided that counties adopting that system for the management of county affairs shall be divided 'into towns' (sec. 5, p. 1067, R. S. 1874), consisting, generally, of a township according to the government surveys. These towns are a species of municipal incorporations, and constitute an integral part of the county, and are closely interwoven with the management of county affairs. In the statute found in Revised Statutes of 1845, page 111, the word 'town' is used in a very different sense. It there plainly means a village, or a small collection of residences; and by that Act it is provided that the inhabitants of any such town may under certain circumstances 'become incorporated for the better regulation of their internal police,' under the management of a board of trustees, with capacity to sue and be sued, to keep a record of their proceedings, and with power to make by-laws and ordinances, to prevent nuisances, to prohibit gambling and other disorderly conduct, to prevent fast driving and indecent exhibitions, to license public shows, to regulate markets, sink wells, to keep open and repair streets, to protect the town from fires, to levy and collect taxes, to enforce their ordinances, etc. Such an organization, in our statutes, was formerly always called an 'incorporated town,' but in later statutes they are sometimes called villages, and their trustees are called village trustees. An examination of the special charter of the Town of Lake (Vol. 4, Special Laws 1869, p. 824), shows it to be a municipal corporation of the latter character, and, in so far as its organization under that charter is concerned, it is merely an incorporated town, or, in other words 'an incorporated village.' Before that [689] charter was enacted, the Town of Lake was merely a municipal corporation under the laws relating to township organization. By this charter, the inhabitants of that town took another form of corporate existence, and became also, in contemplation of law, what, in the Revised Statutes of 1874, is known as a village." The court then, after enumerating the powers conferred by the town charter, adds: "All the powers are of the kind usually conferred upon cities or villages, and of the character conferred upon cities or villages by the general law of 1872, of which this article IX is a part. Before the adoption of our present Constitution, many special charters, conferring like powers, were granted by the General Assembly, and in most cases such corporations are called towns, but in some cases they are called villages; but the character and nature of these corporations, whether called in their charters towns or villages, were in all cases substantially the same." After referring to a number of these charters, the titles of which ran, "An act to incorporate the village of A., or B.," but in the body of which the several communities were called villages and towns indiscriminately, the court concludes as follows: "We therefore hold that the Town of Lake was, and is, a village in the sense in which that word is used in section 168 of the general Act of 1872 relating to cities and villages; that it, therefore, is one of the municipal incorporations which, by that section, are authorized to avail themselves of the provisions of article IX of that Act as an amendment to their charters."

We have quoted more fully from the judgment in this case, because it is not only directly in point, but it shows historically the use of the terms "town" and "village" in the legislation of

Illinois. Its bearing on the present case is enhanced by the fact that the Towns of Lake and Enfield were incorporated at the same session of the Legislature, and invested with like powers and form of organization.

Both of the cases to which we have referred arose after the bonds and coupons now in controversy were issued, and neither of them can control our decision upon the rights of the parties here, any further than as they address themselves to our judgment upon the true construction of the law; and we feel compelled to say that we regard the views expressed in the case of *Martin* v. *People* [*supra*], as the most sound and convincing of the two. It seems to us that the Legislature of Illinois, in the Act for the incorporation of cities and villages, intended to avoid hereafter the use of the ambiguous word "town," as applied to the smaller class of incorporated municipalities, and to designate them by the single term of "village." This conclusion is, on the whole, so obvious that we do not hesitate to adopt it, and to hold that the Town of Enfield is a village within the meaning of the amending Act of February 24, 1869. We may add, as a strong corroboration of what has been said, that in the ninth section of that Act, the word "town" is used indiscriminately with the word "village." The language is: "It shall be lawful for the incorporate authorities of any *incorporate city or village* through which said railway shall be located to donate or lease to said railway company, as a right of way, the right to lay a single or double track through said *city or incorporated village*, or any portion of the same, or any street or highway, that the said railway company shall elect for that purpose, except at the option of the said railway company and corporate authorities of *such towns or cities*."

[690]

An additional point, however, is made in relation to the authority of the Town to issue the bonds under consideration. Supposing that such authority is found in the Acts referred to, it is still contended that it was abrogated by the Constitution of the State adopted on the second day of July, 1870. By a section of that Constitution it is declared that "No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; *Provided, however*, That the adoption of this article shall not be construed as affecting the right of such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." It is urged that whilst the proviso of this section saves the power to make subscriptions to the capital stock of private corporations, it does not save the power to make donations to them. We did so decide in the case of *Concord* v. *Portsmouth Sav. Bank*, 92 U. S. 625 [23:628], but in the subsequent case of *Fairfield* v. *County of Gallatin*, 100 U. S. 47 [25:544], that decision was overruled in deference to several decisions of the Supreme Court of Illinois, to the effect that donations as well as subscriptions were within the meaning of the proviso. The authorities are collected in the latter case, and need not be repeated here. We held, as we had often held before, that this court will follow the construction which has been uniformly given by the highest court of a State to its Constitution and laws.

[691]

To the first and second questions, therefore, our answer is that the Town of Enfield had power under the tenth section of the amending Act approved February 24, 1869, to vote and issue the bonds and coupons in controversy.

The third question is whether the Town was not estopped from further defense by the previous litigation in this (the circuit) court upon the pleadings and facts stipulated and judgment rendered therein. The stipulation and finding on which this question is raised is as follows, to wit: "That at the June Term, A. D. 1880, of this court judgment for the plaintiff against the defendant herein was rendered upon coupons then due, detached from the same bonds from which the coupons in evidence in this suit were taken." The coupons on which said former judgment was rendered were different coupons from those involved in the present suit. This suit, therefore, was brought upon a different cause of action from that upon which the former suit was brought. Whether the same issues were raised and passed upon in that suit which are raised in this, the stipulation does not inform us. The question is too general in its terms to admit of a precise answer. If the defendant sought to set up in this suit some new defense, which was not made in the former one, and not necessarily decided therein, it should have been allowed to do so, under the ruling of this court in *Cromwell* v. *Sac County*, 94 U. S. 354 [24:198]. But we are left in entire ignorance on the subject. As no proper answer can be given to a question stated in such broad and indefinite terms, which admits of one answer under one set of circumstances and of a different answer under another, we must necessarily pass it by as immaterial to the decision of the case in this court.

[692]

The fourth and last question propounded by the judges below is whether one of the bonds and the coupons thereto belonging are void in the hands of the plaintiff in this suit by reason of one Post having litigated it in the state courts of Illinois. The finding on which this question is based is as follows; to wit, 'It is admitted by the plaintiff in this suit that the Enfield town bond represented by Post in the case of *Welch* v. *Post*, 99 Ill. p. 471, was one of the series of seven bonds now in controversy in this suit; but in making said admission plaintiff disclaims any knowledge of which one it was, or any connection with said suit." It is rather a singular proceeding to refer this court to a volume of reports to eke out the record on which it is to pass judgment. The reported case is not even printed in the record before us, and we do not feel called upon to give it a very critical examination in reference to the point now raised, and might well refuse to consider it at all. It consists merely of the opinion of the court already referred to and commented on. The nature and object of the suit and the principal proceedings had therein have already been stated. For the purpose in hand, it is sufficient to remark that the bond held by Post was not matured, and will not mature till the year 1891, and, therefore, a decree against Post has no binding effect on a subsequent holder of the

bond purchasing the same before maturity and without notice. To have made the decree effectual against the bond itself, Post should have been required to produce it in court in order that it might have been canceled. If he parted with the bond pending suit, it would make no difference. The subject of notice by *lis pendens* in relation to negotiable securities was considered by this court in the cases of *Warren Co.* v. *Marcy*, 97 U. S. 96 [24:977], and *Carroll Co.* v. *Smith*, 111 U. S. 556 [28:517], and needs no further discussion. The general rule announced in those cases is that the pendency of a suit relating to the validity of negotiable paper not yet due is not constructive [693] notice to subsequent holders thereof before maturity. This general rule cannot be changed by state laws or decisions so as to affect the rights of persons not residing and not being within the State, any more than publication of suit can be made constructive service of process upon such persons. Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade. See *Brooklyn* v. *Ins. Co.* 99 U. S. 362 [25:416]; *Empire* v. *Darlington*, 101 U. S. 87 [25:878]; *Pana* v. *Bowler*, 107 U. S. 545 [27:430].

But it is contended by the plaintiff in error that the bonds on their face show an illegality as to the place of payment sufficient to put a purchaser upon inquiry, and, therefore, to subject him to notice of the proceedings by which the bond held by Post was declared void. This argument is based upon the fact that the bonds are payable, not at the office of the treasurer of the Town of Enfield, but "at the First National Bank of Shawneetown, Illinois," the principal town in the adjoining county, about thirty miles distant, and the terminus of the railroad passing through Enfield. As the statute which gave the authority to issue the bonds is silent as to the place of their payment, we are at a loss to see how the place named therein can have the effect supposed. Counsel admit in argument that it does not render the bonds void, but insist that the Town had no power to make them payable at any other place than the office of the town treasurer. For this they cite *People, ex rel. Peoria and Oquawka R. R. Co.* v. *County of Tazewell, etc.* 22 Ill. 147; *Pekin* v. *Reynolds*, 31 Ill. 529; and *Sherlock* v. *Village of Winnetka*, 68 Ill. 530. In these cases, it is true, the Supreme Court of Illinois held that a municipal corporation cannot lawfully make its obligations payable at any other place than the office of its treasurer; but the court also held that the making of them payable elsewhere does not affect their validity. The case [694] last cited was a bill by taxpayers to enjoin the collection of taxes levied to pay interest on certain bonds of the village, the validity of which was questioned. They had been issued to pay for erecting a building for educational purposes, which the court held the village had no power to erect. The question of the place of payment of the bonds only came up incidentally, as one of the arguments of counsel used against their payment. On this point the court says: "The objection that the bonds are illegally made payable at a bank in Chicago does not invalidate them, as was held in *Johnson* v. *Stark Co.* 24 Ill. 75. The agreement to pay at that place is void, but the balance of the coupons and bonds are not rendered invalid for that reason. In paying the interest, the treasurer should not obey that agreement in the bond, but pay it at the village treasury. If he were to deposit the money in the bank for the purpose, and it were to break, or the money should otherwise be lost, he and his sureties would no doubt be liable for the loss growing out of his illegal act in placing the money in a place unauthorized by law." The court did not regard this as a ground for enjoining the collection of taxes; but enjoined their collection upon other grounds.

Now, giving to these cases all the effect due to them, we do not see how the fact that the bonds and coupons of the town of Enfield were made payable at Shawneetown can prejudice a *bona fide* holder thereof, or charge him with notice of prior proceedings against other parties who once held them. The most that can be said is that a person purchasing the bonds may be bound to know that the place named for payment therein is not binding on the county and that, though made payable elsewhere, their legal place of payment is at the office of the treasurer of Enfield. The question whether a municipal corporation, authorized to issue bonds, may or may not make them [695] payable at a place other than its own treasury (there being no statutory direction on the subject), is one of general jurisprudence, in reference to which the courts of Illinois take a particular view. Other courts take a different view. There is nothing in the constitution of the municipal bodies of that State, so far as this particular power is concerned, different from that of similar bodies in other States. When the bonds of an Illinois municipality are offered for sale in the market, and on their face are made payable at a different place from the treasury of such municipality, even though it be conceded that a purchaser is bound to know that, by the jurisprudence of Illinois, the bond is legally payable at such treasury, that is all he is bound to know. The same jurisprudence informs him that the naming of a different place for payment does not affect their validity nor the obligation of the municipality to pay them. At all events, we are of opinion that the place of payment named in the bond, which was formerly in the hands of Post, did not affect the present holder with notice of the proceedings in which Post was a party. Those proceedings are an estoppel against Post, even though, in our judgment, the decision was based on an erroneous view of the law; and they would be an estoppel against Jordan if he had notice of them when he took the bond. But there is no evidence that he had any such notice, and we think that the fact of the bond being payable at a place where the Town of Enfield had no authority to make it payable—a fact which it is admitted does not affect its validity—was not sufficient to put Jordan on inquiry. Though made payable in Shawneetown, it is legally payable at Enfield, and is as valid and binding on the Town as if it were in terms made payable there.

The answer to the fourth question, therefore,

is that one of the bonds and the coupons thereto belonging, are not void in the hands of the plaintiff by reason of Post having litigated the bond in the state courts of Illinois.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[643] ALBERT BALDWIN, Subrogated for JOSEPH C. KEYSER, *Appt.*,

v.

JOHN W. BLACK.

(See S. C. Reporter's ed. 643-651.)

Sequestration of mortgaged property under Code of Practice of Louisiana—release by plaintiff and delivery to and use by agent—possession of agent, lawful—agent not liable for use or earnings.

In an action under the Code of Practice of Louisiana to enforce a mortgage on a tug, held under a writ of sequestration, the plaintiff procured the release of the tug and delivered it to his agent who, pending the proceedings, used it in towing for hire. Upon a libel subsequently filed against the agent, it is *held*:

1. That the possession of the agent was lawful.
2. That he is not liable, either in contract or tort, for the use or earnings of the tug.
3. That, if the suit were to be regarded as against the agent's principal, upon the facts disclosed, nothing is due the libelant.

[No. 71.]

Argued and submitted Dec. 2, 3, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States, for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. R. H. Marr, for appellant.

Messrs. **R. H. Browne** and *Henry C. Miller*, for appellee.

[644] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in admiralty, *in personam*, brought in the District Court of the United States for the Eastern District of Louisiana, by Joseph C. Keyser against John W. Black. The substance of the libel is that Keyser was the owner of the steam tug C. C. Keyser; that, in October, 1877, the firm of Neafie & Levy, holding a mortgage on the tug, brought suit in a state court in Louisiana, against Keyser, and obtained a writ of sequestration therein, and caused the sheriff to seize the tug and hold it, until, on the application of Neafie & Levy, it was released on bond; that thereupon Black took possession of it, though he had no lawful right to do so, and used it in towing for hire, on the Mississippi River, injuring it and deteriorating its value; that the value of the use and services of the tug, as made use of by Black, "for his own behoof and benefit," is $25,000; [645] and that Black, by taking possession of and using the tug, is liable to Keyser for that amount "as in an implied contract." The libel prays for a decree that Black pay it to Keyser.

The answer sets up in defense the facts hereinafter recited as those found by the circuit court, and denies that there is any contract or obligation, implied or otherwise, on the part of Black to Keyser.

On a hearing, the district court pronounced for the libelant and, on the report of a commissioner, entered a decree that A. S. Baldwin and J. Levy & Co., "subrogated to the rights of the libelant on undivided halves," recover from Black $506.86. Black appealed to the circuit court, as also did Baldwin and Levy & Co. The circuit court made a finding of facts, of which only the following are material in the view we take of the case:

1. In October, 1877, Neafie & Levy, of Philadelphia, were creditors of Keyser, the libelant, for $18,164, with interest, for which amount they had a mortgage upon the tug, the debt being for the price of the tug built by them for Keyser.

2. On October 11, 1877, they began suit in the Third District Court for the Parish of Orleans to collect that debt. They sequestered the tug in accordance with the law, and in due course recovered judgment against Keyser for the full amount of their debt, with interest, and issued execution against him. The tug was sold under the execution to them, the judgment recognizing their mortgage, for $16,075, the amount was credited on their debt, and there remained due to them by Keyser, on the judgment, after giving him credit for all that was made on the execution, $3,887, with interest.

3. During the pendency of that suit, the tug not having been bonded by Keyser during the ten days allowed by law to him to bond her, Neafie & Levy afterwards bonded her and she was discharged, under the order of the court, into their possession, under the release bond furnished by them under and in accordance with the 279th and 280th articles of the Code of Practice. Black, the defendant, was the surety of Neafie & Levy in the release bond, and was their agent to receive and hold possession of the tug and, under the order of release, did receive and hold possession of her for them.

4. The tug was held under the release bond [646] by Neafie & Levy, through the defendant, as their agent, from October 25, 1877, to January 10, 1878, on which date she was returned to the custody of the sheriff. She was held by him under the writ of sequestration in the suit of Neafie & Levy against Keyser, until May 6, 1878, when she was sold under the execution, issued in that suit, to satisfy the judgment therein.

5. From October 25, 1877, to December 29, 1877, the tug was in actual use in the business of towing vessels by Black, with the authority and under the direction of Neafie & Levy, to whom he accounted for all her earnings; and he acted throughout, in becoming surety, and in receiving, holding and using the tug, as agent for Neafie & Levy.

6. The net amount of earnings so accounted for and paid to Neafie & Levy by Black, over expenses and disbursements incident to the employment of the tug, was $2,588.88.

7. When the tug was seized by Neafie & Levy under their mortgage, she was incumbered with lien and privileged debts to the amount of $4,488.17, all of which, taking precedence of their mortgage, were paid by them under subrogations, legal as well as express, to the

rights of the creditors holding those debts, the debts having been created by Keyser, and being his debts, discharged by them, between the date of the seizure of the tug under their sequestration and the day of the sale by the sheriff to them.

On those facts the court found, as conclusions of law:

1. That Black was lawfully in possession of the tug as the agent of Neafie & Levy, who were lawfully in control of her under the order of a court of competent jurisdiction.

2. That there was no liability on the part of Black *ex contractu* or *ex delicto*, to account to the libelant for the use or earnings of the tug.

A decree was entered dismissing the libel, and the interest of Levy & Co. having been transferred to Baldwin, the latter has appealed to this court.

The Code of Practice of Louisiana (art. 269) provides for a mandate of the court called a judicial sequestration, "ordering the sheriff, in certain cases, to take into his possession and to keep a thing of which another person has the possession, until after the decision of a suit, in order [647] that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing." By article 271, "all species of property, real or personal," may be sequestered. By article 275, a plaintiff in a suit "may obtain a sequestration in all cases where he has a lien or privilege on property." Article 279 provides for the giving by the defendant of an obligation, with surety to the sheriff, to set aside the mandate of sequestration, the obligation to be in an amount equal to the value of the property to be left in the possession of the defendant; and also enacts that whenever the defendant shall not execute such obligation within ten days after the seizure of the property by the sheriff, it shall be lawful for the plaintiff "to give similar bond and security to the sheriff as that required by law from the defendant, and to take the property sequestered into his possession."

Articles 280 and 281 are in these words: "Art. 280. The security thus given by the defendant, when the property sequestered consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff. Art. 281. As regards landed property, this security is given to prevent the defendant, while in possession, from wasting the property, and for the faithful restitution of the fruits that he may have received since the demand, or of their value in the event of his being cast in the suit."

(1.) The proceedings of Neafie & Levy to obtain possession of the tug were strictly in accordance with these provisions of law. They being lawfully in possession and control of the tug, under the order of a court of competent jurisdiction, Black, as their agent, was in lawful possession of her. But he was in possession only as such agent, and no cause of action against him, in favor of Keyser, could arise, either in contract or in tort, in respect to any earnings of the tug or any compensation for or value of her use. Whatever claim there could be could be only against Neafie & Levy. [648]

(2.) The statute seems to make a distinction between movables and landed property, by prescribing in regard to the former that no "improper use" shall be made of them by the party bonding them, thus implying that a proper use may be made of them; and by providing in regard to landed property that the value of its fruits is to be restored. And this distinction is recognized by the Supreme Court of Louisiana, for, in *Segassie* v. *Piernas*, 26 La. Ann. 742, which was a suit against the sureties on a release bond given by the defendant in sequestration, where the question arose whether, in a suit on the bond, the sureties were "liable for the fruits and revenues of movable property sequestered and released on bond," the court, after citing articles 279, 280 and 281, said: "From these provisions of the law we conclude that the surety on such bond is responsible only for the value of movables, when not delivered according to the stipulations of the bond, after judgment in favor of the plaintiff. It is only where the property is land that the law fixes the responsibility for revenues." There is no good reason why this rule should not equally apply where the plaintiff gives what the statute designates as "similar bond and security to the sheriff as that required by law from the defendant," in order to be able, "to take the property sequestered into his possession."

(3.) If the suit were to be regarded as one against Neafie & Levy, to be determined on an accounting with them, it clearly appears that nothing is due to the libelant, when the deficiency in the net proceeds of the sale of the tug to pay the mortgage debt and the other lien and privileged debts is taken into account. This results from the provisions of article 2207 *et seq.*, of the Louisiana Civil Code, in regard to compensation.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley** dissenting:

I dissent from the judgment in this case. The defendant, Black, is treated in all respects as if he had lawful possession and use of the steam tug in question; whereas, in my judgment, his possession and use were entirely without law or right. He could have no better [649] right than his principals, Neafie & Levy, and they had no right, pending the suit, but that of holding the tug in their possession as a pledge for the payment of their debt. They had a mortgage upon it, and brought a suit to recover the debt due, and, under article 275 of the Code of Practice, they sued out a sequestration of the tug. The defendant, Keyser, having failed to give a release bond, Neafie & Levy gave such a bond under the Act of 1842, and the tug was delivered by the sheriff into their possession. This did not give them any right to use it. A sequestration is in the nature of a deposit, and is so treated in the old law, as well as in the Civil Codes of France and Louisiana. See Code Nap. Liv. III, Tit. XI, Du Dépôt et du Sequestre; Louis. Code, 1808, Book III, Tit. XI, Of Deposit and Sequestration; Code 1825, Book III, Tit. XIII, ditto; Œuvres de Pothier, Tom.

VI, Du Contrat de Dépôt. One of the first rules relating to a deposit is that the depositary cannot use the thing deposited. Civ. Code, art. 2940. A sequestration, if gratuitous, is subject to all the rules which apply to a deposit. C. C. art. 2975. It is true that the Code of Practice declares that the judicial sequestration "does not mean judicial deposit, because sequestration may exist together with the right of administration, while mere deposit does not admit it." Art. 270. But this right of administration is no more than the right (as well as the duty) of taking due care of the thing, as a prudent father of a family would do, to prevent it from deterioration. Some things would deteriorate without use. A railroad or a plantation would go to destruction. But these cases, and some others, are exceptional. As a general thing, movables are different. Without the owner's consent they cannot lawfully be used for lucrative purposes by the person who has the mere custody of them. When the plaintiff obtains possession, they become in his hands a pledge for the payment of his debt. His lien or mortgage is converted into a pledge; and a pledge does not give the pledgee the right to use the thing pledged. The exceptions are stated by *Lord* Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 916, 917, and summarized in Addison on Contracts, § 1090, where it is said: "If the pawn be something that will be the worse for wear, as clothes, the pawnee can not [650] use it; but if it will not be the worse for wear, as jewels, the pawnee may use them; but then it must be at his peril; for, if he is robbed in wearing them, he is answerable. Also, if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or horse, the pawnee may milk the cow, or ride the horse; and this is in recompense of the keeping." The rule is derived from the civil law. The Institute says: "Theft is committed not only when one man removes the property of another to appropriate it to himself, but also generally, where one man uses the property of another against the will of the proprietor; thus if a creditor uses a pledge, or a depositary the deposit left with him, etc." Lib. IV, Tit. I, § VI. Mackeldey says of the pledgee: "He is liable for every wrong; he dare not use the pledge without special permission, otherwise he is liable for casual damages resulting to it." Roman Law, Book II, 1, 4.

The right of administration referred to in article 270 of the Code of Practice is vested in the sheriff who takes possession under the mandate of sequestration; but he cannot use sequestered movables except to prevent their deterioration. See *Witkowski* v. *Witkowski*, 16 La. Ann. 232; *Owens* v. *Davis*, 15 La. Ann. 22, 25; *Parish* v. *Hozey*, 17 La. 578; *Asart* v. *King*, 14 La. 62. And if he delivers them to the plaintiff, upon receiving the bond prescribed by the Act of 1842, the latter obtains no greater right. If the defendant bonds them, as he may do, he may use them, because they are his own property; but even he can make no improper use of them, so as to destroy their value to answer the judgment that may be rendered against him. Article 280 expressly provides that "The security given by the defendant, when the property consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; and that he will faithfully present them after definitive judgment, in case he should be decreed to restore the same to the plaintiff." This is entirely different from what is said in regard to the plaintiff when he bonds the goods. The only [651] right given him is "To take the property sequestered into his possession." Code Pr. 279; Act. 1842. Possession is all that the plaintiff acquires pending suit. And the reason is very apparent; the movables do not belong to him; he only holds them as a pledge, and the property in them remains in the defendant until they are sold under execution upon the judgment.

There can be no question that a steam tug is such a movable as may be safely kept without use, or that a pledge of it confers no right of use without a special agreement with the owner.

If this is a correct view of the law, neither Neafie & Levy, nor their agent or lessee, Black, acquired any right to use the steam tug, but were guilty of a tort in using it without Keyser's consent. They became liable to him, not only for all benefit and advantage they derived from its use, but for all deterioration and wear and tear occurring by such use. They are to be treated as tort feasors, and not as lessees under Keyser.

Now, it appears from the findings that Black realized over $14,000 from the use of the tug, either from her actual earnings in towing, or by virtue of the position she occupied, in his name, in the squadron of the Towing Association; whilst his actual expenses, including insurance, coal, commissions, and everything he could count up, amounted only to $4,429. Yet Keyser received credit from these disinterested users of his property for only $2,600. It seems to me that this one-sided settlement, made by the tort feasors themselves, ought not to receive the sanction of a court of justice. The plaintiff sues as upon an implied contract, it is true; but that does not prevent his recovering all that, in equity and justice, he ought to recover. I think that the judgment should be reversed, and a new trial directed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

FELIX A. BORER, Admr. of JOHN GORDON, Deceased, ET AL., *Appts.*, [587]

v.

GEORGE M. CHAPMAN, Exr. of Eunice Chapman, Deceased.

(See S. C. Reporter's ed. 587-608.)

Administration in State other than that of domicil, ancillary—bill by judgment creditor to marshal assets of estate—creditor in another State, not bound to make himself a party to such administration, but may reach assets in forum of primary administration—former action at law—equity jurisdiction of federal courts—judgment nunc pro tunc *may be entered, when—with reference to Statute of Limitations, given effect as of actual date of entry.*

On January 4, 1864, the appellee recovered judgment in a New York court against John Gordon

and others. In 1867 Gordon died testate in Minnesota, where he and his legatees resided. The will was proved in Minnesota, but the estate was administered in California where most of the property of Gordon was situated. The appellee did not make himself a party to the proceedings in the probate court in California, but brought suit on his judgment in the court below against Snow and Clark, the executors named in the will. Service was had upon Snow against whom a personal judgment was rendered. This judgment was reversed by this court, on the ground that it should have been rendered against the defendant *de bonis testatoris*. The court below then entered judgment *nunc pro tunc* against Snow, as executor upon its former decision and findings. Upon a bill subsequently filed in the court below against the appellants to marshal the assets of the estate of said Gordon, it is *held*:

1. That the judgment in the action at law is conclusive that Snow is chargeable as executor of Gordon's will.

2. That said judgment was properly entered *nunc pro tunc* against Snow as executor, although he was dead at the time of its entry; the failure to enter it at the proper time being due to an error of the court.

3. That the entry of said judgment was a valid exercise of the power and discretion of the court.

4. That the administration of Gordon's estate in California was merely ancillary, the primary administration being that of his domicil; that the assets distributed in California remained assets in Minnesota for the payment of any unpaid creditor choosing that forum; that such assets were impressed with a trust in favor of any such creditor; that it is upon the ground of such a trust that jurisdiction in equity rests; and that this jurisdiction in the federal courts is independent of that conferred upon state courts, and not subject to interference by state legislation.

5. That a judgment *nunc pro tunc* may have effect from different dates for different purposes; that the bill in this case is not barred by the Statute of Limitations of Minnesota, said judgment being given effect from the actual date of entry for this purpose; and that it is unnecessary to decide whether said statute applies to a bill filed in the court below by a citizen of another State.

[No. 91.]

Argued Dec. 13, 14, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **W. P. Clough,** for appellants:

The relief prayed by the bill, and awarded by the court, was barred by the proceedings and decrees of the Probate Court for the City and County of San Francisco.

Re Garraud's Estate, 36 Cal. 277; *Reynolds* v. *Brumagim*, 54 Cal. 254; *Re Hudson's Estate*, 63 Cal. 454.

When these legacies were removed from the State of California, and brought into the State of Minnesota, they were there held by the same title, and with the same absolute ownership, by which they had previously been held within the State of California.

After having established his claim according to law, Chapman was limited to the period of one year in which to institute suit against Gordon's legatees, under the Statutes of Minnesota.

While the form of the judgment of July 10, 1871, was such that it erroneously gave a remedy against Snow personally, it was also one which afforded a collateral remedy against the assets of the estate, by proceedings under the provisions of the statute upon which the present bill is based.

Mr. **Charles W. Hornor,** for appellee:

The complainant was not bound in law to go to the ancillary administration in California of the estate of John Gordon to get payment of his judgment.

Story, Eq. § 583; Story, Conflict of Laws, §§ 512, 519; *Mackey* v. *Coxe*, 59 U. S. 18 How. 100 (15: 299).

Until the debts of John Gordon were paid the assets of his succession could never become in law free from the lien of his creditors.

Wheeler v. *Wheeler*, 9 Cow. 34; 1 Atk. 495.

The only qualification to the doctrine of *nunc pro tunc* in judicial proceeding is that the the thing ought to be done; that it be done by leave or order of the court, perhaps in the presence of the parties interested; and that it be done to answer the purposes of justice, and not to do injustice.

State v. *Alvarez*, 7 La. Ann. 284; *Fishmongers* v. *Robertson*, 54 E. C. L. 970; *Matheson* v. *Grant*, 43 U. S. 2 How. 282 (11: 268); *Ins. Co.* v. *Boon*, 95 U. S. 117 (24: 395); *Mitchell* v. *Overman*, 103 U. S. 62 (26: 369); *Ex parte Moryan*, 114 U. S. 174 (29: 135).

The proceedings in the Probate Court of California are binding upon Snow, but not upon Chapman, for the latter had no notice and was no party to them.

Ray v. *Norseworthy*, 90 U. S. 23 Wall. 128 (23: 116).

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed on the 20th of [589] August, 1879, in the Circuit Court of the United States for the District of Minnesota, by George M. Chapman, a citizen of the State of New Jersey, executor of the last will and testament of Eunice Chapman, deceased, against Felix A. Borer, administrator with the will annexed of the estate of John Gordon, deceased, Edson R. Smith, executor of the last will and testament of George D. Snow, deceased, Elizabeth Hewitt and Thomas P. Hewitt, her husband, Harriet Cecilia Snow, Sarah Ann Powell, and Georgiana Smith; the defendants being all citizens of the State of Minnesota. The object and prayer of the bill were to marshal the assets of the estate of John Gordon, deceased, alleged to have been received by the defendants either as his representatives or legatees, for the purpose of applying them to the payment of a judgment recovered by the complainant against George [590] D. Snow, as executor of John Gordon. The case was heard upon the pleadings and proofs, and a decree rendered in favor of the complainant below, to reverse which the defendants prosecute the present appeal.

The facts in the case on which the decree is predicated are as follows: On January 4, 1864, George M. Chapman, executor of Eunice Chapman, recovered judgment in the Supreme Court of the State of New York against John Gordon and two others in a civil action founded on contract for the sum of $4,759.80, damages and costs. On May 14, 1867, Gordon, then a citizen of Minnesota, having his domicil in the County of Le Sueur in that State, made and published his last will, and within a few days thereafter died in that county. On July 1, 1867, his will was duly presented to the probate court of that county for proof and allowance, by George D. Snow, and was duly admitted to probate and record; and letters testamentary in

the usual form were made out and recorded, directed to Snow and Clark, his executors. By that will Gordon made numerous bequests and devises, among which was one of $30,000 in money to Harriet Cecilia Snow, wife of George D. Snow; another of $6,000 in money to Sarah Ann Kniffen, now Sarah Ann Powell; another of a like amount to Georgiana Kniffen, now [591] Georgiana Smith; three small tracts of land in Le Sueur County, Minnesota, with certain personal property then situated thereon, to Margaret Elizabeth Hewitt and, in addition thereto, the sum of $2,000 to Margaret Elizabeth Hewitt and her heirs; and the residue of the estate, after the payment of debts, funeral expenses, costs of administration, and legacies, to George D. Snow. The legatees resided in Le Sueur County, Minnesota. Gordon had previously lived in San Francisco, California, where nearly the whole of the estate was situated. The executors named in the will were George D. Snow and Pomeroy D. Clark, the latter a resident of San Francisco. In the bequests to the Misses Kniffen, and the cash portion of that to Mrs. Hewitt and her heirs, it was provided that the money should be paid into the hands of George D. Snow, to be held and managed by him as their trustee for certain designated periods. It does not appear from the records of the Probate Court of Le Sueur County that either Clark or Snow ever accepted letters testamentary, or took the oath, or gave the bond required from executors by the Statutes of Minnesota, or ever filed in that court any inventory of Gordon's estate, or ever did any other act in respect to the estate under such letters.

After proof of the will in Le Sueur County, Minnesota, a properly authenticated copy of the same, together with the proof and allowance thereof, was forwarded to Clark in San Francisco, who took such proceedings thereon in the Probate Court of San Francisco that the will was there admitted to record, and letters testamentary thereon issued to Clark solely on August 5, 1867. Snow never in any manner appeared in the California proceedings, except to receive and receipt for his legacy. Clark, as executor in California, took the usual and necessary proceedings under the laws of that State for the collection and distribution of the estate. An inventory and appraisement of the property were filed, and notice given by publication to creditors to present their claims to the executor for payment. On November 5, 1868, Clark presented to the probate court his final accounts as executor, with his petition for their allowance, the hearing of which was set for November 17, 1868, and public notice given thereof in accordance with the local law. On December 10, 1868, the probate court made its order allowing and confirming the accounts, on which date Clark filed a further petition in the probate court, praying for a decree of distribution and a final order discharging him from the office and trust of executor of Gordon's will. The court thereon made an order calling on all persons interested in the estate of John Gordon to appear before the court on January 11, 1869, to show cause why an order should not be made distributing the residue of the estate to George D. Snow, the residuary legatee. In pursuance thereof, and on the date fixed for the hearing, the court made its final decree of distribution, in which, among other things, it was ordered, adjudged and decreed that all the acts and proceedings of the said executor, as reported to that court and appearing upon the records thereof, should be and thereby were [592] approved and confirmed, and that the residue of the estate should be and was thereby assigned to the said George D. Snow. On January 12, 1869, the court made its further and final order in the proceedings, discharging Clark from the executorship, the will having been fully and completely executed to the satisfaction of the court. Clark's accounts, filed with the probate court, show the payment of all the money legacies hereinbefore mentioned, to the respective legatees prior to August 1, 1868. The residue decreed to George D. Snow, as residuary legatee, had been turned over to him by Clark prior to January 12, 1869. The indebtedness from Gordon and his associates to Chapman, arising upon the judgment in New York, has never been paid, and no claim based thereon was ever presented to Clark or to the probate judge for the City and County of San Francisco. A transcript of the judgment was procured by Chapman and forwarded to Snow in Minnesota about October 23, 1867, and, after some correspondence between them in respect to its allowance and payment, an action at law was brought thereon in the Circuit Court of the United States for the District of Minnesota by Chapman, as executor, against George D. Snow and P. D. Clark, described as the executors of the last will and testament of John Gordon, deceased. In that action process was served upon Snow, but Clark was not found. Snow appeared and defended, denying in his answer that he was or ever had been the executor of Gordon's will, and pleading that Clark, as executor in California, had fully administered the assets which had come to his hands, and had been discharged by the probate court of that State from his said office. At the June Term, 1871, of the circuit court the issues were found in favor of the plaintiff and against Snow, and judgment rendered thereon for the sum of $7,264.25 and costs. In that action, although brought against Snow and Clark as executors in their official capacity, judgment was finally rendered against Snow personally, and execution awarded *de bonis propriis*. A writ of error from the Supreme Court of the United States to reverse that judgment was sued out, pending which, in the year 1873, Snow died testate, [59 eaving Edson R. Smith as the executor of his will, who was thereupon substituted as plaintiff in error in this court. At the October Term, 1876, a decision was rendered in this court, reversing the judgment of the circuit court on the ground that it was erroneous in form, inasmuch as the action was debt on judgment recovered against the deceased testator of the defendant, and nothing was alleged in the declaration to show that the defendant had become personally liable for the judgment debt. *Smith, Exr.* v. *Chapman, Exr.* 93 U. S. 41 [23:795] The cause was therefore remanded to the circuit court, with instructions to take further proceedings therein in conformity with the opinion. The mandate of this court having been filed on June 7, 1877, in the circuit court, the cause came on to be heard at the December

Term, 1878, upon an order theretofore granted the plaintiff, George M. Chapman, executor, etc., on his petition, directed to Edson R. Smith, as executor of Snow's will, and Felix A. Borer, who had been appointed administrator *de bonis non* with will annexed of John Gordon, deceased, to show cause why the said Borer, administrator aforesaid, should not be substituted as such administrator in the place of George D. Snow, deceased, as defendant in said cause; and why judgment should not be entered in favor of the plaintiff upon the previous findings of the court in the premises; and said Felix A. Borer, administrator as aforesaid, having objected to said substitution, it was ordered by the court that he should not be required against his objection to be substituted as defendant as aforesaid, and the motion of the plaintiff for such substitution was for that reason denied. The judgment of the circuit court then proceeds as follows: "And it is further ordered, considered and adjudged that judgment shall be, and the same is hereby, entered in favor of said plaintiff, George M. Chapman, executor of the last will and testament of Eunice Chapman, deceased, *nunc pro tunc*, upon the said decision and findings of the court as of the 10th day of July, A. D. 1871, against the said George D. Snow in his capacity as executor of the last will and testament of John Gordon, deceased, for the sum of $7,264.25, and costs, taxed at $62.76, to be paid and enforced out of the effects of the [594] testator, John Gordon, deceased, with interest on said sum of $7,264.25 from said 10th day of July, 1871, and that said judgment be also certified by this court to the Probate Court of the County of Le Sueur, Minnesota, as a claim duly allowed and adjudged against the said estate of John Gordon, deceased."

Felix A. Borer had been appointed administrator *de bonis non*, with the will annexed, of John Gordon, by the Probate Court of Le Sueur County, on July 7, 1874, upon the petition of Chapman setting forth the recovery of his judgment in the Circuit Court of the United States, the pendency of the writ of error from the supreme court, and the fact that Clark had never qualified in the Minnesota proceedings, and that Snow in his lifetime had denied the acceptance of the executorship of Gordon's will. Borer has ever since remained administrator by virtue of said appointment.

Upon these facts the cause came on for final hearing in the circuit court, where a decree was rendered in favor of the complainant, the court being of the opinion:

"1. That George D. Snow, appointed executor by the will of John Gordon, deceased, accepted the trust and had the will proved in Le Sueur County, Minnesota.

"2. That this court has jurisdiction to grant the relief asked for by complainant's bill, for the reason that a court of equity can decree that a legatee under a will, after distribution, holds property in trust when valid debts of the decedent remain unpaid, and follow the property or its proceeds in the legatee's hands.

"3. That the estate of George D. Snow is liable for the debt set up in the complaint; and if the estate of Snow is not sufficient to respond to the full amount, the deficiency can be supplied out of the estate of the residuary legatee, Mrs. Snow.

"4. That the complainant's debt is not barred by the Statute of Limitations."

It was found by the decree that no assets of the estate of John Gordon had come into the hands of Felix A. Borer, as administrator; that on the 12th day of January, 1869, George D. Snow, after payment of all debts, funeral ex- [595] penses, legacies, and all claims owing or payable by the estate of John Gordon, except the claim or debt owing to Chapman, received under the will of Gordon property belonging to said Gordon of the value of $10,777; that by the will of George D. Snow, his wife, Harriet Cecilia Snow, was made his residuary legatee; and that the estate of Snow is solvent, and sufficient to pay all his debts and to fulfill all the provisions of the will, with an excess of assets therein of not less than $100,000 in value, including over $20,000 in cash, for said Harriet Cecilia Snow as such residuary legatee; and that she has, as such residuary legatee, received from Edson R. Smith, as executor of the will of George D. Snow, an amount more than sufficient to pay the claims of the plaintiff, with interest and costs. That upon the death of George D. Snow, Edson R. Smith, as the executor of his will, collected and received the sum of $2,824.82, being the proceeds of a claim or debt owing to the said John Gordon at the time of his death, and a part of the estate of the said John Gordon. It also appears that there are no outstanding and unpaid claims against the estate of Gordon, except that due on the judgment in favor of the complainant below.

The errors assigned by the appellants are as follows:

1. The circuit court erred in holding that the said George D. Snow had ever in any manner become executor of Gordon's will or chargeable as such.

2. The court erred in holding that the judgment in the suit at law of Chapman against Snow, entered on December 18, 1878, *nunc pro tunc*, as of July 10, 1871, was of any force or effect whatever, as against the estate of said John Gordon, or that of the said George D. Snow.

3. The court erred in holding that the relief prayed in the bill had not been barred by the proceedings and decrees of the Probate Court for the City and County of San Francisco, in the State of California.

4. The court erred in holding that the relief prayed by the bill had not been barred by laches and the lapse of time, and the several Statutes of Limitations set up and referred to in the answers of the defendants to the bill of complaint.

5. The court erred in holding and adjudging that the estate of the said George D. Snow is [596] liable for the claim or debt owing to the said George M. Chapman, executor.

6. The court erred in holding that if the estate of the said George D. Snow should not be sufficient to respond to the full amount of said claim or debt, the deficiency should be paid by the said Harriet Cecilia Snow.

The first error assigned is that the court erred in deciding that George D. Snow was chargeable as executor of Gordon's will. It is too late to raise that question in this cause. It was one of the matters in issue in the action brought by Chapman, executor, against Snow, executor,

in the Circuit Court of the United States for the District of Minnesota, wherein it was expressly held and adjudged that George D. Snow was executor of John Gordon, deceased. The judgment in that case was reversed upon the application of Snow's personal representatives, on the express ground that it was made payable out of the personal effects of Snow, when it ought to have been *de bonis testatoris*. That judgment concludes the question in this cause.

It is next contended, however, that that judgment is of itself void as having been rendered on the 18th of December, 1878, against Snow, as executor, who was then dead, although the entry was made to take effect as of July 10, 1871. The law on the subject of entries *nunc pro tunc* was fully considered and stated by this court in the case of *Mitchell* v. *Overman*, 103 U. S. 62, 64 [26:369, 370]. It was there stated, "that, where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business, or the intricacy of the questions involved, or for any other cause not attributable to the laches of the parties, but within the control of the court, the judgment or decree may be entered retrospectively as of a time when it should or might have been entered up. In such cases, upon the maxim *Actus curiæ neminem gravabit*, which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice, it is the duty of the court to see that the parties shall not suffer by the [597] delay. A *nunc pro tunc* order should be granted or refused, as justice may require, in view of the circumstances of the particular case."*

This rule was applied in the case of *Coughlin* v. *District of Columbia*, 106 U. S. 7, 11 [27:74, 75]. In that case, a judgment rendered upon a verdict in favor of the plaintiff had been erroneously set aside in the same court. A new trial was had, and a judgment for the defendant was reversed by this court, which affirmed the original judgment for the plaintiff as of the date when it was rendered, in order to prevent the action from being abated by the intervening death of the plaintiff.

In the present instance, upon the findings as originally made by the circuit court, judgment should have been rendered against Snow *de bonis testatoris;* the error of the court was in making it payable *de bonis propriis*. For this error it was reversed on the application of Smith, executor of Snow, who had procured himself to be substituted as plaintiff in error for that purpose. The mandate of this court was sent to the circuit court, in form reversing the original judgment, but, in substance, simply requiring its correction in the one particular in which the error had been committed. The manner in which this duty of the circuit court was performed, under the mandate of this court, was to enter the judgment *nunc pro tunc*, as of the time when it should have been entered in proper form. The reversal of the judgment in the circuit court, by the operation of the mandate of this court, and the execution of that mandate by the circuit court in entering the new judgment, was one continuous judicial act, and to that Smith, as executor of Snow, was a party, for he was a party to the record as plaintiff in error in this court. It cannot, therefore, be said that the action of the circuit court was *ex parte*, or that it was void, because it was directed against a deceased person not represented. This objection, if valid, would prevent, in all cases of the death of one of the parties, the entry of a judgment *nunc pro tunc*. It is the fact of such intervening death that creates the necessity by which the power is justified, in order to prevent a failure of justice, for which the other party is not responsible, and by which, therefore, he should not suffer. [598] The action of the court in making the entry, in the form in which it was made was also, we think, a proper exercise of its discretion upon the circumstances of the case, as the object of the proceeding was to fix the liability of the estate of Gordon, as represented by his executor, Snow, in order that the judgment of Chapman might furnish ground for a creditor's bill, seeking to apply the assets of Gordon's estate to its payment. We hold therefore that the entry of the judgment against Snow, as executor of Gordon, was a valid and effectual exercise of the power and discretion of the court, and that the validity of the judgment itself cannot be impeached.

It is insisted, however, that the relief prayed for by the bill and awarded by the court was barred by the proceedings of the Probate Court for the City and County of San Francisco. The Statutes of California (Gen. Laws of Cal. 1850, 1864) provide that if a claim against the estate of a decedent, in course of distribution in the probate court, shall not be presented within ten months after the first publication of the notice to creditors, it shall be barred forever; unless when it shall be made to appear by the affidavit of the claimant, to the satisfaction of the executor and administrator and the probate judge, that the claimant had no notice, as provided by the Act, by reason of being out of the State, in which case it may be presented at any time before a decree of distribution is entered. 5828, § 130. It is also provided (5944 § 246) that when the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order of payment, shall have any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but, if the executor or administrator shall have failed to give the notice to the creditors, as prescribed by the Act, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to [599] had it been allowed. It is further provided (5977, § 279) that when an estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court

*NOTE BY THE COURT.—This passage is incorrectly printed in the [official] volume of reports.

NOTE BY THE EDITOR.—The above is a copy of the passage as *incorrectly printed*. A true report thereof will be found in this edition, Bk. 26, p. 370.

shall make a decree discharging him from all liability thereafter.

It is argued that Chapman, as a creditor of Gordon's estate, was bound to make himself a party to the proceedings in the Probate Court of San Francisco, for the purpose of obtaining payment and satisfaction of his claim; that, failing to do this, he is barred from any right to recover, either from the executor of that estate or from any legatee; that the defendants in this bill, as legatees of Gordon, received what was due them under his will under the sanction and by the order and judgment of the Probate Court of San Francisco, which vested them with an indefeasible title which must be respected in every other forum, if full faith and credit, according to the Constitution of the United States, is to be given in other States to the public Acts and judicial proceedings of the courts of California.

But these positions are not tenable. The administration of the estate of Gordon, in California, under the orders of the Probate Court of San Francisco, was merely ancillary; the primary administration was that of the testator's domicil, Minnesota. Chapman was not a citizen of California, nor resident there; he was no party to the administration proceedings; he was not bound to make himself such. If he had chosen he could have proved his claim there and obtained payment, but he had the right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found there or brought there from California by the executors or legatees of Gordon's estate. The assets in California finally distributed there, and brought into Minnesota by the executor or by any legatee, remained assets in Minnesota for the payment of any unpaid creditors choosing that forum. Such assets were impressed with a trust which such creditor had a right to have administered for his benefit. *Aspden* v. *Nixon*, [600] 45 U. S. 4 How. 467 [11: 1059]; *Stacy* v. *Thrasher*, 47 U. S. 6 How. 44 [12: 337]; *Hill* v. *Tucker*, 54 U. S. 13 How. 458 [14: 223]; *Mackey* v. *Coxe*, 59 U. S. 18 How. 100 [15: 299]. It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payment of his debts. As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the federal courts, to be administered by the circuit courts in controversies arising between citizens of different States. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the States upon their own courts, and cannot be affected by any legislation except that of the United States. *Suydam* v. *Broadnax*, 39 U. S. 14 Pet. 67 [10:357]; *Hagan* v. *Walker*, 55 U. S. 14 How. 29 [14: 312]; *Union Bank of Tenn.* v. *Jolley's Admrs.* 59 U. S. 18 How. 504 [15:473]; *Hyde* v. *Stone*, 61 U. S. 20 How. 170 [15: 874]; *Green's Admrx.* v. *Creighton*, 64 U. S. 23 How. 90 [16:419]; *Payne* v. *Hook*, 74 U. S. 7 Wall. 425, 430 [19:260.]

In *Payne* v. *Hook*, *ubi supra*, the rule was declared in these words: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union."

The only qualification in the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the State. *Williams* v. *Benedict*, 49 U. S. 8 How. 107 [12:1007]; *Yonley* v. *Lavender*, 88 U. S. 21 Wall. 276 [22:536]; *Freeman* v. *Howe*, 65 U. S. 24 How. 450 [16:749.]

This exception does not apply in the present case, for the assets sought by this bill to be [601] marshaled in favor of the complainant are not in the possession of any other court; they are in the hands of the defendants, impressed with a trust in favor of the complainant, a creditor of Gordon, and subject to the control of this court by reason of its jurisdiction over their persons.

It is further contended, however, on the part of the appellants, that if the relief sought in this bill is not barred by the administration proceedings in California, it is, nevertheless, defeated by the application of the Statute of Limitations of the State of Minnesota. The Statute of Minnesota (1878, p. 826, chap. 77) gives to unpaid creditors of the testator an action against the legatees, in which the plaintiff, in order to recover, is required to show that no assets were delivered by the executor or administrator of the deceased to his heirs or next of kin; or that the value of such assets has been recovered by some other creditor; or that such assets are not sufficient to satisfy the demands of the plaintiff. In the last case he can recover only the deficiency. The whole amount of the recovery shall be apportioned among all the legatees of the testator in proportion to the amount of their legacies respectively; his proportion only being recoverable against each legatee. In respect to this statutory right of action, however, it is provided in the same Act, section 16, that no such action shall be maintained unless commenced within one year from the time the claim is allowed or established. It is maintained that, according to the judicial decisions of Minnesota, the creditor is required, first, to establish his claim by a separate judicial proceeding, and in a subsequent suit obtain the recovery provided for against the legatees. *Bryant* v. *Livermore*, 20 Minn. 313. It is admitted that the suit brought by Chapman in the Circuit Court of the United States against Snow, for the purpose of establishing his claim against Gordon's estate, answers the first of

these conditions, but that, in order to fulfill the second, the present bill should have been filed within one year from the date of the final judgment in that action. The date of the judgment as originally rendered against Snow was April 19, 1872; the present bill was filed August 20, [602] 1879; and we are asked to hold that the right to sue was at that time barred by the Statute of Limitations. But the judgment rendered April 19, 1872, was not the end of the litigation; Snow himself sued out his writ of error to reverse it, and upon his death, in 1873, his executor, Smith, became a party, as plaintiff in error, and prosecuted the writ until the reversal of the judgment at the October Term, 1876. The mandate of this court was filed in the circuit court June 7, 1877, and on December 18, 1878, the final judgment was entered against Snow as executor, to be paid and enforced out of the effects of the testator, John Gordon, deceased, as of July 10, 1871. The present bill was filed within twelve months after the date of that entry. If, for the purpose of determining the application of the Statute of Limitations, this judgment may be considered as dating from December 18, 1878, the bar was not complete. It is contended, however, that, as the entry of the judgment was made on that date *nunc pro tunc* as of July 10, 1871, the latter must be considered as the effective date of the judgment for all purposes. We are not, however, of that opinion. The date of that entry is by a fiction of law made and considered to be the true date of the judgment for one purpose only, and that is to bind the defendant by the obligation of the judgment entered as of a date when he was in full life; but the right of the complainant in this bill to enforce that judgment by the present proceeding certainly did not begin until after the judgment in that form was actually entered. Until that time the right was in abeyance; the litigation had, until then ended, been continuously in progress. It cannot be that the Statute of Limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced.

In *Tapley* v. *Goodsell*, 122 Mass. 176, it was held that a judgment entered *nunc pro tunc* was the final judgment in the action, so as to charge sureties on an attachment bond, on whose behalf it was urged that they could not be considered in default by reason of not paying, for thirty days after its date, the amount of a judgment which had no actual existence until long after the thirty days had expired. [603] And it was there pointed out that a judgment may have effect from one date for one purpose and from another date for another purpose. As in the case of judgments at common law, which had relation to the first day of the term, so as to bind the lands of the debtor of which he was then seised, even though he had aliened them *bona fide* before judgment actually signed and execution issued; and the statute (29 Car. II, c. 3, §§ 13-15), providing that, as against *bona fide* purchasers, they should be deemed judgments only from the time when they were actually signed, did not restrict their validity or effect, in law or equity, by relation to the first day of the term, as against the debtor or other persons. *Odes* v. *Woodward*, 2 Ld. Raym. 766; *S. C.* 1 Salk. 87; *Robinson* v. *Tonge*, 3 P. Wms. 398.

It follows, therefore, that, if this were a suit brought in a state court of Minnesota under the statute in question, it would not be barred by the limitation sought to be applied. Whether that statute has any application to this bill in equity, filed in the Circuit Court of the United States for the District of Minnesota, by a citizen of another State, is a question which need not be considered or decided. It is enough to say that the right of the complainant is not barred by force of the state statute, and that, according to the principles of equity, there has been no such voluntary delay as would make his claim stale. On the contrary, the complainant has shown himself to be diligent, active and eager in the prosecution of his claim and the pursuit of his remedy. He has been guilty of no laches; the delay has been caused by the action of his adversaries, or by the necessary delays of litigation. He is an unpaid creditor of Gordon's estate, who has sought by every means in his power, both at law and in equity, to obtain satisfaction of a just claim The defendants are shown to be in possession of the assets of Gordon's estate, which ought to have been applied in its satisfaction: they should be held as trustees for that purpose.

Such was the decree of the Circuit Court, which is hereby affirmed.

True copy. Test:
James H McKenney, Clerk, Sup. Court, U. S.

EDWARD O. HANCOCK, *Appt.*, [586]

v.

ELIZA JANE HOLBROOK ET AL.

(See S. C. Reporter's ed. 586, 587.)

Removal of causes—prejudice or local influence—citizenship.

A suit cannot be removed under subsection 3 of section 639 of the Revised Statutes on the ground of "prejudice or local influence," unless all the plaintiffs or all the defendants are citizens of the State in which it was brought, and of a State other than that of which those petitioning for the removal are citizens.

[No. 1094.]

Submitted Dec. 13, 1886. Decided Jan. 10, 1887.

APPEAL from decision of the Circuit Court of the United States for the Eastern District of Louisiana, remanding to state court cause removed thence. *Affirmed.*

The case is stated in the opinion.

Messrs. **J. D. Rouse** and **William Grant**, for appellant.

Messrs. **Thomas J. Semmes** and **Robert Mott**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The order remanding this case is affirmed. A suit cannot be removed from a state court to a Circuit Court of the United States under subsection 3 of section 639 of the Revised Statutes on the ground of "prejudice or local in- [587]

fluence," unless all the plaintiffs or all the defendants are citizens of the State in which the suit was brought, and of a State other than that of which those petitioning for the removal are citizens. Here it appears that Hancock, the plaintiff, on whose petition the removal was had, is a citizen of New York; and Eliza Jane Holbrook and George Nicholson, two of the defendants, and those principally interested in the litigation, citizens of Mississippi; while R. W. Holbrook and Richard Fitzgerald, the other defendants, are alone citizens of Louisiana, where the suit was brought. These Louisiana defendants are necessary parties to the suit, but, according to the record, those who are citizens of Mississippi are the real parties in interest.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[664] STEWART HARTSHORN, *Appt.*,

v.

SAGINAW BARREL COMPANY ET AL.

(See S. C. Reporter's ed. 664-679.)

Validity of reissued letters patent, and original letters—improvements in shade rollers—infringement—mistake—abandonment.

1. Where, through the mistake of their common solicitor, one of two inventors secured a patent covering an invention of which the other was the first inventor, and the latter secured a patent limiting his claim to his particular form of the device, it is held that reissues, in which the mistake is corrected by an exchange of claims, obtained more than nine years after the issue of the original patents, are invalid; the first, because the original was invalid, and the second, because the patentee's long acquiescence amounts to an abandonment.

2. The first claim of reissued letters patent No. 7367, for an improvement in shade rollers—the invention claimed in the original patent—is invalid.

3. Reissued letters patent No. 7370, also for an improvement in shade rollers, is invalid for want of novelty, there being nothing novel either in the panel or ratchet, or the mode in which they jointly co-operate to produce the desired result.

4. In the construction of letters patent No. 69189, also for an improvement in shade rollers, the claims must be confined, by reference to the specification, to the use of the devices named in a shade roller, where the pawl or detent is upon the roller, moving with it, and the ratchet, or engaging part, is separated by being placed upon a journal box or bracket, or other fixed part of the mechanism, and that it must also be limited to the particular form of the arm or detent described. Said patent is not infringed by a panel and ratchet of a different form, both being upon one end of the roller.

[No. 66.]

Argued Nov. 30, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **James T. Law** and *S. D Law*, for appellant:

The statute only requires that the reissue shall be "for the same invention," and does not, directly or by implication, impose any condition that the description or claims should be the same in the reissue as in the original.

"The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee, but the invention must be the same. * * * The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue."

Powder Co. v. *Powder Works*, 98 U.S. 126, 138 (25:77, 82); *Siebert Oil Cup. Co.* v. *Harper Steam Lubricator Co.* 4 Fed. Rep. 328.

The specification may be amended.

Powder Co. v. *Powder Works, supra.*

Both specification and claim may be corrected.

Wilson v. *Coon*, 18 Blatchf. 532; *Smith* v. *Merriam*, 6 Fed. Rep. 713.

New claims may be added.

Miller v. *Brass Co.* 104 U. S. 350 (26:783); *James* v. *Campbell*, Id. 356 (26:786): *Combined Pat. Can Co.* v. *Lloyd*, 11 Fed. Rep. 149.

A claim may be enlarged in a reissue, at least when an actual mistake has occurred.

Miller v. *Brass Co.* and *James* v. *Campbell, supra; Yale Lock Mfg. Co.* v. *Scoville Mfg. Co.* 8 Fed. Rep. 288.

When an actual mistake has occurred no presumption of abandonment would seem to exist.

Miller v. *Brass Co. supra; Giant Powder Co.* v. *Cal. Powder Co.* 4 Fed. Rep. 720.

Mr. **Charles J. Hunt**, for appellees:

Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect without the production of something novel, is not invention.

Hailes v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22:241).

A combination to be patentable must produce a different force, or effect, or result, in the combined forces or processes, from that given by their separate parts.

Reckendorfer v. *Faber*, 92 U. S. 347 (23: 719).

An addition to the claim cannot be made, any more than an element can be dropped as useless.

Water Meter Co. v. *Desmer*, 101 U. S. 332 (25:1024); *R. R. Co.* v. *Mellon*, 104 U. S. 112 (26:639).

An inventor must be supposed to know of what his invention consists, and his patent does not secure to him the exclusive right in anything more than he claims to have invented.

Rich v. *Close*, 4 Fish. 279.

Mr. Justice **Matthews** delivered the opinion of the court:

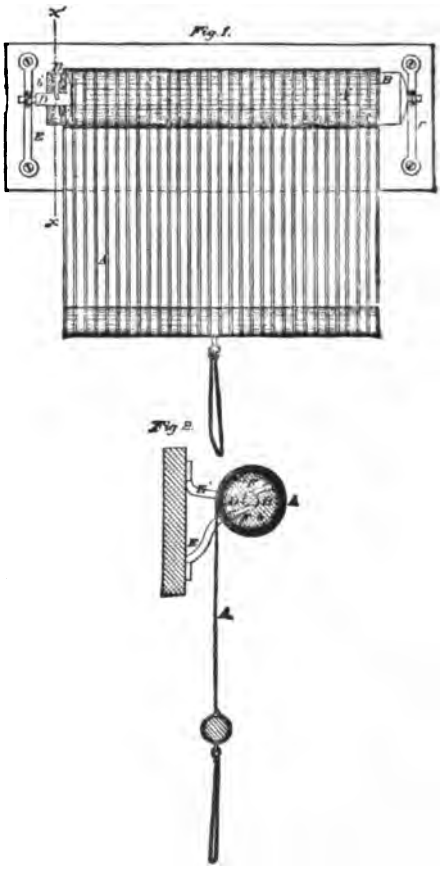
This is an appeal from a decree of the circuit court dismissing the complainant's bill, which was a bill in equity for the purpose of enjoining the alleged infringement of three several letters patent for improvements in shade rollers, designated as follows: 1. Reissued patent No. 7370, dated October 31, 1876, granted to the complainant, called the Hartshorn reissue. 2. Reissued patent No. 7367, dated October 31, 1876, granted to the complainant as assignee of William Campbell, called the Campbell reissue. 3. Patent No. 69189, dated September 24, 1867, [665] granted to Jacob David, and assigned to the complainant, called the David patent.

The questions in the case involve the validity of the reissued patents and the alleged infringement of the David patent. The Hartshorn re-issue was the reissue of original letters patent No. 68502, dated September 3, 1867. The

Campbell reissue was the reissue of original letters patent No. 69176, dated September 24, 1867. In each case there was, therefore, a delay of about nine years in obtaining the reissue.

In order to understand and resolve the questions arising in the case it will be necessary to consider the state of the art at the time of the issue of the patents. This may be briefly stated as follows: The inventions in question are in that class of shade rollers which are rolled up by the unwinding of a coiled spring; the roller was hollow and the spring placed within it, one end being attached to the roller and the other end to the shaft or rod on which the roller revolved. Sometimes this rod passed entirely through the roller, and sometimes only partially through. As the curtain was drawn down the spring was wound up, and when the tension upon the curtain was released and the curtain allowed to roll up, the spring was unwound, thereby producing the desired result. The upward movement of the curtain was controlled by a pawl and ratchet at one end of the roller, the pawl or the ratchet being attached to the bracket. The pawl might be operated by a cord hung at the side of the window; by pulling down on this cord the pawl was disengaged from the ratchet, and the curtain immediately rolled up under the action of the spring. Hartshorn, the appellant, obtained a patent, not in controversy in this suit, but to be considered in reference to the state of the art, dated October 11, 1864. The invention described in that patent consisted in the application of a pawl and ratchet or notched hub arranged in such a manner that the shade may be stopped and retained at any desired height or point within the scope of its movement by a single manipulation of the shade, the usual cord for operating or turning the shade roller being dispensed with entirely, as well as counterpoises, which had in some instances been employed, in connection with spring rollers, for holding the shade at the desired point. He made a ratchet with two [666] notches, one on each side in the periphery of the ratchet wheel, and constructed a pawl to engage with such notches. The pawl was on the bracket, and the ratchet was on the roller. When the curtain was drawn down the spring in the roller was wound up, and when the curtain was released, while the pawl rested on the perimeter of the ratchet wheel, the curtain would roll up, and continue so to do as long as the velocity of the curtain was sufficient to carry the notches in the ratchet past the pawl before it could fall into them.

Such was the condition of the art when Campbell obtained his original patent dated September 24, 1867. He described his invention as having "for its object to furnish an improved device, by means of which the spring roller of a window shade may be made to hold the shade stationery at any desired elevation, and yet allow the same to be drawn down or run up, without obstruction or stoppage, as far as may be desired, and it consists in the combination of the loose or sliding pins or bolts, having heads formed upon them, with the flattened shaft of the roller, as hereinafter more fully described." The description, as contained in the specifications, is as follows, having reference to the annexed drawings: "A is the window shade. B is the hollow roller, one end of which is pivoted to the bracket C, and the other end of which revolves upon the shaft D, that carries the coiled spring, and the projecting end of which is secured in the jaws of the bracket E, so that, by drawing down the shade A, and thus revolving the roller B, the coiled spring may be wound closer around the shaft D. In the block, or part of the roller B that closes or forms the end of the said hollow roller B, and forms its bearing upon the shaft D, are formed two holes leading, upon opposite sides, from its



[667]

outer or convex surface to a little at one side of its center, as shown in figure 2. The outer ends of these holes are countersunk, as shown. The two opposite sides of the shaft D within the block or part b′ are flattened or notched as shown in figure 2. F are two pins or bolts, the bodies of which fit into the holes in the block b′, and their heads fit into the countersunk parts of said holes. The bolts or pins F are of such a length that when their heads rest [668] against the case or shell of the roller B, their points may be free from the shaft D, and when their heads rest upon the bottom of the countersunk part of the said holes, their inner ends or points may overlap the flattened sides of the shaft D, so as to bind said shaft and prevent its revolution. Whenever the shaft D is drawn down or allowed to run up with a little rapidity, the centrifugal force engendered by the revolution of the roller B projects the pins F

outward, so that their heads rest against the case or shell of the roller B, leaving the block b' free to revolve upon the shaft D, but when the motion of the roller B is checked, the pin F that happens to be uppermost drops down, so that its point or forward end rests upon the shaft D, and as soon as the said point reaches the flattened side of said shaft, it drops down a little further, so as to overlap the said flattened side of the said shaft and hold it securely in place.

"Having thus described my invention, I claim as new and desire to secure by letters patent:

"The combination of the loose or sliding pins or bolts F, having heads formed upon them, with the flattened or notched shaft D, substantially as herein shown and described, and for the purpose set forth."

On the third of September, 1867, Hartshorn, the appellant, also obtained his original patent for an improved shade fixture. In that specification he describes his invention as relating "to a new and useful improvement in that class of shade fixtures in which the shade roller is provided with a spiral spring for automatically winding up the shade. The present invention is an improvement on a shade fixture of this class, for which letters patent were granted to me, bearing date October 11, 1864, and is designed to obviate an objection attending the original device, which consists in the unwinding of the spring whenever the shade roller is removed from its brackets or bearings, a contingency which involves the necessity of winding up the spring previous to the replacing of the roller in its bearings, and which cannot be done by an unskilled person without considerable difficulty." He then proceeds to describe in the specification, by reference to the [669] illustrations, the device which embodies this invention, and adds as follows: "The difference, however, between the within described arrangement and that of the original invention is essential. In the original plan, the spring unwinds immediately as soon as the roller is removed from its bracket or bearings, as the pawl, instead of being attached to the roller or any part connected therewith, is attached to the bracket, the notched hub being attached to the journal of the roller, and when the notched hub is removed from the pawl the spring immediately unwinds. In my present improvement the pawl and notched hub, being both connected with the roller, the spring is retained or prevented from unwinding equally as well when the roller is removed from its brackets or bearings as when adjusted in them." His claim is as follows: "The attaching of a pawl and a ratchet or notched hub to a window-shade roller, provided with a spring, or to parts connected with said roller, in such a manner that the tension of the spring will, without any manipulation or adjustment of parts whatever, always be preserved, whether the roller be fitted in the brackets or bearings or removed therefrom, substantially as set forth."

The principle embodied in the Hartshorn patent of 1864 was that of an automatic pawl or ratchet, or a pawl so constructed and arranged, with respect to the ratchet, that the pawl would be caused to engage with the ratchet to stop and hold the shade at any desired height or point, or would be prevented from engaging with the ratchet by merely varying the speed of the revolution of the roller, which was effected through the simple manipulation of the shade alone by the hand of the operator, the pawl engaging with the ratchet when the roller was revolved slowly, and not engaging when the roller was made to revolve quickly. He thus dispensed entirely with cords for operating the roller, and with counterpoises, and with the old spring pawl and ratchet which required the use of both hands in manipulating the roller and controlling the shade in its ascent under the force of the spring, as by its use the shade could be raised or lowered by the manipulation of the shade alone in the hands of the operator. In what was previously known as the coach fixture, it was necessary, while one hand of the operator lifted the pawl from the ratchet by means of the cord, [670] to hold the shade with the other hand, or else the shade would quickly fly up for its whole extent. The particular construction or arrangement of pawl and ratchet described by Hartshorn, in his patent of 1864, as his invention, consisted of a ratchet or notched hub on the end of the roller and revolving with it, and a pawl placed upon the bracket or stationary part of the fixture and dropping into the ratchet or notched hub by gravity. The pawl being mounted on a different part of the fixture from that on which the ratchet was mounted, the latter being on the revolving roller and the former on the stationary part of the bracket, it was the necessary result, from such a construction, that when the roller as a whole was removed out of its bearings there would be a disconnection and disengagement of the pawl and ratchet, and the spring would uncoil or run down, necessitating the winding up of the spring before the roller was again replaced in its bearings, which was a difficult thing to be done, particularly by those having the fixture in use. It was also inherent in the arrangement of the pawl and ratchet used in this roller —the pawl being stationary and resting on the upper side of the revolving notched hub or ratchet as the roller and its notched hub or ratchet revolved under the stationary pawl— that there would be more or less noise in its operation, caused by the notched hub striking against and throwing up the pawl.

It will, therefore, be perceived that the Hartshorn patent of September 8, 1867, and the Campbell patent of September 24, 1867, are for improvements upon the invention described in the Hartshorn patent of 1864, and in any comparison between the two former the invention embodied in the original Hartshorn patent of 1864 must be eliminated as common to both. The circumstances relied upon to justify and make valid the reissues in 1876 of the Hartshorn patent of 1867, and the Campbell patent of the same year, are conceded to be as follows: In 1873 a suit was brought in the District of Massachusetts upon the David patent by the *Salem Shade Roller Co.*, then the owner of it, against one *William G. Harris*, who was selling [671] rollers made by Hartshorn, the present appellant, who assumed the defense of that suit. The rollers sold by Harris had the pawl arranged so as to move towards and away from the axis of the roller, as described and claimed in the David patent, but this pawl was different

in form from that shown in the David patent, and engaged with the spindle instead of with the bracket. The transcript of the record in that suit is in evidence in this, and shows that it was made to appear, in the effort to fix the dates of the inventions described in the three patents of David, of Campbell, and of Hartshorn, that Campbell made his invention on the first of May, 1867, while Hartshorn was not able to fix the date of his invention as earlier than about the first of August, 1867. It was thus shown that while Hartshorn had the elder patent he was the junior inventor, and as the claim in the Hartshorn patent of 1867 covered the invention described in the Campbell patent, there was a conflict between the two which it was sought to reconcile by reissues, Hartshorn becoming the owner by assignment of the Campbell patent. Accordingly, in the reissue of the Hartshorn patent of 1867, made October 31, 1876, being one of the patents now sued upon, the patentee enters the following disclaimer. He says: "I do not claim generally the arrangement of both the pawl and ratchet upon or in connection with the roller, so that the roller can be removed from its brackets without permitting the spring to unwind, as I believe such an arrangement of pawl or detent and ratchet, as shown in the patent of William Campbell granted to him September 24, 1867, had been known previous to being made by myself." He then adds his claim, modified as follows: "In a spring shade roller having a pawl or detent and ratchet, or their equivalent, constructed and arranged so as to engage automatically for holding the shade at any desired point or height, the combination with a ratchet, or its equivalent, upon the stationary spindle or stationary part of the fixture, of a hinged or pivoted pawl placed upon the end of the roller and acting substantially at right angles to the ratchet or notched hub."

In the Campbell reissue of October 31, 1876, the claims are stated as follows:

[672] "1. In a spring shade roller, having a pawl or detent and a ratchet, or their equivalent, so arranged as to allow the shade to be drawn down or run up without obstruction, and which engage automatically with each other to hold the shade in any desired position, the arrangement of such pawl or detent on the roller which carries the notched spindle or ratchet, so that, when the roller is removed from its brackets, the tension of the spring will be preserved.

"2. In a spring shade roller, having a detent and ratchet, or their equivalent, constructed and arranged to engage automatically with each other for holding the shade, the combination, with the ratchet, or its equivalent, of a loose pawl or detent, moving in a chamber or guide, and adapted to engage with the spindle.

"3. The combination of the loose or sliding pins or detents F, constructed as described, with the flattened or notched shaft or spindle substantially as herein shown and described."

It thus appears that the third claim of the reissued Campbell patent of 1876 is identical with the entire claim of the original Campbell patent of 1867, the first and second claims in the reissued patent being entirely new.

In the original Hartshorn patent of September 3, 1867, he characterizes the invention as an improvement upon that contained in his patent of 1864, in this, that the pawl and notched hub, being both connected with the roller, the spring is retained or prevented from unwinding equally as well when the roller is removed from its brackets or bearings as when adjusted in them; and he states his claim as follows: "The attaching of a pawl and a ratchet or notched hub to a window-shade roller provided with a spring, or to parts connected with said roller, in such a manner that the tension of the spring will, without any manipulation or adjustment of parts whatever, always be preserved, whether the roller be fitted in the brackets or bearings or removed therefrom, substantially as set forth." This claim in the reissued patent of October 31, 1876, is changed so as to read as follows: "In a spring shade roller having a pawl or detent and ratchet, or their equivalent, constructed and arranged so as to engage automatically for holding the shade at any desired point or height, [673] the combination with a ratchet, or its equivalent, upon the stationary spindle or stationary part of the fixture, of a hinged or pivoted pawl placed upon the end of the roller and acting substantially at right angles to the ratchet or notched hub."

In the case of *Hartshorn* v. *Eagle Shade Roller Co. et al.* 18 Fed. Rep. 90, decided in the Circuit Court of the United States for the District of Massachusetts, the validity of the Campbell reissue of 1876 was questioned and affirmed. It appears also in that case that the original patent of Hartshorn of 1864 had been surrendered and a reissue obtained, No. 2756, August 27, 1867, being the same in evidence in this cause, for the purpose of showing the state of the art at that time. This reissue, No. 2756, was also questioned in the case just referred to, and held to be invalid, on the ground that the reissued patent extended the claim of the original patent, so as to cover a shade roller where the pawl and the ratchet are both affixed to the roller, so that the roller might be detached from the bracket without unwinding; and that, within the decision of *Miller* v. *Brass Co.* 104 U. S. 350 [26:783], there had been an unreasonable delay in obtaining the reissue, amounting to laches. That reissue was accordingly held void, but the Campbell reissue of 1876 was held valid, notwithstanding the admitted enlargement of the claim and the delay in obtaining the reissue for nearly ten years. The ground of the decision was that the patentee did not discover until in 1874 that he was entitled to a priority of invention over Hartshorn, whose patent of 1867 covered the same claim. His solicitor, who was also the solicitor for Hartshorn, in obtaining the two patents, had assumed that Hartshorn was the first inventor, because his application was received first, and had framed the application of Hartshorn accordingly, and caused that of Campbell to correspond, limiting his claim to the particular form of the device, and granting to Hartshorn the broad claim now found in the Campbell reissue. This mistake seems to have been discovered, as already stated, by the taking of the testimony of the parties in the case of the *Salem Shade Roller* [674 *Co.* v. *Harris, ubi supra*, the proceedings and decree in which are in evidence in this cause. The reissue of both patents was applied for and obtained within two years after the discovery of this alleged mistake, and as the exclusive

right to the invention was apparently covered by the claim of the Hartshorn patent of 1867, it was inferred and held by the learned Circuit Court of the Massachusetts District that there was no laches in the delay, and no evidence of an abandonment to the public of the invention. In the opinion of that court it is said (18 Fed. Rep. 92): "Campbell, misunderstanding perhaps his rights, or the true state of things, acquiesced through his solicitors, who were common to both parties, in the broad claim of Hartshorn. When the mistake was discovered, it was corrected by a simple exchange of claims. We are of opinion that, under these unusual circumstances, the lateness of the application is explained and shown to have been brought about by an actual mistake without fraud, and to have been one from which no innocent person could have suffered."

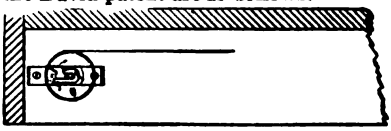
We are not satisfied, however, with either this reasoning or the conclusion. Campbell's acquiescence in Hartshorn's claim must be regarded, so far as he is concerned, as an abandonment of any right on his part to a patent for the same invention, and having deliberately rested in that acquiescence for a period of between nine and ten years, it is too late, according to the settled course of decisions in this court, to resume his rights. It is, accordingly, no answer to this view to say that, in the meantime, the invention was not dedicated to the public by Campbell's abandonment, because it was covered by Hartshorn's claim; for, according to the supposition, Hartshorn's was a false claim, and though it may not be regarded as [675] fraudulent, but founded upon an honest mistake, nevertheless the validity of his patent must have failed whenever called in question, and the facts were made known, as they did become known, in the suit against Harris. The mutual mistakes of the two parties cannot be considered as correcting each other. Hartshorn claimed an invention to which he now confesses he was not entitled, and for that reason his original patent was invalid. Campbell contented himself with the narrow claim originally contained in his patent of 1867, and thereby acknowledged that he was not entitled to the broader claim which he now asserts under his reissue. He had the means and the opportunity at the time the application for his original patent was pending to have asserted his claim to priority of invention; he chose not to do so. He acquiesced in the claim of his adversary; he cannot now claim what he then abandoned.

The question of laches is perhaps immaterial, for the reissue of the Campbell patent was not for the same invention described and claimed in the original. This does not rest merely on the enlargement and change in the nature of the claim. The specification itself was substantially altered. The alterations, it is said in argument, had the effect only of giving a more full, complete, and accurate description of the same mechanism; but, in point of fact, the alterations changed the shape of the specification in such a way as to admit the new and enlarged claim in a manner in which it could not have been made upon the original description. A comparison between the original and reissued patents shows that the specification of the latter has been materially changed so as to cover, as the invention of the patentee, that function of the structure by which the spring will be locked when the roller as a whole is removed from the brackets, in respect to which the original patent is entirely silent. We are, therefore, of the opinion that the first claim of the Campbell reissue, the only one alleged to be infringed in this case, is void.

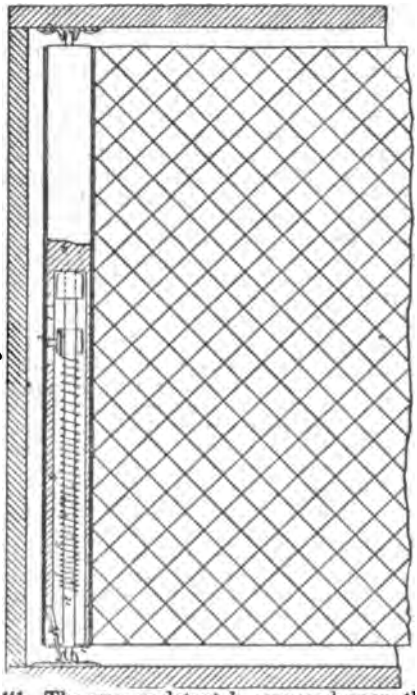
We are also of opinion that the Hartshorn reissued patent, No. 7870, of October 31, 1876, is void on a different ground. That reissue disclaims what was claimed in the original patent, viz.: the arrangement of both the pawl and the ratchet upon or in connection with the roller, so that the roller can be removed from its brackets without permitting the spring to unwind, for the reason that such an arrangement had been previously invented by Campbell; and, instead of that claim, the reissued patent is confined to claiming "the combination with a ratchet, or its equivalent, upon the stationary spindle or stationary part of the fixture, of a [676] hinged or pivoted pawl placed upon the end of the roller, and acting substantially at right angles to the ratchet or notched hub." But, according to the admission of all the parties, Campbell was a prior inventor of the arrangement by which the pawl and ratchet were combined upon the roller in such a way as to allow the roller to be removed from its brackets without permitting the spring to unwind. Such a combination therefore was not the subject of a subsequent patent of itself, unless some additional novelty and utility were introduced into the combination by reason of some substantial change in the form or mode of operation of the parts. But in this reissued patent of Hartshorn there is nothing novel, either in the pawl or the ratchet, or the mode in which they jointly cooperate to produce the desired result. The fact that the pawl is described as acting substantially at right angles to the ratchet or notched hub does not seem to introduce any new or useful element. The combination covered by the claim in the reissued patent is, in law and in fact, merely a mechanical equivalent for that which was already covered by the Campbell patent, which had the priority of invention. For this reason, therefore, we hold the Hartshorn reissue of 1876 to be invalid.

It remains now only to consider the question of the alleged infringement of the David patent, No. 69189. The invention is claimed to have been made in December, 1866, though the patent was granted on September 24, 1867. It is for an improvement upon the original invention of Hartshorn, as described in his patent of 1864, and must be construed with reference to that. It seems to have had for its object to do away with the noise produced in the Hartshorn roller by the contact of the pawl with the ratchet. That objection to the Hartshorn roller, David says in his testimony, was what incited him "to invent something that would do away with the noise." He gave a new form to the pawl and ratchet used, and also shifted the ratchet from the roller and made it a part of the bracket, which was a stationary part of the fixture, and applied the pawl or engaging part to the revolving roller. His pawl was "an arm or detent," hinged or pivoted in a radial slot in, and arranged in the plane of the axis of, the roller; the free end of the arm projecting be- [677] yond the end of the roller, so that, as the latter

revolved rapidly, the free end of the pawl or arm would be carried away from the axis of the roller by the motion of the roller itself. By this movement, when the roller was rapidly turned, sending the detent outward, it would pass over the elevated side of the journal box, which constituted the ratchet. When the roller moved slowly or was in a state of rest, the action of gravity brought the detent toward the center of the roller when the detent was above the center, and at such time the detent engaged the elevated side of the journal box or ratchet, and the revolution of the roller was arrested. His roller was also made of wood bored out at one end to receive the spring, and he placed at one and the same end of the roller the spring which caused the shade to rise, the stationary spindle to which one end of the spring was attached, and the arm or pawl, whereby he was able to saw off the other end of the roller to fit any width of window. As the pawl was on the revolving roller and the ratchet on the bracket, when the roller was removed from its brackets the pawl and the ratchet became disconnected, so that the spring would uncoil instead of holding the parts in place. The claims of the David patent are as follows:



[678]



"1. The arm or detent *k*, arranged upon the roller in such a manner that it moves toward and away from the center or axis of the roller *a* by the action of gravity and centrifugal force, substantially as described.

"2. The combination and arrangement, at the same end of a shade roller, of a spring, *c*, rod *d*, and arm or detent *k*, or their mechanical equivalents, substantially as described."

The device is illustrated by drawings accompanying the specification of the patent, as follows:

It is to be observed that in these claims nothing is said about the combination of the arm or detent *k* with the elevated side of the journal box, which is a distinct and separate part of the mechanism; and yet it is perfectly obvious that it is only in combination with that separate ratchet that the arm or detent *k* performs any useful function at all. The fact that the arm or detent *k*, arranged on the roller in the manner described, moves toward and away [679] from the center or axis of the roller in consequence of the motion of the roller itself, is not patentable independently of any useful combination in which it performs a necessary part. Any arm or detent, pivoted at one end and loose at the other, would necessarily follow the motion of the roller, the loose end flying outwardly. The same remarks apply to the second claim of the combination and arrangement of the roller and spring, the rod, and the arm or detent at the same end of the roller. They perform no function by reason of the circumstance of their being at the same end of the roller, except in conjunction with the ratchet on the bracket, and there is no novelty in such a combination and arrangement, as the same thing was found in the original Hartshorn patent. It follows, therefore, that in the construction of the David patent the claims must be confined, by reference to the specification, to the use of the devices named, in a shade roller, where the pawl or detent is upon the roller, moving with it, and the ratchet or engaging part is separated by being placed upon a journal box or bracket, or other fixed part of the mechanism, and that it must also be limited to the particular form of the arm or detent described. It follows from this that the shade roller manufactured and used by the defendants is not an infringement of the David patent. In the defendants' roller, the pawl and the ratchet are both upon one end of the roller, the pawl being upon the revolving part and the ratchet upon the fixed part of the roller, and the pawl and ratchet are of a different form from those covered by the David patent.

We hold, therefore, upon this part of the case, there was no infringement.

The decree below was therefore right, and is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HOBART B. IVES, *Appt.*, [65
v.
JOSEPH B. SARGENT.

(See S. C. Reporter's ed. 652-663.)

Reissued letters patent—improvement in door bolts—claims invalid as not for the same invention as original patent—laches in applying for reissue—rule as to diligence required.

1. The third and fourth claims of reissued letters patent, No. 9901, for an improvement in door bolts, with the corresponding alterations in the specifica-

tion, constitute such an expansion of the original patent as to destroy its identity, and to that extent to avoid the reissued patent.

2. Said reissue as to said claims is also void because of the laches of the patentee and his assignee, in failing to apply for the reissue until more than two years after the issue of the original patent.

[No. 94.]

Argued Dec. 15, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Henry T. Blake,** for appellant:

The neglect by a lawyer of his client's cause does not constitute unreasonable laches on the part of the client.

Where an attorney neglected to file an application as directed by the inventor, it was held that "The client should not be made to suffer for the neglect of his attorney."

Howes v. *McNeal*, 3 Bann. & Ard. 376; *Birdsall* v. *McDonald*, 1 Bann. & Ard. 165; *Adams* v. *Jones*, 1 Fish. 529; *Sayles* v. *Chicago & N. W. R. R. Co.* 2 Fish. 523.

The general rule is that "Delay will not operate as a bar so long as the party remains, without any fault of his own, in ignorance of his rights and injuries."

Stanhope's Case, L. R. 1 Ch. App. Cas. 161; *Charter* v. *Trevelyan*, 11 Cl. & F. 714.

In *Stutz* v. *Armstrong*, 20 Fed. Rep. 843, it was held that nothing should be predicated against the inventor through the acquiescence of his solicitor in the rejection of the broad claim, when such acquiescence arose from the solicitor's misunderstanding of the nature of the invention; the inventor being of foreign speech, and so possibly "Not having been able fully to explain the matter."

Where some of the ingredients or devices are new, though claimed in a general combination only, if these new ingredients or devices are found described and clearly shown in the specifications, drawings or models of the original patent, such distinct inventions may be segregated from the combination and made the subject of a reissue "In order to give effect to the real invention."

Battin v. *Taggert*, 58 U.S. 17 [How. 74 (15:37); *Smith* v. *Merriam*, 6 Fed. Rep. 713; *Crandal* v. *Watters*, 20 Blatchf. 97; *Parham* v. *American Buttonhole etc. Co.* 4 Fish. 468; *Pearl* v. *Ocean Mills*, 2 Bann. & Ard. 469; *Herring* v. *Nelson*, 3 Bann. & Ard. 55; *Gallahue* v. *Butterfield*, 10 Blatchf. 237; *Graham* v. *McCormick*, 11 Fed. Rep. 859; *Asmus* v. *Alden*, 27 Fed. Rep. 684.

Mr. **John S. Beach,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the appellant to restrain the alleged infringement of the complainant's rights, as the assignee of Frank Davis, of reissued letters patent No. 9901, for an improvement in door bolts. The original patent was No. 202158, dated April 9, 1878. The application for the reissue was filed April 1, 1881, the reissued letters patent being dated October 18, 1881. The alleged infringement is of the third and fourth claims. As the case turns wholly upon the validity of the reissued patent it is important, for purposes of comparison, to set out the original and the reissue in parallel columns. So much of the original as is excluded from the reissue is marked in brackets, and the additions made by the reissue are in italics. They are as follows: [653]

Original.	*Reissue.*
"Specification forming part of letters patent No. 202158, dated April 9, 1878. Application filed January 29, 1878.	"Specification forming part of reissued letters patent No. 9901, dated October 18, 1881. Original No. 202158, dated April 9, 1878. Application for reissue filed April 1, 1881.
To all whom it may concern:	*To all whom it may concern:*
Be it known that I, FRANK DAVIS, of North Adams, in the County of Berkshire and State of Massachusetts, have invented certain new and useful improvements in door bolts; [and I do hereby declare that] the following is a [full, clear, and exact] description [of my invention, which will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.]	Be it known that I, FRANK DAVIS, of North Adams, in the County of Berkshire and State of Massachusetts have invented certain new and useful improvements in door bolts, *of which* the following is a description.
[This invention is an improvement] on letters patent [No. 190,561,] granted to [the undersigned] May 8, 1877.	*The improvements are on the door bolt, for which letters patent were granted to me May 8, 1877.*
The [nature of said] invention consists [chiefly] in combining a cylindrical outer casing with an inner [casing] constructed and recessed as hereinafter described, said [casings] combining to inclose the operating mechanism, and to form a fulcrum and guide therefor; [and] in combining with said [casings] a bolt, pitman, and [hub, so constructed and arranged as to operate in the same without pivot pins or any additional devices, all as] hereinafter more fully [described] and claimed.	The invention consists in combining a cylindrical outer case with an inner *case*, constructed and recessed as hereinafter described, said *cases* combining to inclose the operating mechanism, and to form a fulcrum and guide therefor; in combining with said *cases* a bolt, pitman, and *crank; and in a pitman or connecting rod performing the functions of both pitman and spring, as the above are* hereinafter more fully *set forth* and claimed. [654]
In the accompanying drawings Fig. 1 [represents the device as a whole] in perspective. Fig. 2 [represents] a perspective view of the inner [casing and contents.] Fig. 3 is a [detail] view of the bolt [and its attachments]. Fig. 4 is a detail view of the inner [casing.] Fig. 5 is a detail view of the outer casing.	In the accompanying drawings Fig. 1 *shows the bolt* in perspective. Fig. 2 *is* a perspective view of the inner *case and portions of some of the working parts.* Fig. 3 is a view of the bolt, *spring, and crank.* Fig. 4 is a detail view of the inner *case, and* Fig. 5 is a detail view of the outer case.
A designates a cylindrical metallic outer casing or sleeve, which is provided with opposite openings *a a* near its rear end, and with a hole a^1, for attachment by means of screw a^2 to inner casing B.	*To enable others to make and use my improvements in door bolts, I will describet them in detail.* *A, Figs.* 1 *and* 5, *is a cylindrical metallic outer case, having the holes* a a *near its rear end, and hole* a', *through which a screw,* a^2, *Fig.* 1, *passes into the inner case B, to hold the two cases together.*

It is obvious that any
[655] known equivalent fastening may be substituted for said screw. Said casing A is preferably a mere shell of steel, but both the material and thickness can be considerably varied without departing from my invention.

Inner casing B is of brass, cast iron, or other cheap metal, and has such diameter as allows it to pass readily into said outer casing or sleeve, and to be conveniently withdrawn therefrom. It is provided at the front end with a disk, which has a central opening, *b*, for the passage of the bolt, and an annular flange,
[656] b^1, which prevents it from being forced back too far within said exterior casing. The bottom of said inner casing B has a broad longitudinal slot, b^2, extending from end to end, and communicating with a similar longitudinal slot, b^3, in the top of said casing B, which extends about two thirds of the length of said casing, beginning just behind said front disk. The interior of the forward part of said inner casing is thus entirely removed, leaving vertical walls b^4 b^4 on each side of the space thus produced. This space is separated by a transverse partition, b^5, from a transverse groove, b^6, in the bottom of which is a longitudinal slot, b^7. A transverse partition, b^8, at the rear of said groove and slot, forms part of the rear end of casing B, and has in its top screw-threaded hole or socket b^9, for the reception of fastening screw a^2.

C designates the door bolt, having guide pins c on its side, and near its rear end a recess, c', in which works the lower end of crank arm D', formed in one piece with flat hub D. Said lower end of crank arm D' is connected by pitman E to the front part of said bolt. Said hub D, when
[657] in position for use, extends up through said slot b^7, so that its square or similarly shaped central hole is in a line with transverse groove b^6 of inner casing B, and opposite holes *a a* of outer casing A. The prismatic shank of the key is passed through said holes and groove, and operated as usual to shoot or draw the bolt.

I do not confine myself to the exact details of construction shown, as these may be somewhat modified in various ways without departing from the spirit of my invention.

The working parts of my mechanism are more firmly secured and more perfectly protected than in my former patent, as hereinbefore recited. I also deem the shape of my new hub and crank preferable for practical working.]

Having [thus] described my [invention], what I claim as new, and desire to protect by letters patent, is—

1. The combination, with a door bolt and operating mechanism, of a cylindrical exterior [casing,] and a recessed inner [casing,] said [casings] combining to inclose the operating mechanism, and to form a fulcrum and guide therefor substantially as set forth.

2. The combination of [casing] A, having opposite holes *a a*, with inner [casing] B, having transverse groove b^6 and slot b^7, [flat hub] D, [having crank arm D,'] and the bolt and pitman, substantially as set forth.

[3. The combination of cylindrical outer casing A with inner casing B, having annular front flange b^1, side walls b^4 b^4, transverse partitions b^5 and b^8, transverse groove b^6, and slot b^7, said casings being securely fastened together and adapted to receive the bolt and working mechanism, substantially as set forth.]"

The inner cylindrical case, B, Figs. 2 and 4, is made to fit closely into the outer case, and has on its front end a disk in which is the central opening, b'. On its front end the flange b' is formed, against which the outer case comes. A slot, b^2, Fig. 4, extends from the disk on the front end the whole length of the case. Another slot, b^3, opposite the slot b^2, extends backward from the end disk, as shown in Fig. 4. These slots leave the parts b^4 b^4 of the inner case, as shown in Fig. 4. A groove, b^6, extends across the case between the parts b^5 and b^8 of the case. A longitudinal slot, b^7, bisects this groove and is cut through the case.

C, Fig. 3, is the bolt, made with the lugs c c, only one of which is used. The projecting end is round, the part within the case is rectangular, one of the narrower sides fitting into the slot b^2, and the other into b^3. Its rear end is made narrower and thinner to make room for the crank, as shown in Fig. 3.

The crank D is made in the usual form, and is arranged in a position to bring the hole through its larger end in line with the groove b^6 on the inner case and with the openings a a in the outer case.

The pitman and spring E, Fig. 3, is a straight hard-drawn wire, and is connected to the bolt and crank by suitable pivotal connections. As shown in the drawings, its ends are bent at right angles to its length and pass into holes in the bolt and crank, the spring being made long enough for the purpose. The lug c on the bolt is so arranged relative to the connections of the spring as to give it the required degree of tension or "set up," as it is called. The tension bends the spring over the lug c, as shown in Fig. 3. The key has its shank square to fit the hole in the crank, with a round part near the handle to turn in the case, as shown in Fig. 1.

Having described my *improved bolt and its mode of operation*, what I claim as new, and desire to secure by letters patent, is—

1. The combination, with a door bolt and operating mechanism, of a cylindrical exterior *case* and a recessed inner *case*, said *cases* combining to inclose the operating mechanism, and to form a fulcrum and guide therefor, substantially as set forth.

2. The combination of *case* A, having opposite holes *a a*, with inner *case* B, having transverse groove b^6 and slot b^7 *crank*, D, and the bolt and pitman, substantially as set forth.

3. *The combination of the bolt C, provided with the lug c, pitman E, operating as a pitman and spring, and crank D to hold the bolt, substantially as set forth.*

4. *In a cylindrical door bolt, the pitman E, arranged and adapted to operate as a pitman and spring, substantially as set forth.*"

Fig. 1.

Fig. 2.

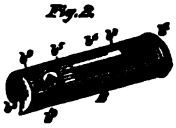


Fig. 3.

Fig. 4.

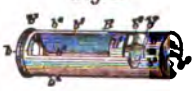


Fig. 5.

It will be observed that the first and second claims of the reissued patent are substantially the same as the first and second claims of the original patent; but as there is no allegation or proof of any infringement by the appellee, of either of these, they may both be dismissed from further consideration. The third claim of the original patent is omitted from the reissue, its place being taken by the third and fourth claims of the latter. The whole question is whether the patentee and his assignee are entitled, under the circumstances of the case, to claim the pitman E, operating as a pitman and spring in a door bolt, as a distinct and separate invention, irrespective of its combination with the exterior and interior cases mentioned in the

first and second claims. This right is affirmed by the appellant and denied by the appellee.

The invalidity of the reissued patent is maintained by the appellee on two grounds: (1) that the reissue embraces a different invention in the third and fourth claims from any described [659] or contained in the original specification; and (2) that, if it were otherwise, the patentee and assignee had, at the time of the application for a reissue, lost their rights to correct the defects in the original by their own laches. It was upon the latter of these grounds that the circuit court proceeded in dismissing the bill. The undisputed facts on this part of the case are stated by the circuit court in its opinion and are as follows:

"The inventor, a carpenter by trade and not an educated man, invented the device in November, 1877, and applied, in January, 1878, to Mr. Terry, a patent solicitor in New Haven, to procure him a patent, specifying, as the invention to be patented, the pitman, which, in connection with the crank, held the bolt and answered the double purpose of pitman and spring. Terry, being in ill health and therefore not then doing business, sent the case to his agent in Washington, with Davis' instructions. In due time the papers were returned to Terry and were signed by Davis, who read them and supposed that the application 'covered the spring which he intended to be patented.' Terry did not read the application. The patent was received by Davis in April, 1878. It does not appear whether it was then examined or not. The plaintiff did not see the patent until after it was assigned to him, on May 28, 1879. Whether he then read it or not he does not know; but in the latter part of 1880, after the defendant had begun to infringe, he did read it and supposed, from the drawings, that the pitman spring, as a separate invention, was secured by the patent, until he was undeceived by Mr. Terry. In the spring of 1878 the plaintiff received from Davis a license to use the pitman spring upon another than the patented bolt. In September, 1880, Sargent & Co. commenced work upon the patterns for the infringing bolt, and made the first bolts December 1, 1880." *Ives* v. *Sargent*, 21 Blatchf. 417.

The application for the reissue was not made until after the lapse of nearly three years from the date of the original patent; that is, from April 9, 1878, until April 1, 1881. It may be assumed, as the effect of the evidence, that [660] Davis in describing to his solicitor, Terry, the invention which he wished to have patented, specifically designated and described the pitman spring as his substantial invention, distinct from the combination of which it formed a part in the first and second claims of the patent. In his testimony on this point, in answer to the question, "What did you describe to him as the invention which you wished to have patented?" Davis states, "I explained to Mr. Terry that I had got the spring, answering for a spring and also for turning the bolt—a pitman spring. I didn't know the term at that time;" and also that he wished to have patented "this pitman spring, and this guard, lever, and that purchase it had in holding the bolt out or back; also, in moving the bolt out and back." Terry also, on the same point, says that Davis "brought the invention or bolt to me and stated that he wanted to get it patented. He also stated what his invention was, as he considered it, that he wanted patented, and the thing that he wanted patented particularly was the pitman or connecting rod, which answered the double purpose of pitman and spring, and in connection with the crank held the bolt when it was shoved out of the case and when it was drawn within the case." Terry also states that he sent "a letter of instructions with the model, setting forth Mr. Davis' wishes as he had expressed them to me." The specification, as prepared by the solicitor in Washington, was returned to Terry and by him exhibited to Davis, who signed the application, as he states, after he had examined it and supposed it to be right, "covering the spring which I intended to be patented." Mr. Terry states that he does not recollect whether he himself read over the specification and examined the claims at the time Mr. Davis signed the papers, or not. On this application the patent was issued, and it does not appear to have been read or examined by any of the parties in interest until after the appellee commenced making the bolts now alleged to be an infringement. It was then discovered for the first time that the original patent did not cover the claim as now made, and the reissue was obtained to effect that purpose.

It is admitted in argument by the counsel for the appellant that there was negligence; it is [661] contended, however, that it was not the negligence which in law is imputable to the patentee or the appellant, but the negligence of the solicitor employed by the patentee to obtain the patent. Counsel say, "It was the Washington solicitor's disobedience to instructions which caused the mistake, and Terry's neglect to revise the application before sending for Davis to sign it, which prevented its discovery."

The rule of diligence required in such cases, as the result of previous decisions of this court, is stated in *Wollensak* v. *Reiher*, 115 U. S. 96, 99 [29: 350, 351.] in these words: "It follows from this, that if, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men in the management of their own interests in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it. Not to improve such opportunity, under the stimulus of self interest, with reasonable diligence, constitutes *laches*, which in equity disables the party who seeks to revive the right which he has allowed to lie unclaimed from enforcing it to the detriment of those who have in consequence been allowed to act as though it were abandoned."

In *Mahn* v. *Harwood*, 112 U. S. 354, 362 [28: 665, 668], it was stated that "If a patentee has not claimed as much as he is entitled to claim, he is bound to discover the fact in a reasonable time or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue

for the purpose of correcting the supposed mistake, he exceeds his power, and acts under a mistaken view of the law; the court, seeing this, has a right, and it is its duty, to declare the reissue *pro tanto* void in any suit founded upon it."

[662] It is also settled that while no invariable rule can be laid down as to what is a reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use, before an application for a patent, should be construed equally favorable to the public, and that excuse for any longer delay than that should be made manifest by the special circumstances of the case. *Wollensak* v. *Reiher*, and *Mahn* v. *Harwood* [*supra*].

In the present case no special circumstances in excuse for the delay are alleged. The excuse proffered is simply an attempt to shift the responsibility of the mistake, as originally made, from the patentee to his solicitor; but no excuse is offered why the patentee did not discover the negligence and error of his solicitor in due time. On the contrary, he assumed, without examination, that the specification and claims of his patent were just what he had desired and intended they should be, and rested quietly in ignorance of the error and of his rights for nearly three years, and then did not discover them until after others had discovered that he had lost the right to repair his error by his neglect to assert it within a reasonable time.

We are therefore of opinion that the circuit court was clearly in the right in deciding the reissue void as to the third and fourth claims, on the ground that the right to apply for it had been lost by the laches of the patentee and his assignee.

We are also of opinion, however, that the reissue is void on the other ground; viz., that it contains new matter introduced into the specification, and that it is not for the same invention as that described in the original patent. In support of the reissued patent, on this ground, it is contended, on the part of the appellant, that the invention of the pitman-spring device is shown in the drawings, which are the same both in the original and the reissued patents. All that can be said in respect to the drawings is that they show the pitman-spring device as a part of the bolt intended to be covered by the patent, and described as a combination of which that device forms a part. There is nothing whatever in the drawings to [663] show that the patentee claimed to be the inventor of that part separate from the combination, as a distinct novelty, useful by itself, or in any other combination; neither is it so described in the specification. The operating mechanism of the bolt, as distinct from the casings, which are described as forming a fulcrum and guide to it, is described as "a bolt, pitman, and hub so constructed and arranged as to operate in the same (said casings) without pivot pins or any additional devices." It is argued, on this language, that the only additional device usual in such cases is a spring, and that, therefore, the meaning of the specification is that no separate spring was required, and from that the inference is to be made that the pitman should operate both as a pitman and a spring; but this inference is entirely too obscure and remote. It is not obvious that the additional device referred to was a spring, and there is nothing in the language to suggest, what is clearly and fully expressed in the amended specification, that "the pitman and spring E, figure 8, is a straight, hard-drawn wire, and is connected to the bolt and crank by suitable pivotal connections." So that in the original description there is nothing to show of what material the pitman is made so as to operate as a spring, and there is no assertion in it of its performing the double function of pitman and spring.

In this view, therefore, the case comes within the rule as stated in *Coon* v. *Wilson*, 113 U. S. 268, 277 [28: 933, 966]. There, as here, the lapse of time and laches based upon it were considered immaterial, because the reissued patent was for a different invention from that described in the original. "The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing."

We are therefore constrained to the conclusion that the addition of the third and fourth claims, with the corresponding alterations in the specification, is such an expansion of the invention as originally described as to destroy its identity, and to that extent to avoid the reissued patent.

For these reasons, the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LUCIUS L. HUBBARD, *Plff. in Errr.*, [69

v.

NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

(See S. C. Reporter's ed. 696-702.)

Contract—construction of—suit for commissions on sale of railroad—review of evidence—instruction to find for defendant, sustained.

In an action by a representative of the defendant Company to recover commissions on the sale of a railroad, this court holds, upon a review of the entire evidence, that the business did not originate in the territory controlled by the plaintiff and included within his contract; that he is not entitled to recover, either under his contract or the common counts, and that the court below properly instructed the jury to find for the defendant.

[No. 103.]

Argued Dec. 17, 20. 1886. Decided Jan. 17, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **William Warren Vaughan** and *Robert Dickson Smith*, for plaintiff in error.

Mr. **Hugh Porter**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action at law brought by the plaint-

iff in error a citizen of Massachusets, against the defendant in error, in the Supreme Judicial Court of that State for the County of Suffolk, and removed by the defendant, a corporation and citizen of the State of Illinois, into the Circuit Court of the United States for that District. The New York, New England and Western Investment Company is a corporation chartered by the State of Illinois under the name of the Edgar County Land and Loan Company, its name having been subsequently changed. It has an authorized capital stock of $100,000, subject to be increased to $200,000. Its powers were conferred by the third section of an Act approved March 8, 1867, which reads as follows:

"Section 3. The said Corporation shall have power to borrow money and to receive money in deposit and pay interest thereon, and to loan money within or without this State at any rate of interest not exceeding that now or hereafter allowed by law to private individuals, and to discount loans; and in computation of time [697] thirty days shall be a month and twelve months a year; and to make such loan payable either within or without this State, and to take such securities therefor, real and personal, or both, as the directors and managers of said Corporation shall deem sufficient, and may secure the payment of such loans by deeds of trust, mortgages, or other securities, either within or without this State; may buy and sell negotiable paper or other securities; may open and establish a real estate agency; may purchase and sell real estate, and shall have power to convey the same in any mode prescribed by the by-laws of such Corporation; may accept and execute all such trusts, whether fiduciary or otherwise, as shall or may be committed to it by any person or persons, or by order of any court or tribunal or legally constituted authority of the State of Illinois, or of the United States, or elsewhere; may make such special regulations in reference to trust funds, or deposits left for accumulation or safe keeping, as shall be agreed upon with the depositors or parties interested, for the purpose of accumulating or increasing the same; may issue letters of credit and other commercial obligations, not, however, to circulate as money, and may secure the payment of any loan made to said Company in any way the directors may prescribe."

The home office of the Company was at Chicago, but a branch was established in New York City, which became, and was at the time of the transactions in question in this suit, the main office at which its business was chiefly transacted. The Company also directed the establishment of branch offices at Philadelphia and Boston. The relation between the defendant and the plaintiff grew out of a contract entered into between them, having in view the establishment of the office in Boston. A contract in writing was entered into between them on the 17th day of December, 1879, the substantial parts of which are as follows: The plaintiff, Hubbard, agreed "to open and take charge of a branch office of said Corporation at Boston, Mass.; to devote his best energies and time to the interests of said Corporation, as far as may not be inconsistent with a due regard [698] for the interests of such legal clients as he may have from time to time, always considering his duties towards said Corporation as of the utmost importance; to use his best endeavors to place in New England, where it may be of greatest advantage to said Corporation, twenty-five thousand dollars ($25,000) of the capital stock of said party of the first part, and generally to do and perform (within his 'division,' so called,) all acts for the furtherance of the interests of said party of the first part as shall be consistent with honor, honesty, equity, and fair dealing."

On its part, the defendant agreed "forthwith to elect said party of the second part one of its directors, with the title of assistant vice president; to give said party of the second part the direction of said office designated as the Eastern Division, subject, of course, to the by-laws of said Corporation now in force or hereafter to be enacted; to furnish said office and its furniture, all the books, signs, circulars, and advertising, which said Corporation may require; to pay the salary of its book-keeper and of such other employes as may be deemed necessary and proper, and generally to pay the running expenses of said office; to pay to said party of the second part the sum of eighteen hundred dollars ($1,800) per year as 'salary,' together with all expenses of travel incurred by him on its behalf, and a further amount, as 'commissions,' to be determined as follows; to wit, all business originating in said 'Eastern Division,' which shall include the whole of Maine, New Hampshire, Vermont, and Massachusetts, or transacted at said Boston office, shall be 'valued' according to the amount of gross profit coming therefrom to said Corporation, or which can be rightfully claimed by it. After deducting from the aggregate of such profits for each year the sum of fifty-four hundred dollars ($5,400), plus the amount of book-keeper's salary said party of the second part shall be entitled to one third of the balance as commissions, as above. Settlement shall be made between said parties as often as once a month, said party of the second part becoming entitled to said 'commissions' *pro rata* as soon as the same shall have been earned and received, and shall exceed in the aggregate the amount of $5,400, plus salary of book-keeper, as above set forth, and shall be paid 'in kind.'

"Said party of the first part shall favor as [699] much as practicable said Boston office, to the end that parties within its precincts may deal directly with it. All legal services required by said party of the first part, for itself or others in suits or proceedings in court, or in the drawing of railroad deeds and mortgages, shall be entitled to extra compensation from said party of the first part."

It was also provided that "This agreement shall go into effect from and after the sale or purchase by said party of the second part at par of ten thousand dollars ($10,000) of the capital stock of said party of the first part and payment therefor, and shall be in force for one year, at the end of which time there shall be a general accounting together of said parties, and a new agreement may be made and entered into, if the mutual interests of said parties may so require."

This agreement went into effect, according to its terms, by the plaintiff taking and paying for $10,000 of its capital stock at par on the

24th of December, 1879. On the 5th of June, 1880, he was elected a director by the stockholders at their annual meeting in Chicago. The plaintiff opened in Boston the branch office contemplated, and performed all the services required of him during the year fixed by his contract; was paid his salary of $1,800, and reimbursed for all outlays, as provided in the contract of December 17, 1879, rendering monthly accounts to the New York office, as required, to which no objection was ever made; and, apart from the transaction here in question, there was no controversy as to his interest in any part of the gross profits arising under the contract.

It also appeared from the evidence—the whole of which is set out in the bill of exceptions—that, through a contract with the Kansas City, Burlington and Santa Fé Railway Company, of which W. H. Schofield was then president, the defendant had for sale certain bonds of that company, and, in order to place them before other railroads and investors, it had issued a circular, dated May 15, 1880, offering for sale these bonds, which were to cover not only the extension of that road to Burlington, Kansas, but also that portion of [709] the road already built from Ottawa to Burlington, and on this completed portion of the road of 45 miles there was already outstanding $600,000 of first mortgage bonds, which were to be taken up and canceled from the proceeds of the new bonds offered in this circular. One of these circulars was sent from the New York office to the plaintiff at the Boston office. A negotiation was commenced and carried on personally by J. C. Short, president of the defendant Company, with the Atchison, Topeka and Sante Fé Railroad Company in interviews, some of which occurred at the office of the latter company in Boston. At some of these the plaintiff was present, at others not. At one of these interviews, on June 10, 1880, at which the plaintiff was not present, a preliminary agreement or memorandum between the parties was entered into, signed by the president of the Atchison, Topeka and Santa Fé Railroad Company, the president of the Kansas City, Burlington and Santa Fé Railway Company, and Short, as president of the defendant Company. This memorandum contemplated the purchase by the Atchison, Topeka and Santa Fé Railroad Company of the railroad of the Kansas City, Burlington and Santa Fé Railway Company, and, as a means of accomplishing that, the purchase of the mortgage bonds of the latter company with a view to a foreclosure of the mortgage and the reorganization of the company. This memorandum was supplemented by a subsequent agreement entered into on the 13th of June, 1880, to which the parties were the Atchison, Topeka and Santa Fé Railroad Company, the New York, New England and Western Investment Company, Alden Speare, Charles S. Tuckerman, and Lucien M. Sargent, the three last named to act as trustees to hold the bonds to be used in consummating the purchase. The object of this contract was to provide and declare the modes by which the property of the Kansas City, Burlington and Santa Fé Railway Company should be sold and delivered to the Atchison, Topeka and Santa Fé Railroad Company, free from incumbrance, and contemplated the foreclosure and sale of the road for that purpose. The transaction was completed in accordance with the terms of the contract. It resulted in a gross profit to the New York, New England and Western Investment Company, as is alleged by [7 the plaintiff in his declaration, of $117,833.33, of which the plaintiff claims to be entitled to recover one third, on the ground that the business originated and was transacted and said contract was made in said Eastern Division or Boston office, and that the plaintiff himself procured, or was instrumental in procuring and carrying out, the same.

The cause was tried by a jury, when, at the close of the plaintiff's evidence, the defendant asked the court to instruct the jury to render a verdict for the defendant, which was done, and a verdict rendered accordingly, and judgment thereon, to reverse which this writ of error is prosecuted.

The error assigned is in the ruling of the court in this instruction to the jury. The principal question, in our view of the case, is one of fact; it is whether, within the meaning of the contract between the parties, made December 17, 1879, the business in question, out of which these profits arose, originated in the Eastern Division, as therein described, or was transacted at the Boston office.

Upon a careful review of the entire evidence, giving to the plaintiff the benefit of all inferences which might reasonably have been drawn by the jury, we are of the opinion that the court below did not err in instructing the jury to find a verdict for the defendant. In our opinion, it clearly appears from the evidence, in which there was no conflict, that the business did not originate in the Eastern Division, and was not transacted at the Boston office. It would serve no useful purpose to go into any detail of the testimony, which, we think, admits of no different conclusion.

The plaintiff's declaration, in addition to counting on the special contract in writing, contained also common counts for work and labor done and services performed in and about the negotiation of the contract for the sale of the Kansas City, Burlington and Santa Fé Railway, under which a recovery might have been had, in the absence of a special contract, for the reasonable value of services as a broker, if any such had been performed; but in the present case no such recovery could be had, because it clearly appeared that whatever was done by the plaintiff in that behalf was done [7 under the special written contract, and not upon any implied contract for compensation.

The judgment is accordingly affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1886.

Vol. 120.

the services of Symonds were performed under the orders of the Secretary of the Navy, and in a vessel employed with authority of law. If they were performed "at sea," his compensation therefor is absolutely fixed by section 1556. Does the statute confer upon the Secretary of the Navy, acting alone or by direction of the [49] President, the power to declare a particular service to be shore service if, in fact, it was performed by the officer "when at sea," under the orders of the department and on a vessel employed with authority of law? By the Navy Regulations of 1876, it was declared that "Duty on board a sea going vessel of the Navy in commission, on board a practice ship at sea, or on board a coast-survey vessel actually employed at sea, will be regarded by the department as sea service." (P. 85). Assuming that the first clause of that regulation contemplates services at sea under the orders of the department, in a vessel employed with authority of law, it is clear that all the different kinds of services described therein are services performed at sea in the meaning of section 1556. But they are to be deemed such, not because the Secretary of the Navy has announced that the department will so regard them, but because they are, in fact, services performed at sea, and not on shore. If the regulations of 1876 had not recognized services "on board a practice ship at sea" as sea services, the argument in behalf of the Government would imply that they could not be regarded by the courts, or by the proper accounting officers, as sea services; in other words, that the Secretary of the Navy could fix, by order, and conclusively, what was and what was not sea service. But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely con- [50] sistent with *Gratiot* v. *U. S.*, 45 U. S. 4 How. 80 [bk. 11, L. ed. 884], and *Ex parte Reed*, 100 U. S. 13 [25:588], upon which the Government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 U. S. 181 [29:606]. In neither case, however, was it held that such regulations, when in conflict with the Acts of Congress, could be upheld. If the services of Symonds were, in the meaning of the statute, performed "at sea," his right to the compensation established by law for sea service is as absolute as is the right of any other officer to his salary as established by law. The same observations may be made in reference to the order of the Secretary of the Navy of July 7, 1882, which, without modifying the previous order that Symonds should perform the duties of executive officer of The New Hampshire, declared that that ship would not be considered as in commission for sea service after August 1, 1882. It does not appear that the Secretary had any purpose, by his order, to affect the pay of the officers of the ship as fixed by the statute. Other reasons doubtless suggested the propriety or necessity of its being issued. But his order is relied upon here as depriving Symonds of the right to sea pay after the date last named. For the reasons stated, that order could not convert the services of Symonds from sea services into shore services, if they were, in fact, performed when "at sea."

We concur in the conclusion reached by the court of claims; namely, that the sea pay given in section 1556 may be earned by services performed under the orders of the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads or other arms of the sea, under the general restrictions, regulations and requirements that are incident or peculiar to service on the high sea. It is of no consequence, in this case, that The New Hampshire was not, during the period in question, in such condition that she could be safely taken out to sea beyond the main land. She was a training ship, anchored in Narragansett Bay during the whole time covered by the claim of appellee, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when per- [51] forming his duties as executive officer of The New Hampshire, was "at sea."

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S

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[51]

UNITED STATES, *Appt.*,

v.

JOSHUA BISHOP.

(See S. C. Reporter's ed. 51, 52).

Naval officer of training ship, entitled to sea pay—what is sea service.

The executive officer of a training ship is held to be entitled to sea pay under section 1556, R. S., for service in New York Harbor, for the reasons given in U. S. v. Symonds, *ante*, 557.

[No. 1029.]

Submitted Dec. 6, 1886. Decided Jan. 10, 1887.

APPEAL from the Court of Claims. *Affirmed.*

In connection with this case, see the preceding case of *United States* v. *Symonds*.

Messrs. **A. H. Garland**, *Atty-Gen.* and **F. P. Dewees**, *Assistant Atty.*, for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This case does not differ in principle from that of *United States* v. *Symonds*, just decided.

Bishop is now, and has been for more than four years, a Lieutenant-Commander in the Navy. By direction of the Secretary of the Navy, he assumed the duties of executive officer of the training ship Minnesota, on the 18th of April, 1884. During the period of such service that vessel was stationed in New York Harbor, cruising and moving about under her own power. Her machinery and equipment were kept in order, and she was perfectly seaworthy, capable, upon short notice, of being used in a protracted cruise.

The duties of Bishop, while such executive officer, were more arduous and confining than those of officers of similar grade upon vessels in foreign waters.

[52] For the reasons given in *United States* v. *Symonds*, we are of opinion that the services of appellee were, within the meaning of section 1556 of the Revised Statutes, performed "at sea," and, consequently, it was rightly adjudged in the court below that he was entitled to sea pay, as established for officers of his grade, during the period of his service on The Minnesota.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[52] UNITED STATES, *Appt.*,

v.

HENRY R. PHILBRICK.

(See S. C. Reporter's ed. 52-59.)

Statute, repeal of—restoration of former law by—order of Secretary of Navy relating to commutation of quarters, etc.—validity of—contemporaneous official construction of statutes.

1. Where an Act of Congress simply removes a prohibition contained in a former Act, the effect is, without formal words for that purpose, to restore the law as it was before the passage of said Act.

2. In case of doubt the contemporaneous construction of a statute by officers charged with its execution is entitled to great weight.

3. This court refuses, at this late day, to question the validity of the order issued by the Secretary of the Navy May 12, 1866, relating to the commutation of quarters, furniture, lights, fuel, etc., such order being in accordance with the former construction placed by the Executive Department upon the various Acts relating to the naval establishment, and defining the powers of the Secretary of the Navy.

[No. 1032.]

Submitted Dec. 6, 1886. Decided Jan. 10, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.* and **F. P. Dewees,** *Assistant Atty.*, for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines,** for appellee.

[53] *Mr. Justice* **Harlan** delivered the opinion of the court:

The appellee, Philbrick, having served as a carpenter in the Navy from July 8, 1861, to March 14, 1866, and again continuously after November 12, 1869, filed with the Fourth Auditor of the Treasury his claim for the benefits of the Act of Congress of March 3, 1883, providing, among other things, that "All officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the regular Navy, in the lowest grade having graduated pay held by such officer since last entering the service." 22 Stat. at L. 473. The claim having been passed by the Fourth Auditor, was forwarded to the Second Comptroller of the Treasury, who is the reviewing officer charged with the examination of all accounts of this class. The latter officer, while recognizing that the appellee had a valid claim under the Act of 1883, deducted from the amount which the Fourth Auditor had ascertained to be due the sum of $214.88. That amount was made up of two items, $169.50 and $45.38.

In respect to the item of $169.50—which is the only one disputed on this appeal—the Second Comptroller held that that sum had, by mistake of law, been improperly allowed and paid to appellee for commutation of quarters, furniture, lights and fuel from November 12, 1869, to July 1, 1870, although such payment was in conformity with a general order, issued by the Secretary of the Navy on the 12th of May, 1866, in reference to allowance to officers in that branch of the public service.

It is, however, insisted, on behalf of the United States, that that order was unauthorized by law and void and, consequently, that the amount allowed under it to appellee was properly chargeable against his claim for pay under the Act of 1883. [54]

So far as we are aware, the first Act of Congress providing for special allowances or compensation to officers, seamen, and marines beyond their regular pay, was that of April 18, 1814. The second section of that Act authorized the President "to make an addition, not exceeding 25 per cent, to the pay of the officers, midshipmen, seamen, and marines, engaged in any service, the hardships or disadvantages of which shall, in his judgment, render such addition necessary." 3 Stat. at L. 136, chap. 84. That section was, however, repealed by the Act of February 22, 1817. 3 Stat. at L. 345, chap. 13. The reasons which led to the withdrawal of this power from the President are not disclosed in any public document to which our attention has been called. The practice which prevailed in the Navy Department for many years after the passage of the Act of 1817, in reference to special allowances to or for the benefit of naval officers beyond their regular pay—of which practice Congress was fully informed—tends to show that the repeal of the Act of 1814 was not intended as a prohibition of allowances of every kind. In the Rules, Regulations, and Instructions prepared by the Board of Navy Commissioners, with the consent of the Secretary of the Navy, and published in 1818,—a copy of which was transmitted to Congress by President Monroe on the 20th of April of that year (American State Papers, Class VI, Naval Affairs, p. 510), will be found provisions for certain allowances, graduated according to the character of the vessel or the rank of the officer in charge. In the "Rules

of the Navy Department Regulating the Civil Administration of the Navy Department," prepared under the supervision of Secretary Woodbury, and by him published in 1832 in what is known as the "Red Book," are provisions in reference to allowances for cabin furniture, chamber money, furniture of officers' houses at yards, fuel, lights, servants, etc. Chap. 10. Besides, the Naval Appropriation Acts, for many years before and after 1832, contained items in gross for all the objects covered by [55] these allowances; but none of them contained directions as to the manner in which the sums appropriated should be apportioned. The absence of such directions was no doubt due to the fact, known to Congress, that the amounts annually appropriated were used or apportioned by the Navy Department as indicated in the rules prescribed by the Secretary.

That these allowances were habitually made, and that Congress was aware of this practice, appears from a report to President Monroe by the Secretary of the Navy, transmitted to Congress on the 4th of March, 1822. That report was accompanied by a statement showing the number and grade of the officers attached to each navy yard or station, with the amount allowed each for pay, subsistence, emoluments or extra compensation. The Secretary in his report says: "The allowances to officers attached to the navy yards have, I understand, been made to them since the commencement of these establishments, and vary in some instances, according to the expense of living, house rent, etc., in the different places at which they are located. The pay and rations, authorized by law to officers, are understood to be for their maintenance on board ship, in which they are accommodated with rooms, fuel, candles, etc.; but when placed on shore at naval stations they have not such accommodations. * * * The allowances now made are regulated by a table, making them all equal, or as nearly so as practicable. * * * The allowances have, in most instances, been made by the auditor in the settlement of accounts without any reference to this department, he considering himself authorized so to do by the usage of the service from the commencement of the naval establishment, with the approbation and sanction of the Secretary of the Navy." Am. State Papers, Class VI, Naval Affairs, Vol. 1, p. 797. The subject was subsequently brought to the attention of Congress by the report of the Secretary of the Navy to the Senate, January 1, 1825 (Am. State Papers, Naval Affairs, Vol. 2, p. 40); by the letter of the Secretary to the chairman of the House Committee on Naval Affairs, February 2, 1826 (*Id.* p. 626); by the communication of [56] the Fourth Auditor of the Treasury, May 28, 1830, which was transmitted to Congress (*Id.* Vol. 3, p. 685), the latter being accompanied by a table showing every kind of allowance made under the regulations and orders of the Navy Department. The same facts are disclosed by the report of Amos Kendall, the Fourth Auditor of the Treasury, February 5, 1835, to the Secretary of the Navy, and transmitted by the latter to the House of Representatives in conformity with a resolution of that body. The latter report embodies a statement, in detail, showing the regular pay, rations and allowances of all commissioned officers of the Navy, according to the laws and regulations then in force. Exec. Doc. 192, H. of Rep. Navy Dept. 23d Cong. 2d Sess.

Thus matters stood until the passage of the Act of March 3, 1835, regulating (and increasing) the pay of the Navy, by which allowances of every description were prohibited. The second section of that Act provided that "No allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for recovering or disbursing money or transacting any business for the Government of the United States; nor shall he be allowed servants, or pay for servants, or clothing or rations for them, or pay for the same; nor shall any allowance be made to him for rent of quarters, or to pay rent for furniture, or for lights, or fuels, or transporting baggage. It is hereby expressly declared that the yearly allowance provided in this Act is all the pay, compensation and allowance that shall be received under any circumstances whatever, by any such officer or person, except for traveling expenses when under orders, for which ten cents per mile shall be allowed." 4 Stat. at L. 757.

This prohibition of allowances continued in force until the Act of April 17, 1866, making appropriations for the naval service. The second section of that Act provided "That so much of the second section of an Act, entitled 'An Act to Regulate the Pay of the Navy of the United States,' approved March 3, 1835, as prohibits any allowance to any officer in the naval service for rent of quarters, or for furniture, or for lights or fuel, or transporting baggage, and all Acts or parts of Acts authorizing the appointment of navy agents be and the same [57] are hereby repealed." 14 Stat. at L. 38, chap. 45.

After the passage of that Act Secretary Welles issued the order which the Government now assails as unauthorized by law. It is as follows:

"[General Order, No. 75.]

"NAVY DEPARTMENT, *May* 23, 1866.

"Congress having, in view of the call for increased compensation for officers of the Navy, repealed the law which prohibited any allowance to them 'for rent of quarters or to pay rent for furniture, or for lights and fuel, etc.' the Department, in order to prevent a recurrence of the irregularities, abuses and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to thirty-three and one third per centum of their pay in lieu of all allowances, except for mileage or traveling expenses under orders; and those provided with such quarters, twenty per centum of their pay in lieu of said allowances.

"The Act of March 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them.

"GIDEON WELLES.
Secretary of the Navy"

This order was, no doubt, issued in the belief that the legal effect of the repeal of that part of the Act forbidding allowances "for rent of quarters, or for furniture, or for lights, or fuel, or transporting baggage," was to reinvest the department with the authority it had prior to the Act of 1835. That Act, upon its face, recognized the fact that such allowances had theretofore been made, and its object was to forbid them in the future. When the Act of 1866 simply removed the prohibition contained in [58] the Act of 1835, the effect was, without formal words for that purpose, to restore the law as it was before the passage of the latter Act. Such is the rule where the effect of the repealing statute is not by its own terms, or by some general statute, limited to the abrogation of the Act repealed. 1 Bl. Com. 90; 1 Kent, 460; Bouvier's Bacon's Abridgment, title, *Statute*, D; *Commonwealth* v. *Churchill*, 2 Met. 122; *Van Denburgh* v. *Village of Greenbush*, 66 N. Y. 4. The general rule was never modified by Congress until the passage of the Act of February 25, 1871, now section 12 of the Revised Statutes, which declared that "Whenever an Act is repealed which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided." 16 Stat. at L. 431, chap. 71. It is scarcely necessary to say that the Act of 1871 cannot control the present case, for the order of Secretary Welles, and the settlement under it with Philbrick, both occurred before its passage. And for the same reason this case is unaffected by the fourth section of the Act of July 15, 1870, (now § 1558, of the Revised Statutes), which provides that the pay prescribed therein for officers of the Navy shall be their full and entire compensation, and that (with certain exceptions not material to be here noticed) "No additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowances shall on 1st of July, 1870, be repealed." 16 Stat. at L. 332, chap. 295.

Notwithstanding the order of Secretary Welles was in harmony with the long-established practice of the Navy Department for many years prior to the passage of the Act of 1835, it is contended that such a practice never has had support in an Act of Congress, and that, without legislative sanction, the Secretary of the Navy was without authority to establish an arbitrary rule for the distribution of moneys appropriated in gross for specified objects connected with the naval service, and could, in no event, make allowances beyond the actual cost incurred by the officer in whose behalf they were made. It is a sufficient answer to these propositions to say that the power of the Secretary to establish rules and regulations for the ap- [59] portionment of the sums set apart by Congress, in gross, for such objects as those involved in the allowances here in dispute, having been frequently exercised prior to 1835, without objection by the legislative branch of the Government; and since that Act, as well as the one of 1866, is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed, at this late day, to question the validity of the order of May 23, 1866. That order was in accordance with the construction which the Executive Department, for many years prior to 1835, placed upon the various statutes relating to the naval establishment and defining the powers of the Secretary of the Navy. A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned. See *Hahn* v. *U. S.* 107 U. S. 405 [Bk. 27, L. ed. 528], and *Brown* v. *U. S.* 113 U. S. 571 [28: 1080], and authorities cited in each case.

As these views lead to an affirmance of the judgment, it is unnecessary to consider whether, after the account of the appellee for commutation of quarters, furniture, lights and fuel, between November 12, 1869, and June 30, 1870, had been finally stated and closed, and after he had been paid the amount allowed him, the Second Comptroller had authority to open it upon the ground of error therein arising from mere mistake of law. Nor need we determine whether errors in accounts so stated, closed and settled by payment, could be corrected otherwise than by regular judicial proceedings, instituted for that purpose by the United States against the appellee.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [60]
v.
CHARLES H. ROCKWELL.

(See S. C. Reporter's ed. 60-63.)

Naval officers, graduated pay of—Acts relating to—construction of—credit of previous service.

An officer of the Navy is entitled to have his previous service credited to the lowest grade held by him after the Act of 1870 took effect, having graduated pay attached to it by that Act, and not to a lower grade which was not graduated, in respect to pay, until after he ceased to hold it.

[No. 1030.]

Submitted Dec. 6, 1886. Decided Jan. 10, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. H. Garland**, *Atty. Gen.*, and **F. P. Dewees**, *Assistant Atty.*, for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellee, Rockwell served in the volunteer Navy as Acting Master from July 15, 1862, to December 16, 1862; as Lieutenant from December 16, 1862, to April 29, 1865; as Lieutenant-Commander from April 29, 1865, to December 8, 1865, when he was honorably discharged; and as Acting Master from November 19, 1866, to March 12, 1868; in the regular Navy, as Master from March 12, 1868, to December 18, 1868; as Lieutenant from December 18, 1868, to February 26, 1878; and as Lieutenant-Commander from February 26, 1878, to March 3, 1883. He was paid for his services in those

proceed, immediately after its organization, in the "erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi River, or elsewhere, as may be judged most expedient."

In *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 681 [29:527]—which involved the validity of a municipal ordinance granting to one Rivers the privilege of bringing water from the Mississippi River into his hotel, in the City of New Orleans, by means of mains and pipes laid in its streets—it was adjudged that so much of the Company's charter as gave it the exclusive privilege before mentioned was, within the meaning of the Constitution of the United States, a contract protected against impairment, in respect of its obligation, by that provision of the State Constitution of 1879 abolishing the monopoly features in the charters of all then existing corporations other than railroad corporations; consequently, that ordinance was void as interfering with the contract rights of the Company.

It was also decided that "The right to dig up and use the streets and alleys of New Orleans for the purpose of placing mains and pipes for supplying the City and its inhabitants with water is a franchise belonging to the State, which she could grant to persons or corporations upon such terms as she deemed best for the public interests;" and since "the object to be attained was a public one, for which the State could make provision by legislative enactment, the granting the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property." But it was also decided that, notwithstanding the exclusive privileges granted to the Company, "the power remains with the State or with the municipal government of New Orleans acting under legislative authority to make such regulations as will secure to the public the uninterrupted use of the streets as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require;" and that rights and privileges arising from contracts with the State are "subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations."

[66]

The St. Tammany Water Works Company was organized in 1882, under the general laws of Louisiana relating to corporations. Its articles of association declare the object of its incorporation to be "To furnish and supply the inhabitants of the City of New Orleans and other localities contiguous to the line of its works with an ample supply of pure, clear, and wholesome water from such rivers, streams, or other fountain sources as may be found most available for such purpose," and to that end to lay pipes and conduits and construct and maintain such system of water works as may be required for the purposes of its organization.

This Company being about to take active steps to obtain authority for bringing into New Orleans the waters of the Bogue Falaya River in the Parish of St. Tammany, and distributing the same by means of pipes, mains and conduits placed in the streets of that City parallel with those constructed by the New Orleans Water Works Company, the present suit was brought by the latter Corporation for the purpose of obtaining an injunction against all attempts by the appellant, its agents and employés to infringe upon the exclusive privileges granted to the appellee. The answer admits the material facts alleged in the bill, but insists that the charter of the appellee, so far as it granted the exclusive privileges in question, could be set aside, repealed, or abolished by the State, or by the Legislature, or by the municipal government of New Orleans, in the exercise of police functions. The controlling question is as to the effect of the before-mentioned provision of the State Constitution upon the exclusive rights granted to the plaintiff by its charter.

As the exclusive right of the appellee to supply the City of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi River, but embraced water from any other stream, it is impossible to distinguish this case in principle from that of the *New Orleans Water Works Co.* v. *Rivers*. Upon the authority of the latter case, it must be held that the carrying out by appellant of its scheme for a system of water works in New Orleans would be in violation of the rights of the appellee, and that the State Constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the National Constitution forbidding a State from passing any law impairing the obligation of contracts.

[67]

It is however contended, in behalf of the St. Tammany Water Works Company, that the water from the Bogue Falaya River is shown by the proof to be pure, uncontaminated by saline or organic matters to any appreciable extent, and to be more suitable for drinking, washing, cooking, manufacturing, and other purposes, than the water drawn from the Mississippi River and distributed through the City by the New Orleans Water Works Company. And upon these facts is based the suggestion that the people of New Orleans cannot be prevented, by the contract the appellee has with the State, from obtaining, through any lawful agency, such water as is most beneficial to their health or best adapted for business or public uses. Touching this and similar suggestions by counsel of the appellant, it is sufficient to say that no question arises in the present case as to whether the State or the municipal government of New Orleans may not, if the public health or the public comfort so require, compel the appellee, now having the exclusive right of supplying the City of New Orleans and its inhabitants with water distributed through pipes laid in the streets of that municipality (or if it refuses, employ other agencies), to supply water from some river or stream other than the Mississippi. No such action has been had either by the State or by the City, and, consequently, there was no substantial dispute between the plaintiff and the City. The latter has not given its assent to the use by the St.

[68] Tammany Water Works Company of the public streets for the distribution of water by means of pipes laid in them, nor has it, so far as the record shows, determined that the public health would be better protected, or the public comfort subserved, by supplying the people with water from the Bogue Falaya River rather than from the Mississippi River. These are matters which neither the appellant nor individual citizens may determine for the constituted authorities. In what mode such questions may be determined, so as to be binding upon the appellee, need not be considered until they actually arise in proper form.

The legal effect of the decree is only to prevent the St. Tammany Water Works Company, under any power it now has, from laying pipes, mains and conduits in and through the streets of New Orleans, for supplying that City and its inhabitants with water. It is, therefore, upon the authority of the former case. *Affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[1] CHARLES MALI, Consul of His Majesty the KING OF THE BELGIANS, AND JOSEPH WILDENHUS ET AL., *Appts.*,

v.

THE KEEPER OF THE COMMON JAIL of HUDSON COUNTY, NEW JERSEY.

(See S. C. "*Wildenhus' Case*," Reporter's ed. 1—19.)

International law—Treaty between the United States and Belgium—a felonious homicide committed on board a Belgian vessel in a port of the United States, a subject of local jurisdiction—review of various treaties—general rule, independent of treaty—habeas corpus.

1. Under the present Treaty between the United States and Belgium, whereby each nation is granted such local jurisdiction over its merchant vessels while in the ports of the other as may be necessary to maintain order on board, and in which is reserved to each nation the right to interfere if the disorder on board of a merchant vessel belonging to the other while in its ports is of such a nature as to disturb the public tranquillity, a felonious homicide, committed on board of a Belgian vessel in a port of the United States, is held to be a subject for the local jurisdiction, such a crime being of a character to awaken public interest and to affect the public at large, although committed below deck and in the presence of none but members of the crew.

2. It *seems* that, if a person charged with an offense committed on board of such a vessel in a port of the United States is improperly imprisoned by the local authorities, he may enforce his rights under the Treaty by writ of *habeas corpus* in any proper court of the United States.

[No. 1288.]

Argued Dec. 7, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the District of New Jersey. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **F. R. Coudert** and **Edward K. Jones**, for appellants:

The jurisdiction of Belgium is exclusive under the general rules of international law.

The general rule is well established that the vessels of a nation are to be considered as a part of its territory, and the persons on board of them are deemed to be within the jurisdiction of such nation, and are protected and governed by the laws of the country to which such vessels belong.

Vattel, L. of Nat. book 1, c. 19, § 216; Wheat. Elements Int. L. 3d ed. 157; 8th ed. § 106; 1 Kent, Com. 26; Halleck, Int. L. 172, 173; *Crapo* v. *Kelly*, 83 U. S. 16 Wall. 610 (21: 430); *Re Ah Sing*, 13 Fed. Rep. 286.

The general doctrine of international law is also in accordance with the established practice of the United States.

The action of our government, through its consuls at Antwerp and Marseilles, in the cases of *The Newton* and *The Sally*, in 1806, was soon afterwards followed by legislation affirming the principle of international law, declared and assented to by the two nations in those cases.

Act of March, 3, 1825, chap. 65; §§ 730, 5339, 5345 R. S.

Since the passage of the Act of 1825, numerous convictions have been had in federal courts for crimes committed on board American vessels in foreign ports.

See, among others, *U. S.* v. *Stevens*, 4 Wash. C. C. 547; *U. S.* v. *Roberts*, 2 N. Y. Legal Obs. 99; *U. S.* v. *Seagrist*, 4 Blatchf. 420; *U. S.* v. *Bennett*, 3 Hughes, 466.

The offense in question is exclusively cognizable by the authority of Belgium by virtue of treaties existing between that country and the United States.

We contend that the right of the Belgian Consul in the present case is, according to a fair and just interpretation, to be found in the first clause of the Treaty, under which this action is brought, conferring upon him the "exclusive charge of the internal order of the merchant vessels of his nation."

In construing a treaty, courts take into consideration the situation of the parties to it, the subject involved, and the intention of the parties, and, to ascertain this intention may consider the construction which the parties have given to it, and what has been their action under it.

U. S. v. *Payne*, 8 Fed. Rep. 883.

Where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal, the latter is to be preferred.

Hauenstein v. *Lynham*, 100 U. S. 483 (25: 628).

The federal courts have power to release the prisoners by writ of *habeas corpus*.

R. S. § 753. See also *N. Hampshire* v. *Louisiana*, 108 U. S. 76, 90 (27: 656, 661); *Holmes* v. *Jennison*, 39 U. S. 14 Pet. 540 (10: 579); *People* v. *Curtis*, 50 N. Y. 321.

Mr. **C. H. Winfield**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This appeal brings up an application made to [2] the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "Consul of His Majesty the King of the Belgians, for the States of New York and New Jersey, in the United States," for himself as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbo-

sich and Ostenmeyer from the custody of the Keeper of the Common Jail of Hudson County, New Jersey, and their delivery to the Consul, "to be dealt with according to the law of Belgium." The facts on which the application rests are thus stated in the petition for the writ:

"*Second.* That on or about the sixth day of October, 1886, on board the Belgian steamship 'Noordland' there occurred an affray between the said Joseph Wildenhus and one Fijens, wherein and whereby it is charged that the said Wildenhus stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterwards died.

"*Third.* That the said Wildenhus is a subject of the Kingdom of Belgium and has his domicil therein, and is one of the crew of the said steamship 'Noordland,' and was such when the said affray occurred.

"*Fourth.* That the said Fijens was also a subject of Belgium and had his domicil and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

"*Fifth.* That at the time said affray occurred the said steamship 'Noordland' was lying moored at the dock of the Port of Jersey City, in said State of New Jersey.

"*Sixth.* That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said Port of Jersey City was in nowise disturbed or endangered thereby.

[3] "*Seventh.* That said affray occurred in the presence of several witnesses, all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or near by.

"*Eighth:* Your petitioner therefore respectfully shows unto this honorable court that the said affray occurred outside of the jurisdiction of the said State of New Jersey.

"*Ninth.* But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police authorities of Jersey City, in said State of New Jersey, have arrested the said Joseph Wildenhus, and also the said Gionviennie Gobnbosich and John J. Ostenmeyer, of the crew of the said vessel (one of whom is a quartermaster thereof); and that said Joseph Wildenhus has been committed by a police magistrate, acting under the authority of the said State, to the common jail of the County of Hudson, on a charge of an indictable offense under the laws of the said State of New Jersey, and is now held in confinement by the keeper of the said jail; and that the others of the said crew arrested as aforesaid are also detained in custody and confinement as witnesses to testify in such proceedings as may hereafter be had against the said Wildenhus."

[4] Articles 8, 9 and 10 of a royal decree of the King of the Belgians, made on the 11th of March, 1857, relating to consuls and consular jurisdiction, are as follows:

"Art. 8. Our consuls have the right of discipline on Belgian merchant vessels in all the ports and harbors of their district.

"In matters of offenses or crimes they are to make the examination conformably to the instructions of the disciplinary and penal code of the merchant service.

"They are to claim, according to the terms of the conventions and laws in force, the assistance of the local authorities for the arrest and taking on board of deserting seamen.

"Art. 9. Except in the case where the peace of the port shall have been compromised by the occurrence, the consul shall protest against every attempt that the local authority may make to take cognizance of crimes or offenses committed on board of a Belgian vessel by one of the ship's company towards one, either of the same company, or of the company of another Belgian vessel.

"He shall take the proper steps to have the cognizance of the case turned over to him, in order that it be ultimately tried according to Belgian laws.

"Art. 10. When men belonging to the company of a Belgian vessel shall be guilty of offenses or crimes out of the ship, or even on board the ship, but against persons not of the company, the consul shall, if the local authority arrests or prosecutes them, take the necessary steps to have the Belgians so arrested treated with humanity, defended and tried impartially."

The application in this case was made under the authority of these articles.

Article XI of a Convention between the United States and Belgium "Concerning the rights, privileges and immunities of consular officers," concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881, 21 Stat. at L. 776, is as follows:

"The respective consuls general, consuls, vice consuls and consular agents shall have exclusive [5] charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.

"In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The claim of the Consul is that, by the law of nations, and the provisions of this Treaty, the offense with which Wildenhus has been charged is "solely cognizable by the authority of the laws of the Kingdom of Belgium." and that the State of New Jersey is without jurisdiction in the premises. The circuit court refused to deliver the prisoners to the Consul and remanded them to the custody of the jailer. 28 Fed. Rep. 924. To reverse that decision this appeal was taken.

By sections 751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the Constitution or a law or treaty of the United States;" and the ques-

tion we have to consider is whether these prisoners are held in violation of the provisions of the existing Treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by *Chief Justice* Marshall in *The Exchange*, 11 U. S. 7 Cranch, 144 [3: 296] "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *U. S.* v. *Diekelman*, 92 U. S. 520 [23: 742]; 1 Phill. Int. Law, 3d. ed. 483, § CCCLI; Twiss, Law of Nations in Time of Peace, 229, § 159; Creasy, Int. Law, [12] 167, § 176; Halleck, Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina* v. *Cunningham*, Bell, C. C. 72; *S. C.* 8 Cox, C. C. 104; *Regina* v. *Anderson*, 11 Cox, C. C. 198, 204; *S. C.* L. R. 1 C. C. 161, 165; *Regina* v. *Keyn*, 13 Cox, C. C. 403, 486, 525; *S. C.* 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

[13] The first of these Conventions entered into by the United States after the adoption of the Constitution was with France, on the 14th of November, 1788, 8 Stat. at L. 106, "For the purpose of defining and establishing the functions and privileges of their respective consuls and vice consuls," article VIII of which is as follows:

"The consuls or vice consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of *The Sally* and *The Newton* arose, an account of which is given in Wheaton's Elements of International Law, 3d ed. 158, and in 1 Phillimore's International Law, 3d ed. 484 and (2d ed.) 407. The Sally was an American merchant vessel in the Port of Marseilles, and The Newton a vessel of a similar character in the Port of Antwerp, then under the dominion of France. In the case of *The Sally*, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of *The Newton*, one seaman had made an assault on another seaman in the vessel's boat. In each case, the proper consul of the United States claimed exclusive jurisdiction of the offense, and so did the local authorities of the port; but the Council of State, a branch of the political department of the Government of France to which the matter was referred, pronounced against the local tribunals, "Considering that one of these cases was that of an assault committed in the boat of the American ship Newton, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship Sally upon one of the seamen for having [14] made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheaton, Elements Int. Law, 3d ed. 154. The case of *The Sally* was simply a quarrel between certain of the crew while constructively on board the vessel, and that of *The Newton* grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted to the consul by the treaty.

No other treaty or convention bearing on this subject, to which our attention has been called, was entered into by the United States until a Treaty with Sweden and Norway, on the 4th of September, 1816, 8 Stat. at L. 232, where it was agreed, by article 5, that "The consuls and their deputies shall have the right, as such, to act as judges and arbitrators in the differences which may arise between the captains and crews of the vessels of the nation whose affairs are entrusted to their care. The respect-

ive governments shall have no right to interfere in matters of this kind, except the conduct of the captain or crew shall disturb the peace and tranquillity of the country in which the vessel may be, or the consul of the place shall feel himself obliged to resort to the interposition and support of the executive authority to cause his decision to be respected and maintained. It being, nevertheless, understood that this kind of judgment or award shall not deprive the contending parties of the right which they have, on their return, to recur to the judicial authorities of their own country."

Substantially the same provision is found in Treaties or Conventions concluded with Prussia in 1828, art. X, 8 Stat. at L. 382; with Russia in 1832, art. VIII, 448; with Greece in 1837, art. XII, 504; with Hanover in 1840, art. VI, 556; with Portugal also in 1840, art. X, 564; with the Grand Duchy of Mechlenburg-Schwerin in 1847, art. IX, 9 Stat. at L. 916; with Oldenburg in 1847, 868; with Austria in 1848, art. IV, 946; with the Hanseatic Republics in 1852, art. I, 10 Stat. at L. 961; with the two Sicilies in 1855, art. XIX, 11 Stat. at L. 650; [15] with Denmark in 1861, art. I, 13 Stat. at L. 605; and with the Dominican Republic in 1867, art. XXVI, 15 Stat. at L. 487.

In a Convention with New Grenada concluded in 1850 the provision was this:

"They [the consuls, etc.] may cause proper order to be maintained on board vessels of their nation, and may decide on disputes arising between the captains, the officers, and the members of the crew, unless the disorders taking place on board should disturb the public tranquillity, or persons not belonging to the crew or to the nation in whose service the consul is employed; in which case the local authorities may interfere." Art. III, clause 8, 10 Stat. at L. 903.

Following this was a Convention with France, concluded in 1853, 10 Stat. at L. 996, article VIII of which is as follows:

"The respective consuls-general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not on any pretext interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

The same provision in substantially the same language was embraced in a Convention with Italy in 1868, article XI, 15 Stat. at L. 609; and in another with Belgium, also in 1868, article XI, 16 Stat. at L. 761. This Convention with Belgium continued in force until superseded by that of 1880-1, under which the present controversy arose.

The form of the provision found in the present Convention with Belgium first appeared in a Convention with Austria concluded in 1870. [16] article XI, 17 Stat. at L. 827, and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the Conventions with the German Empire in 1871, art. XIII, 17 Stat. at L. 927; with The Netherlands in 1878, art. XI, 21 Stat. at L. 668; with Italy in 1881, art. I, 22 Stat. at L. 832; with Belgium in 1881, as stated above; and with Roumania the same year, art. XI, 23 Stat. at L. 714.

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of *The Sally* and *The Newton* are illustrative of this position. That of *The Sally* related to the discipline of the ship, and that of *The Newton* to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the State which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board and to decide [17] disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the Convention with Belgium which we have now to consider. This Treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The Treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the Consul of Belgium exclusive jurisdiction over the offense which it is alleged has

been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the Treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the State of New Jersey for their protection. If the thing done—"the disorder," as it is called in the Treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within [18] its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the Treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the Port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Con- [19] vention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every State has sovereign jurisdiction throughout its territory;

"Considering that by the terms of article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the State of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every State is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law" (*droit commun*, the law common to all civilized nations), "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan, Diplomatie De La Mer, 4th ed. pp. 455, 456; Sirey (N. S.) 1859, p. 189.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD P. KIRBY, EXR., etc., *Appt.*, [130]

v.

LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, AND EXRS. of WILLIAM H. VANDERBILT, Deceased.

(See S. C. Reporter's ed. 130-140.)

Limitation of actions—New York Statutes—jurisdiction of the courts of the United States in equity, uniform and not subject to state legislation—fraud—time runs from discovery of.

1. The equity jurisdiction of the courts of the

United States is subject to neither limitation nor restraint by state legislation, and is uniform throughout the States of the Union.

2. Where the object of a bill is to obtain a complicated accounting, especially when concealed fraud is charged, a court of equity has jurisdiction.

3. Where relief is sought in equity on the ground of actual fraud, especially if such fraud has been concealed, time for commencing suit will not run against the plaintiff until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered.

4. A bill filed in the court below, to set aside certain settlements of accounts on the ground of fraud, nearly seven years after the discovery of the fraud is held to be barred by the Statutes of New York.

5. Under the New York Statute of September 13, 1883, allowing additional time for the commencement of actions by executors and administrators, it is held that only the actual time between the death of the testator and the grant of letters at the place of primary administration, and six months in addition thereto, can be excluded in computing the time within which action may be brought.

[No. 50.]

Argued Nov. 15, 16, 1886. Decided Jan. 10, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John C. Fay,** *George Norris* and *Joseph E. McDonald,* for appellant:

Courts of equity interfere to prevent the bar of the Statute of Limitation where it would be inequitable or unjust to enforce it; and in no case is it better established that they will do so than where the party invoking the bar has perpetrated a fraud.

Story, Eq. Jur. § 1521; *Booth* v. *Warrington,* 4 Brown, Par. Cas. 163; *Bailey* v. *Glover,* 88 U. S. 21 Wall. 347 (22: 638); *Stearns* v. *Page,* 48 U. S. 7 How. 819 (12: 928); *Prevost* v. *Gratz,* 19 U. S. 6 Wheat. 481 (5: 311); *Moore* v. *Greene,* 60 U. S. 19 How. 69 (15: 533); *Rosenthal* v. *Walker,* 111 U. S. 185 (28: 395); *Troup* v. *Smith,* 20 Johns. 33.

In *Payne* v. *Hook,* 74 U. S. 7 Wall. 425 (19: 260), this court held that the equity jurisdiction of the federal courts is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union.

See also *Green* v. *Creighton,* 64 U. S. 23 How. 90 (16: 419); *U. S.* v. *Howland,* 17 U. S. 4 Wheat. 108 (4: 526); *Robinson* v. *Campbell,* 16 U. S. 3 Wheat. 222 (4: 375).

Mr. **J. E. Burrill,** for appellees:

Although fraud is one of the grounds of equitable jurisdiction, it is not exclusive but concurrent with law; and equity will not interfere unless there be some special ground to justify it, and unless an adequate remedy at law does not exist.

1 Story, Eq. Jur. § 60, 184; *Foot* v. *Farrington,* 41 N. Y. 164; *Miller* v. *Scammon,* 52 N. H. 609; *Russell* v. *Clark,* 11 U. S. 7 Cranch, 69 (3: 271); *Newham* v. *May,* 13 Price, Exch. 749; *Learned* v. *Holmes,* 49 Miss. 290.

The Statute of Limitations applicable to a legal action cannot be avoided by changing the forum from law to equity when law might give relief.

Murray v. *Coster,* 20 Johns. 576; *Rundle* v. *Allison,* 34 N. Y. 184; *Kane* v. *Bloodgood,* 7 Johns. Ch. 90.

Whatever jurisdiction equity has is concurrent with law, and in such case equity will follow the statute which would have been enforced at law.

Godden v. *Kimmell,* 99 U. S. 201 (25: 431); *Foot* v. *Farrington,* 41 N. Y. 164.

Independently of the Statute of Limitations the laches apparent on the face of the bill is a bar to the action.

Brown v. *Buena Vista County,* 95 U. S. 157 (24: 422); *Wood* v. *Carpenter,* 101 U. S. 135 (25: 807); *Godden* v. *Kimmell, supra.*

There is no allegation in the bill that decedent had any interest in the transactions referred to, and from the nature of the contract it is clear that he had none, and that it was a contract which could not be performed by him. No personal liability, therefore, attaches to him or the contract.

Rathbon v. *Budlong,* 15 Johns. 1; *Stanton* v. *Camp,* 4 Barb. 274; *Many* v. *Beekman Iron Co.* 9 Paige, 188; *Randall* v. *Snyder,* 1 Lans. 165; *Bellinger* v. *Bentley,* 1 Hun, 562; *Bradley* v. *McKee,* 5 Cranch, C. C. 298; *Bank of Newburg* v. *Baldwin,* 1 Cliff. 521.

Mr. Justice **Harlan** delivered the opinion of the court:

This case was heard in the court below upon demurrers to an amended bill and to an amended bill in the nature of a supplemental bill. The demurrers were sustained and the bill dismissed, upon the ground that the suit was barred by the Statute of Limitations of the State of New York. [131]

The material facts admitted by the demurrer are as follows: the appellant, the plaintiff below, is the executor of John T. Alexander, who died, at his domicil in the State of Illinois, on the 21st of August, 1876. He received his letters testamentary from the proper court in that State on the 6th of September of the same year. On the 7th of April, 1880, ancillary letters were issued to him by the surrogate of the County of New York, in the State of New York. 2 R. S. N. Y. 2d ed. marg. p. 67, § 68.

This suit was brought April 9, 1880. Its object is to obtain a decree setting aside sundry settlements of accounts had by the firm of J. T. & G. D. Alexander & Co. (composed of John T. Alexander, G. D. Alexander, and William Fitch, and to be hereafter called Alexander & Co.) with certain railroad Corporations, defendants below, in reference to various business transactions between the parties. Those transactions arose under an agreement, partly written and partly verbal, entered into May 28, 1870, between those Corporations and Alexander & Co., relating to the shipment of horned cattle and hogs by the latter over the roads of the former between designated points, and at specified rates of freight. The agreement took effect June 10, 1870, and was to continue in force one year, during which period Alexander & Co. were not to ship horned cattle or hogs over any rival road between the points named. In the event there was a reduction of rates, Alexander & Co. were to have the benefit of the lowest rates between those points charged by either of the defendant Corporations or by any other rival corporation. The agreement contemplated settlements between the parties from time to time and the payment by Alexander & Co., on each shipment, of the rates specified in the agreement. But the [132]

amounts so paid, when in excess of the lowest rates charged by the defendant Corporations, or either of them, or by other rival corporations, were to be held by the defendants in trust for the shippers and repaid to the latter, by way of "drawbacks," on each occasion when the accounts between the parties were stated and settled.

These settlements were had monthly or oftener. At each of them Vanderbilt, the testator of the individual defendants, in behalf of the railroad Corporations, claimed to have peculiar facilities for obtaining information in reference to rates, and promised to keep Alexander & Co. (who had no means of obtaining such information) fully advised in the premises. In reply to specific inquiries addressed to him on the occasion of each of such settlements, he represented that the rates charged by his Companies to that firm were not higher than those charged by rival corporations. Relying upon such representations, Alexander & Co. consummated the various settlements upon the basis suggested by Vanderbilt. They, however, subsequently ascertained that the rates charged by the defendant Corporations as well as by rival corporations to shippers between the points named, and during the same period, were much lower than those charged Alexander & Co., and that the representations to the contrary by the defendant Corporations were knowingly false, and made with the intent to cheat and defraud said firm. The bill alleges that the truth as to what were the current rates for the period covered by the settlements was fraudulently concealed by the defendant Corporations from Alexander & Co.; and that said frauds were not, and could not have been, discovered by the latter until on or about April 16, 1878.

The settlements between the parties, it may be stated, covered more than two hundred shipments of cattle and hogs, the freights upon which aggregated nearly $350,000 or about [133] $9,000 per week, from June 10, 1870, to March 14, 1871, when the contract was canceled by mutual consent. Immediately thereafter the partnership of Alexander & Co. was dissolved and its affairs adjusted.

G. D. Alexander was adjudged to be a lunatic by the proper court in Illinois on the third day of April, 1872, and is still of unsound mind. A conservator of his estate was shortly thereafter selected, but in reference to that appointment the bill charges that it was a nullity, and that no valid appointment was made until July 3, 1880. As to Fitch, the remaining partner, he, on April 12, 1879, brought an action in one of the courts of New York for the purpose of enforcing the liability to him, individually, of the defendant Corporations and Vanderbilt, on account of the matters in this suit set forth; but by proceedings had after the commencement of this litigation his interest in the claim preferred in his own suit was sold, one Taylor becoming the purchaser thereof, and subsequently Fitch's suit was dismissed, by the procurement of the defendants, for want of prosecution. The plaintiff states that, at the time of Taylor's purchase, Fitch, by his laches, had lost any individual rights he might theretofore have had in said claim; and that Taylor had not succeeded to any substantial interest capable of being enforced herein He also avers that both Fitch and the present conservator of the estate of G. D. Alexander have declined, upon request, to unite as coplaintiffs in this suit.

It is further alleged by the plaintiff that, the receipted freight bills having been surrendered to the defendant Corporations at the time of the settlements with them, he has no means of ascertaining the amount justly due to said firm, by way of drawbacks, except from the freight bills, checks and vouchers in the possession or under the control of said Corporations.

The prayer of the bill is that the before mentioned settlements be opened and set aside; that a re-accounting be had in respect of all of said transactions; and that, upon final hearing, the plaintiff have a decree for the difference between the amount of "drawbacks" repaid to Alexander & Co. at the time of the settlements and the amounts which that firm were entitled to receive upon each settlement, with interest [134] thereon from the time they were respectively payable.

The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Jur. § 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted.

Did the circuit court err in adjudging that the suit was barred by the Statute of Limitations?

By the Code of Civil Procedure of New York in force prior to September 1, 1877, the period of six years was prescribed as the limitation for:

"1. An action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument.

* * * * *

"6. An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." [135] Voorhees' Code, 4th ed. p. 86, § 91.

The Code which went into operation September 1, 1877, prescribed the like limitation for actions upon contracts, obligations or liabilities, express or implied, other than judgments or sealed instruments; but, in place of subdivision 6 of section 91 of the old Code, was substituted the following:

"5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action is not deemed to have accrued until the discovery, by the plaintiff or the person under whom he claims,

of the facts constituting the fraud." Code, N. Y., as amended in 1877, § 382.

The circuit court deeming the jurisdiction in equity and at law to be concurrent in cases like this, was of opinion that the question of limitation is controlled by the local statute, and upon the authority of *Carr* v. *Thompson*, 87 N. Y. 160, adjudged that this action was not, within the meaning of section 382 of the Code, one "to procure a judgment, other than for a sum of money, on the ground of fraud;" and that, consequently, the cause of action accrued upon the commission of the alleged frauds (which was in 1871), and not at the date of their discovery, on the 16th of April, 1873. As this view is controverted by the appellant, and is the main ground upon which appellees rely for an affirmance of the judgment below, it must be examined.

It is not clear that the decision in *Carr* v. *Thompson* goes as far as the circuit judge supposed. That was an action against an agent, to recover moneys obtained from his principals and converted to his own use, by means of false and fictitious accounts, rendered from time to time, and which he represented to be correct and just. Fraud, although charged, was not regarded by the state court as the basis of the action. It was not deemed a suit to recover [136] damages for the fraud practiced, but one merely to recover damages for the violation of the agent's contract or obligation to account justly and honestly to his principals. The sole question, the state court said, presented by the complaint and answer, was whether the agent properly performed his duty. It also was careful to say: "It is to be observed that the complaint is not framed for the purpose of opening an account stated: it does not allege the existence of such an account as an obstacle to a recovery, which requires the aid of equity to remove; nor, indeed, does the answer set up any such defense." These remarks, in connection with the further declaration that the words "an action to procure a judgment, other than for a sum of money, on the ground of fraud," sufficiently described "a case in which judgment for an accounting is sought in addition to, and as a means of reaching, a judgment for money," lead us to doubt whether that court would hold, in a case like the present, that the time for commencing the action begins to run from the commission, not from the discovery, of the fraud.

Be that as it may, it is an established rule of equity as administered in the courts of the United States that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Meader* v. *Norton*, 78 U. S. 11 Wall. 442, 458 [20: 184, 187]; *Prevost* v. *Gratz*, 19 U. S. 6 Wheat. 481 [5: 311]; *Michoud* v. *Girod*, 45 U. S. 4 How. 503, 561 [11: 1076, 1102]; *Veazie* v. *Williams*, 49 U. S. 8 How. 149, 158 [12: 1025, 1028]; *Brown* v. *Buena Vista*, 95 U. S. 157 [24: 422]; *Rosenthal* v. *Walker*, 111 U. S. 190 [28: 397]; 2 Story, Eq. § 1521*a*; Ang. Lim. In *Bailey* v. *Glover*, 88 U. S. 21 Wall. 347 [22: 638], it was said that "In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." [137] In the same case it was said: "To hold that by concealing fraud, or by committing a fraud in a manner that concealed itself, until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure." See also *Traer* v. *Clews*, 115 U. S. 538 [29: 470]. These observations were made with reference to an Act of Congress prescribing a fixed time within which a suit between an assignee in bankruptcy and persons asserting adverse rights in property conveyed to such assignee should be brought. They are peculiarly applicable to a local statute which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and the laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several States, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different States in which they sit. In *United States* v. *Howland*, 17 U. S. 4 Wheat. 108, 115 [4: 526, 528] *Chief Justice* Marshall, speaking for the court, said that, as the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the States. The same view was expressed by *Mr. Justice* Curtis in his work on the jurisdiction of the courts of the United States (p. 13), when he observed that "The equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws." So, in *Payne* v. *Hook*, 74 U. S. 7 Wall. 430 [19: 261] it was said: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or [13 which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction of the courts of the United States is the same that

the High Court of Chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union." See also *Robinson* v. *Campbell*, 16 U. S. 3 Wheat. 221-2 [4: 375]; *Boyle* v. *Zacharie*, 31 U. S. 6 Pet. 658 [8: 536]; *Livingston* v. *Story*, 34 U. S. 9 Pet. 656 [9: 264]; *Stearns* v. *Page*, 48 U. S. 7 How. 819 [12: 928]; *Russell* v. *Southard*, 53 U. S. 12 How. 147 [13: 930]; *Neves* v. *Scott*, 54 U. S. 13 How. 272 [14: 142]; *Barber* v. *Barber*, 62 U. S. 21 How. 592 [16: 229]; *Green* v. *Creighton*, 64 U. S. 23 How. 105 [16: 423]. In view of these authorities, it is clear that the Statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should with due diligence have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every State. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the Statutes of Limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective States in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud.

[139] It results that even if this be not an action "to procure a judgment, other than for a sum of money, on the ground of fraud," within the meaning of the New York Code of Procedure, the limitation of six years, being applied here, does not, as adjudged below, commence from the commission of the alleged frauds.

Can the suit be maintained if the cause of action is to be deemed to have accrued from the discovery of the fraud? In *Burke* v. *Smith*, 88 U. S. 16 Wall. 401 [21: 365], where the local statute prescribed six years for the commencement of actions for fraud, the court, after observing that equity acts or refuses to act in analogy to the statute, said: "We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the Statute of Limitations, after he had knowledge of the fraud or after he was put upon inquiry with the means of knowledge accessible to him." Without inquiring whether the plaintiff was not guilty of such gross laches, in applying for relief, as deprived him of all right to the aid of equity, and giving him the benefit of the limitation of six years, to be computed from the discovery of the fraud, there seems to be even then no escape from the conclusion that the suit was not brought in time. Seven years, lacking only seven days, elapsed after the discovery of the frauds by the plaintiff's testator before suit was brought.

The plaintiff however contends that he had seven years within which to sue. This position is supposed to be justified by the New York Statute of September 13, 1883, which declares that "The time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators." 2 R. S. N. Y. 733, chap. 8, title 3, art. 1, § 9, Banks & Bros. ed.

If this statute has any application to a case where the cause of action accrued in the lifetime of the testator or intestate, it cannot avail the plaintiff. [140] It does not give the party claiming the benefit of its provisions both of the two periods of six months therein mentioned, but only such time, not exceeding six months, as elapsed after the death of the testator or intestate before the granting of letters, and the additional time of six months after the granting of letters. Here only sixteen days intervened between the death and the granting of letters testamentary. In computing the time for suing there must be excluded only these sixteen days and the six months immediately succeeding that period. In other words—applying the Statute of 1878 to the case in hand—the plaintiff had only six years, six months and sixteen days, after the discovery on April 16, 1878, of the alleged frauds, within which to sue; whereas, this action was not brought until seven years, lacking only seven days, after the alleged frauds were discovered.

We do not conceive that the time of granting the ancillary letters testamentary in New York can affect the question. The will having been proved in Illinois, the place of domicil, there was nothing to prevent the immediate issue of letters upon it in New York. By the laws of that State no further probate was necessary; a certified copy deposited in the office of the surrogate was all that was required. As this was in the executor's power to have done at any time, he can hardly claim that his own voluntary delay should extend the period which equity considers reasonable for the institution of a suit. 2 N. Y. R. S. 2d ed. marg. p. 67, § 82; Code Civil Proc. § 2695.

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

AUGUSTA B. ALLEN ET AL., *Plffs. in Err.*, [20]

v.

ST. LOUIS NATIONAL BANK.

(See S. C. Reporter's ed. 20-40.)

Principal and agent—factor no power at common law to pledge principal's property—difference between power to sell and to pledge—Statutes of Missouri affecting such transfers—effect of words "on the faith thereof," considered—usage—practice—judgment ordered for plaintiffs in error.

1. When a factor, holding property in trust for his principal, transfers it to a bank which has no-

tice of the capacity in which he holds it, the principal may assert his right in the property against the bank, either by independent suit, or by way of defense to an action by the bank against him.

2. By the common law a factor or agent for the sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbol of them, as by consigning them to him by a bill of lading in which he is consignee or indorsee.

3. Under the Statutes of Missouri a factor has no power to make a pledge of the goods of his principal by a transfer, without an indorsement in writing, of a bill of lading or warehouse receipt thereof.

4. The Missouri Statutes, to regulate transfers of warehouse receipts and bills of lading by indorsement, discussed and compared with the English and New York Factors' Acts, the words "on the faith thereof" being especially considered.

5. The plaintiff cannot set up usage which does not appear to have been known to the defendants, and which is contrary to law in that it undertakes to alter an express contract and to sustain a pledge by a factor of the goods of his principal to secure his own general balance of account to a third person.

6. Where a jury is waived, the court's finding of facts, whether general or special, has the same effect as the verdict of a jury; and although a bill of exceptions is necessary to present rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court are sufficient in law to support the judgment may be reviewed on a writ of error without a bill of exceptions, and a general judgment for defendants ordered, without new trial.

[No. 10.]

Argued April 9, 1886. Decided Jan. 10, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa. *Reversed and judgment ordered for plaintiffs in error.*

Action on promissory note made by plaintiffs in error, defendants below

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **John N. Rogers,** for plaintiffs in error:

The delivery by Dowell & Co. to the Bank of the bills of lading for the cotton, and afterwards of the warehouse receipts, running to bearer, for the purpose of securing the Bank upon its contemporaneous loans to Dowell & Co., were in law, as between these parties, pledges or hypothecations of the cotton.

Gibson v. *Stevens*, 49 U. S. 8 How. 384 (12: 1123); *St. Louis Nat. Bank* v. *Ross*, 2 Mo. App. 399; *Fourth Nat. Bank* v. *St. Louis Cotton Compress Co.* 11 Mo. App. 333; *Rice* v. *Cutler*, 17 Wis. 362.

A factor cannot pledge the goods of his principal, and can dispose of them only by sale according to the usual course of business, unless otherwise specially authorized.

1 Am. Lead. Cas. marg. 676 and cases there cited; *Warner* v. *Martin*, 52 U. S. 11 How. 209 (13: 667); *McCombie* v. *Davies*, 7 East, 5; *Martini* v. *Coles*, 1 Maule & S. 140; *Solly* v. *Rathbone*, and *Cockran* v. *Irlam*, 2 Maule & S. 298, 301; *Boyson* v. *Coles*, 6 Maule & S. 14; *Gray* v. *Agnew*, 95 Ill. 315; *Newbold* v. *Wright*, 4 Rawle, 195; *Rodriguez* v. *Heffernan*, 5 Johns. Ch. 417; *Merchants Nat. Bank* v. *Trenholm*, 12 Heisk. 520; *Kauffman* v. *Beasley*, 54 Tex. 563.

And no court has more strictly maintained these limitations on the factor's authority than the Supreme Court of Missouri.

Benny v. *Rhodes*, 18 Mo. 147; *Benny* v. *Pegram*, 18 Mo. 191; *Wheeler* v. *Given*, 65 Mo. 89.

A factor cannot pledge the principal's goods to the extent of his advances thereon.

McCombie v. *Davies*, and *Solly* v. *Rathbone*, *supra*; *Daubigny* v. *Duval*, 5 T. R. 604. See also *Queiros* v. *Trueman*, 8 Barn. & C. 342; *Graham* v. *Dyster*, 2 Stark, 21; *Urquhart* v. *M'Ivor*, 4 Johns. 103; *Warner* v. *Martin*, *supra*.

Evidence of a local usage or custom cannot be admitted to contradict or vary the general rules of law.

Barnard v. *Kellogg*, 77 U. S. 10 Wall. 383 (19: 987); *Oelricks* v. *Ford*, 64 U. S. 23 How. 49 (16:534); *Savings Bank* v. *Ward*, 100 U. S. 195 (25: 621); *Thompson* v. *Riggs*, 72 U. S. 5 Wall. 663 (18:704); *National Bank* v. *Burkhardt*, 100 U. S. 686 (25: 766).

It has been expressly held that a usage of factors to pledge their principal's goods is inadmissible, being against the rule of law.

Newbold v. *Wright*, 4 Rawle, 195.

A partner is no more entitled to dispose of the partnership goods to pay or secure his own debt, or that of another firm of which he is a member, than a factor is so to dispose of his principal's goods.

Rogers v. *Bachelor*, 37 U. S. 12 Pet. 221 (9: 1063); *Dob* v. *Halsey*, 16 Johns. 34; *Smith* v. *Burridge*, 4 Taunt. 684; *Brewster* v. *Mott*, 4 Scam. 378; *Kelley* v. *Greenleaf*, 3 Story, 93.

The Bank's case is in no way fortified by the Missouri Statutes in regard to bills of lading and warehouse receipts.

See *Steiger* v. *Third Nat. Bank*, 2 McCrary, 494; *S. C.* 6 Fed. Rep. 569; *Shaw* v. *R. R. Co.* 101 U. S. 557 (25: 892).

The Bank can derive no aid from either section of the Act of 1869, because neither the bills of lading nor the warehouse receipts for the cotton are found to have been transferred to it by written indorsement thereon.

Erie & Pac. Dispatch Co. v. *St. Louis Cotton Compress Co.* 6 Mo. App. 172; *Fourth Nat. Bank* v. *Same*, 11 Mo. App. 333; *Smith* v. *Sac County*, 78 U. S. 11 Wall. 139 (20: 102).

Messrs. **James Hagerman** and **Frank Hagerman,** for defendant in error:

There was no conversion so as to make the Bank liable. Consignors' failure to demand the goods while in the hands of the Bank defeats their claim.

Roach v. *Turk*, 9 Heisk. 708.

The demand notes of J. H. Dowell & Co. having been paid by check of the latter on their deposit account with the Bank, after the sale of the cotton, such payment is valid and effectual, although Dowell & Co. may not have been authorized to pledge, in the first instance, the bills of lading and warehouse receipts as security for such demand notes.

The relative obligations between a bank and its depositing customers are simply those of debtor and creditor.

Foley v. *Hill*, 2 H. L. Cas. 28; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82; *Boyden* v. *Bank of Cape Fear*, 65 N. C. 13; *Allen* v. *Fourth Nat. Bank*, 5 Jones & S. 187; *Buchanan F. Oil Co.* v. *Woodman*, 1 Hun, 639; *Matter of Franklin Bank*, 1 Paige, 249; *Phœnix Bank* v. *Risley*, 111 U. S. 125 (28: 374); *Thompson* v. *Riggs*, 72 U. S. 5 Wall. 678 (18: 707); *Marine Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 252 (17: 785); *Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152 (19: 897); *Oulton* v. *Savings Inst.* 84 U. S. 17 Wall. 109 (21: 618).

When the property was sold, the factor became the debtor of the consignors only.

Vail v. *Durant*, 7 Allen, 408; *Clark* v. *Moody*, 17 Mass. 145.

The usage and custom at St. Louis make the transaction valid.

Laussatt v. *Lippincott*, 6 Serg. & R. 386: *S. C.* 1 Am. Lead. Cas. Hare & Wall. ed. 636; *Bowie* v. *Napier*, 1 McCord, 1; *Martini* v. *Coles*, 1 Maule & S. 147.

An authority to sell is authority to deal according to the usage of trade.

Evans v. *Potter*, 2 Gall. 13; Story, Ag. § 113.

Allen & Dowell, through Dowell, authorized the transactions now called in question and are concluded by them.

Locke v. *Lewis*, 124 Mass. 1.

The Missouri Statutes authorize and validate the transactions between Dowell & Co. and the Bank, so far as the rights of the Bank are concerned.

[30] *Mr. Justice* **Gray** delivered the opinion of the court:

When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has the same effect as the verdict of a jury; and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are sufficient in law to support the judgment, may be reviewed on writ of error without any bill of exceptions. Act of March 3, 1865, chap. 86, § 4, 13 Stat. at L. 501; Rev. Stat. §§ 649, 700; *French* v. *Edwards*, 88 U. S. 21 Wall. 147 [22:534]; *Ex parte French*, 91 U. S. 423 [23:249]. The question whether the facts found by the court in the case at bar are sufficient to support the judgment below includes the several questions of law affecting the merits of the case. That judgment is for more than $5,000, which is sufficient to give this court jurisdiction in error. Act of February 16, 1875, chap. 77, § 3, 18 Stat. at L. 316. It is therefore unnecessary to consider whether those questions are duly stated in the certificate of division of opinion, within the rule affirmed in *Williamsport Bank* v. *Knapp*, 119 U. S. 357 [*ante*, 446].

The leading facts of the case, as found by the circuit court, are as follows:

The original action was on a promissory note made by the defendants, payable to the order of J. H. Dowell & Co., and by them indorsed to the plaintiff Bank. J. H. Dowell & Co. were a partnership of cotton factors at St. Louis, in which Dowell was the active and managing partner. Dowell was also a partner with the defendants, under the name of Allen & Dowell, in the working of a cotton plantation in Arkansas.

The note in suit was made and delivered by the defendants to the payees, their factors, to enable them to raise funds to furnish supplies for working that plantation, and under an agreement between the parties that the note should [31] be taken up and paid by the factors out of the proceeds of the cotton crop of the plantation for the coming season, when received and sold by them. That crop was consigned to the factors under that agreement, and its proceeds were more than sufficient to pay this note and all other charges of the factors. It is not doubted that upon these facts the makers would have a complete defense to the note in the hands of the payees.

But before the maturity of the note, the payees had it discounted by, and indorsed and delivered it to the plaintiff Bank, with which they kept their deposit account, and of which they from time to time borrowed large sums of money. As soon as they received the bills of lading of cotton consigned to them as factors by the defendants or by other persons, they delivered those bills to the Bank, which thereupon gave them a credit, in their deposit account, of $40 for each bale, and took their note for the amount, payable on demand, with interest. On the arrival of the cotton it was delivered to warehousemen, who gave receipts undertaking to deliver it to bearer, and these receipts were delivered to the Bank in exchange for the bills of lading, which were surrendered and canceled. There was no evidence that either the bills of lading or the warehouse receipts were indorsed in writing. The Bank knew that the payees of the note in suit were factors, and that they held the cotton as such. It did not know and made no inquiry as to the ownership of any of the cotton, or the dealings of the factors with the owners, or the state of accounts between them.

The cotton was sold in the following manner: the factors negotiated sales by means of samples, and fixed the price and other terms of sale. The Bank received the whole price from the purchasers, and delivered to them the warehouse receipts, and credited the factors with the amount received, but at the same time and as part of the same transaction, required them to draw, and they did draw and deliver to the Bank, their checks for the amount of their demand notes held by the Bank. After all the cotton had been sold, there was a large balance of account due from the factors to the Bank.

The substance of the transaction between the factors and the Bank in regard to the cotton was that the factors delivered the bills of lading and warehouse receipts to the Bank, to secure the repayment of money lent them by the Bank, and thereby made a pledge of the cotton to secure their own debt; *Ins. Co.* v. *Kiger*, 103 U. S. 352, 356 [26: 433, 434]; and that the Bank sold, on terms negotiated by the factors, the cotton so pledged to it, and received the price from the purchasers. The notes and checks which passed between the factors and the Bank were but forms to carry out the main purpose of the transaction between them, and did not change its nature or effect. [32]

By the common law, a factor or agent for sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbol of them, as by consigning them to him by a bill of lading in which he is consignee or indorsee. 2 Kent, Com. 625; *Kinder* v. *Shaw*, 2 Mass. 398; *Warner* v. *Martin*, 52 U. S. 11 How. 209, 224 [13: 667, 673]; *Phillips* v. *Huth*, 6 M. & W. 572, 596; *Cole* v. *Northwestern Bank*, L. R. 10 C. P. 354, 363. And such was the law of Missouri before the passage of any statute upon the subject. *Benny* v. *Rhodes*, 18 Mo. 147; *Benny* v. *Pegram*, 18 Mo. 191.

The essential difference between a power to sell and a power to pledge is well brought out

in a recent case in the House of Lords by *Lord Chancellor* Selborne, who said: "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money; but when those goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first; namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title un-
[33] accompanied by any indebtedness, to their full equivalent in money." *City Bank* v. *Barrow*, L. R. 5 App. Cas. 664, 670.

The weight and bearing of the cases cited at the bar, upon the construction of the Statutes of Missouri, annexed to the finding of facts, cannot be properly appreciated without keeping in mind the provisions of the various statutes under which those cases arose.

The English Factors' Act of 6 Geo. IV., c.94, passed in 1825, enacted in section 2 that any person intrusted with and in possession of any bill of lading, warehouse receipt or other like document, should be deemed and taken to be the true owner of the goods described therein, so far as to give validity to any contract made by him with other persons for the sale or disposition of the goods, or for the deposit or pledge thereof as a security for advances made by them "upon the faith of such several documents or either of them;" provided such persons had no notice, by such documents or otherwise, that the person intrusted as aforesaid was not the actual and *bona fide* owner of the goods.

The New York Factors' Act of 1830, chap. 179, based upon the Act of 6 Geo. IV, provided in section 8 that every factor or other agent intrusted with the possession of any bill of lading, custom-house permit or warehouse-keeper's receipt for the delivery of merchandise, and every such factor or agent not having the documentary evidence of title, but intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, should be deemed to be the true owner thereof, so far as to give validity to any contract made by him with any other person for the sale or diposition of the merchandise, for any advances made by such other person "upon the faith thereof." It will be observed that this section did not in terms repeat the proviso of the corresponding section of the English Act.

But before the enactment in Missouri of any of the statutes cited in argument, the construction of this section of the New York Statute had been settled, by decisions of the highest courts of that State and of this court, to be that the words "on the faith thereof" were not to
[34] be referred to "merchandise," or to its symbols, but to the words "shall be deemed to be the true owner thereof." In the leading case, *Mr. Justice* Bronson, speaking for *Chief Justice* Nelson, *Mr. Justice* Beardsley and himself, said: "The obvious meaning is that the factor or other agent who has been entrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him 'upon the faith thereof;' that is, upon the faith, induced by the usual indicia of title, that he was the true owner of the property. The second section of the British Statute, which answers very nearly to the third section of our own, contains a proviso which expressly saves the rights of the true owner where the pledgee had notice that he was dealing with an agent; and our statute, though framed in a different manner, was evidently designed to produce the same result. It is impossible to suppose that the Legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances knew that he was not dealing with the true owner." *Stevens* v. *Wilson* (1844), 6 Hill, 512, 514; *S. C.* in Court of Errors (1846), 3 Denio, 472; *Warner* v. *Martin* (1850), 52 U. S. 11 How. 209, 228 [13: 667, 674]; *Covell* v. *Hill* (1852), 6 N. Y 374, 380; *Cartwright* v. *Wilmerding* (1862), 24 N. Y. 521, 534; *Dows* v. *Greene* (1862), 24 N. Y. 638, 642. See also *Howland* v. *Woodruff* (1875), 60 N. Y. 73, 79, 80; *First Nat. Bank* v. *Shaw* (1874), 61 N. Y. 283, 301.

If the Legislature of Missouri had adopted the words of that provision of the New York Factors' Act, the meaning of which had been thus settled on full consideration by the highest courts of that State and by this court, there would be the strongest ground for holding, in accordance with a familiar canon of construction, that it had enacted those words with that meaning. *Cathcart* v. *Robinson*, 30 U. S. 5 Pet. 264, 280 [8: 120, 126]; *McDonald* v. *Hovey*, 110 U. S. 619, 628 [28: 269, 271]; *Commonwealth* v. *Hartnett*, 3 Gray, 450; *Scruggs* v. *Blair*, 44 Miss. 406; *Wiesner* v. *Zawn*, 39 Wis. 188, 205.

But the Statute of Missouri of March 4, 1869, differs widely, in language and in purpose, [35
from the New York Factors' Act of 1830, and was apparently derived, through sections 6 and 9 of the Missouri Statute of March 10, 1868, from the Statute of New York of 1858, chap. 326, entitled "An Act to Prevent the Issue of False Receipts, and to Prevent Fraudulent Transfers of Property, by Warehousemen, Wharfingers and Others," as amended by the Statute of that State of 1859, chap. 353, extending its provisions to bills of lading. None of these provisions of the Missouri Statutes are limited or even addressed to factors or other agents authorized to sell the goods of their principals, and intrusted for that purpose with the possession either of the goods, or of warehouse receipts, bills of lading or other similar documents in which such agents are named as consignees. But their leading object is to regulate the manner and effect of transferring warehouse receipts and bills of lading by indorsement.

By section 6 of the Statute of Missouri of 1868 (following almost word for word the Stat-

utes of New York of 1858, chap. 326, § 6, and 1859, chap. 353), it was enacted that warehouse receipts or bills of lading "May be transferred by endorsement thereon, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce or commodity, therein specified, so far as to give validity to any pledge, lien, or transfer, made or created by such person or persons," that is, by the indorsee before mentioned; and by section 9, warehouse receipts and bills of lading were made "negotiable by endorsement in blank, or by special endorsement, in the same manner and to the same extent as bills of exchange and promissory notes." Missouri Laws 1868, pp. 12, 13.

By section 3 of the Statute of 1869, those sections of the Statute of 1868 are repealed. But section 1 of the later statute substantially re-enacts section 9 of the earlier one, substituting for the words "by endorsement in blank or by special endorsement," the words "by written endorsement thereon and delivery," and omitting the words "and to the same extent;" and section 2 re-enacts section 6, with the substitution, for the words "by endorsement thereon," [36] of the words "by endorsement in writing thereon, and the delivery thereof so endorsed," and, for the words "by such person or persons," of the words "thereby, as on the faith thereof." Missouri Laws 1869, p. 91.

The principal provisions of the Statute of 1869 then, as to all warehouse receipts and bills of lading (except those which have the words "not negotiable" plainly written or stamped upon their face), are, first, that they are "made negotiable by written endorsement thereon and delivery, in the same manner as bills of exchange and promissory notes;" and, second, that any person "to whom the same may be transferred shall be deemed and held to be the owner of the goods," "so far as to give validity to any pledge, lien or transfer, given, made or created thereby, as on the faith thereof."

The first provision, while it doubtless gives the indorsee the right to sue thereon in his own name, does not, for the reasons fully stated by *Mr. Justice* Strong in delivering the judgment of this court in *Shaw* v. *R. R. Co.* 101 U. S. 557 [25: 892], attach to such an indorsement of the symbol of property the same effect which the common law gives to the indorsement of a bill of exchange or promissory note for the payment of a sum of money, nor confer upon persons making, upon a bill of lading indorsed in blank by the owner, an advance of money to a subsequent indorser whom they have reason to believe not to be the owner, the right to hold the goods against the true owner.

The second provision does not appear to have been brought to the notice of this court in that case, and presents more difficulty. It differs from the provision of the Factors' Act of New York, construed by the courts of that State and by this court in the cases before cited, in several important particulars: 1. Any person "to whom the same may be transferred" (instead of any person by whom it is transferred) "shall be deemed and held to be the owner." 2. The ensuing qualification is, "so far as to give validity to any pledge, lien or transfer, given, made or created thereby," which last word cannot possibly be referred to anything but the transfer aforesaid. 3. The words "as on the faith thereof" followed directly afterwards, without any intermediate mention of advances made by the transferee. In short, the New York Factors' Act declares that any agent entrusted with the possession of [37] goods, or of the symbol thereof, shall be deemed to be the true owner, so far as to give validity to a pledge made by him to another person for advances made by the latter "on the faith thereof;" but the Missouri Statute only declares that an indorsee of the symbol of property shall be deemed to be the owner, so far as to give validity to any pledge made to him by such indorsement "as on the faith thereof." The difficulty arises from the introduction of the words "on the faith thereof," borrowed from the Factors' Acts, into a statute relating to the negotiability of warehouse receipts and bills of lading, without sufficient regard to the difference in the terms and the objects of the two classes of statutes.

It may well be that, upon a view of the whole provision, it protects only *bona fide* indorsees. *Whitlock* v. *Hay*, 58 N. Y. 484, 487; *Steiger* v. *Third Nat. Bank*, 2 McCrary, 494, 498. But it is by no means clear that the mere fact that the indorsee of the bill of lading or warehouse receipt knows that the indorser is a factor and holds the goods as such is sufficient proof of bad faith. Under the English Factors' Act of 5 & 6 Vict. c. 39, extending the provisions of the Act of 6 Geo. IV, and protecting those advances only, which are "made *bona fide* and without notice that the agent making" the pledge "has not authority to make the same, or is acting *mala fide* in respect thereof against the owner" of the goods, it has been held by the highest authorities that knowledge that the agent making the pledge is a factor, without further notice that he is acting *mala fide* and beyond his authority, does not deprive the pledgee of the protection of the statute. *Navulshaw* v. *Brownrigg*, 1 Sim. N. S. 573, and *S. C.* 2 D. M. & G. 441; *Vickers* v. *Hertz*, L. R. 2 H. L. Sc. 113; *Kaltenbach* v. *Lewis*, L. R. 10 App. Cas. 617. Yet it may be doubted whether receiving, from persons known to be factors and to hold property as such, a pledge of the symbols of the property, to secure the payment of the general balance of their bank account with the pledgee, is consistent with good faith.

We have considered the question of the effect of the words "on the faith thereof," as used in [38] Missouri and elsewhere, at some length, because of the large space devoted to it in the arguments of counsel, and in order to put the whole matter in a clearer light. But it is not necessary to express a decisive opinion upon the meaning of those words, as they stand in the Missouri Statute of 1869, because upon a narrower ground it is quite clear that that statute affords no protection to the plaintiff.

That statute applies only to transfers of warehouse receipts and bills of lading by "endorsement in writing thereon and the delivery thereof so endorsed." The finding of facts contains this statement: "It is not shown whether or not the bills of lading or the warehouse receipts or any of them were endorsed in writing by J. H. Dowell & Co., or by any

one, when transferred to the Bank, there being no evidence on this specific matter." The want of any evidence upon this point is perhaps to be explained by the facts, also found and stated, that upon the delivery of the warehouse receipts to the Bank the bills of lading were surrendered and canceled, and that the warehouse receipts ran to bearer, and were therefore probably not indorsed. But whatever be the explanation, the fact remains that it was not proved, and cannot be presumed, that either the bills of lading or the warehouse receipts were indorsed in writing, as required by the statute; and no better title passes by a transfer of the symbols without such indorsement than by a delivery of the goods which they represent. *Rice* v. *Outler*, 17 Wis. 362, 369; *Hirschorn* v. *Canney*, 98 Mass. 149; *Erie & Pacific Dispatch Co.* v. *St. Louis etc. Co.* 6 Mo. App. 172; *Fourth Nat. Bank* v. *St. Louis etc., Co.* 11 Mo. App. 333.

The decision in *Price* v. *Wisconsin F. & M. Ins. Co.* 43 Wis. 267, on which the plaintiff much relied, was based both upon a warehouse receipt Act differing from that of Missouri in allowing the documents to be transferred "by delivery, with or without endorsement," and in not containing the words "as on the faith thereof;" and also upon other grounds inconsistent with the judgments of this court in *Warner* v. *Martin*, and *Shaw* v. *R. R. Co.* before cited.

[39] The Statute of Missouri of March 28, 1874, affixing a heavy penalty to the negotiation or pledge of bills of lading or warehouse receipts by an agent or consignee, without the written authority of the owner or consignor, does not change the law as to the validity of the transfer as between individuals. A transfer by an agent, that before was valid as between his principal and his transferee, is not invalidated by the statute. *Gardner* v. *Gager*, 1 Allen, 502. And with even stronger reason a transfer that was wholly invalid before is not rendered valid by being made a criminal offense. The proviso that any consignee or agent, lawfully possessed of a bill of lading or warehouse receipt, may pledge it to the extent of raising sufficient means to pay charges for storage or shipment, or for advances drawn for by the owner or consignor, has no application to this case; because this pledge was not made for either of those purposes, but to secure the factor's own debt to the pledgee.

Factors having no power, by the law of Missouri, to make a pledge of the goods of their principals by a transfer, without indorsement in writing, of the bills of lading or warehouse receipts, the finding of the circuit court, that the transactions between the factors and the plaintiff "were all according to the general usage of trade between banks and cotton factors at St. Louis," cannot aid the plaintiff; because the usage attempted to be set up was not shown to have been known to the defendants or to other owners of cotton; and because it was contrary to law, in that it undertook to alter the nature of the contract between the factors and their principals, which authorizes them to sell, but not to pledge, and in that it would sustain a pledge by a factor of the goods of several principals to secure the payment of his own general balance of account to a third person. *Barnard* v. *Kellogg*, 77 U. S. 10 Wall. 383 [19 : 987]; *Irwin* v. *Williar*, 110 U. S. 499 [28 : 225]; *Newbold* v. *Wright*, 4 Rawle, 195; *Lehman* v. *Marshall*, 47 Ala. 362; *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99; *S. C.* 3 Scott, 521, and 2 Hodges, 150; *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

Nor is the further fact found that Dowell, the active member of the firm of J. H. Dowell & Co., the factors, was also a partner with the defendants in the working of the plantation at all material; because he had not been held out by the defendants as the owner of the property, or as authorized by them to dispose of it otherwise than as a factor, and was not understood by the plaintiff to be acting in any other capacity. *Rogers* v. *Batchelor*, 37 U. S. 12 Pet. 221 [9 : 1068]; *Locke* v. *Lewis*, 124 Mass. 1. [40]

Although the general relation of a bank to its depositor is that of debtor and creditor, yet when, as in this case, a factor, holding property in trust for his principal, transfers it to a bank which has notice of the capacity in which he holds it, the principal may assert his right in the property against the bank, either by independent suit, or by way of defense to an action by the bank against him. The defendants in this case were therefore entitled to have the proceeds of their property, so received by the plaintiff, applied to the payment of the note in suit. *National Bank* v. *Ins. Co.* 104 U. S. 54 [26 : 693]; *Baker* v. *New York Nat. Exch. Bank*, 100 N. Y. 31; *St. Louis Bank* v. *Ross*, 9 Mo. App. 399. As those proceeds are found to have been more than sufficient to pay and satisfy this note and all other charges of the factors against the defendants, the plaintiff cannot maintain this action.

All the facts of the case being ascertained by the special finding of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants. *Fort Scott* v. *Hickman*, 112 U. S. 150 [28 : 636].

Judgment reversed, and case remanded to the Circuit Court, with directions to enter judgment for the original defendants.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

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[68]

JOHN HAYES, *Plf. in Err.*,

v.

STATE OF MISSOURI.

(See S. C. Reporter's ed. 68-72.)

Constitutional law—construction of Fourteenth Amendment—equal protection of the laws—number of peremptory challenges to jurors in criminal cases, a matter within legislative discretion, and may vary in different communities—Missouri Statute.

1. The Fourteenth Amendment does not prohibit legislation which is limited in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

2. The power of the Legislature of a State to prescribe the number of peremptory challenges in criminal cases is limited only by the necessity of

having an impartial jury. The number of such challenges is a matter of legislative discretion, and may vary according to the condition of different communities, and the difficulties in each of securing intelligent and impartial jurors.

3. The accused is entitled to an impartial jury, and if such a jury is obtained from those who remain, his constitutional right is maintained.

4. The provision of the Revised Statutes of Missouri allowing the State, in capital cases, fifteen peremptory challenges in cities of over 100,000 inhabitants, instead of eight as in other parts of the State, is a valid exercise of legislative discretion.

[No. 1261.]

Submitted Jan. 3, 1887. Decided Jan. 17, 1887.

IN ERROR to the Supreme Court of the State of Missouri. Reported below, 81 Mo. 574. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Jeff. Chandler**, for plaintiff in error:

The plaintiff in error was deprived of the equal protection of the laws, by being denied an advantage which the law would have extended to him had he been tried in any other part of the State.

Re Jilz, 3 Mo. App. 243; *State* v. *Hays*, 81 Mo. 586.

While the State may prescribe by law the relative number of peremptory challenges granted to either party in criminal prosecutions, such a law, as intimately affecting the administration of justice must, to be valid or constitional, operate equally upon every citizen of the State.

Re Jilz, 3 Mo. App. 246.

By this statute, 1 Mo. R. S. § 1902, the prosecution is primarily permitted to set aside fifteen, it may be, of the very best men on the panel, some of whom the defendant might prefer as jurors to try his cause, thus depriving him of his right of choice to at least seven qualified jurors to which he would be entitled under the equal operation of the general law.

Generally and necessarily, an enlargement of the number of peremptory challenges allowed the State in capital cases detracts from the advantages of the accused, and magnifies his danger, while at the same time it multiplies the chances of the State for conviction.

Mr. **B. G. Boone**, *Atty-Gen. of Missouri*, for defendant in error:

Section 1902, Revised Statutes of Missouri, is not a special law. Plaintiff in error was not denied the equal protection of the law by reason of its existence.

State v. *Tolle*, 71 Mo. 650; *State* v. *Herrmann*, 75 Mo. 340; *Rutherford* v. *Jeddens*, 82 Mo. 388.

Peremptory challenges of jurors are under legislative control.

Stokes v. *People*, 53 N.Y. 164; *Walter* v. *People*, 32 N. Y. 147; *Commonwealth* v. *Walsh*, 124 Mass. 32; *Hartzell* v. *Commonwealth*, 40 Pa. 462; *Jones* v. *State* and *Boon* v. *State*, 1 Ga. 610, 618; *Hudgins* v. *State*, 2 Ga. 178; *State* v. *Wilson*, 48 N. H. 398; *Commonwealth* v. *Dorsey*, 103 Mass. 412.

The constitutionality of statutes regulating challenge, when questioned, has uniformly been upheld.

Hartzell v. *Commonwealth*, 40 Pa. 462; *Walston* v. *Commonwealth*, 16 B. Mon. 15; *Jones* v. *State*, *Boon* v. *State* and *Hudgins* v. *State*, *supra*.

[69] *Mr. Justice* **Field** delivered the opinion of the court:

The Revised Statutes of Missouri provide that, in all capital cases, except in cities having a population of over 100,000 inhabitants, the State shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen. Rev. Stat. Mo. §§ 1900, 1902.

The plaintiff in error, John Hayes, was indicted in the Criminal Court of St. Louis, a city of over 100,000 inhabitants, by its grand jury, for the crime of murder in shooting and killing one Mueller, in that city, on the 26th of August, 1881; and was tried in April, 1882, and convicted of murder in the first degree. A new trial having been obtained from the Supreme Court of the State, he was again tried in January, 1885, and convicted, as on the first trial, of murder in the first degree. Judgment of death followed. On appeal to the Supreme Court of the State, the judgment was affirmed, and the case is brought before us on error, upon the single ground that—by the law of Missouri providing that, in capital cases, in cities having a population of over 100,000 inhabitants, the State shall be allowed fifteen peremptory challenges to jurors, whilst elsewhere in Missouri the State is allowed in such cases, only eight peremptory challenges—the accused is denied the equal protection of the laws enjoined by the Fourteenth Amendment of the Constitution of the United States. When the jurors were summoned for the trial, and before any peremptory challenges were made by the State, the accused moved the court to limit the State's peremptory challenges to eight, objecting to its being allowed more than that number. But the motion was overruled, and the accused excepted. And on the trial, against his protest and objection, the State challenged, peremptorily, fifteen of the forty-seven qualified jurors.

The Constitution of Missouri, and, indeed, of every State of the Union, guarantees to all persons accused of a capital offense, or of a felony of lower grade, the right to a trial by an impartial jury, selected from the county or city where the offense is alleged to have been committed; and this implies that the jurors shall be free from all bias for or against the accused. [70] In providing such a body of jurors the State affords the surest means of protecting the accused against an unjust conviction, and at the same time of enforcing the laws against offenders meriting punishment. To secure such a body numerous legislative directions are necessary, prescribing the class from whom the jurors are to be taken, whether from voters, taxpayers and freeholders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which their selection is to be made; the objections that may be offered to those returned and how such objections shall be presented, considered, and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the trial; the form and presentation of their verdict; and many other particulars. All these, it may be said in general, are matters of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the Legislature, but is among its highest duties. It is to be remem-

bered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held.

Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted.

The number of such challenges must necessarily depend upon the discretion of the Legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control. *Stokes* v. *People*, 53 N.Y. 164; *Walter* v. *People*, 32 N.Y. 147, 159; *Commonwealth* v. *Dorsey*, 103 Mass. 412, 418.

Originally, by the common law, the Crown could challenge peremptorily without limitation as to number. By Act of Parliament [71] passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and if no sufficient cause was shown, the jury was completed from them.

In this country the power of the Legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. In our large cities there is such a mixed population; there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors. And to that end it may be a wise proceeding on the part of the Legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642 [29:755]. The right to challenge is the right to reject, not to select a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges, and it does not appear that he exhausted them.

The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred [72] and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." 113 U. S. 27, 32 [28:923, 925.]

In *Missouri* v. *Lewis*, 101 U. S. 22 [25:989], it was held that the last clause of the Amendment as to the equal protection of the laws was not violated by any diversity in the jurisdiction of the several courts which the State might establish, as to subject matter, amount or finality of their decisions, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment.

Allowing the State fifteen peremptory challenges in capital cases tried in cities containing a population of over 100,000 inhabitants is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size, which does not exist in other portions of the State. So far from defeating, it may furnish the necessary means of giving that equal protection of its laws to all persons, which that Amendment declares shall not be denied to any one within its jurisdiction.

We see nothing in the legislation of Missouri which is repugnant to that Amendment.

The judgment of the Supreme Court of that State, therefore, is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** dissented.

JAMES HUNTINGTON ET AL., Assignees [73]
of WILLIAM A. SAUNDERS, *Appts.*,

v.

MARY P. SAUNDERS AND WILLIAM A. SAUNDERS.

(See S. C. Reporter's ed. 78-82.)

Pleading—bill to charge wife of bankrupt with money received from him—demurrer, sustained.

A bill which seeks to charge the wife of a bankrupt with money received from him, but fails to name any fund now existing and does not seek a discovery, answer under oath being expressly waived, held bad on demurrer.

[No. 111.]

Argued for appellants, the court declining to hear further oral argument, Dec. 22, 1886. Decided Jan. 17, 1887.

APPEAL from the Circuit Court of the United States for the District of Massachusetts. Reported below, 14 Fed. Rep. 907. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **George W. Parke**, for appellants:

A person who holds property of any kind transferred in fraud of creditors, and not as a *bona fide* purchaser for value, is constructively a trustee for their benefit, and is to be held accountable as a trustee.

Perry, Trusts, §§ 149, 164, 165; *Bean* v. *Smith*, 2 Mason, 253; *Flagg* v. *Mann*, 3 Sumn. 84; *Stark* v. *Starrs*, 73 U. S. 6 Wall. 419 (18 : 930); *Traders Bank* v. *Campbell*, 81 U. S. 14 Wall. 87 (20 : 882); *Verselius* v. *Verselius*, 9 Blatchf. 189; *Schrenkeisen* v. *Miller*, 9 Ben. 65; *Rolfe* v. *Gregory*, De. G. J. & S. 576; *Brown* v. *Lynch*, 1 Paige, 147; *Post* v. *Stiger*, 29 N. J. Eq. 558.

Personal judgments have sometimes been entered against transferees in fraud of creditors, when the property is not forthcoming.

Murtha v. *Curley*, 90 N. Y. 372.

But the usual course is to decree an account as prayed in this case.

Dunphy v. *Kleinsmith*, 78 U. S. 11 Wall. 615 (20: 226); *Hendricks* v. *Robinson*, 2 Johns. Ch. 296; *Riggs* v. *Murray*, 2 Johns. Ch. 565; *Halbert* v. *Grant*, 4 Mon. (Ky.) 580.

The assignees did not and do not propose to abandon pursuit of the secreted fund, but to follow the same, and when as matter of fact its identity is established, to ask for its application to their trust. Money and paper securities can be followed, and it is not necessary to identify the particular bonds, bills or coin, but only to identify the fund. The identity is a question of fact, not of law,—a matter for evidence.

Perry, Trusts, § 837; Lewin, Trusts, 8th ed. chap. XXX, § 2, 892; 2 Story, Eq. Jur. § 1258; *U. S.* v. *State Bank*, 96 U. S. 30 (24 : 647); *Nat. Bank* v. *Ins. Co.* 104 U. S. 54 (26 : 693); *Earnest* v. *Croysdille*, 2 De G. F. & J. 175; *Knatchbull* v. *Hallett*, 13 Ch. Div. 696.

The rule of following trust funds has been applied to the constructive trust arising from a fraudulent conveyance.

Clements v. *Moore*, 78 U. S. 6 Wall. 315 (18 : 789).

Equity has to adapt its remedies to the case, and to decide according to the special circumstances. It requires only that degree of certainty in pleading which the subject matter and circumstances admit.

Montesquieu v. *Sandys*, 18 Ves. 302; *Moore* v. *McKay*, 2 Molloy, 134; *May* v. *Le Claire*, 78 U. S. 11 Wall. 217 (20 : 50).

Messrs. Henry C. Hutchins and *James H. Young*, for appellees:

The bill should state the claim of the plaintiff with accuracy and clearness. The material facts ought to be plainly yet succinctly alleged, and with all necessary and convenient certainty as to the essential circumstances of time, place, manner and other incidents.

Story, Eq. Pl. § 247; 1 Dan. Ch. Pr. 368, 4th ed.; *Price* v. *Coleman*, 21 Fed. Rep. 357; *Hazard* v. *Griswold*, 21 Fed. Rep. 178; *Wormald* v. *De Lisle*, 3 Beav. 18; *Ryves* v. *Ryves*, 3 Ves. 343.

The present suit is peculiarly of such a nature as to make the requirement of a specification of the property which the plaintiffs seek to recover an indispensable one; for the present bill, being against a married woman to recover property received by her from her husband, will lie only for the specific property shown to be in her possession. A judgment *in personam* for its value cannot be taken against her.

Phipps v. *Sedgwick*, 95 U. S. 3 (24 : 591).

A plaintiff who seeks relief on the ground of fraud is held to stringent rules of pleading. And if it is sought to set aside the bar of the Statute of Limitations on the ground that the cause of action has been fraudulently concealed, the plaintiff must in particular aver when and how the fraud was discovered and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been before made.

Wood v. *Carpenter*, 101 U. S. 135 (25 : 807); *Stearns* v. *Page*, 48 U. S. 7 How. 819 (12 : 928); *Moore* v. *Greene*, 60 U. S. 19 How. 69 (15: 583); *Beaubien* v. *Beaubien*, 64 U. S. 23 How. 190 (16: 484); *Badger* v. *Badger*, 69 U. S. 2 Wall. 95 (17: 838); *Wollensak* v. *Reiher*, 115 U. S. 96 (29: 350); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 (22 : 482); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Landsdale* v. *Smith*, 106 U. S. 391 (27: 219).

The bill waives the oath of the defendants and seeks no discovery. And even if the bill prayed discovery, it would be no less incumbent on the plaintiffs to make specific the charges they sought to establish by the evidence to be elicited by the discovery.

Story, Eq. Pl. § 256; *Ryves* v *Ryves*, 3 Ves. 343; *Wormald* v. *DeLisle*, 3 Beav. 18; *East India Co.* v. *Henchman*, 1 Ves. Jr. 287.

Mr. Justice **Miller** delivered the opinion of the court: [79]

This is an appeal from the Circuit Court of the United States for the District of Massachusetts.

It was decided in that court upon a demurrer to the bill of complaint, that the demurrer be sustained and the bill dismissed. The bill was brought by the present appellants, as assignees in bankruptcy of William A. Saunders, against said William A. Saunders and Mary P. Saunders, his wife, and, after alleging that, by due course of proceeding, William A. Saunders had been adjudged a bankrupt and the plaintiffs appointed assignees of his estate, it proceeds to say that they have discovered, within one year, "and been first informed of facts and circumstances upon which they believe, and therefore aver, that the said bankrupt, without consideration, transferred to and placed in the hands of his wife, the said Mary P. Saunders, a large amount of personal property in the form of money, bonds, stocks and other securities, none of which can your orators more particularly describe, because all particular information is refused by the bankrupt and his wife and the persons managing the property for them, and because the same has been invested for income, and often changed in form by reinvestment and in pursuance of devices for more effectual concealment." Then it is further averred that "said property is of the value of about forty thousand dollars, and was so transferred by said bankrupt to his said wife for the purpose of concealing the same from his creditors and from these assignees, and to delay,

hinder, and defraud his creditors, he being then deeply indebted, and to an amount wholly beyond his means and ability to liquidate and pay, so that he was hopelessly insolvent and in contemplation of bankruptcy." The prayer of the bill is "that said Mary P. Saunders, the respondent, may fully, truly and particularly answer this bill, but not under oath, which is hereby waived," and for a decree that said property may be held to belong to the assets of [80] said William A. Saunders in bankruptcy, and the respondent compelled to transfer and deliver the property, or the proceeds thereof, in whatever form existing, to the plaintiffs, as assets of the bankrupt. and for further and other relief.

The imperfections of this bill are very obvious. Counsel for appellants, conceding the doctrine of *Phipps* v. *Sedgwick*, 95 U. S. 3 [24 : 591], and *Trust Co.* v. *Sedgwick*, 97 U. S. 304 [24 : 954], that a wife cannot be held liable to a personal judgment for money received of her husband during the marital relation, argues that this bill is an attempt to proceed against a fund in her hands; but as no particular fund is named, as no particular set of securities or description of them is given in the bill, as no place is named where they are deposited, nor any person, even the wife, as holding them, as no real estate is mentioned as belonging to this fund, as the nature and character of the conversion made of the fund after it came to the hands of the wife is not set forth, it seems impossible to maintain such a bill as seeking to lay hold of and appropriate a particular fund coming from the bankrupt himself, or even the proceeds of such a fund. As was very pertinently asked by the circuit judge in his opinion sustaining the demurrer, what relief could be given by the court, or what decree could be granted on this bill, if it were taken *pro confesso*, no opposition being made to it? 14 Fed. Rep. 907. It is not possible to see what decree could be made or what relief could be given. It is not a bill of discovery, because the answer under oath of the defendant is expressly waived. No interrogatories are propounded to either of the defendants; no effort made to obtain from them, or either of them, by way of sworn answer, anything which could be used as evidence in the case. An issue of a general denial of the truth of the bill would leave nothing on which evidence could be introduced. It is in fact what is familiarly known as a "fishing bill." The plaintiffs allege no distinct fact which the defendants or either of them can be called upon to deny. The plaintiffs do not say positively that any of the allegations of the bill are true, but the substance of what they say is that they [81] have received certain information which excites their suspicion; and this information is so vague, so uncertain and indefinite as it regards any fund or any particular sum of money or bonds, or any time or occasion when they were placed in the control of the female defendant, that, unless we are prepared to establish the proposition that whenever a married woman is suspected of having received money from her husband to the prejudice of his creditors, she must be brought up to answer, and not under oath, as to what she has done with it, this bill must be held to be insufficient.

In the case of *Phipps* v. *Sedgwick* [*supra*], which is a case somewhat analogous to this, this court said: "While the Statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received, and probably spent at his dictation. Such a proposition would be a very unjust one to the wife while under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt. But if it is beyond his reach, the wife should no more be held liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance."

To this principle we adhere; and, as there is no statement or description or reference in this bill to any fund now existing arising out of the bankrupt's gift to his wife, and no call for discovery in regard to any such fund, but an express waiver of an answer under oath, *we think the bill was properly dismissed.* [82]

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [214

v.

SARAH E. RAMSAY, Widow in Community, AND ANNA E. WAGNER, Heir of G. ALEXANDER RAMSAY, Deceased.

(See S. C. Reporter's ed. 214-223.)

Internal revenue—informer's share under Acts of Congress—effect of repealing Act—letter of Secretary of Treasury.

The judgment of the court below for a share claimed by an informer under the internal revenue laws, involving the construction of the repealing Act of 1872 as to the fees of informers in cases in which the amount of the penalty was not then fixed, and the effect of a letter of the Secretary of the Treasury is *affirmed by a divided court.*

[No. 1081.]

Submitted Dec. 20, 1886. Affirmed by divided court Jan. 17, 1887.

APPEAL from the Court of Claims. Reported below, 21 Court of Claims, 443.

This is an appeal from a judgment on demurrer rendered by the court below in favor of the appellees against the United States for the sum of $1,700.

The facts are in substance, as follows:

In pursuance of information given by G. Alexander Ramsay, now deceased, late of the

State of Louisiana, in the year 1871, to the Commissioner of Internal Revenue, suit was instituted in the name of the United States against the Houston and Central Railway Company, of Texas, for forty penalties of $1,000 each, such penalties being for alleged frauds on the internal revenue of the United States.

The suit was compromised in June, 1874, the railway company paying the sum of $15,694.08; $5,000 of this amount being in lieu of penalties.

Mr. Ramsay, after the compromise of the suit, applied to the Secretary of the Treasury for payment as informer, under the provisions of section 179 of the Act of June 30, 1864, 13, Stat. at L. 304, as amended by the Act of July 13, 1866, 14 Stat. at L. 145.

It appears from a letter of the Secretary of the Treasury dated November 6, 1885, and addressed to George A. King, attorney for G. Alexander Ramsay, that, as shown by the records of the Treasury Department, the application of Mr. Ramsay for compensation was never formally rejected. The Secretary writes:

"The record of the office on this point is that Mr. Ramsay was notified by the Commissioner of Internal Revenue that he was not entitled to the share for which he made application, because the Act of June 6, 1872, repealing informers' shares, went into effect before the case in which he claimed the share had been compromised, and that the claim was merely marked 'too late;' that no finding or award was made, and that no letter of rejection was written by the Secretary to the claimant."

Mr. Ramsay not succeeding in obtaining payment from the Secretary of the Treasury, filed his petition in the court of claims, where it was dismissed for want of jurisdiction. 14 Ct. Cl. 367.

Subsequently the attorney of Ramsay wrote to the present Secretary of the Treasury, requesting him to take up said claim to ascertain as required by law whether the said Ramsay was or was not the informer, to determine the share falling due to him as such under the terms of the said circular, and, having determined the question, either to order the claim paid or to refer it, under section 1068 R. S. to the court of claims for adjudication. It was in response to this request that the Secretary of the Treasury wrote said letter to Mr. King, dated November 6, 1885. In this letter the Secretary refused to comply with Mr. King's request either to pay the claim or to refer it to the court of claims. The Secretary states a fact which has never been disputed, and was recognized in the trial of *Ramsey* v. *U. S.*; viz., that "George Alexander Ramsay was the first informer against the Houston and Texas Railway Company, and that the information given by him led to the recovery from said company of penalties amounting to $5,000."

The Secretary asserted that he is not bound by the construction of the said repealing law made by his predecessor: "Nevertheless as the construction referred to has been applied, as I am informed, to a large number of cases, and has been acquiesced in from 1875 to the present time, I prefer not to set it aside without the authority of a judicial construction, and therefore I decline to award or order the payment of the share claimed by Mr. Ramsay in the above case."

The appellees claim that said letter is a decision by the Secretary that Mr. Ramsay was entitled to his share as informer, and that the same should be paid to them; that the refusal of the accounting officers to pay in accordance with such fact is unwarranted, and the court of claims has jurisdiction to enforce payment; that the decision of the Treasury Department that Mr. Ramsay was not entitled to receive $1,700, by reason of the repealing statute aforesaid, is wrong; and that notwithstanding such repealing Act the informer's share under the Act of 1866 is legally due claimant.

The appellant claims that the subject matter of the claim is *res judicata*; that the letter of the Secretary of the Treasury was not a formal adjudication; that said letter was in effect a refusal to comply with claimant's request, or to disturb the rulings already made by the department; and that the repealing Act of 1872 left the claimant without legal remedy, the amount of the penalty not then having been fixed.

The court below sustained the position of the claimants and entered judgment in their favor for $1,700, as above stated.

Messrs. **A. H. Garland,** *Atty-Gen.* and **E. P. Dewees,** assistant attorney, for appellant:

The court held in the *Ramsay Case*, 14 Ct. Cl. 367, that the power conferred upon the Secretary of the Treasury by the Act of 1866, that he "shall determine whether any claimant is entitled to any such share as above limited and to whom the same shall be paid," vested the exclusive jurisdiction as to the determination of such facts in the Secretary of the Treasury, and the petition was thereupon dismissed. The point then decided is the point again raised by the present petition and the letter exhibit. It is a controversy adjudicated.

Hughes v. *U. S.* 71 U. S. 4 Wall. 237 (18: 305); *Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 592 (18: 558).

The ruling and decision of the Secretary of the Treasury that, by reason of the repealing Act of 1872, claimant is not entitled to informer's fees under the provisions of the Act of 1866 is correct.

Not only did no right vest in Mr. Ramsay prior to the date of the compromise, but the Secretary of the Treasury had the power at any time to deprive him of the benefit conferred upon him as informer by remitting the penalty.

Much stronger cases than the present have been decided adversely to informers by this court.

Confiscation Cases, 74 U. S. 7 Wall. 454 (19 196).

A defendant is discharged by the repeal of the law.

Norris v. *Crocker*, 54 U. S. 13 How. 429 (14: 210); *U. S.* v. *Mann*, 1 Gall. 177 The section of the statute authorizing informers' pay being repealed, the power of the Secretary to direct payment is, as a consequence, gone.

The statute being repealed, no measure of damage exists. No judgment can be rendered in a suit after the repeal of the Act under which it was brought.

Ex parte McCardle, 74 U. S. 7 Wall. 506 (19: 264); *Norris* v. *Crocker*, *supra*; *Ins. Co.* v. *Ritchie*, 72 U. S. 5 Wall. 541 (18: 540).

As to effect of repeal of statutes, see Sedgwick on Statutory and Constitutional Law, 129 *et seq.*

Messrs. **George A. King** and **William W. Handlin**, for appellees.

Mr. Chief Justice **Waite** announced the affirmance of the decision of the court below by a divided court.

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[41] COUNTY OF NEMAHA, *Plff. in Err.*

v.

AUGUSTUS FRANK.

(See S. C. Reporter's ed. 41-46.)

Precinct bonds—when action lies against county—practice—error without prejudice.

1. An action lies against a county on municipal bonds issued by a precinct where payment is to be made from a special tax to be levied by the county commissioners upon the property within the precinct.

2. Where the plaintiff obtained no advantage and the defendant suffered no detriment, by the action of the court below in striking out part of the answer, the error, if any, is not sufficient ground for reversal.

[No. 1048.]

Submitted Dec. 20, 1886. Decided Jan. 17, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **John M. Thurston, Walter J. Lamb** and **J. S. Stull**, for plaintiff in error:

In Nebraska, precincts are not now nor have they ever been corporations, or possessed of any corporate power, privileges or franchises whatever. The character of precincts under the laws of Nebraska, and the relation of the several officers to these subdivisions of the county, is such that the county commissioners possess no implied power or authority whatever as respects them, and there is no statute in force in that State giving them authority to bind the taxpayers by any recitals whatever in the bonds to be issued by them, nor have they any power over the matter except to issue aid bonds within the narrow limits defined in the letter of the statutes.

State v. *Dodge Co.* 10 Neb. 21.

The grant of power to vote bonds in aid of works of internal improvement gave the precinct no authority to enter into a stock speculation and vote and issue bonds with which to buy stock.

Jonesboro City v. *Cairo & St. L. R. R. Co.* 110 U. S. 192 (28: 116).

The commissioners and voters had no power to depart from the strict letter of the law or to obtain or issue bonds by any attractive scheme whatever.

Scipio v. *Wright*, 101 U. S. 665 (25: 1087); *Marsh* v. *Fulton Co.* 77 U. S. 10 Wall. 681 (19: 1042).

If the authority to issues bonds for a political subdivision of the county is not found in the law, the bonds are void.

Harshman v. *Bates Co.* 92 U. S. 578 (23: 747).

An issue of bonds which in itself, by the very terms of the proposition authorizing its issue, was in excess of 10 per cent of the entire assessed valuation of the precinct at the time the voting was had and the bonds issued, is illegal and absolutely void.

Dixon Co. v. *Field*, 111 U. S. 83 (28: 360).

Mr. **J. M. Woolworth**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action at law brought by Augustus Frank, a citizen of the State of New York, for the purpose of enforcing the payment of the interest coupons on certain municipal bonds alleged to have been issued by the County of Nemaha, on behalf of Brownville precinct in said County, to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad, in pursuance of an Act of the Legislature of the State of Nebraska. The petition alleges, that, by virtue of an Act entitled "An Act to Enable Counties, Cities and Precincts to Borrow Money on Their Bonds, or to Issue Bonds to Aid in the Construction or Completion of Works of Internal Improvement in this State, and to Legalize Bonds Already Issued for Such Purposes," passed on the 15th day of February, 1869, the board of commissioners of the County of Nemaha issued the special bonds or written obligations of said Brownville precinct, on the 20th day of August, 1870, to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad, and delivered the same to the company authorized to construct said road; that prior to the issue of said bonds the proposition to issue the same was duly submitted to the voters of said Brownville precinct, in strict accordance with the provisions of the said Act of the Legislature, and that a large majority voted for said proposition; that, during the years 1871 and 1872, the said Brownville precinct and the board of county commissioners duly paid the coupons then falling due by means of a tax levied for that purpose, but for the years 1878 and 1879 they have failed and refused to pay the same or to levy a tax therefor. The petition also alleges that, on or about the 20th of February, 1871, for a valuable consideration, the bonds and coupons were transferred in good faith to John Fitzgerald, and by him to the plaintiff. [42]

An answer was filed by Nemaha County, as defendant, containing the following matter:

"The total amount of the bonds so issued and sold, being one series, under one proposition, amounted to one hundred thousand dollars. The said bonds and coupons were voted upon the following contract and conditions and none other: At the time of the vote for said bonds certain persons were attempting to organize a railroad corporation under the name of the Brownville, Fort Kearney and Pacific Railroad Company, the identical same organization named in said bonds, with a capital stock of two million dollars, but were unable to organize it because unable to obtain a payment on said amount of stock of 10 per cent thereof, as

required by law, precedent to the right to do business; they considered and treated said series of one hundred thousand in bonds as one one-hundred-thousand-dollar cash subscription all paid up in cash in advance; and, also, they treated and considered bonds of the City of Brownville situated within the said precinct of Brownville mentioned in the petition, of the nominal sum of sixty thousand dollars, as sixty [43] thousand dollars cash subscription paid up in cash in advance, all as capital stock of said railroad company, aggregating one hundred and sixty thousand dollars, so considered and treated as cash capital stock paid in; but by considering the said bonds of the nominal sum of $160,000 as one hundred and sixty thousand dollars in money paid in on the capital stock, there was still an insufficient amount paid in to enable the company to do business, there being no cash paid in except on a few private subscriptions, and not exceeding ten thousand dollars, so that even by treating said bonds as money there was still a deficiency of thirty thousand dollars of the amount prescribed by law as a condition precedent to the organization of the company for the purpose of transacting any of the business for which it was sought to be organized. Defendant, therefore, denies that said railroad company was ever a corporation with power to transact business or to receive municipal bonds for its aid.

"Defendant, therefore, avers that neither said precinct nor said county had any power or authority to aid in the organization of said railroad company by subscribing its stock or in any other manner. Defendant further avers that said pretended railroad company never either filed or recorded its articles of incorporation, if any it ever had, in any county in the State of Nebraska, as by law it was compelled to do prior to its existence as a corporation.

In the transactions of issuing said bonds by defendant, and of receiving the same by said pretended railroad company, neither the defendant nor the said company had any power to act, and all the acts therein on both sides are and ever have been *ultra vires* and null and void.

"The proposition submitted to the voters of said precinct as a basis of the right to issue said bonds was a proposition to subscribe by said precinct one hundred thousand dollars in stock and shares in the capital stock of said pretended railroad company, and pay the same in bonds aforesaid.

"The total assessed valuation of all the property in the said precinct, as shown by the last assessment preceding the issuing of said bonds, was $920,000, and the issue of $100,000 in bonds was in excess of the amount allowed by law."

The plaintiff having filed a reply afterwards [44] moved the court to strike out from the answer of the defendant all the forgoing matter as immaterial and irrelevant. This motion was sustained by the court, to which ruling the defendant excepted. Upon the pleadings as thus amended the cause was tried by a jury, who returned a verdict in favor of the plaintiff, on which judgment was rendered, to reverse which this writ of error has been sued out and prosecuted.

This ruling of the court in striking out this portion of the answer is alleged as error. For the purposes of the argument we shall assume what is claimed by the plaintiff in error, that the matter stricken out was material and relevant. The defenses intended to to be raised by it were, that in two particulars the bonds in question were void as not having been issued in conformity with law. The sections of the Statute of 1869, in pursuance of which it is alleged they were issued, are as follows:

"Section 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or any other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city, provided the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money.

"Section 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this Act; and in such case the precinct election shall be governed in the same manner as is provided in this Act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct; and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, [46] but shall contain a statement showing the special nature of such bonds."

The averments in that portion of the answer stricken out are in substance: 1, that the bonds were illegal and void because not issued to a company authorized by the statute to receive them; and 2, that they were illegal and void because issued in excess of the amount of 10 per centum of the assessed valuation of the taxable property in said precinct. The answer of the defendant, in addition to the matter stricken out, contains the following: "Defendant has no knowledge as to whether the plaintiff is a *bona fide* holder of said bonds, or any part thereof, or whether he purchased them before due or paid any value therefor, or purchased them at all, and, therefore, for the purpose of raising the issue and procuring the proof thereon by compulsory process, defendant denies the allegations of the petition on that subject, and also denies each and every allegation contained in said petition, except such as it has herein expressly admitted in this answer."

This clause in the answer remained and formed the issue which was tried. It is a general denial of each and every allegation of the petition, as no allegation of the petition was otherwise admitted in the answer. It therefore put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that

he was owner of the coupons sued on, taken from bonds in fact executed by the defendant, issued in accordance with law, and delivered to a party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void. It follows, therefore, that every defense which was open to the defendant under that portion of the answer stricken out was equally open to it under the answer as it stood at the trial. The plaintiff obtained no advantage, and the defendant suffered no detriment, by the ruling of the court requiring that portion of the answer to be stricken out. The action of the court in granting the motion did not, therefore, prejudice the defendant. It does not appear from this record what took place at the trial. There is no bill of exceptions which shows what evidence, if any, the defendant offered, or whether any that he did offer was rejected. For aught that appears, the very matters which he might have offered in evidence, under that portion of the answer stricken out, were in fact offered and received under the pleadings as they stood at the time of the trial.

[46]

It seems also to be objected to the judgment rendered against the County of Nemaha that the coupons sued on are not the obligations of the County. It is said that the bonds are precinct bonds, issued by the county commissioners of the County, the duty to pay which rests upon the precinct alone; the mode of payment being by means of a tax to be levied by the county commissioners upon the property within the bounds of the precinct. It is, therefore, argued that no action will lie against the County in respect to these bonds and coupons, except in case of the refusal of the county commissioners to levy the tax when it ought to be levied, when a *mandamus* is the sole remedy, being the one prescribed by the statute. This question has been set at rest by the previous decisions of this court. *Davenport* v. *Dodge Co.* 105 U. S. 237 [26:1018], and *Blair* v. *Cuming County*, 111 U. S. 363 [28:457], are decisions upon the very point arising under the same statute.

There is, therefore, no error in the record, and the judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[73]

CAROLINE M. FORSYTH, Impleaded with JACOB FORSYTH, *Plff. in Err.*,

v.

JAMES R. DOOLITTLE, JAMES R. DOOLITTLE, JR., AND HENRY McKEY.

(See S. C. Reporter's ed. 73-78.)

Parties—joint defendants—admission of joint liability under Illinois Statute—evidence—practice—length of hypothetical questions within discretion of the court—verdict for professional and other services.

1. Under a Statute of Illinois, in a joint action the joint liability of the defendants is admitted by them if not denied by plea in abatement, or a plea in bar.

2. Where the defendants are jointly liable the declarations of one are admissible against both.

3. The length of hypothetical statements, presented to a witness to ascertain his opinion, depends upon the character of the transactions recited, and must, in a great degree, be left to the discretion of the trial court. In the case presented the questions, though long, are sustained, the court below having properly instructed the jury in regard to them.

[No. 107.]

Argued Dec. 21, 22, 1886. Decided Jan. 17, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Joseph E. McDonald** and **John M. Butler**, for plaintiff in error.

Messrs. **Melville W. Fuller, J. R. Doolittle,** and **J. R. Doolittle, Jr.**, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

This is an action to recover compensation for services rendered by the plaintiffs below to the defendants, in effecting a sale of certain lands in Indiana, and in various legal proceedings concerning the title, or claims against them. The declaration alleges a joint contract and liability by the defendants below, Caroline Forsyth and Jacob Forsyth, her husband; but the summons was served on her only. She appeared and pleaded the general issue. A Statute of Illinois provides that in actions on contracts, express or implied, against two or more defendants as partners, joint obligors, or payors, proof of their joint liability or partnership shall not be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by a plea in abatement, or a plea in bar, denying the partnership or joint liability, verified by affidavit. The joint contract and liability of the defendants, therefore, stood admitted by the pleadings; and this is a sufficient answer to several objections taken to the admissibility of statements and the proof of acts of the defendant, Jacob Forsyth. Being jointly liable with Caroline on the contract in suit, his declarations respecting the services rendered under it were as admissible as if made by her.

[74]

The services for which compensation is sought were not only those required of attorneys and counselors at law, but were also those of negotiators seeking to accomplish the result desired, by consultation with proposed purchasers and presentation to them of the advantages to be derived from the property, present and prospective. Varied as were the legal services of the plaintiffs, it is plain from the testimony that those rendered by negotiation and consultation, and presentation of the uses to which the property could be applied, were far more effective and important. This fact necessarily had a controlling weight in estimating the value of the services. It is difficult to apply to such services any fixed standard by which they can be measured, and their value determined, as can be done with reference to services purely professional. There is a tact and skill and a happy manner with some persons, which render them successful as negotiators; while others of equal learning, attainments, and intellectual ability, fail for the want of those qualities. The compensation to be made in such cases is, by the

ordinary judgment of business men, measured by the results obtained. It is not limited by the time occupied or the labor bestowed. It is from overlooking the difference in the rule by which compensation is measured in such cases, and that in cases where the services are strictly of a professional nature, that several objections are urged for reversal of the judgment recovered which, if this difference were regarded, would not be seriously pressed.

[75] The services rendered related to so many different subjects that it would require a long narrative to describe them with much detail. It is sufficient for the consideration of the questions not disposed of by what has already been said, to state generally the main facts of the case. Caroline Forsyth, for several years before the employment of the plaintiffs, had been the owner of a tract of land consisting of 8,000 acres in Indiana, about sixteen miles from Chicago. Only about 1,000 acres of it were fit for cultivation. The principal value of the tract was owing to its proximity to Chicago, and to the belief that it could be made use of for manufacturing and commercial purposes as a suburb of that city. It yielded no revenue; there were taxes due upon it, and portions of it had been sold for taxes. It was subject to a mortgage for $163,000, executed in 1875, upon a loan of $100,000, which, with the stipulated interest to maturity, amounted to that sum; and a suit had been commenced by its holders in the Circuit Court of the United States in Indiana for its foreclosure, and the sale of the premises.

The defendants were without means to meet the mortgage debt or pay the taxes due, or even the expenses of agents dealing with the property, and relied entirely upon effecting a sale to obtain what was needed for these several demands. The defendants had previously made an effort to sell the property to a stock company in London, and had signed certain documents for that purpose. The company claimed a right to a conveyance, pursuant to a contract made upon the supposed authority of those documents. Another party, by the name of Horne, claimed that he had negotiated a sale, and was demanding $50,000 for his services.

It was when the property was in this condition, and when its entire loss seemed highly probable, from the inability of the defendants to meet the demands pressing for payment, that the plaintiffs were retained to help them out of their complicated embarrassments and effect a sale of the property; the defendants promising them, in case of success, compensation which should be "large, liberal and generous." The plaintiffs entered upon their employment and, [76] during the following nine months, by arduous labor, constant negotiation and great tact, they accomplished what was desired. The suit to foreclose the mortgage was resisted, and its dismissal obtained. The property was sold for $1,000,000, one third of which was paid in cash, and the balance secured by mortgage on the property. The existing mortgage was then redeemed, a large reduction from the amount claimed having been first obtained. The taxes and other debts were paid and the claim of Horne was compromised and settled. A suit, commenced pending these proceedings, by the trustee of the London stock company, to compel a conveyance of the property, was defended and ultimately defeated. It would serve no useful purpose to detail the number of particulars in which the skill and tact of the plaintiffs were exhibited. The claim made by them for compensation was resisted, and this action was thereupon brought. The jury found that it should have been $40,000 and gave their verdict for that amount. Of the justice of this amount we are not to determine. We are called upon only to see whether any error was committed in the manner in which the case was submitted to the jury.

We see nothing in the objection that evidence was admitted as to the character of the land sold, or its possible value as a future suburb of Chicago. Its character in this respect might increase or diminish the chances of its sale. The only points which we find in the record calling for examination arose from the hypothetical statements submitted to witnesses, with inquiry as to the value of the services thus supposed to have been rendered. There were such hypothetical statements upon five subjects, which embraced matters that were to be disposed of before the consummation of the contract of sale. They embody with some fullness the matters supposed by the plaintiffs to have been established, and it was only upon that assumption that the opinions of the witnesses as to the value of the services rendered were given. If the assumption was erroneous, if the matters supposed to be established were not in the judgment of the jury in truth established, the opinions went for nothing; and so the court instructed the jury. Its language was as follows:

"As to the questions, you must understand [77] that they are not evidence; they are mere statements to these witnesses, called by the respective parties, of what the party putting these questions claims the proof shows was the nature and amount of plaintiffs' services rendered; and, upon the hypothesis or assumption of these questions the witnesses are asked to give their estimate of the value of these services. You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts."

And as to the estimate of the value placed by the witnesses upon the services, the language of the court to the jury was as follows:

"You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case and to award to the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiffs rendered, after deducting the amount the plaintiffs have already received for such services."

The length of the hypothetical statements is urged as an objection to them. They were lengthy even without the exhibits, which constituted the larger portion; but the court took especial care to impress upon the jury that they were not to consider the statements as facts in the case, but merely as assumptions of the party propounding the questions. *Cowley* v. *People*, 83 N. Y. 464, 479. The witnesses do not appear to have been confused by their length; they expressed no inability to fully comprehend them. Nor did the court, though complaining of their length, indicate that they [78] were unintelligible to the jury, or tended in any way to turn their minds from the points in issue.

The length of hypothetical statements presented to a witness, to ascertain his opinion upon any matter growing out of the facts supposed, will necessarily depend upon the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired. And this subject, like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the discretion of the court.

We do not see that the rights of the defendants were at all prejudiced by them.

The judgment, therefore, must be affirmed and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[97] LITTLE ROCK AND FORT SMITH RAILWAY, *Plff. in Err.*,

v.

ROBERT W. WORTHEN, as Collector of PULASKI COUNTY, ET AL.

CHARLES W. HUNTINGTON AND GEORGE RIPLEY, Trustees, *Appts.*,

v.

ROBERT W WORTHEN, as Collector of PULASKI COUNTY, ET AL.

(See S. C. Reporter's ed. 97-102.)

Constitutional law—valuation of railroad property—Arkansas Statute—part of, invalid—ministerial officers may disregard such part—Fourteenth Amendment.

1. That part of the Arkansas Act of 1883, relating to the valuation of railroad property for purposes of assessment, which excludes from the schedules of such property "embankments, tunnels, cuts, ties, trestles or bridges," is invalid, being in conflict with the Constitution of that State.
2. The action of the proper officers in including such property in the valuation of the railroad represented by the complainants did not deprive them of their property without due process of law, within the Fourteenth Amendment.
3. An unconstitutional enactment binds no one, and when clearly so, ministerial officers may properly disregard it, although it may not be wise, as a rule, for them to pass upon the validity of legislation prescribing their duties.

[Nos. 1077, 1078.]

Submitted Jan. 6, 1887. Decided Jan 24, 1887.

IN ERROR to the Supreme Court of the State of Arkansas. *Dismissed.*

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. *Affirmed.*

Statement of the case by *Mr. Justice* **Field:**

In the first of the above entitled cases the plaintiff, the Little Rock and Fort Smith Railway, is a corporation created under the laws of Arkansas, and operates a railroad from Little Rock to Fort Smith, in that State, running through several counties in its route. The defendants are the sheriffs of those counties, and *ex officio* collectors of taxes therein. The suit was brought to enjoin them from collecting certain taxes assessed and levied for the year 1885 on what is termed in the Revenue Act of the State as the "railroad track" of the Corporation, upon the alleged ground that the board of railroad commissioners of the State exceeded its powers by including unauthorized elements in the estimate of its value. That term "railroad track" embraces all fixed railroad property of the Corporation, and is assessed for purposes of taxation as real estate. [98]

In the second of the above entitled cases, the plaintiffs, who are citizens of Massachusetts, and trustees under a mortgage executed by the Railway Company upon its railroad and land grant, filed their bill of complaint against the same Collectors to restrain the collection of the same taxes. Subsequently the bill was amended by joining the county clerks of the several counties on the line of the railway as defendants, with prayers for injunctions restraining them from doing the several acts which the Revenue Act requires them to perform in connection with and subsequently to the sale of the railroad track.

By a Statute of Arkansas, passed in 1883, the Governor, Secretary of State, and Auditor of Public Accounts were constituted a board of railroad commissioners for the State, and required on the first Monday of April of each year to ascertain the value of all property, real and personal, of every railroad company existing under the laws of the State, including therein the railroad track, rolling stock, water, and wood stations, passenger and freight depots, offices and furniture. And it was made the duty of the company in March, 1883, and every second year thereafter when required, to prepare and file with the Secretary of State a statement or schedule showing the length of its [99] main and side tracks, switches and turn outs in each county, in which the road is located, and in each city and town through or into which its road may run; also the value of all improvements, stations and structures, including the railroad track located on the right of way; but the statute declares that "*such schedule shall not include nor value embankments, tunnels, cuts, ties, trestles, or bridges.*"

The statute also required the board of railroad commissioners to meet on the first Monday of April in each year, at the office of the Secretary of State, and examine the lists or schedules of the description and value of the railroad track of the railroad companies filed with the Secretary of State; and if the schedules are made out in accordance with the provisions of the Act, and in the opinion of the board the valuation of the railroad track is fair and reasonable, it shall appraise the same, and the Secretary of State shall certify to the

assessor of each county, in which the railroad is located, so much of the list as values the railroad track located in the county and in any city or town thereof; and the assessors shall list and assess the same as real estate.

The Little Rock and Fort Smith Railway, under this statute, made a return of the length of its main and side tracks; and of the value thereof; and of the improvements and structures, including the railroad track on its right of way; but omitted in its estimate the value of the embankments, tunnels, cuts, ties, trestles and bridges, following in this respect the directions of the statute.

At a subsequent meeting, the board passed a resolution declaring that all property of railroad companies in the State should be assessed at its true value, without regard to the restrictions and limitations mentioned, by which the value of the embankments, tunnels, cuts, ties, trestles and bridges is excluded from the schedule of their property; that, after full examination and consultation, it had determined that such limitations and restrictions were unconstitutional, and that it was not bound thereby. The several railroad companies were, therefore, requested to render full statements of their property, of whatever kind or description, and the [100] true value thereof, without regard to the restrictions and limitations mentioned. A hearing was accorded to the companies by the board; but its conclusion was not changed, and it proceeded to include in the assessment of the railroad track the value of the embankments, tunnels, cuts, ties, trestles and bridges. The assessment was thereby largely increased. The plaintiff thereupon commenced the present suit to restrain the collection of the taxes, setting forth the matters above mentioned, and alleging that it was unable to state to what extent the assessment of its property was increased by this action of the board, as the increase was incapable of separation from the whole. It charged, therefore, that the whole assessment was vitiated and rendered void by this unlawful action of the board, and prayed an injunction to restrain the collection of the taxes based upon it.

The defendants appeared in the suit and demurred to the complaint. The court in which the suit was commenced sustained the demurrer and dismissed the suit. The Supreme Court of the State, on appeal, affirmed the decree of the court below, and the case is now brought here for review.

In the second suit—the one from the federal court—the defendants appeared and pleaded in bar the decree in the above case in the state court, and also, by leave of the court, demurred to the complaint. The court sustained the demurrer and dismissed the bill. From its decree the case is brought here on appeal.

Mr. **C. W. Huntington,** for plaintiff in error and appellants:

The plaintiffs contend that the construction given by the state court changes the whole scheme of taxation provided for by the Act, at least so far as relates to the valuation and taxation of the "railroad track" of railway corporations, and substitutes judicial legislation for that of the law-making power.

They also claim that the effect of such construction is either to leave the "railroad track" not subject to taxation, or subject to taxation only under the Act of 1879.

The provisions in sections 46, 47 and 49 of the Act relate entirely and exclusively to the valuation and assessment of the "railroad track" of railway corporations. Their purpose was to provide for that sole object. Some of those provisions the state court decides are void, and nothing remains except provisions which not simply nullify and defeat, but completely reverse the entire scheme of the Legislature in relation to this subject. This case falls within the rule laid down by this court in *Trade Mark Cases*, 100 U. S. 82 (25:550), reaffirmed in *Virginia Coupon Cases*, 114 U. S. 269 (29:185); *Presser* v. *Ill.* 116 U. S. 252 (29:615).

We respectfully submit that it is beyond the power of the judiciary thus to legislate and to enact that a mode of valuation expressly prohibited by the Legislature can be substituted for the mode in express terms prescribed by the Legislature.

Mr. **Daniel W. Jones,** *Atty-Gen. of Arkansas,* for defendants in error and appellees.

Mr. Justice **Field** delivered the opinion of the court, as follows:

The Constitution of Arkansas of 1874 provides that "All property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State," and that "no [101] one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value."

The following property is declared to be exempt from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." And the Constitution declares that "All laws exempting property from taxation other than is provided" therein "shall be void."

As thus seen, no part of the property of railroad companies in the State is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly. The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed. A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result cannot be accomplished, as well observed by the Supreme Court of the State, under the guise of regulating the duties of assessors.

When, therefore, under the advice of the Attorney-General, the board of railroad commissioners treated as invalid the direction of the statute that the value of embankments, tunnels, cuts, ties, trestles and bridges, should not be included in the estimate of the railroad track, it obeyed the Constitution rather than the Legislature.

It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional Act is not a law; it binds [102] no one, and protects no one. Here the conflict between the Constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State; and his conclusion was sustained by the judgment of the Supreme Court of the State. The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an Act are so dependent upon each other that it is evident the Legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency the Act will stand, though different parts of it are rejected.

As to the objection which the counsel of the plaintiffs in error in the state case, and of the appellants in the federal case, raise, that the action of the board of railroad commissioners was in conflict with that clause of the Fourteenth Amendment of the Constitution of the United States which declares that no State shall deprive any one of property without due process of law, we can only say, we do not perceive its application. The complaint of the plaintiffs in error and appellants is that the board of railroad commissioners did not follow the Act of the Legislature. If that Act was valid, no ground lay for complaint that the State had done anything to deprive the Company of its property without due process of law. If the Act was, in the particulars mentioned, unconstitutional, as the Supreme Court of the State afterwards held, there was no just ground of complaint that the railroad commissioners had refused to follow its directions.

In the state case the writ is dismissed, there being no federal question involved. In the federal case the decree of the court below is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[105] MRS. MARTHA A. GIBBS, ET AL., *Appts.*,
v.
ABNER W. CRANDALL, Admr. of the Estate of THOMAS J. MARTIN, Deceased.

(See S. C. Reporter's ed. 105-109.)

Removal of causes arising under the Constitution and laws of the United States—proceedings in courts of Louisiana.

Under section 5 of the Act of March 3, 1875, providing for the removal of causes "arising under the Constitution and laws of the United States," where all of the parties are citizens of the State in which the action is brought, to sustain a removal it must appear upon the record, by a statement of facts in legal and logical form, such as is required in good pleading, that the suit involves a real and substantial dispute or controversy arising under the Constitution or laws of the United States.

[No. 1295.]

Submitted Jan. 7, 1887. Decided Jan. 24, 1887.

APPEAL from the Circuit Court of the United States for the Western District of Louisiana. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **S. Prentiss Nutt** and **Wade R. Young**, for appellants.

Messrs. **Thomas C. Catchings** and **James T. Coleman**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act [106] of March 3, 1875, chap. 137, 18 Stat. at L. 470, from an order of the circuit court remanding a case which had been removed from a state court, on the ground that the suit was one "arising under the Constitution and laws of the United States." All the parties, both plaintiffs and defendants, are citizens of Louisiana, and the right of removal depends entirely on the question whether it appears on the face of the record that there is in the case a real and substantial dispute or controversy arising under the Constitution or laws of the United States—that is to say, whether "some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction." *Starin* v. *New York*, 115 U. S. 257 [29: 390]; *Southern Pac. R. R. Co.* v. *Cal.* 118 U. S. 109 [*ante*, 103].

The facts are these: At some time prior to September, 1878, Thomas J. Martin brought suit in the Eighth District Court of the Parish of Madison, Louisiana, against Thomas W. Watts, as principal, and Phillip Hoggatt, then in life, as surety, "on a contract of rent." Pending this suit Hoggatt died, and Mrs. Martha A. Gibbs was appointed and qualified as administratrix of his succession. The suit was then revived and afterwards conducted contradictorily with the administratrix. At November Term, 1880, a judgment was rendered in favor of the administratrix, rejecting the demand against the succession of Hoggatt. By [107] agreement of Martin and Watts a new trial was awarded; but it is claimed that the administratrix of Hoggatt was not a party to this agreement, and that no new trial was ever ordered as to her. At November Term, 1881, a second trial was had and judgment rendered. On appeal to the Supreme Court of the State this judgment was reversed and a new judgment given against Watts and the succession of Hoggatt *in solido*. At May Term, 1882, of the district court a rule was taken on the administratrix of Hoggatt to show cause why the property of the succession should not be sold to pay this judgment. To this rule the administratrix made answer, setting up the original judgment in her favor rejecting the claim, and averring that the subsequent proceedings were null and void as to the succes-

sion for lack of jurisdiction. The defense was sustained in the district court, but on appeal to the supreme court this was reversed, and the district court afterwards, in obedience to the mandate of the supreme court, made the rule absolute and directed the administratrix to cause the property to be sold to pay the judgment.

In this condition of things the heirs of Hoggatt, on the first of August, 1885, filed their petition in the district court against the administrator of the estate of Martin, who had died pending the original proceedings, and the administratrix of Hoggatt, to restrain the sale which had been ordered and to annul the judgment of the supreme court against the estate, on the ground that after the original judgment in her favor the administratrix was no longer a party to the suit, and that the estate was not bound by the subsequent proceedings therein. In the petition it is averred, in various forms, that the judgment against the administratrix when she was not a party to the suit, was "absolutely null and void, as being repugnant to and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, and an attempt to deprive these petitioners of their property without due process of law." On the third of August a writ of injunction, as prayed for, was issued on the allowance of the judge of the district court, and the next day this writ and a citation in the [108] suit were served on the administrator of Martin. On the 23d of October, 1885, the heirs of Hoggatt filed in the state court their petition for the removal of the suit to the Circuit Court of the United States, as "A suit of a civil nature, in equity, * * * arising under the Constitution and laws of the United States, the said suit being a bill in equity to avoid the mandate, judgments and decrees of the honorable the Supreme Court of Louisiana and of your honorable court, for the reason that said mandate, judgments and decrees are repugnant to and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States." After the case was entered in the circuit court, Crandall moved that it be remanded; and this motion was granted July 20, 1886, the court "being of opinion that the record does not disclose a case within the jurisdiction of the court."

This order was clearly right. The case as made by the plaintiffs presents no disputed question of federal law. If the administratrix of the estate of Hoggatt was not a party to the proceedings after the first judgment in her favor, no one can claim that the succession she represented was bound by what was afterwards done in the suit. All depends on whether she continued to be in law and in fact a party; and this is to be determined by the effect of the original judgment in her favor, and the form of the proceedings thereafter. This may involve a consideration of the law and practice in Louisiana, but it is not, so far as anything now appears on the record, at all dependent for its solution on any construction of the Constitution or laws of the United States. As was said in *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 203 [24: 658]: "Before a circuit court can be required to retain a cause under this jurisdiction it must in some form appear upon the record, by a statement of facts in 'legal and logical form' such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States." It is not enough for the party who seeks a removal of his cause to say that the suit is one arising under the Constitution. He must state the [109] facts so as to enable the court to see whether the right he claims does really and substantially depend on a construction of that instrument. That has not been done in this case, and *the order remanding the suit is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LITTLE ROCK AND FORT SMITH RAILWAY, *Appt.*, [160]
v.
CHARLES W. HUNTINGTON ET AL., Trustees, etc.

(See S. C. Reporter's ed. 160-165.)

Duties of trustees under railroad mortgage—application of proceeds of land sales to payment of coupons.

Under the mortgage, or deed of trust, executed by the Little Rock and Fort Smith Railway, December 19, 1874, it is the duty of the trustees to apply the proceeds of sales of lands to the payment of the interest coupons of the bonds issued under said mortgage, or deed of trust, to the extent that the earnings of the road are insufficient for that purpose. It is also their duty to apply any surplus arising from the sale of lands to the payment of certain coupons which have been extended and are held by them as collateral security for scrip issued in lieu thereof.

[No. 1265.]

Submitted Jan. 6, 1887. Decided Jan. 24, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **William S. Rogers**, for appellant.
Mr. **C. W. Huntington**, for appellees.

Mr. Justice **Field** delivered the opinion of [161] the court:

The Little Rock and Fort Smith Railway is a corporation organized under the laws of Arkansas, and the defendants are citizens of Massachusetts, and trustees under a mortgage or deed of trust executed to them by the Corporation on the 19th of December, 1874. The bill is filed to enforce the performance of certain trusts devolving upon the defendants under that instrument.

By the Act of Congress of July 28, 1863, a grant of land was made to the State of Arkansas, to aid in the construction of the railroad from Little Rock to Fort Smith. The grant was of ten alternate sections of land on each side of the road, with a right of way over land of the United States to the width of two hundred feet.

By legislation of Arkansas in 1869, the right to the lands thus granted by Congress became vested in the Little Rock and Fort Smith Railway Company. In December following, that

corporation executed a mortgage upon its road, equipments, franchises, and property to secure its bonds to be issued thereunder to the amount of $3,500,000, and in June, 1870, it executed a second mortgage upon the same property to secure its bonds to be issued to the amount of $5,000,000. The bonds were issued, but the company defaulted in their payment, and both mortgages were foreclosed, and the property was sold under a decree of the Circuit Court of the United States for the Eastern District of Arkansas.

The purchasers at such sale, under a Statute of Arkansas, organized themselves into a corporation, and adopted as their corporate name that of the Little Rock and Fort Smith Railway, and became vested with all the rights, privileges, powers, and franchises of the former corporation, together with the lands granted to that company by the Acts of Congress and of the Legislature of Arkansas.

This new Company, the plaintiff herein, in order to provide means for the completion and equipment of its road, and for other purposes, issued and negotiated a series of bonds, amounting in the aggregate to $3,000,000, payable to [162] bearer at the end of thirty years from January 1, 1874, with interest coupons payable semi-annually at the rate of 7 per cent per annum, free from any United States tax. The bonds were issued in denominations of $1,000 each, from No. 1 to 2,000 inclusive, and in denominations of $500 each, from numbers 2,001 to 4,000 inclusive. To secure their payment, principal and interest, the Company executed a mortgage, or deed of trust, bearing date December 19, 1874, upon its road, franchises, rights, and lands, to the defendants, Huntington and Ripley, in trust, among other things, to apply the moneys arising from the lands of the Company, after deducting the expenses of executing the trust, as follows:

1. To the payment of the coupons or interest warrants attached to the bonds, as fast as they shall become due and payable, to the extent that the net earnings from the business of the road shall be insufficient for that purpose.

2. To the purchasing and canceling of such outstanding bonds as can be obtained, at their market value, not exceeding, however, a premium of 10 per cent; and

3. To the payment of such of the bonds as shall not have been purchased in accordance with these provisions, when the same shall become due and payable.

All the trust moneys coming to the trustees, not applied or used in accordance with the above provisions, were to be invested in United States securities, or lent from time to time in such manner as by the law of Massachusetts is permitted to savings banks. The interest derived from such investments or loans was to be applied by the trustees to the payment of the bonds or coupons.

The bill alleges that, after the execution of this mortgage, the Company completed its railroad from Little Rock to Fort Smith, within the time, and in the manner required by the Acts of Congress and of Arkansas, and thereby became the owner of 1,057,000 acres of land, as certified by the Secretary of the Interior to the State, all of which, and the proceeds of sales, were subject to the trusts and charges imposed by the mortgage or deed of trust; that the Corporation has disposed of all the bonds authorized to be issued under the mortgage, [163] but that of the lands there still remain unsold 623,000 acres; that during the years 1877, 1878 and 1879, and the first six months of the year 1880, the net earnings derived from the operation of the road, even when united with the proceeds of the sales of lands, were insufficient to meet the coupons or interest warrants attached to the bonds maturing on January 1, 1878, July 1, 1878, January 1, 1879, July 1, 1879, and January 1, 1880; and thereupon an agreement was made between the Corporation and the holders of the bonds and coupons payable on those dates, by which the holders surrendered to the defendants, trustees, the coupons, and the Corporation issued to them negotiable scrip or certificates by which it promised to pay the trustees, or bearer, the amount of the coupons surrendered, in ten years from their maturity, with interest at the rate of 7 per cent per annum, payable semi-annually, the Corporation reserving the right to pay the scrip and interest at any time previous to its maturity.

The scrip or certificate also provided that the trustees should hold the coupons surrendered, as collateral security for the payment of the scrip thus issued therefor, and that the coupons should not be surrendered or canceled until the scrip should be paid. The coupons maturing on July 1, 1883, and January 1, 1884, were also unpaid, and a similar arrangement was made with the holders of these coupons by the issue of scrip for them; so that the whole amount of scrip issued for coupons thus unpaid was $636,000.

The bill also alleges that out of the moneys received from the sale of the lands since the execution of the mortgage, the trustees have bought and canceled bonds amounting to $536,500, besides appropriating moneys to aid the Corporation in paying the interest coupons attached to the bonds; that since the year 1881 the trustees have applied the net proceeds of the sales to the purchase and cancellation of the bonds, and no part thereof to the purchase and cancellation of the said scrip, or the coupons held by them as collateral security for the payment of that scrip; that for several years, the net earnings of the road have been more than sufficient to enable the Corporation to pay its current coupons and the interest upon the scrip; that the Corporation has notified the trustees [164] that it was no longer necessary to retain any portion of the proceeds of sales for the payment of the interest coupons to mature hereafter; that the net earnings of the road would, in all probability, be ample for that purpose, and, by reason of the increased earnings, will continue to be more than ample to pay the coupons as they severally become due and payable; and that the price of the bonds has greatly risen in value, and the premium thereon has varied the past year from 13 to 17 per cent, so that under the mortgage the trustees are no longer able to purchase such bonds, being limited by the mortgage to the payment of 10 per cent premium.

The bill also alleges that 623,000 acres of the lands of the Company remain unsold; that the trustees hold contracts for lands sold, upon which partial payments have been made, but

upon which deeds are not to be executed until the purchase money and interest are fully paid, amounting in the aggregate to more than the sum of $428,691; and that in the ordinary course of business, the trustees and their successors will have large amounts of money from sales thereof, which must be applied by them in accordance with the provisions of the mortgage, and in the order of priority, before the moneys can be invested, as provided therein; that the trustees have refused to apply any of the said money to the payment of the outstanding coupons for which the scrip mentioned was given; that such coupons draw interest at the rate of 7 per cent, and any investment of such moneys by the trustees can only be made so as to obtain a much smaller rate of interest, and that, therefore, it would be greatly to the advantage of the Corporation, and to the bondholders, that such moneys should be applied to taking up the outstanding coupons. The trustees, in their answer to the demand of the Corporation that the moneys be so applied, have expressed a willingness to so apply them, but they entertain doubts as to their authority so to do, unless directed by order of the court.

The mortgage, as is seen by its terms, contemplates that the proceeds of sales of lands shall be applied to the payment of the interest coupons to the extent that the earnings of the [165] road are insufficient for that purpose. The contract, by which the time to pay those coupons, for which the scrip was issued, was extended for ten years, does not release the Corporation from its obligation, provided it is in funds from the earnings of the road and the sales of its lands. The coupons are not canceled, but are still held as collateral security for the scrip issued. The inability of the Company to pay such coupons from the earnings of the road, combined with the proceeds of the sales of the lands, which led to the contract for the scrip, no longer exists, and there is no legal impediment in the way of the trustees taking up such coupons, notwithstanding the contract deferring their compulsory payment for ten years. The money received from the sales of the lands cannot be used in purchasing the bonds of the Company, which are now at more than 10 per cent premium, and the trustees are restricted in their payment to that premium. Any investment under the law of Massachusetts would bring them only a moderate interest, probably not exceeding 4 per cent. The coupons draw 7 per cent. There is, therefore, a manifest propriety and justice in the demand of the Corporation that the surplus money from the sales of its lands, instead of being thus invested, should be applied to taking up the outstanding coupons. And it is the plain duty of the trustees, in the execution of their trust, to make the proceeds of the sales of lands as available as possible for the extinction of the indebtedness of the Corporation, first on its coupons, and then upon its bonds, so long as the same can be bought at a premium not exceeding 10 per cent.

The decree of the court is therefore reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ENDOWMENT AND BENEVOLENT ASSOCIATION OF KANSAS, *Plff. in Err.*, [103]

v.

STATE OF KANSAS.

(See S. C. Reporter's ed. 103-105.)

Jurisdiction of this court—writ of error to state court—constitutionality of state statute.

1. This court is without jurisdiction of a writ of error to the highest court of a State, unless it distinctly appears of record that a question under the Constitution or a law of the United States not only might have been, but actually was, raised and decided in the state court.

2. The fact that in a motion for a new trial the question of the constitutionality of a statute of the State was presented is not sufficient to give this court jurisdiction, unless it appears that the Constitution of the United States was relied on.

[No. 1296.]

Submitted Jan. 6, 1887. Decided Jan. 24, 1887.

IN ERROR to the Supreme Court of the State of Kansas. Reported below, 35 Kan. 253. *Dismissed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **J. Jay Buck,** and **G. W. DeCamp,** for plaintiff in error.

Messrs. **S. B. Bradford,** *Atty-Gen. of Kansas,* **Charles B. Smith** and **Edwin A. Austin,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit begun by the State of Kansas in the District Court of Lyon County against the Endowment and Benevolent Association of Kansas, for a forfeiture of its charter because it had neglected to comply with the requirements of chapter 131 of the laws of Kansas of the year 1885, approved March 7, 1885, "providing for the organization and control of mutual life insurance companies in this State." The case was submitted without pleadings on an agreed statement of facts, from which it appears that the Corporation was organized under the general laws of Kansas, January 7, 1885, with the following objects:

"1. To guard its members, to a great extent, against the ills of pecuniary want during life, and especially during the period of infirm old age, and at their death to make a provision for their families and friends, which latter is supposed to be the only physical anxiety of dying man.

"2. To create a fund to be paid to the members of the society, in accordance with rules [104] and regulations thereof, whereby the members may the better be enabled to perpetuate and sustain their membership, which in so doing will secure to them and their dependents the continued support and protection of the association.

"3. To encourage and promote benevolence, industry and charity among its members."

The district court gave judgment against the Corporation, but on what ground does not appear, except as it may be inferred from the following reasons assigned in support of a motion for a new trial.

"1. That said chapter 131 is unconstitutional and void.

"2. For error of law occuring at the trial and excepted to by the defendant.

"3. That the facts of this case do not war-

rant either the conclusion of law made by the court or the judgment herein rendered."

When the case went to the Supreme Court of the State on a petition in error the following was the assignment of errors:

"1. The said court erred in rendering judgment for said plaintiff below.

"2. The conclusions of law and the judgment are not authorized or warranted by the facts of the case.

"3. Said court erred in overruling the motion of the defendant below for a new trial."

From this statement it is clear that we have no jurisdiction, as no federal question appears affirmatively on the face of the record. It is true that in the motion for a new trial the question of the constitutionality of chapter 181 of the Acts of 1885 was presented, but that is not enough, since it is nowhere shown that any provision of the Constitution of the United States was relied on. The suggestion in the motion applies as well to the Constitution of the State as to that of the United States, and it has long been settled that we have no jurisdiction unless it distinctly appears that a question under the Constitution or a law of the United States not only might have been but actually was raised and decided. *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368, 398 [9:458, 470]; *Brown* v. [105] *Colorado*, 106 U. S. 95, 97 [27:132, 133]; *Chouteau* v. *Gibson*, 111 U. S. 200 [28:400]; *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 [29:118]. Here there is nothing of the kind, and in the assignment of errors on the petition in error to the Supreme Court of the State no reference was made to any constitutional question whatever, except inferentially under that which relates to overruling the motion for a new trial. Certainly it does not appear unmistakably on the face of the record that the Supreme Court of the State either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnancy to the Constitution or laws of the United States. *Brown* v. *Colorado*, *supra*. Indeed, we know of no provision of the Constitution which renders such a statute invalid as a whole, and there is nowhere in the record any claim that in the charter of the Corporation there was a contract by the State the obligation of which had been impaired by the legislation.

If there had been, the validity of the statute could not have been challenged except in its application to this charter, and that was not the objection made either in the motion for a new trial or anywhere else that we can discover.

The writ of error is dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[126] UNITED STATES, *Appt.*,

v.

JAMES C. SAUNDERS.

(See S. C. Reporter's ed. 126-130.)

Public officers—one who holds two distinct offices may recover compensation for both.

Sections 1763-1765 Revised Statutes, prohibiting the allowance of additional pay or extra compensation to public officers, have no application to the case of two distinct offices, places, or employments, each of which has its own duties and compensation, which offices may both be held by one person at the same time.

[No. 1084.]

Submitted Jan. 7, 1887. Decided Jan. 24, 1887.

APPEAL from the Court of Claims. Reported below, 21 Ct. Cl. 408. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Heber J. May,** assistant attorney, for appellant.

Mr. **Van H. Manning,** for appellee.

[127] *Mr. Justice* **Miller** delivered the opinion of the court:

Saunders, the appellee in this case, recovered against the United States in the court of claims a judgment for $1,627, from which the United States appeals. The recovery was for the salary of the claimant as clerk of the Committee on Commerce of the House of Representatives, from the 14th day of March, 1885, to the 7th day of January, 1886, at the rate of $2,000 per annum.

Mr. Saunders held this place from the first day of July, 1884, when he was appointed, up to the 7th day of January, 1886, when his successor was appointed. He was paid the compensation up to the 14th of March, 1885, and for the time between that and the 7th of January, 1886, the Comptroller refused to pay him. The various Appropriation Acts, including the one which would cover the period now in question, had all made appropriations for compensation for the clerk of the Committee on Commerce. The ground upon which payment is resisted by the United States is that the claimant was, on the 14th day of March, 1885, appointed a clerk in the office of the President of the United States, since which time he has continued to perform the duties of that office and receive its salary. The Comptroller, in his decision refusing to allow the claim, places his objection upon section 1765 United States Revised Statutes, and upon the opinion of Attorney-General Black, in regard to extra pay and double compensation, delivered in 1857. 9 Opinions Attys-Gen. 123. Section 1765 is found in immediate connection with several other sections on the same subject, of which [128 the two immediately preceding may be considered to some extent *in pari materia*. They are as follows:

"Sec. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"Sec. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"Sec. 1765. No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or

for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation."

Some stress is laid in the letter of the Comptroller on the proposition that the clerkship to the committee is not an office in contemplation of the Constitution of the United States and the law; and the decision in *United States* v. *Germaine*, 99 U. S. 508 [25:482], is relied upon in support of that proposition. We do not think it important to decide in this case whether such a clerkship is an office within the meaning of these sections of the law and the Constitution, because sections 1764 and 1765 both include in their prohibition officers, clerks and other persons. The proposition of the Comptroller that the clerk is not an officer is made to meet his concession that a person who holds two distinct compatible offices may lawfully receive the salary of each.

The general question here raised has been much discussed in the opinions of the Attorneys-General, and in the decisions of this court.
[129] This section 1765, mainly relied upon by the Government, is taken from two statutes, the first passed March 3, 1839, 5 U. S. Stat. at L. 349, and the second, August 23, 1842, 5 U. S. Stat. at L. 510. This opinion of Attorney-General Black seems to be in conflict with the principles laid down by his predecessors, and is materially modified, if not overruled, on the point mainly in question here, by his opinion in the case of J. P. Brown, on page 507 of the same volume. In *Hiero's Case*, 5 Ops. Attys-Gen. 765, Attorney-General Crittenden held that these two Acts of 1839 and 1842 "Were intended to fence against arbitrary extra allowances in each particular case, but not applying to distinct employments, with salaries affixed to each by law or regulation."

The case before us comes within the terms of this language, which is further confirmed by the fact that he regarded the Act of 1850 as prohibiting a person "from receiving the salary of an office which he does not hold, and not against his receiving the salaries of two offices which he does legitimately hold;" and we do not see that there is any distinction between emoluments received for two distinct employments, whether offices or not, the salaries of which are distinct, and the services rendered distinct, both appointments being held by the same person, as in this case. We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise—which is intended to cover all the services which, as such officer, he may be called upon to render—from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by Act of Congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct; and, according to all the decisions, he is in such case entitled [130] to recover the two compensations. In the former case, he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation. The case of *United States* v. *Brindle*, 110 U.S. 688 [28:286], in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, which was affirmed in this court, was upon the ground that these additional services were performed for the benefit of the Indians, and the statute implied the payment of a reasonable compensation for such services. See also *Converse* v. *U. S.* 62 U. S. 21 How. 463 [16:192].

These views require the affirmance of the judgment of the Court of Claims; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, *Appt.*, [287]
v.
ROBERT K. DOW, ET AL., Trustees.

(See S. C. Reporter's ed. 287-308.)

Railroads—reorganization—bonds in payment for property, rights and privileges acquired, not invalid under Constitution of Arkansas—protection of property by junior incumbrancers—subrogation—interest—trustees' services, counsel fees and costs.

1. The bonds issued by the Memphis and Little Rock Railroad Company on May 2, 1877, in payment for the property, rights and privileges acquired upon its reorganization, are not within the prohibition of the Constitution of Arkansas against the issuing of stock or bonds except for money actually received or labor done.

2. Said bonds are not void because made to bear interest at a rate in excess of that specified in the Arkansas Act of January 22, 1855, as they were not issued for money borrowed.

3. Where it is the duty of a mortgagor to protect junior incumbrancers against a prior lien and he fails to do so, and they pay the amount of such lien to prevent a forced sale of the property, they are entitled to be subrogated to the rights of the prior lienholder.

4. In the case presented it is held that the trustees in the deed of May 2, 1877, while entitled to reimbursement for their outlays in protecting the mortgaged property against a prior lien held by the State, are only entitled to 6 per cent interest upon the whole amount actually paid, instead of 8 per cent allowed by the court below.

5. Under the trust deed of May 2, 1877, the trustees are entitled to recover for services rendered in and about the trust, and for counsel fees and costs in this suit.

[No. 40.]

Argued Nov. 11, 12, 1886. Decided Jan. 24, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas. Reported below, 20 Fed. Rep. 260, 768. *Affirmed except as to rate of interest.*

The history and facts of the case appear in the opinion of the court.

Messrs. **B. C. Brown, Wager Swayne,** *John F. Dillon* and *John C. Brown*, for appellant:

It seems plain that a corporation can have no right to increase its obligations without consideration, and this most certainly when, as here, the corporation can obtain the money for discharge of such obligation only by increasing its charges for transportation, or, in other words, by, in effect, imposing a burden or tax upon the people. Railroad corporations control three fourths of the transportation of the country, and if entitled to increase their charges to enable them to make gifts to their owners, are invested with power to confiscate the earnings of the whole people to the use of those owners. The direct question here is whether the practice of watering stock and bonds, so freely indulged in by these corporations, by which for no consideration furnished to the public they seize and appropriate the money of the people to themselves, is or is not illegal.

That obligations issued in direct violation of a prohibitory statute, especially when such statute declares them void, are void in the hands of every one is well established by authority, and is a principle of sound common sense. In such cases there can be no innocent purchaser. A public law is notice to all the world.

Root v. *Godard*, 3 McLean, 102; *Hayden* v. *Davis*, 3 McLean, 276; *Root* v. *Wallace*, 4 McLean, 8; *Harris* v. *Runnels*, 53 U. S. 12 How. 79 (13: 901); *Armstrong* v. *Toler*, 24 U. S. 11 Wheat. 258 (6:468); *Cincinnati Mut. H. Ins. Co.* v. *Rosenthal*, 55 Ill. 85; *Leavitt* v. *Palmer*, 3 N. Y. 19.

"A contract void by the statute cannot be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it."

Dunphy v. *Ryan*, 116 U. S. 491 (29:708).

To like effect: *Southern Loan Co.* v. *Morris*, 2 Pa. 175; *Davidson* v. *Lanier*, 71 U. S. 4 Wall. 453 (18:379); *Bank of U. S.* v. *Owens*, 27 U. S. 2 Pet. 535 (7:511); *Brown* v. *Tarkington*, 70 U. S. 3 Wall. 377 (18:255); *Peck* v. *Burr*, 10 N. Y. 294; *Barton* v. *Port Jackson Plank R. Co.* 17 Barb. 397; *Utica Ins. Co.* v. *Scott*, 19 Johns. 1; *Utica Ins. Co.* v. *Caldwell*, 3 Wend. 297; Chitty, Cont. 972, 1003; Daniel, Neg. Inst. § 197; *Worthen* v. *Badgett*, 32 Ark. 496; *Eagle* v. *Beard*, 33 Ark. 497.

In each and every of these cases the paper held void was issued for value and upon consideration. In this case it is admitted that the bonds and deed are founded on no consideration.

It seems clear from the authorities, as well as on principle, that no one can be estopped from showing a contract illegal.

Collins v. *Blantern*, 2 Wills. C.P. 247; 1 Smith Lead. Cas. 667, and cases cited.

The issue of these bonds was not only *ultra vires*, they, as issued, were absolutely prohibited by the statute.

These bonds contracted for interest at 8 per cent per annum.

The statute declares that such bonds should bear a rate "not exceeding 7 per cent per annum."

The statute contemplates a sale and nothing but a sale.

These bonds were given away.

Acts done, obligations issued, *ultra vires* are void.

Shrewsbury etc. R. Co. v. *Northwestern R. Co.* 6 H. of L. 113.

The contract is likewise void when the statute prohibits it by implication. Thus, although a corporation may, without special statute authority, issue bonds to pay its debts, or to raise money for a corporate purpose, a statute which prescribes certain conditions on which they may be issued prohibits by implication the issue of bonds which do not comply with the conditions, and those issued without such compliance are void.

Pierce, R. R. 512; *Commonwealth* v. *Smith*, 10 Allen, 448; *Head* v. *Providence Ins. Co.* 6 U. S. 2 Cranch, 127 (2:229); *Chambers* v. *Manchester & M. R. Co.* 5 Best. & S. 588; *Rockwell* v. *Elkhorn Bank*, 13 Wis. 731; *James* v. *Cincinnati, H. & D. R. R. Co.* 2 Disney, 261; *Kent Coast R. Co.* v. *London, C. & D. R. Co.* L. R. 3 Ch. App. 656.

The exception to the effective operation of the doctrine of *ultra vires* is based entirely on the reception of a consideration.

See Green's Brice, Ultra Vires, and cases in note, 729-749; *Hitchcock* v. *Galveston*, 96 U. S. 352 (24:662); *Hotel Co.* v. *Wade*, 97 U. S. 13 (24:917); *National Bank* v. *Matthews*, 98 U. S. 621 (25:188).

In this case it is admitted that no consideration for these bonds was received; hence, no estoppel can arise.

Equity will interfere between wrong doers where a public interest is involved. Equity will also interfere when the party asking relief was, at the time of the transaction, so much under the control of the other party as not to be his own master, or to have any discretion.

Huguenin v. *Baseley*, 2 W. & T. Lead. Cas. Eq. 556, and cases cited on pages 150-153; Story, Eq. Jur. § 300; *Smith* v. *Bromley*, Doug. K. B. 696; *Osborne* v. *Williams*, 18 Ves. 379; *Browning* v. *Morris*, 2 Cowp. 790; *Phalen* v. *Clark*, 19 Conn. 421; *Ford* v. *Harrington*, 16 N. Y. 285; *Long* v. *Long*, 9 Md. Ch. 348.

The acts of a corporation are controlled by its stockholders, and that such acts, when illegal or wrongful, are condemned is settled in this court.

Sawyer v. *Hoag*, 84 U. S. 17 Wall. 623 (21:736).

These wrong doers in paying the State merely discharged a just debt due appellant. They were and are the wrong doers and are not entitled to subrogation.

Guckenheimer v. *Angevine*, 81 N. Y. 394; *Wilkinson* v. *Babbit*, 4 Dill. 208.

The right of subrogation rests on principles of pure equity, and should not be allowed where it appears that the person seeking it is indebted to the person against whom he is proceeding on any account in an amount equal, greater, or less than the demand, without first satisfying the debt.

Coates' Appeal, 7 Watts & S. 99; Sheldon, Subrogation, § 112.

Messrs. **U. M. Rose** and **John M. Bowers**, for appellees:

As the old company had authority expressly conferred by its charter to borrow money for the purpose of building and equipping its road, and as the present Company has succeeded to its charter, no reason can be shown why the latter should not have authority on its organization to issue bonds for a debt contracted for building and equipping the road, no part of which had ever been paid.

If not, perhaps a stockholder might have enjoined the issue of the bonds and the execution of the mortgage by a timely application to a court of chancery; but after the act was done and the appellant had received the benefit from it for which it had contracted, neither it nor any stockholder could avoid its responsibility by pleading *ultra vires*.

1 Jones, Mort. 127; Sedgwick, Stat. & Const. Law, 90; *Township of Pine Grove* v. *Talcott*, 86 U. S. 19 Wall. 678 (22 : 234); *Houston & T. R. R. Co.* v. *Shirley*, 54 Tex. 125; *Grant* v. *Henry Clay Coal Co.* 80 Pa. 209; *Sand* v. *Coffman*, 50 Mo. 243; *Natoma Water & M. Co.* v. *Clarkin*, 14 Cal. 544; *Darst* v. *Gale*, 83 Ill. 136; *Union W. Co.* v. *Murphy's Flat Fluming Co.* 22 Cal. 621; *Southern L. Ins. & T. Co.* v. *Lanier*, 5 Fla. 110; *Third Ave. Bank* v. *Dimock*, 24 N.J. Eq. 26; *Rutland etc., R. R. Co.* v. *Proctor*, 29 Vt. 93; *Farmers Bank* v. *R. R. Co.* 17 Wis. 383; *Oil Creek R. R. Co.* v. *Pa. Trans. Co.* 83 Pa. 160; *City of Natchez* v. *Mallery*, 54 Miss. 499; *Attleborough Nat. Bank* v. *Rogers*, 125 Mass. 339; *State* v. *Woram*, 6 Hill, 33; *Steam Nav. Co.* v. *Weed*, 17 Barb. 378; *Underwood* v. *Newport Lyceum*, 5 B. Mon. 129; *Parish* v. *Wheeler*, 22 N. Y. 494; *State Board, etc.*, v. *Citizens Street R. Co.* 47 Ind. 407; *Sturges* v. *Knapp*, 31 Vt. 1; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62.

"Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable, and the Sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

Nat. Bank v. *Matthews*, 98 U. S. 628 (25 : 190). See also *Gold Mining Co.* v. *Nat. Bank*, 96 U. S. 640 (24: 648); *R. Co.* v. *McCarthy*, 96 U. S. 267 (24 : 696); *Hotel Co.* v. *Wade*, 97 U. S. 13 (24 : 917); *Hitchcock* v. *Galveston*, 96 U. S. 351 (24 : 662); *R. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (19 : 117).

"The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."

Thomas v. *R. R. Co.* 101 U. S. 86 (25 : 953). See also *Ex parte Chippendale*, 4 De G. M. & G. 19; *Re Cork & G. R. Co.* L. R. 4 Ch. App. 748; *Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225.

He who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable.

Andrews v. *Hensler*, 73 U. S. 6 Wall. 257 (18 : 739); *Nat. Bank* v. *Matthews*, *supra*; *Benjamin* v. *Hobbs*, 31 Ark. 154.

In any event the plaintiffs are entitled to subrogation.

The payment by the plaintiffs, of the debt due the State, relieved the defendant of a burden which could only be got rid of by payment. Under these circumstances the defendant would be compelled to repay the money advanced by the trustees, though in point of fact it might be held that the trust deed is void.

Crosby v. *Taylor*, 15 Gray, 64; *Valle's Heirs* v. *Fleming's Heirs*, 29 Mo. 152; *Champlin* v. *Williams*, 9 Pa. 341; *Davis* v. *Roosevelt*, 53 Tex. 305; *Johnson* v. *Robertson*, 34 Md. 165; *Payne* v. *Hathaway*, 3 Vt. 212; *Muir* v. *Berkshire*, 52 Ind. 149; *Webb* v. *Williams*, Walker (Mich.) 544; *Howard* v. *North*, 5 Tex. 291; *Selleck* v. *Phelps*, 11 Wis. 380; *Tomkins* v. *Sprout*, 55 Cal. 31; *McLaughlin* v. *Daniel*, 8 Dana, 183.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellant, the Memphis and Little Rock Railroad Company (as reorganized), an Arkansas corporation, conveyed, by deed of May 2, 1877, to Pierson, Matthews, and Dow, trustees, its road and connections, and all its property, rights and privileges, including its franchise to be a corporation, to secure the payment of its bonds of the same date, aggregating $2,600,000, and payable in thirty years, subject to a mortgage for $250,000, executed May 1, 1877. The [288] deed provided for the employment, at the expense of the trust estate, of such attorneys and agents as were reasonably necessary for the execution of the trust, and also for the payment of charges, costs, expenses and compensation, incurred by the trustees from time to time "in and about or for the execution of the trust."

On the fourth day of March, 1882, the Supreme Court of Arkansas, in a suit to which that Corporation was a party, rendered a decree adjudging that the State had a lien upon its road and rolling stock to secure the payment of $202,183.32 with interest from December 22, 1879, until paid, at the rate of 8 per cent per annum; that being the aggregate principal and interest then due on a loan of $100,000 made January 10, 1861, by the State to the (old) Memphis and Little Rock Railroad Company, and secured by a mortgage upon its rolling stock and upon the same road now operated by the appellant.

On the 25th of March, 1882, five days before the day fixed for the sale directed to be made in satisfaction of that decree, the appellees, (Moran having succeeded Pierson), as trustees in the deed of May 2, 1877, paid into the treasury of Arkansas the sum of $239,672.71 in full discharge of the State's claim.

The appellees seek by this suit to be subrogated to the rights of the State, and to charge the mortgaged property and interests with the amount so paid by them, with interest thereon, and also with such sums as may be ascertained to be due by reason of liabilities incurred, and costs, time, and labor expended by them in and about the trust.

The Company resists each of the claims asserted by the appellees. Its answer proceeds mainly upon the ground that the bonds secured by the deed of May 2, 1877, were and are void under the Constitution and laws of Arkansas, having been issued, it is alleged, to the stockholders of the appellant without consideration in money, labor, or property actually received, of which fact the plaintiffs and every original taker of the bonds were advised, and as to which subsequent takers, if such there were, were put upon inquiry by the recitals in the mortgage securing their payment. Conse- [289] quently, it is contended, the appellees were under no duty and had no legal right as trustees, or in any other capacity, to intervene and satisfy the decree in favor of the State, or to incur liability or costs in reference to the defendant's property. The Company also filed a cross-bill, setting forth the same grounds, and praying that upon final hearing the deed of May 2, 1877, and the bonds thereby secured, be declared void.

The court sustained exceptions to the answer and a demurrer to the cross-bill, dismissing the latter for want of equity, and rendering a decree in accordance with the prayer of the bill. By the decree, the appellees were subrogated to all of the rights of the State under the decree of March 4, 1882; and for the amount so paid by them, with interest thereon from March 25, 1882, at the rate of 8 per cent per annum, aggregating $261,456.27, together with interest on the latter sum at the same rate, from the date of the decree herein, they were adjudged to have a lien upon the property, rights and interests embraced by the deed of May 2, 1877, subject—the appellees having consented thereto—to the lien created by that deed as well as by a deed executed May 1, 1877. A decree was also entered against the Company for $29,580.87, the amount found due to the plaintiffs for services rendered in and about the trust, and for counsel fees and costs in this suit. To this provision of the decree the appellant also objects, upon grounds to which reference will be hereafter made.

The principal question relates to the validity of the $2,600,000 issue of bonds secured by the deed of May 2, 1877.

The principal facts, chronologically stated, which bear upon this and other questions in the case are as follows: the Memphis and Little Rock Railroad Company was incorporated in 1853 under the laws of Arkansas, with authority to increase its capital to a sum sufficient to complete and operate a railroad between Memphis and Little Rock, by opening books for new stock, or by selling new stock, or by borrowing money secured by mortgage of its charter and stock. Its stockholders, at a meeting held February 20, 1860, adopted a resolution authorizing the board of directors, for the [290] purpose of building and equipping the road, to increase the capital stock of the company to $1,300,000, by issuing coupon bonds of $1,000 each, bearing 8 per cent interest, convertible at any time within ten years thereafter into shares of stock; such bonds to be secured by mortgage upon the company's road, charter, works and real estate, or either of them. The action of the stockholders having been ratified by the directors, the company by deed of trust executed May 1, 1860, conveyed to Tate and others its franchises, property, privileges, road, road-bed, right of way, rolling stock and works, in trust to secure its bonds, aggregating $1,300,000, payable thirty years after date, with interest at the rate of 8 per cent per annum. On the 10th of January, 1861, it placed a mortgage upon its road and rolling stock to secure the before mentioned state loan of $100,000, with interest from that date until paid at the rate of 8 per cent. By deed of March 1, 1871, it conveyed its franchises, property and net income, to Henry F. Vail, in trust to secure other bonds, amounting to $1,000,000, payable thirty years thereafter, with interest at the rate of 8 per cent per annum. The company having made default in the payment of interest on the latter bonds, Vail, the trustee, on the 17th day of March, 1872, sold and conveyed these properties, rights, privileges and franchises, for $15,000 in cash, subject to all prior and superior liens, to one Stillman Witt, who purchased in behalf of the holders of bonds secured by the deed of March 1, 1871. Subsequently, March 29, 1873, Witt executed a deed declaring the respective interests of the parties whom he represented, and conveying to each his proportionate share of the property and interest so purchased. On the 17th of November, 1873, the grantees in the latter deed conveyed the same property, rights and franchises to the Memphis and Little Rock Railway Company—a corporation then recently organized under the laws of Arkansas, by the parties to whom Witt conveyed, subject, however, to the condition that that company should execute its bonds for $2,600,000, secured by first mortgage to the New York Guaranty and Indemnity Company—that amount, according to the estimate of the parties, being less than the principal and interest due on the $1,300,000 mortgage of May 1, 1860, and other indebtedness theretofore incurred in the construction and equip- [291] ment of the road. In conformity with that condition the railway company executed, December 1, 1873, a mortgage securing its bonds for $2,600,000. That mortgage provided, among other things, that "In case of any sale, judicial or otherwise, of the premises embraced in this mortgage, and the holders of a majority in interest of the then outstanding bonds secured by this mortgage shall, in writing, request the said trustee, or its successor or successors, or his or their survivor or survivors, so to do it, they or he is authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds and coupons secured by this mortgage. And that, having so purchased said premises, the right and title thereto shall vest in said trustee or trustees, and no bondholder shall have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said premises as represented in a new company or corporation to be formed by a majority in interest of said bondholders for the use and benefit of the holders of the bonds secured hereby. And whenever the holders of a majority of said bonds shall have organized a new company or corporation for the use and benefit of all the holders of the bonds secured by this mortgage the said trustee, or its successor or successors, or his or their survivor or survivors, shall reconvey the premises so purchased by it, him, or them to said new company or corporation."

The New York Guaranty and Indemnity Company was succeeded in the trust by Pierson, Dow and Matthews. The railway company having made default in meeting the interest on its bonds, and the principal, under the terms of the deed of trust, becoming thereby due, the trustees instituted a suit for foreclosure. Pending that suit, Tate and others, trustees in the mortgage of May 1, 1860, were made coplaintiffs. The bill was amended and the prayer for relief so enlarged as to include a foreclosure of the latter mortgage. Both mortgages were foreclosed by final decree of November 1, 1876, the amount found to be due on that of May 1, 1860, being $1,088,348.80, with interest at the rate of 6 per cent per annum, and the amount due on that of December 1, [29 1873, being $3,016,000. The decree provided, among other things, "That if said trustees shall be so requested, and shall bid for said

property, they shall pay into court a sufficient sum to pay the costs of sale and this suit, including counsel fees, allowances to trustees, to the commissioner for sale, and master of this court. And for the residue, their bid to the amount due and ordered to be paid by this decree shall be accepted by said commissioner, and he shall forthwith execute a deed conveying the purchased property to said trustees for and upon the trusts expressed in said second mortgage; that is to say, upon trust that they will convey the same to such new company or corporation as may be organized by the holders of a majority in interest of said bonds upon demand thereof."

At the sale under that decree, Pierson, Dow and Matthews, as trustees in the deed of December 1, 1873, purchased the property for the holders of bonds secured by that instrument, and a deed was made to them, on April 28, 1877, in trust for such holders, "and upon the further trust that they will convey the same and all thereof to such company or corporation as may be formed by the holders of a majority of such bonds at such time and upon such terms and conditions as a majority of the holders of such bonds may require."

On the day last mentioned the majority, in value, of such bondholders entered into articles of association reorganizing the Memphis and Little Rock Railroad Company and fixing its capital stock at $1,300,000. The parties engaged in the reorganization being holders of the bonds secured by the deed of December 1, 1873, and beneficiaries under the deed of April 28, 1877, took the entire stock to themselves without paying therefor in money. The articles, after declaring that each and every share of the above named stock was fully paid stock, and acknowledging, on behalf of the Company, that $100 had been paid upon each share by the holder thereof, provided:

"That we hereby require the said trustees, William S. Pierson, Watson Matthews, and R. [293] K. Dow, to convey all and singular the property, charter, franchises, rights, privileges, and immunities, so conveyed to them by such commissioner, to the Memphis and Little Rock Railroad Company, as reorganized, upon the following terms and conditions, to wit:

"1. That said Railroad Company, as reorganized, shall issue its two hundred and fifty bonds, payable to bearer at the office of the Central Trust Company of New York, in the City of New York, each for one thousand dollars, maturing in five equal installments, on the first days of May, in the years 1879, 1880, 1881, 1882 and 1883, bearing interest from date at the rate of 10 per centum per annum, payable semi-annually at the same place, with coupons for said interest annexed; and shall secure the payment of the principal and interest thereof by a mortgage of all and singular the said property, charter, franchises, rights, privileges and immunities, of which mortgage said Pierson, Matthews and Dow shall be trustees, and shall deliver the same to the said Pierson, Matthews and Dow, to be by them sold, and the proceeds applied to the payment of the liens upon the said property reserved by the decree of the said court directing the sale thereof, and to the payment of moneys borrowed by them to make the cash payment required by said decree.

"2. That said Memphis and Little Rock Railroad Company, as reorganized, shall execute and deliver, to said Pierson, Matthews and Dow, its two thousand five hundred and seventy-five other bonds, each for the sum of one thousand dollars; and its one hundred other bonds, each for two hundred and fifty dollars, payable at the same place thirty years after date, bearing interest from the first day of July, 1878, and until the first day of July, 1882, at the rate of 4 per centum per annum, and after the last named date at 8 per centum per annum, payable at the same place, with coupons for such interest attached; and shall make provision for a sinking fund for redemption of such bonds, and shall secure payment of said bonds, interest and sinking fund, by a mortgage of all said property, charter, franchises, rights, privileges and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees; such [294] last named bonds to be by said Pierson, Matthews, and Dow, *equally distributed among the holders of the bonds secured by the mortgage of the Memphis and Little Rock Railway Company, of date December* 1, 1873."

These terms were formally accepted by the stockholders, and on April 30, 1877, the trustees conveyed to the reorganized Company the property, rights and interests so purchased, subject to the terms, conditions and trusts prescribed in its said articles of association.

Pursuant to the conditions upon which it received title, the appellant, on May 1, 1877, issued its bonds, amounting to $250,000, and, to secure their payment, conveyed the same property, rights and interests to Pierson, Dow and Matthews as trustees. The proceeds of these bonds were applied in payment of the expenses of foreclosure and reorganization. In further compliance with these terms, the appellant issued its bonds for $2,600,000 for distribution among the holders of bonds secured by the mortgage of December 1, 1873, and, to secure their payment, executed the before mentioned mortgage or deed of trust of May 2, 1877. The recitals in the deed disclose all the foregoing circumstances connected with the organization of the appellant Corporation, and with its acquisition of these properties.

From these facts it appears that at the date [297] of the mortgage of May 2, 1877, appellant's entire assets consisted of the property, rights and privileges purchased by Pierson, Dow, and Matthews, trustees, at the sale under the decree foreclosing the mortgage of December 1, 1873, and by them conveyed to it, on the express condition that the beneficial owners should receive therefor, besides $1,300,000 in stock, its mortgage bonds for $2,600,000. That amount, in the stock and bonds of the appellant, was the valuation placed by such owners upon their interests, after taking into account, as well the amount previously expended in the construction and maintenance of the road, as the probable value in the future of the stock and bonds to be given for a surrender of those interests. The transaction was, in its essence, a purchase of said property, rights and privileges by the appellant at an agreed price, to be paid in its stock and bonds. A part of the price was paid when the $1,300,000 of stock was issued. But appellant disputes its liability upon the bonds given for the balance, upon the theory that

they were prohibited from issuing them by the eighth section of the twelfth article of the Constitution of Arkansas, adopted in 1874. That section provides that "No private corporation shall issue stock or bonds, except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void." In support of this view our attention is called to the fact, admitted by the demurrer, that the full value of the property, rights and privileges conveyed to appellant did not exceed $1,800,000, the amount at which the capital stock was fixed; and, consequently, it is argued, the $2,600,000 of bonds were issued without any consideration received in money, property, or labor, and represented only a fictitious indebtedness. In other words, appellant's vendors were fully compensated for their interests by taking to themselves its entire stock.

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We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the State Constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was pretended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the Constitution of Illinois, adopted in 1870, containing a prohibition, as to railroad corporations, similar to that imposed by the Arkansas Constitution upon all private corporations, the Supreme Court of the former State, in *Peoria & S. R. R. Co.* v. *Thompson*, 103 Ill. 201, said: "The latter part of the clause of the Constitution in question, which declares that 'all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void,' we think, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. * * * Under this provision of the Constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either except for a present consideration and for a corporate purpose."

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Recurring to the language employed in the Arkansas Constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper; provided, always, the transaction is a real one based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the State Constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders. And, that subsequent holders of stock might not be misled, each certificate of stock states upon its face that "the holder takes this stock subject to $2,850,000 of mortgage bonds of the Company, which are secured by two mortgages duly recorded." All that was done was to reorganize the Little Rock and Memphis Railroad Company upon the same basis, substantially, as to capital stock and bonded indebtedness, as existed in respect to these properties, rights and privileges, before the adoption of the State Constitution, and while they were held and controlled by the companies which preceded the appellant in the ownership. There was, consequently, no fictitious increase by appellant of its stock or indebtedness. Under these circumstances it cannot be fairly said that the bonds secured by the mortgage were issued without any consideration whatever actually received in property.

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Equally untenable is the position that the bonds were void because made to bear interest at a rate in excess of that specified in the Act of January 22, 1855, now section 5488 of the Revised Statutes of Arkansas. Mansfield (Ark.) Digest. The 7th section of that Act provides that "Whenever any railroad company heretofore or hereafter incorporated in this State shall, in the opinion of the directors thereof, require an increased amount of the capital stock, they shall, if authorized by the holders of a majority of the stock, be, and they are hereby, authorized to increase their capital stock to any amount not exceeding the estimated cost of their road, and shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding 7 per cent per annum, and may execute its bonds therefor in sums of five hundred dollars or one thousand dollars; and to secure payment thereof may pledge the property, both real and personal, and the income of said company, and to secure the payment thereof may execute a deed of mortgage or other instrument of writing; and such company are hereby authorized to sell, negotiate, pledge or mortgage such bonds for the benefit of such company, and on such terms and at such places, either within or without this State, and at such rates and at such prices as in the opinion of such directors will best advance the interests of such company; and if said bonds are thus sold *bona fide* at a discount, such sale shall be valid in every respect, and such securities as binding for the respective amounts thereof, as if sold at their par value."

It is sufficient to say that this statute has no application to the present case; for, there was here no increase of the existing capital stock of a corporation; nor were the bonds secured by the mortgage of May 2, 1877, executed for money borrowed, but for property, rights and privileges conveyed to appellant at an agreed price, to be paid in its stock and bonds.

It results, from what has been said, that the validity of the bonds cannot be disputed upon any of the grounds stated. Neither the Constitution nor the Statutes of Arkansas interpose any obstacle to the full performance by the [301] appellant of the terms and conditions upon which only it acquired the ownership of the interests in question.

The appellant, in the mortgage to the appellees, covenanted that the interests conveyed were free from incumbrances and that it would warrant and defend the title against all lawful claims whatsoever. Its duty therefore was to protect those interests against prior liens. Appellant having neglected to perform that duty, the appellees, as junior incumbrancers, had the right to protect the mortgaged estate against a forced sale. Upon payment of the amount due the State, they became entitled to the benefit of her lien upon the property. Although the appellees did not purchase the State's claim or become, technically, the assignee thereof, her lien will be regarded in equity, as subsisting, so far as is necessary for their protection.

In behalf of the appellant it is contended that the decree below went beyond what was required for the indemnification of the appellees. The debt due the State, by the terms of her contract with the old company, bore interest at the rate of *eight* per cent per annum until paid. The entire claim, with interest at that rate, was paid by the appellees. But the decree below gave a lien, as against the appellant, for the amount so paid with interest *from the date of such payment, at the same rate as was stipulated in the contract between the State and her debtor.*

The Constitution of Arkansas provides that "All contracts for a greater rate of interest than 10 per centum per annum shall be void as to principal and interest, and the General Assembly shall prohibit the same by law; but where no rate of interest is agreed upon the rate shall be 6 per centum per annum." Art. 19, § 13. And by statute it is provided that "Judgments or decrees upon contracts bearing more than 6 per cent interest shall bear the same interest as may be specified in such contracts, and the rate of interest shall be expressed in all such judgments and decrees; and all other judgments and decrees shall bear interest at the rate of 6 per cent per annum until satisfaction is made as aforesaid."

[302] The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties. All that the appellees can, in good conscience, demand is *reimbursement* for their outlay in protecting the mortgaged property against the prior lien of the State. When relief to that extent is accorded, they will have no just ground to complain, especially as the debt held by the State was not the personal debt of the appellant. There was no agreement between them and the appellant in respect to interest upon any sum they might be compelled to pay in order to relieve the property from prior incumbrances. If, therefore, they are adjudged to have a lien upon the mortgaged property for the whole amount actually paid to the State, with interest thereon from the date of such payment, at the rate established by law in the absence of an agreement as to rate, they will be fully indemnified. It is not for the court or for parties to say that the rate of interest fixed by law in the absence of an agreement is not adequate compensation for delay in the payment of money. It results that the decree, so far as it allows to appellees interest in excess of 6 per cent per annum, on the aggregate amount of principal and interest paid by them to the State, is erroneous.

One other question remains to be determined. The appellant insists that the court below erred in giving judgment against it for $29,580.87, the amount found to be due the appellees for services and counsel fees herein and for costs paid out by the appellees in this suit. We are of opinion that the decree in this respect was right. This allowance, as to its amount, is fully sustained by the evidence in the cause. And it is authorized by that clause and condition in the mortgage of May 2, 1877, which provides that the appellant "will from time to time, as incurred, pay all charges, costs and expenses" of the appellees, or either of them, "in and about the execution of the trust," and "will indemnify and hold harmless" the appellees "against all costs, charges, damages and expenses which they or either of them may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may be incurred by or arise from the culpable [303] act or neglect" of said appellees.

The decree below is reversed so far as it gives the appellees interest upon the aggregate amount paid by them into the treasury of the State, at the rate of 8 per cent per annum from the time of such payment; and the cause is remanded, with directions to allow interest upon that amount, from the date of payment, at the rate only of 6 per cent per annum. In all other respects the decree is affirmed. The appellant will have its costs in this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[89] UNITED STATES, *Plff. in Err.*,
v.
HUBBARD G. PARKER ET AL.

(See S. C. Reporter's ed. 89-97.)

Action on penal bond—dismissal of former action, a bar—liberal construction of pleadings—Nevada Statutes.

1. A judgment of dismissal based upon and entered in pursuance of an agreement of the parties, which recites that the subject matter has been adjusted and settled by them, is a bar to a subsequent action both at common law and under the Statutes of Nevada.

2. Under the statutory rule in Nevada requiring a liberal construction of pleadings, a second action on a penal bond is held to be for the same breach, although the amount claimed is less than that alleged in the former suit.

[No. 945.]

Argued Jan. 3, 1887. Decided Jan. 24, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nevada. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error:

In cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.

Cromwell v. *County of Sac*, 94 U. S. 358 (24: 198).

When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleading, must be shown by extrinsic evidence.

Davis v. *Brown*, 94 U. S. 428 (24: 206); *Russell* v. *Place*, 94 U. S. 608 (24: 215); *Campbell* v. *Rankin*, 99 U. S. 263 (25: 436).

No extrinsic evidence in this case was offered to show that the claim now sued for was actually included in the former action pleaded. If, then, the plea does not state such facts, or set forth such a record as to show that the claim now sought to be enforced was actually embraced in the former contention, the demurrer should have been sustained.

The record pleaded is in fact, and no doubt in intent, but a consentable nonsuit. The defendant's plea in this case states it was by consent. The record entry shows no trial, no evidence on the part of plaintiff; but, on motion of defendants' attorneys, the court substantially states that the case, having been settled by the parties, need not be heard, and is therefore dismissed. In law this is merely a judgment of nonsuit.

Haws v. *Tiernan*, 53 Pa. 192; *McLaughlin* v. *McGee*, 79 Pa. 217.

Even a compulsory nonsuit is not a bar to a subsequent action for the same claim.

Fleming v. *Ins. Co*, 4 Clark, 54; *Bournonville* v. *Goodall*, 10 Pa. 133.

Messrs. **C. J. Hillyer** and *William M. Stewart*, for defendants in error:

The judgment in the former action determines every possible question that can arise on the bond as to the liability of defendant Parker.

Secor v. *Sturgis*, 16 N. Y. 548; *Baird* v. *U. S.* 96 U. S. 430 (24: 703); *Bendernagle* v. *Cocks*, 19 Wend. 207; *Miller* v. *Covert*, 1 Wend. 487; *Phillips* v. *Berick*, 16 Johns. 136; *Furrington* v. *Payne*, 15 Johns. 432; *Heriter* v. *Porter*, 23 Cal. 385; *Cunningham* v. *Harris*, 5 Cal. 81; *Warren* v. *Comings*, 6 Cush. 103.

Cromwell v. *County of Sac*, *Davis* v. *Brown* and *Russell* v. *Place*, all in 94 U. S. (Bk. 24, L. ed.), and *Campbell* v. *Rankin*, in 99 U. S. (25: 436), cited by the solicitor, have no application to the case at bar. In these cases the court made a distinction between the judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action.

The effect of the judgment in this case must be determined by the laws of Nevada.

Sec. 914 R. S.; *Nudd* v. *Burrows*, 91 U. S. 426 (23: 286); *Indianapolis, etc. R. R. Co.* v. *Horst*, 93 U. S. 291 (23: 898); *Sawin* v. *Kenny*, 93 U. S. 289 (23: 926); *Weed Sewing Machine Co.* v. *Wicks*, 3 Dill. 261.

The case at bar is not included among the cases which may be dismissed or in which a nonsuit may be entered under the Nevada Statute.

Phillpots v. *Blasdel*, 10 Nev. 19; *Merritt* v. *Campbell*, 47 Cal. 542.

Both the Supreme Courts of California and Nevada in construing the statutes of those States give to them the same effect as the courts of Kentucky give to a case "dismissed agreed." It will be observed by the cases, *Bank of Commonwealth* v. *Hopkins*, 2 Dana, 395, and *Jarboe* v. *Smith*, 10 B. Mon. 257, that an agreed dismissal of a case in Kentucky is a judgment on the merits and final.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action at law commenced by the United States, on the 18th of November, 1885, against Hubbard G. Parker, as principal, and William M. Stewart, as surety, upon an official bond executed on the 12th day of March, 1867, in the penal sum of $20,000, the condition of which was that whereas, the said Hubbard G. Parker had been appointed superintendent of Indian affairs for Nevada and had accepted such appointment, if the said Hubbard G. Parker should at all times carefully discharge the duties thereof, and faithfully expend all public moneys and honestly account for the same and for all public property which should or might come into his hands, without fraud or delay, the obligation should be void. [90]

It is alleged in the complaint that after the execution of the bond, and while the defendant Parker still held and remained in said office, and prior to November 18, 1869, the plaintiff placed in his hands various and sundry large sums of money to be expended by him for the benefit of the Indians of Nevada, and to be properly accounted for by him; that on said November 18, 1869, "there then and ever since has remained and now remains of said moneys in said defendant Parker's hands, unexpended and unaccounted for, the sum of $6,184.14;" and he having failed to account for or to return the same to the plaintiff, judgment is prayed for against the defendants for that amount, with interest thereon at the rate of 6 per cent per annum from November 18, 1869.

The defendants filed the following answer:

"That heretofore, to wit, on the 27th day of November, A. D. 1871, the said above named plaintiff commenced an action in the Circuit Court of the United States, Ninth Circuit and District of Nevada, against said above named defendants, upon the official bond of the defendant Hubbard G. Parker, as superintendent of Indian affairs for Nevada (the same identical bond as set out in the complaint herein), to recover the sum of fifteen thousand one hundred and eight and $\frac{44}{100}$ ($15,108.62) dollars, together with interest and costs; that said action was commenced by the filing of a complaint and

the issuance of summons thereon in due form of law; that the said defendants appeared in said action by their attorneys, Ellis & King, and on, to wit, December 15, A. D. 1871, filed their answer to the complaint, and, among other things, denied that there was any balance due the United States from the said de-
[91] fendant Hubbard G. Parker, as superintendent of Indian affairs for Nevada, or otherwise. That said United States Circuit Court had jurisdiction of the parties and the subject matter of said action.

"That afterwards, and on, to wit, the 1st day of December, A. D. 1873, said cause came on for trial in the said Circuit Court of the United States and District of Nevada, before Hon. Lorenzo Sawyer, Circuit Judge, and Hon. E. W. Hillyer, United States District Judge for Nevada, the plaintiff being represented by its duly authorized and appointed attorney for the District of Nevada, Jonas Seely, and the defendants being represented by their attorneys, Messrs. Ellis & King.

"That thereupon the defendants, by their attorneys, presented to the court a statement of accounts duly certified by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, showing that said defendant Hubbard G. Parker's accounts with the United States as superintendent of Indian affairs for Nevada had been settled and adjusted, and that the said defendant Parker was discharged from all claims of the United States as superintendent of Indian affairs for Nevada, or otherwise, and that said Parker was not indebted to the United States in any sum whatever as superintendent of Indian affairs for Nevada, or otherwise.

"Whereupon, in open court, on motion of defendants' attorneys, the district attorney representing the United States consenting thereto, the following judgment was duly made and entered, to wit:

"'Upon motion of Ellis & King, attorneys for defendants, and it appearing to the court that the subject matter in this suit has been adjusted and settled by the proper parties in Washington; it is therefore ordered that this cause be and the same is hereby dismissed.'

"Defendants further aver that said judgment so as aforesaid made and entered is a bar to any and all claims of the plaintiff in this action against each and all of the said defendants, and that the said plaintiff is estopped thereby, and ought not to have or maintain this action.

[92] "And for further and separate answer defendants aver that on the 21st day of June, A. D. 1872, the said defendant Hubbard G. Parker, as superintendent of Indian affairs for Nevada, made a full settlement with proper officers of the United States of all his accounts as superintendent of Indian affairs for Nevada, and his accounts were finally adjusted and settled by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, whereby he was fully discharged from all obligations and demands of the United States as superintendent of Indian affairs for Nevada, or otherwise.

"Defendants further aver that the pretended claims against these defendants for six thousand one hundred and eighty-four and $\frac{14}{100}$ ($6,184.14) dollars is founded upon a pretended readjustment of the accounts of the said defendant Parker by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, made on the 25th day of June, A. D. 1884, and that such pretended readjustment was made without authority of law; that the said settlement and adjustment made on the 21st day of June, A. D. 1872, aforesaid, was final and conclusive, and a bar to the pretended claim for $6,184.14 herein, or any claim of the United States against these defendants, or either of them."

To this answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a bar to the cause of action set out in the complaint. This demurrer was overruled and the attorney for the plaintiff resting his case upon the demurrer, judgment was entered in favor of the defendants, to reverse which the United States has sued out and now prosecutes this writ of error.

In the view which we take of the case, it is not necessary to consider the validity of the second defense set up in the answer. The points relied upon by the plaintiff in error, so far as the first defense is concerned, are: 1, that the former judgment relied on as an estoppel does not appear to be for the same cause of action as that on which recovery is now sought; and 2, that the judgment is not a final judgment on the merits. The two actions are upon the same bond, but it is alleged that it does not sufficiently appear that the recovery sought in the two actions is upon the same breach. In the first action the amount alleged to be due was [93]
$15,108.62, the action having been brought November 27, 1871. On the trial on December 1, 1873, the averment is that the defendants presented to the court a statement of accounts, duly certified by the Second Auditor and Second Comptroller of the Treasury Department, showing that the defendant Parker's accounts with the United States as superintendent of Indian affairs for Nevada had been settled and adjusted, and that Parker was thereby discharged from all claims of the United States against him as superintendent of Indian affairs for Nevada, or otherwise, and that said Parker was not indebted to the United States in any sum whatever as superintendent of Indian affairs for Nevada, or otherwise.

It is stated, by way of recital in the judgment itself, that it thus appeared to the court "that the subject matter in this suit has been adjusted and settled by the proper parties in Washington." This recital, together with the judgment founded on it, was entered by the consent of the attorney representing the United States, who thus in open court officially admitted the effect of the evidence to be as claimed. The present action was begun on the 18th of November, 1885, but the breach alleged occurred on November 18, 1869, the judgment demanded being for the amount stated then to have become due, with interest thereon from that date. The cause of action, therefore, arose and existed at that time; and if in existence now it must have been so at the date of the trial of the first action; to wit, December 1, 1873. It is therefore a fair and reasonable, if not a necessary, inference that the amount alleged to be due in the present action was part of

the larger amount sought to be recovered in in the former action. It is not material that the two sums are not identical; it is sufficient that the smaller was part of the larger amount. In the first cause there might have been a recovery, if the proof had justified, for a sum less than that demanded. It was found and adjudged by the court in that cause, not only that the whole sum demanded was not due, but that there was nothing due from the defendant to the United States; and if nothing was then due, the amount now sought to be recovered must [94] have been adjudged not to have been due; for if due now, according to the averments of the complaint, it was due from a time prior to the date of that trial and judgment. The averment is that it was due on and from November 18, 1869. It may be, according to the rule of pleading at common law, where a former judgment is set up by way of a bar to the action as an estoppel, the plea in this case would not be regarded as sufficiently certain, for want of an express averment that the amount sought to be recovered in this action was part of the same amount sought to be recovered in the prior action. But the rules of the common law as to pleading are not in force in Nevada, where the procedure is regulated by a statutory Code, which governs the practice of the courts of the United States sitting therein in common-law cases by virtue of section 914 of the Revised Statutes. This Code, like other similar codes regulating the practice of the state courts, has relaxed the strictness of the common-law rules of pleading, so that now, instead of construing pleadings strictly against the party, they are to be construed liberally in his favor for the furtherance of justice.

Section 70 of the Civil Procedure Act of the State of Nevada, approved March 8, 1869, being section 3092 of the General Statutes of Nevada of 1885, is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

In commenting on this section, the Supreme Court of Nevada, in *Ferguson* v. *Virginia and Truckee R. R. Co.* 13 Nev. 184, 191, uses the following language: "But the rule construing pleadings most strongly against a pleader has been replaced in this State by the more liberal rule prescribed in section 70 of the Practice Act. This section is the same as section 159 of the New York Code. The result of the decisions in that State seems to be that on a general demurrer the allegations of a complaint will be construed as liberally in favor of the pleader as, before the Code, they would have been construed after the verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action for the defense. Moak's Van Santvoord's Pl. 3d ed. side page, 771 *et seq.* In this State a similar doctrine has been declared in *State* against *Central Pacific R. R. Co.* 7 Nev. 103."

[95] Applying this rule, it becomes quite clear that the pleading in question sufficiently avers all the facts necessary to constitute the former judgment a bar to the present action.

The second question is whether the judgment rendered in the first action was final. It is claimed to be equivalent only to a nonsuit, and therefore not *res judicata*. A judgment of *nonsuit*, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. *Homer* v. *Brown*, 57 U. S. 16 How. 354 [14:970]; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121 [27:878]; *Haldeman* v. *U. S.* 91 U. S. 584 [23:433]. But a nonsuit is to be distinguished from a *retraxit*. *Minor* v. *Mechanics Bank*, 26 U. S. 1 Pet. 46 [7: 47]. Blackstone defines the difference as follows: "A *retraxit* differs from a nonsuit in this: one is negative and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." 3 Bl. Com. 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. *Bank of Commonwealth* v. *Hopkins*, 2 Dana, 395; *Merritt* v. *Campbell*, 47 Cal. 542. It is clearly so when, as here, the judgment recites that the subject matter of the suit had been adjusted and settled by the parties. This is equivalent to a judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact. [96] Upon general principles of the common law, regulating the practice and procedure of courts of justice, it must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause.

If its effect is to be determined by the Statutes of Nevada, the same conclusion will be reached. The Civil Practice Act of that State, passed March 8, 1869 (Gen. Stat. Nev. 1885, sec. 3173), is as follows:

"An action may be dismissed or a judgment of nonsuit entered in the following cases: First. By the plaintiff himself at any time before trial, upon the payment of costs, if a counterclaim has not been made. If a provisional remedy has been allowed the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon. Second. By either party upon the written consent of the other. Third. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. Fourth. By the court, when upon trial and before the final submission of the case the plaintiff abandons it. Fifth. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. In every other case the

judgment shall be rendered on the merits."

It thus appears that there are five instances in which the dismissal of an action has the force only of a judgment of nonsuit; "in every other case," the statute provides, "the judgment shall be rendered on the merits." If the case at bar is not included among the enumerated cases in which a dismissal is equivalent to a nonsuit, it must therefore be a judgment on the merits. In the present case the suit was not dismissed by the plaintiff himself before trial, nor by one party upon the written consent of the other, nor by the court for the plaintiff's failure to appear on the trial, nor by the court at the trial for an abandonment by the plaintiff of his [97] cause; neither was it a dismissal by the court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at the trial. The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a *prima facie* case. That evidence was passed upon judicially by the court, who determined its effect to be a bar to the cause of action. This was confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based on the ground of the finding of the court, as matter of fact and matter of law, that the subject matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judicially that the defense relied upon was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants. Being, as already found, for the same cause of action as now sued upon, it operates as a bar to the present suit by way of estoppel.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[82] EMIL HEINEMANN ET AL., *Plff's. in Errr.*,
v.
DANIEL G. ROLLINS ET AL., Exrs. of CHESTER A. ARTHUR, Deceased, Late Collector of the PORT OF NEW YORK.

(See S. C. "*Heinemann* v. *Arthur's Exrs.*" Reporter's ed. 82-86.)

Duty on wool—"value" time and place of exportation—computation of foreign coin—statute applies as of date of entry.

Where a duty on imported goods is to be imposed according to their "value" at the time and place of exportation, and that "value" is stated in foreign coin in the invoice and entry, the statute as to the computation of such coin applies as of the date of entry to such entered value.

[No. 81.]

Submitted Jan. 3, 1887. Decided Jan. 24, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Patrick A. Collins** and **Sidney DeKay**, for plaintiffs in error.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for defendants in error.

Mr. Justice **Blatchford** delivered the opin- [83] ion of the court:

In October, 1873, the firm of Heinemann, Payson & Morgan bought, paid for, and exported from Taganrog in Russia some colored carpet wools, the actual cost of which, exclusive of charges, was below twelve cents per pound, at the time and place of exportation. They were imported into the Port of New York, and entered at the custom house there January 5, 1874, at the invoice value of 41,975.01 silver roubles. The Collector reduced the amount into United States money at $77\frac{11}{16}$ cents to the rouble. This made the value of the wool greater than twelve cents per pound, and the Collector exacted a duty on it of six cents per pound. The importers protested that the rouble should be computed at 75 cents, which would have made the value twelve cents or less per pound, and the duty would have been three cents per pound. The Tariff Act in force at the time of the entry was section 1 of the Act of March 2, 1867, chap. 197, 14 Stat. at L. 560, which, as applicable to the merchandise, which was wool of the third class, provided as follows: "Upon wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound; upon wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound." The Secretary of the Treasury, on appeal, confirmed the action of the Collector, and the importers, after paying the duty exacted, to obtain their goods, brought this suit against the Collector to recover the alleged excess.

Section 1 of the Act of March 3, 1843, chap. 92, 5 Stat. at L. 625, provided "that in all computations of the value of foreign moneys of account at the custom houses of the United States, * * * the rouble of Russia shall be deemed and taken to be of the value of seventy-five cents."

On the third of March, 1873, the following Act was approved, 17 Stat. at L. 602, chap. 268:

"Sec. 1. That the value of foreign coin, as [84] expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and proclaimed on the first day of January by the Secretary of the Treasury.

Sec. 2. That in all payments by or to the treasury, whether made here or in foreign countries, when it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to four dollars eighty-six cents and six and one-half mills, and the same rule shall be applied in appraising merchandise imported, when the value is, by the invoice, in sovereigns or pounds sterling, and in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the first day of January, eighteen hundred and seventy-four, based on an assumed par of exchange with Great Britain, of fifty-four pence to the dollar, or four dollars forty-four and four-ninths cents to the sovereign or pound sterling, shall be null and void.

Sec. 8. That all Acts and part of Acts inconsistent with these provisions be, and the same are hereby, repealed."

In pursuance of this statute the director of the mint estimated the value of the Russian rouble for the year 1874 at 77.17 cents in United States money of account, and the Secretary of the Treasury thereafter, on the 20th of December, 1873, proclaimed by a circular addressed to the collectors of customs, that, "from and after January 1, 1874, the following table of standard values of foreign moneys, reduced to the moneys of account of the United States, will, until otherwise provided for by law or regulation, be taken at custom houses in computing the invoice value of all imported merchandise expressed in such currency; to wit, Russian roubles of 100 copecks, silver, 77.17."

The foregoing facts appearing at the trial of the case before the court and a jury, the plaintiffs contended that the wool was purchased before the Act of March 3, 1873, took effect, and that the value in United States money should have been computed as of the time of [85] exportation. These positions were overruled by the court, and it directed the jury to find a verdict for the defendant, which was done under the objection and exception of the plaintiffs. To review a judgment for the defendant the plaintiffs have brought this writ of error.

The decision of this court in *Collector* v. *Richards*, 90 U. S. 23 Wall. 246 [23:95], establishes that the effect of the Act of 1873 was to fix the value of the Russian silver rouble, in the money of account of the United States, for the purpose of computing, at the custom house, the amount of an invoice of imported goods, and, consequently to repeal the Act of 1843. See also *Cramer* v. *Arthur*, 102 U. S. 612 [26:259]; *Hadden* v. *Merritt*, 115 U. S. 25 [29:333].

Evidence that the merchandise cost, exclusive of charges, less than twelve cents per pound, at the time and place of exportation, could not affect the question, because, although the duty was imposed according to the value of the goods "at the last port or place whence exported to the United States," yet, when that value was stated, in the invoice, in the foreign silver currency, its equivalent in the money of account of the United States could not be computed, for the purpose of the entry of the goods at the custom house, for duty, at any sum less than the invoice or entered value. Section 7 of the Act of March 3, 1865, chap. 80, 13 Stat. at L. 498, in force at the time of this importation, provided that, in all cases where the duty imposed by law should be based upon the value of any specified quantity of merchandise, the value upon which the duty should be assessed should be its actual market value or wholesale price at the period of exportation, in the principal markets of the country of exportation; but that the duty should not be assessed "upon an amount less than the invoice or entered value, any Act of Congress to the contrary notwithstanding." This made it imperative on the Collector to compute the value of the silver rouble, at the time of the entry, according to that value as determined in accordance with the Act of 1873, which was 77.17 cents. The duty was im- [86] posed by the statute according to the "value" of the goods at the time and place of exportation. The importer stated that "value," in the foreign coin, in his invoice and entry. The statute as to computation applied as of the date of entry, to such entered value. Hence it could not affect the question to show that the "cost" of the goods abroad, computing the rouble at a lower rate, as of the date of exportation, was twelve cents or less per pound.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [124]

v.

JOHN C. COOPER.

(See S. C. Reporter's ed. 124-126.)

Direct taxes—sale for—action to recover surplus—Statute of Limitations—right of redemption—sale of.

Under the direct tax Act of June 5, 1861, where the surplus arising from a sale was deposited in the treasury, the owner, prior to his application therefor, has no right of action against the United States, and the Statute of Limitations runs only from the date of such application. The sale, by the owner, of his right of redemption, does not affect his right to recover such surplus.

[No. 1022.]

Submitted Jan. 4, 1887. Decided Jan. 24, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Heber J. May,** *assistant attorney*, for appellant.

Mr. **Gilbert Moyers,** for appellee.

Mr. Justice **Field** delivered the opinion of the court:

In June, 1864, certain parcels of real estate in the County of Shelby, State of Tennessee, at that time the property of John C. Cooper, were sold by the United States tax commissioners for direct taxes, under the Act of Congress of June [August] 5, 1861, and Acts amendatory thereof. 12 Stat. at L. chaps. 45, 98. The taxes, including charges and commissions, amounted to $33.35. The property was sold for $425. The surplus, after payment of the taxes, charges and commissions, was paid into the Treasury of the United States. For this surplus, amount- [125] ing to $391.45, Cooper presented a claim to the Secretary of the Treasury in August, 1882, which was disallowed in April, 1884, and he thereupon brought this suit in the court of claims, and obtained a judgment for the amount from which the United States have appealed.

The grounds of the appeal, as set forth by counsel of the Government, are not sustained by the record. The court of claims found that in 1865 the claimant sold the property, subject to the tax title; and in 1882 released to the Government, and those claiming under it, all his interest, to secure it against a second payment of the surplus. Upon these findings, counsel assume that the claimant retained possession of the property after the tax sale: and that he sold it to a third person for a valuable consideration, regardless of the sale and conveyance by the tax commissioners. But there was no evidence that the claimant was in possession, either at the time of the sale or afterwards; nor does it appear that the claimant ever asserted ownership over the property after the tax sale, and

sold it, regardless of that sale, for a valuable consideration. His sale was made subject to the tax title, and could, therefore, have been of nothing more than his right to redeem the property from the tax sale, and the consideration paid is not stated. Of course it is not necessary to consider the argument founded upon these assumed facts, however ingeniously framed or however replete with learning.

The thirty-sixth section of the Act of June [August] 5, 1861, in prescribing the manner in which property subject to a direct tax shall be sold, where it is not divisible, so that by a sale of a part the whole amount of the tax, with costs, charges, and commissions, may be raised, provides that "The surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives; or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, [126] who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." 12 Stat. at L. chap. 45, sec. 36, p. 304.

In *United States* v. *Taylor*, 104 U. S. 216 [26: 721], this section was the subject of consideration by this court; and it was held that it was not repealed by the Act of June 7, 1862; that prior to the application of the owner for the surplus he has no claim therefor which can be enforced by suit against the United States; and that the Statute of Limitations begins to run against it only from the date of his application. This decision covers the present case. It is of no consequence to the Government what the claimant did with his right of redemption; it was never exercised by him or the purchaser from him, assuming that it could have been enforced, and the time for its assertion has long since elapsed. The United States did not guaranty the title it gave upon the tax sale; and it does not appear that the levy or the proceedings for the sale have ever been called in question. If the sale was for any reason invalid, and the United States could be held to indemnify the owner therefor, the release by his quitclaim of all interest in the property would secure the Government against any claim on that account.

We see no valid ground for the refusal of the Secretary of the Treasury to comply with the command of the law and pay to the claimant the money which the Government has always held as trustee for him, and payable on his application.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[109] UNITED STATES, *Plff. in Err.*,
v.
BARTHOLD SCHLESINGER ET AL., Doing Business under the Firm Name and Style of NAYLOR & COMPANY.

(See S. C. Reporter's ed. 109-114.)

Duties—construction of decision by Secretary of the Treasury—when not final.

Under sections 2931 and 3011 R. S. the decision of the Secretary of the Treasury is not final in a suit against an importer to recover further duties, there having been a payment of estimated duties, a delivery of the goods, a reliquidation assessing such further duties, a protest and an appeal.

[No. 105.]

Argued Jan. 13, 1887. Decided Jan. 24, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. Reported below, 14 Fed. Rep. 682. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **William S. Hall and L. S. Dabney,** for defendants in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought by the United States against the members of the firm of Naylor & Co., in the Circuit Court of the United States for the District of Massachusetts, to recover a sum of money claimed to be due as [110] duties on merchandise, imported into the Port of Boston from England, in January, 1880. The importers paid the estimated amount of duties, and obtained possession of the goods, and this suit was brought to recover the difference between the duties so paid and a larger amount at which the collector subsequently liquidated the duties. The case was tried by the court without a jury, evidence being introduced by both parties. The court found the following facts: "The defendants imported into Boston from Liverpool the merchandise named in plaintiffs' declaration, which they (the defendants) invoiced and entered as 'scrap steel,' dutiable at 30 per cent *ad valorem*. At the time of the entry they paid the estimated duties thereon, calculated at 30 per cent *ad valorem*, and all the merchandise was thereupon then delivered to them. No question was made but that a portion of the merchandise was dutiable at 30 per cent *ad valorem*, as entered. The other and disputed portion of the merchandise consisted of pieces of steel railway bars, sawed at both ends, from two feet to six feet in length. After entry the whole merchandise was weighed by customs officers, proper examination was made thereof by the appraiser, who duly made report thereon to the collector, who, in due course and form of law, liquidated the entries, classifying the undisputed portion of the merchandise as it was entered, and assessing the duty thereon at 30 per cent *ad valorem*, but classifying the disputed portion as 'steel in bars, dutiable at 2¼ cents a pound, under department decision of October 31, 1879, No. 4273.' Against this classification of the disputed portion of the merchandise and the ascertainment and liquidation of the duty thereon the defendants duly protested, and appealed to the Secretary of the Treasury, who sustained the action of the collector, and, the defendants not paying the duty thus ascertained and assessed, this action was brought. The plaintiffs claimed that the decision of the Secretary of the Treasury, under the provisions of section 2931 of the Revised Statutes of the United States, was final and conclusive, the defendants not having paid the duties and brought suit to recover the amount so paid, [111]

and that the plaintiffs were entitled to recover the whole amount found due upon liquidation by the collector, with interest, which amount so found due was $2,125.80. It also appeared that, owing to error in the supposed weight and amount of the merchandise when the estimated duties were paid, the proper duty due upon all the importations, calling the merchandise 'scrap steel,' as entered, and dutiable at 30 per cent *ad valorem*, was $116.50 more than had been paid as the estimated duty thereon; which sum of $116.50 is included in the above amount of $2,125.80. The defendants introduced testimony tending to show, and the court found, as a fact, that the steel railway bars above described were commercially known as 'scrap steel,' and that they were fit only to be remanufactured."

Upon the foregoing facts the court ruled, as matter of law, that the assessment of duty by the collector upon the disputed portion of the merchandise was illegal, and that the plaintiffs were not, under the provisions of section 2931, entitled to recover the full amount they claimed, and ordered judgment for the plaintiffs for $116.50 only. To this ruling and order the plaintiffs excepted; and judgment being entered for them for $116.50, they have brought this writ of error.

The circuit court, in its decision, made in December, 1882, 14 Fed. Rep. 682, construed sections 2931 and 3011 of the Revised Statutes. Section 3011, as it stood at the time of these importations and stands now, reads as follows: "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest [and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.]" The portion contained in brackets was inserted by the Act of February 27, 1877, chap. 69, 19 Stat. at L. 247, in place of the words "in writing and signed by the claimant or his agent, was made and delivered at or before the payment, setting [112] forth distinctly and specifically the grounds of objection to the amount claimed." Section 3011, as it originally stood in the Revised Statutes, was a re-enactment of the Act of February 26, 1845, chap. 22, 5 Stat. at L. 727.

Section 2931 is a re-enactment of section 14 of the Act of June 30, 1864, chap. 171, 13 Stat. at L. 214, and is in these words: "On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east [113] of the Rocky Mountains, or more than five months in case of an entry west of those mountains." The view of the circuit court was, that, under section 3011, there could be no suit against a collector to recover back an excess of duties paid on merchandise imported, unless the payment, in addition to being made under protest, was made "in order to obtain possession" of the merchandise; that section 2931 di not destroy the limitation imposed by section 3011 on the right to sue to recover back duties or create any right to sue independently of such limitation; and that, consequently, as it was plain, as a fact, that the $2,009.30 of duties liquidated and sought to be recovered were illegally imposed, the importers could not, after paying them, recover them back, but could obtain the benefit of the exemption from the duty demanded by a defense in this suit, and by that means alone.

We concur in this view, and are of opinion that the proper construction of section 2931, in view of the fact that section 3011 is in force concurrently with it, is that the decision of the Secretary of the Treasury is not final and conclusive, except in a case where, after a protest and an appeal, a payment of duties is made in order to obtain possession of the goods, and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by section 2931. That being so, it is not final in the present case, there having been a payment of estimated duties, a delivery of the goods, a reliquidation assessing further duties, a protest, an appeal, and a suit against the importers by the United States to recover the further duties.

The United States cite the decision of the District Court of the United States for the Southern District of New York in *U. S.* v. *Cousinery*, 7 Ben. 252, and the cases of *Watt* v. *U. S.* 15 Blatchf. 29, and *U. S.* v. *Phelps*, 17 Blatchf. 312, as sustaining the view maintained

by them. The first case cited was decided in April, 1874, before the enactment of the Revised Statutes, in June, 1874; the second case in July, 1878; and the third in November, 1879. But this court, in November, 1883, in *Arnson* v. *Murphy*, 109 U. S. 238 [27: 920], a [114] suit brought against a collector in 1879, to recover back duties executed in 1871, held that the only existing authority for such a suit was to be found in the provisions of sections 3011 and 2931 taken together. In the opinion of this court at October Term, 1875, in *Barney* v. *Watson*, 92 U. S. 449 [23: 730], a suit brought to recover back duties paid in March, 1864, on an importation made in December, 1863, it was suggested that the Act of February 26, 1845, now section 3011, was supplied by section 14 of the Act June 30, 1864, now section 2931, and was thus repealed by implication. That case, however, arose before the Act of June 30, 1864, was passed, and not under it, though adjudged here after it was enacted. But the decision in *Arnson* v. *Murphy* was based on the view that sections 3011 and 2931 coexist, and must be construed together. So, what was held in *United States* v. *Cousinery*, under the idea that section 14 of the Act of June 30, 1864, was the only statute to be considered (and the Act of February 26, 1845, is not alluded to in the decision), is of no force when sections 3011 and 2931 are both of them to be taken into consideration, as coexisting. The same remarks apply to what was ruled, on the same basis, in *United States* v. *Phelps*.

In *Watt* v. *United States*, the suit was by the United States to recover duties liquidated in 1876 on an importation made in 1872, and there was no appeal after liquidation; and it was held that for that reason the defendant could not attack the liquidation.

Nor does anything in the decision in *Westray* v. *United States*, 85 U. S. 18 Wall. 322 [21: 768], control the present case. That case had reference, it is true, to section 14 of the Act of June 30, 1864, and the suit was one by the United States, on a bond given on the entry of goods for warehousing, conditioned to pay the amount of duties to be ascertained to be due and owing on the goods. The duties were afterwards liquidated. The defendants, at the trial, offered to show that the duties should have been less. The evidence was excluded, on the ground that there had been no appeal from the decision of the collector, and this court sustained the ruling.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[115] UNITED STATES, *Appt.*,

v.

GEORGE K. OTIS.

GEORGE K. OTIS, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 115-124.)

Contracts for carrying the mail—construction of.

In a suit on certain contracts for carrying the mails in the City of New York, it is held that the new or additional service which was to be performed without additional compensation is such service in the City of New York, and does not include additional service in carrying the mails to a depot in Jersey City.

[Nos. 683, 806.]

Submitted Dec. 20, 1886. Decided Jan. 24, 1887.

CROSS appeals from the Court of Claims. Reported below, 20 Ct. Cl. 315. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Robert A. Howard,** *Assistant Atty-Gen.*, for the United States:

The claim of the contractor is for extra service in carrying mails from the foot of Cortlandt Street to the Pennsylvania Railroad depot at Jersey City. It is admitted that this service was not included in the designation of routes in the contract. The contract nowhere contains any provision for compensation for extra, additional, or new service. On the contrary, the contractor agreed to perform all other mail messenger and transfer service now being performed in the said City of New York, and any and all new or additional mail messenger or transfer service in the said city, whether to and between depots and landings now established and those which may hereafter be established, which may become necessary and be required by the Postmaster-General, without additional compensation. And it was further stipulated and agreed that the Postmaster-General may order new or additional service which may become necessary to be performed, which shall be performed without additional compensation.

There is no uncertainty in the terms of this contract. No necessity exists to go beyond its language. The fact that the contract was prepared and furnished by the defendant does not affect the matter of dispute. The advertisement by the United States and the proposal by the contractor preceded the contract and are recited in it. These were the mutual acts of the parties; and the contract can, in the correct uses of phrases, be brought within the doctrine of a contract prepared by another and under which obligations were incurred or property parted with, as spoken of in *Noonan* v. *Bradley*, 76 U. S. 9 Wall. 407 (19:761)

No question of *quantum meruit*, or equitable right to reasonable allowance by reason of a departure from the terms of the contract by mutual consent, as mentioned in *Robert's Case*, 92 U. S. 41 (23:646), need be considered here. The defendant relies upon the express covenant to perform all other mail messenger service without additional compensation.

It matters not whether the extra service was "other" or "new," or "additional;" it is fully covered by the stipulations of the agreement. It is useless elaboration to discuss whether it was additional to the designated service "from the New York City postoffice to the Pennsylvania Railroad depot (Jersey City) fifty-four (54) times per week," or whether it was other service, or new service, as distinguished from that specified. It is sufficient to know it was mail messenger service to a depot then established, and that it was required by the Postmaster-General. It was then, by reference to the contemporaneous acts of the contracting parties, service in the City of New York.

Mr. **J. Coleman,** for claimant:

The defendant, having ordered the change in the service, and the change being of such a nature as to reasonably involve the claimant in additional expense, he is entitled to recover the money paid by him for ferriage and also for the extra service performed by him. And the contract being silent upon the amount to be paid for the extra service, the measure of damage is the reasonable value of the service performed and interest on the amount paid by him from the time of payment.

Grant's Case, 5 Ct. Cl. 72; *Cooper's Case*, 8 Ct. Cl. 199; *Ford* v. *U. S.* 17 Ct. Cl. 60.

The chief guide in construing the contract is the actual intention of the parties—the understanding which they both had—not the design of either individually.

Gunnison v. *Bancroft*, 11 Vt. 490; 2 Pars. Cont. 7th ed. 681.

The court will consider the object which the parties had in view.

Springsteen v. *Samson*, 32 N. Y. 706; *Lacy* v. *Green*, 84 Pa. 514; *Akins* v. *U. S.* 17 Ct. Cl. 260.

It will take into consideration all the surrounding facts and circumstances.

Dent v. *North Am. Steamship Co.* 49 N. Y. 390; *Thomas* v. *Wiggers*, 41 Ill. 470; *Karmuller* v. *Krotz*, 18 Iowa, 352; *U. S.* v. *Gibbons*, 109 U. S. 200 (27: 906).

If any doubt exists, it should be construed strongly against the party who prepared it.

Noonan v. *Bradley*, 76 U. S. 9 Wall. 394 (19: 757); *Garrison* v. *U. S.* 74 U. S. 7 Wall. 688 (19: 277).

Mr. Justice **Blatchford** delivered the opinion of the court:

These are appeals by both parties from a judgment rendered by the court of claims in favor of George K. Otis against the United States for $16,445.36. The claims of Otis are founded on two contracts for carrying the mails, on two routes, No. 6636 and No. 6635. The findings of fact by the court of claims, contained in the record, are set forth at length in the report of the case in 20 Ct. Cl. 315. Such of them as are material are as follows:

As to No. 6636. Finding No. 1. The United States advertised, March 1, 1877, by an advertisement headed "*Mail Station Service, New York City*," for proposals "For carrying the mails of the United States from July 1, 1877, to June 30, 1881, in the City of New York, as herein specified. Route No. 6636." The findings state that the advertisement designated the points to and from which the mails should be carried, but those points are not set forth in the findings. The advertisement then proceeded: "It is to be understood and agreed that any increase in the service which may be rendered necessary by the removal to other localities of [116] any of the above named stations, or by any other cause, may be ordered by the Postmaster-General, and shall be paid for *pro rata;* and, also, that compensation, *pro rata*, shall be deducted in case of decrease in said service, caused by any such removal or by the discontinuance of any of said stations."

Under this advertisement Otis made a written proposal "To carry the mails of the United States from July 1, 1877, to June 30, 1881, on Route No. 6636, between New York City post-office and branch offices, State of New York, under the advertisement of the Postmaster-General dated March 1, 1877," for the sum of $14,900 per annum. On the 13th of April, 1877, a written contract was executed by the United States and Otis, which recited that the proposal of Otis, under said advertisement, "for the performance of the mail station service at the City of New York, in the said advertisement described," at the price and for the term above named, had been accepted, and then proceeded: "Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant and agree with the United States of America to carry the mail of the United States, using such proper means therefor, and particularly the wagons hereinafter described, as may be necessary to transport the whole of said mail, whatever may be its size or weight, during the term of this contract. * * * And any new or additional mail station service which may become necessary and be required by the Postmaster-General during the term of this contract. * * * It is further understood and agreed that any increase in the service which may be rendered necessary by the removal to other localities of any of the above named stations, or by any other cause, may be ordered by the Postmaster-General, and shall be paid for *pro rata;* and also that compensation, *pro rata*, shall be deducted in case of decrease in said service, caused by any such removal, or by the discontinuance of any of said stations."

Otis, while engaged in carrying the mails under this contract, and also under the contract for mail messenger service, set forth hereinafter in finding No. 2, was directed by the postmaster in New York City to perform the following trips: Eighteen round trips per week [117] from station E, No. 465 Eighth Avenue, to the Hudson River Railroad depot, Thirtieth Street and Tenth Avenue; six trips per week from postoffice to Harlem Railroad depot, Forty-Second Street and Fourth Avenue, 6:30 A. M. train. These trips were duly performed. The service between station E and the Hudson River Railroad depot amounted to 2,784 miles. The allowance therefor under said station service contract would be $657.58. The service between the postoffice and the Harlem Railroad depot amounted to 2,607.82 miles. The allowance therefor under said station service contract would be $615.97.

As to No. 6635. Finding No. 2. The United States advertised March 1, 1877, by an advertisement headed, "*Mail Messenger Service, New York City*," for proposals "For carrying the mails of the United States between the postoffice in the City of New York and the railroad stations and steamboat landings, and between the several stations where transfer service is required, from July 1, 1877, to June 30, 1881", on Route No. 6635. The advertisement then proceeded: "The following schedule shows the mail messenger and transfer service now required at New York; but the accepted bidder under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may become necessary during the term of the contract, whether to and between depots and landings now established or those which may be hereafter established. Bids must be made with this

distinct understanding, and must name the amount per annum for the whole service, and not by the trip. There will be no diminution of compensation on account of the discontinuance of such portions of the service as may become unnecessary during the contract term; but deductions will be made for neglect of duty. * * *

[118]

Schedule of service now required.

Railroad.	Location of depot.	Distance from post-office to depot.	Number of trips per week from office to depot.	Number of trips per week from depot to office.
		Miles.		
Pennsylvania	Jersey City	1.45	54	27
Pennsylvania	Foot of Cortlandt st.	.45	50	50
Erie Railway	Jersey City	1.63	43	57
Northern Railroad of New Jersey	do	1.63	12	12
New Jersey and New York	do	1.63	18	24
Montclair and Greenwood Lake	do	1.63	6	6
New Jersey Midland	do	1.45	6	6
Central Railroad of New Jersey	do	1.63	49	37
Delaware, Lackawanna & Western	Hoboken	2.20	36	42
New York and New Haven	Grand Central depot	3.23	50	44
New York and Harlem	do	3.23	18	18
New York Central & Hudson River	do	3.23	45	71
New Jersey Southern	Pier 8, North River	.65	12	12
Staten Island	Foot of Whitehall st.	.90	18	18
Fall River boat landing	Pier 28, North River	.58	6	7
Long Island	Long Island City	3.55	36	36

Transfers. Grand Central depot to Erie Railway, 3.35 miles, six times a week; Grand Central depot to Pennsylvania Railroad, 3.55 miles, twenty-four times a week; Grand Central depot (Boston line) to Grand Central depot (New York Central and Hudson River line) .35 of a mile, as often as required. The transfer service to include the conveyance of all cases of post-office supplies for transit through the city."

Under this advertisement Otis made a written proposal "To carry the mails of the United States, from July 1, 1877, to June 30, 1881, on mail messenger route No. 6685, between the postoffice at New York City and the railroad stations and steamship landings in said city, including transfers between stations, and under the advertisement of the Postmaster-General, dated March 1, 1877," for the sum of $57,900 per annum. On the 13th of April, 1877, a written contract was executed by the United States and Otis, which recited that the proposal of Otis, under said advertisement, "For the performance of the mail messenger service at the City of New York, in the said advertisement described," at the price and for the term above named, had been accepted, and then proceeded: "Now, therefore the said contractor and his sureties do, jointly and severally, undertake, covenant and agree with the United States of America to carry the mails of the United States, using such proper means therefor, and particularly the wagons hereinafter described, as may be necessary to transport the whole of said mail, whatever may be its size or weight, during the term of this contract, as follows, to wit: [119]

From the New York City postoffice to the Pennsylvania Railroad depot (Jersey City) fifty-four (54) times per week; returning from said depot to postoffice twenty-seven (27) times per week.

From the New York City postoffice to the Pennsylvania Railroad depot (foot of Cortlandt Street) and back fifty (50) times per week.

From the New York City postoffice to the Erie Railway depot, forty-three (43) times per week; returning from said depot to postoffice fifty-seven (57) times per week.

From the New York City postoffice to the depot of the Northern Railroad of New Jersey and back twelve (12) times per week.

From the New York City postoffice to the New Jersey and New York Railroad depot eighteen (18) times per week; returning from said depot to postoffice twenty-four (24) times per week.

From the New York City postoffice to the Montclair and Greenwood Lake Railroad depot and back six (6) times per week.

From the New York City postoffice to the New Jersey Midland Railroad depot and back six (6) times per week.

From the New York City postoffice to the depot of the Central Railroad of New Jersey forty-nine (49) times per week; returning from said depot to postoffice thirty-seven (37) times per week.

From the New York City postoffice to the Delaware, Lackawanna and Western depot thirty-six (36) times per week; returning from said depot to postoffice forty-two (42) times per week.

From the New York City postoffice to the New York and New Haven Railroad depot [120] fifty (50) times per week; returning from said depot to postoffice forty-four (44) times per week.

From the New York City postoffice to the New York and Harlem Railroad depot and back eighteen (18) times per week.

From the New York City postoffice to the New York Central and Hudson River Railroad depot forty-five (45) times per week; returning from said depot to postoffice seventy-one (71) times per week.

From the New York City postoffice to the New Jersey Southern Railroad depot and back twelve (12) times per week.

From the New York City postoffice to the Staten Island Railroad depot and back eighteen (18) times per week.

From the New York City postoffice to the Fall River boat landing six (6) times per week; returning from said landing to postoffice seven (7) times per week.

From the New York City postoffice to the Long Island Railroad depot and back thirty-six (36) times per week.

Transfers. Grand Central depot to Erie Railway six times a week; Grand Central depot to

Pennsylvania Railroad twenty-four times a week; Grand Central depot (Boston line) to Grand Central depot (New York Central and Hudson River line) as often as required.

The transfer service to include the conveyance of all cases of postoffice supplies arriving for transit through the city; each and every transfer to be made as often as may be required by the Postmaster-General; and will do and perform all other mail messenger and transfer service now being performed in said City of New York, and any and all new or additional mail messenger or transfer service in the said city, whether to and between depots and landings now established and those which may hereafter be established, which may become necessary and be required by the Postmaster-General during the time of this contract, without additional compensation; said service to be performed at such hours of arrival and departure at and from the above designated points or places, or those which may be hereafter established, as the postmaster at New York City may order and direct.

* * * * * *

It is hereby stipulated and agreed that the Postmaster-General may, if it be required by [121] the public interest, order new or additional service which may become necessary to be performed, which shall be performed without additional compensation; also, that he may discontinue or curtail the service, in whole or in part, if in his judgment the public interest shall so require, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

While Otis was engaged in the performance of this contract, the United States, on the 12th of November, 1878, directed him to transport mails which theretofore had been transferred, as required by the contract, "from the New York City postoffice to the Pennsylvania Railroad depot (foot of Cortlandt Street) and back, fifty times per week," across the Hudson River to the Pennsylvania Railroad depot at Jersey City, in the State of New Jersey. This service Otis performed from November 12, 1878, to July 1, 1881. The *pro rata* compensation for it, as also its reasonable value, is $15,787.78. When the contract was executed, this extra service was being performed by the Pennsylvania Railroad Company, under contract with the United States.

The item for the extra service between station E and the Hudson River Railroad depot, $657.58, and the item for the extra service between the foot of Cortlandt Street and Jersey City, $15,787.78, were allowed by the court of claims. The item for the extra service between the postoffice and the Harlem Railroad depot, $615.97, was disallowed.

No error is assigned by Otis as to the disallowance of the $615.97. But the United States question the propriety of the allowance of the other two items. They contend that the "eighteen round trips per week from station E, No. 465 Eighth Avenue, to the Hudson River Railroad depot, Thirtieth Street and Tenth Avenue," were mail messenger service, under the contract for Route No. 6635, and not, as held by the court of claims, mail station service, under the contract for Route No. 6636. The argument is made that mail station service, under the latter contract, comprehended only service between the city postoffice and the stations or branch offices, and did not include [122] service between a station or branch office and a railroad depot; and that the latter was mail messenger service, and was governed by the terms of the contract for Route No. 6635, which forbade extra compensation in regard to it. Although it does not appear by the record what points were designated in the advertisement or in the contract for Route No. 6636, as those between which the mails were to be carried, the fair inference is that there was no specific designation which would include the trips between station E and the Hudson River Railroad depot. The opinion of the court of claims says, on this subject, that this service was not "named in the station contract, but that instrument provided that any increase in mail station service should be paid for *pro rata*." It held that the service was, on its face, station service, the mails being taken from a station. The mail station service for which Otis proposed was designated in his proposal as "between New York City postoffice and branch offices," and the "mail station service" named in the contract is referred to as that for which Otis proposed. Any increase in the service which might be ordered was to be paid for *pro rata*. The service in question was an increase in the service, beyond that for which the $14,900 per annum was to be paid. The mail messenger contract for route No. 6635 did not contemplate mail station service, but only service between the main postoffice and railroad stations and steamboat landings. The $657.58 was, accordingly, properly allowed.

As to the extra service to Jersey City, under the contract for Route No 6635, the contract covered fifty-four trips per week from the New York City postoffice to the Pennsylvania Railroad depot at Jersey City, and twenty-seven trips per week from that depot to that postoffice, and also fifty trips per week from that postoffice to the Pennsylvania Railroad depot at the foot of Cortlandt Street, and fifty trips per week from the latter depot to that postoffice. The finding of the court of claims is, that on each occasion of a trip under the item of fifty trips per week from the postoffice to the depot at the foot of Cortlandt Street and back, Otis was required, in addition, to carry the mails across the Hudson River, and did so. These trips were [123] no portion of the trips contracted for from the postoffice to the Pennsylvania Railroad depot at Jersey City and back. It is also found by the court of claims that, when the contract was executed, this extra service in regard to the fifty trips was being performed by the Pennsylvania Railroad Company, under a contract with the United States. This extra service was not included in the routes designated in the contract.

The contract provides that Otis shall "do and perform all other mail messenger and transfer service now being performed in the said City of New York, and any and all new or additional mail messenger, or transfer service in the said city, whether to and between depots and landings now established and those which may hereafter be established, which may become necessary and be required by the Postmaster-General during the time of this contract, without addi-

tional compensation." There is this further provision: "It is hereby stipulated and agreed that the Postmaster-General may, if it be required by the public interest, order new or additional service which may become necessary to be performed, which shall be performed without additional compensation."

It is contended for the United States that, as Otis specifically agreed in the contract to carry the mails to the Pennsylvania Railroad depot at Jersey City, 54 times, and back 27 times, each week, in addition to carrying them to Cortlandt Street and back 50 times each week, the extra service across the river is "new or additional service" and so to be performed without additional compensation. But the fair construction of the two clauses of the contract, taken together, is that the new or additional service which is to be performed without additional compensation is [124] new or additional service in the City of New York, as expressed in the first clause. Especially is this so, as the contract specifically designates the 54 trips and the 27 trips as being to and from Jersey City, and then provides for 50 other trips to Cortlandt Street and 50 back. Under those circumstances, the limitation of the new or additional service to be performed without additional compensation, to such service in the City of New York, would be natural; service under the contract, and out of that city and to Jersey City, being specially provided for in the case of mails deliverable at a depot of the Pennsylvania Railroad, at Jersey City; and service under the contract, and out of the City of New York, being also provided for in six other instances of delivery in Jersey City, and one in Hoboken, and one in Long Island City, at places to be reached only by ferries.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[86] MAMIE M. ROBERTS, EXTX. of FANNIE M. COOK, Deceased, *Appt.*,

v.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

(See S. C. Reporter's ed. 86-89.)

Life insurance—action by assignee of policy—proof of assignment, necessary.

One claiming to be the assignee of a policy of life insurance cannot maintain an action thereon without satisfactory proof of the assignment.

[No. 125.]

Argued Jan. 12, 13, 1887. Decided Jan. 24, 1887.

APPEAL from the Circuit Court of the United States for the District of Kentucky. *Affirmed.*

The case is sufficiently stated by the court.

Messrs. **Marc. Mundy, Samuel Shellabarger** and *J. M. Wilson*, for appellant:

A. B. Cook, as creditor of William G. Harvison, had an insurable interest in his life to the amount of the indebtedness.

Cammack v. *Lewis*, 82 U. S. 15 Wall. 643 (21: 244); *Thatch* v. *Metropole Ins. Co.* 11 Fed. Rep. 29.

The policy, being made payable to A. B. Cook, his executors, administrators or assignees, is assignable. The use of the word "assigns" is direct authority for the payment of the assignee.

Pomeroy v. *Manhattan Life Ins. Co.* 40 Ill. 398; *N. Y. Life Ins. Co.* v. *Flack*, 3 Md. 341; *Page* v. *Burnstine*, 102 U. S. 664 (26:268).

Although the legal title remains in Cook, the equitable right to have, use and enjoy the donation as separate estate, passed to and vested in appellant in September, 1872, and equity created him her trustee.

Maraman v. *Maraman*, 4 Met. (Ky.) 84; *Penn* v. *Young*, 10 Bush, 628; *Campbell* v. *Galbreath*, 12 Bush, 459; *Thomas* v. *Harkness*, 13 Bush, 25.

Mr. **Augustus E. Willson**, for appellee:

Complainant cannot recover, because she had no insurable interest in the life insured; and the policy on that life could not be assigned to her.

Warnock v. *Davis*, 104 U. S. 775 (26:924); *Basye* v. *Adams*, 81 Ky. 368.

If Dr. Cook had assigned this policy directly to his wife, as alleged, he could, unless such assignment was exhibited to the Company, sell the policy to the Company even against her wishes.

Kitchen v. *Bedford*, 80 U. S. 13 Wall. 413 (20: 637); *Cassell* v. *Carroll*, 24 U. S. 11 Wheat. 134 (6:488). See *Moore* v. *Page*, 111 U. S. 119 (28: 373).

The assignment to complainant is not proved. The only testimony to prove the execution or delivery of the assignment of the policy by Dr. Cook, the beneficiary named in the policy, to complainant, is that of complainant's husband, and he is not a competent witness to prove this for his wife.

Civ. Code Prac. Kentucky, §§ 606-1; Rev. Stat. U. S. § 658; *Stein* v. *Bowman*, 38 U. S. 13 Pet. 221 (10:135); *Lucas* v. *Brooks*, 85 U. S. 18 Wall. 452 (21:783).

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 27th of August, 1872, the Phœnix Mutual Life Insurance Company, of Hartford, [87] Connecticut, a Connecticut corporation, issued a policy, No. 66,488, whereby, in consideration of the representations made to them in the application for the policy, and the sum of $1,024 to it duly paid "by A. B. Cook, creditor," and of the annual payment of a like amount on or before the 27th day of August in every year during the continuance of the policy, it assured the life of William G. Harvison, of Louisville, Kentucky, in the amount of $20,000, for the term of his natural life, the amount of the insurance to be paid, after the death of Harvison, "to the said A. B. Cook, creditor, and his executors, administrators or assigns," "any indebtedness to the Company on account of this policy being first deducted therefrom." The policy was in force at the death of Harvison, which occurred August 25, 1880. Fannie M. Cook, the wife of the said A. B. Cook, both of whom resided at Louisville, Kentucky, commenced a suit in March, 1881, in a state court of Kentucky, against the Company, to recover on the policy $17,340, with interest, being the amount of the policy, less certain premium notes. She based her claim to recover on a written assignment, which she alleged had been executed

by her husband, A. B. Cook, and delivered to her, on the 19th of September, 1872, twenty-three days after the date of the policy, and which was in these words:

"This instrument of writing certifies that the policy No. 66,488 I have taken out on the life of Wm. G. Harvison, for twenty thousand ($20,000) dollars, in the Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, was taken out by me for the sole benefit of my wife, Fannie M. Cook; and I hereby declare that the above mentioned life policy of $20,000, and the money secured thereby, is given and assigned to my said wife as separate estate, and shall continue to be the separate estate of my said wife; and whether the said Harvison dies before or after me, my said wife shall have and receive and hold said money as her separate estate and for her separate and sole benefit, to dispose of as she may think proper.

Witness my hand, this 19th day of September, 1872, at Louisville, Ky.

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A. B. COOK."

The suit was removed into the Circuit Court of the United States for the District of Kentucky, where the plaintiff filed a bill in equity making the Company and A. B. Cook defendants, and praying judgment against the Company for the $17,340 and interest. The Company answered, setting up various defenses, on which issue was joined. A. B. Cook also answered. On a hearing on proofs, the court dismissed the bill, without delivering any opinion, oral or written. The plaintiff appealed to this court. She has since died, and her executrix has been substituted as plaintiff.

It appears, by the proofs, that A. B. Cook, on the 14th of June, 1880, and before Harvison's death, received from the Company $4,000, and delivered to it the policy and the following instrument, signed by him, indorsed on the policy:

"Louisville, Ky., June 14, 1880.

I hereby sell, transfer, and assign to the Phœnix Mut. Life Ins. Co. of Hartford, Conn., all right and title to the within policy on the life of W. G. Harvison, in consideration of the sum of four thousand dollars in hand paid, by draft on the said Co., and a return of the premium notes.

A. B. COOK."

Among the defenses set up and urged by the defendant were: (1) that A. B. Cook, who was a witness for his wife, was not a competent witness for her under the Statutes of Kentucky; (2) that no assignment of the policy by A. B. Cook to his wife was ever in fact executed and delivered; (3) that Fannie M. Cook had no insurable interest in the life of Harvison, and, therefore, could not become assignee of the policy; (4) that the statement in the application for the policy, that Harvison was not addicted to the habitual use of spirituous liquors, was untrue; (5) that after the policy was issued the habits of Harvison became, as to the use of spirituous liquors, so far different from his habits as to such use represented in the application, as to make the risk more than ordinarily hazardous.

[89] Without considering any of the other questions raised, we are of opinion that, as a matter of fact, and even conceding that A. B. Cook was a competent witness, the assignment by him to his wife is not satisfactorily proved to have been made or delivered prior to the transaction of June 14, 1880. The evidence on that point is conflicting, and it would not be profitable to discuss it in detail. As the suit cannot be maintained without proof of the assignment, *the decree is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY ET AL., *Plffs. in Err.*, [141]

v.

BUTCHERS' UNION SLAUGHTER-HOUSE AND LIVE-STOCK LANDING COMPANY.

(See S. C. Reporter's ed. 141-160.)

Jurisdiction—constitutional law—malicious prosecution—probable cause—prior adverse judgment of state court—history of litigation as to an alleged exclusive privilege to carry on the live-stock landing and slaughter-house business in New Orleans.

1. Whether a state court has given due effect to a decree or judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and is within the jurisdiction of the federal courts.

2. In an action for a malicious prosecution, brought in a state court, it is held that the decree of the Circuit Court of the United States in the action complained of is conclusive evidence of probable cause; although an adverse judgment had been rendered by the Supreme Court of the State in a prior action by the defendant against a different party.

3. Want of probable cause and the existence of malice, express or implied, must concur to entitle the plaintiff to recover in an action for a malicious prosecution.

[No. 1167.]

Submitted Jan. 6, 1887. Decided Jan. 24, 1887.

IN ERROR to the Supreme Court of the State of Louisiana. Reported below, 37 La. Ann. 874. *Affirmed in part, reversed in part.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **William A. Maury,** *Asst. Atty-Gen.*, and **Robert Mott,** for plaintiffs in error:

The right set up by the plaintiffs in error to the protection of the decree of the Circuit Court of the United States in the injunction suit, was a right claimed under an authority exercised under the United States, within the meaning of section 709, R. S.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 (18: 257); *Factors & T. Ins. Co.* v. *Murphy*, 111 U. S. 738 (28: 582); *New Orleans, etc. R. R. Co.* v. *Delamore*, 114 U. S. 501 (29: 244).

To maintain an action for malicious prosecution there must be a concurrence of malice and want of probable cause.

Stewart v. *Sonneborn*, 98 U. S. 194 (25: 119).

"Probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court."

Griffis v. *Sellars*, 4 Dev. & B. Law, 177. See also *Herman* v. *Brookerhoff*, 8 Watts, 240; *Kaye*

v. *Kean*, 18 B. Mon. 845; *Whitney* v. *Peckham*, 15 Mass. 243; *Palmer* v. *Avery*, 41 Barb. 290; *Reynold* v. *Kennedy*, B. R. 1 Wils. 232; *Witham* v. *Gowen*, 14 Me. 362; Cooley, Torts, 185.

We deny that the decision of the State Supreme Court in the previous case against the City of New Orleans debarred the Crescent City, etc. Company from filing a bill against another party in the United States Circuit Court for the purpose of litigating the very point of constitutional law involved in the first suit, or that it was the duty of the circuit court to accept the doctrine laid down by the state court until it should be overruled by this court. No authority for this has been or can be shown.

What the Crescent City, etc. Company wanted was the decision of this court on the constitutional provision which it claimed had invaded its monopoly; and it is certainly not obnoxious to censure if, finding that the federal question involving that point was not properly raised in its suit against the City of New Orleans, or that there was room for doubt in that particular, it pursued the direct course of filing a bill in the United States Circuit Court which did fairly present that question.

Messrs. **E. Howard McCaleb** and **B. R. Forman**, for defendant in error:

We deny that in a suit brought to recover damages for a malicious prosecution the judgment of an inferior court, subsequently reversed, is conclusive, in all cases, of probable cause sufficient to exempt the prosecutor from liability.

The better opinion would seem to be that the judgment of the court of the first instance, afterward reversed, "if regarded as evidence of probable cause, is *prima facie* only, and not conclusive."

Bacon v. *Towne*, 4 Cush. 236; *Burt* v. *Place*, 4 Wend. 591.

What is the probable force and effect of a reversed judgment? Whether such judgment amounts to full and complete evidence of probable cause is not a federal question, but one of general law, as to which the decision of the state court is not examinable here.

"The legal effect of the judgment set up in bar is a question of general law, as to which the decision of the state court is not reversible here. The federal questions, if any there were in the case, lay behind this defense, and could not be reached until it was out of the way."

Thouteau v. *Gibson*, 111 U. S. 201 (28: 401).

"The general rule is, the *lex fori* governs the admissibility and effect of evidence."

Blocker v. *Whittenburg*, 12 La. Ann. 401; Story, Confl. L. § 629; *Scudder* v. *Union Nat. Bank*, 91 U. S. 412 (23: 248); Whart. Ev. § 816.

The reversed decree of the circuit judge in the case of the *Crescent City Company* v. *Butchers Union Company*, granting and subsequently perpetuating the injunction complained of, was a direct violation of the prior judgment of the Supreme Court of Louisiana in the case of the *Crescent City Slaughter-House Company* v. *City of New Orleans*, 33 La. Ann. 934. The decision of the State Supreme Court in the last mentioned suit was virtually a decree between the same parties on the same subject matter; because in the suit previously decided by the state court, the City of New Orleans, acting in its corporate capacity, represented all of its inhabitants, every person within its limits, both natural and artificial, individuals and corporations.

A judgment rendered for or against a city is *res judicata* as against its inhabitants.

Parker v. *Scogin*, 11 La. Ann. 629; *Shields* v. *Chase*, 32 La. Ann. 409; Freem. Judg. § 178.

The decree of the circuit court was void for want of jurisdiction over the controversy, because the suit did not arise under the Constitution of the United States and the parties were citizens of the same State.

The decree of a court without jurisdiction over the controversy furnishes no justification and is not even "*prima facie*" evidence of probable cause. All proceedings had under such decree are wrongful and a trespass.

Hayes v. *Younglove*, 7 B. Mon. 545.

In order to reverse the decision of the Supreme Court of Louisiana, it is necessary to hold that a judgment of a federal circuit judge allowing an injunction, or maintaining an attachment, arrest or other writ, even though reversed on appeal, is, regardless of circumstances, a complete and perfect bar under federal laws and the Federal Constitution, to any action for damages, although the same questions had been twice decided by the highest court of the State adversely to the prosecutor in litigation provoked by himself.

Mr. Justice **Matthews** delivered the opinion of the court; [142]

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Louisiana, reported in 37 Louisiana Annual Reports, 874. The federal question arising upon the record presented for our consideration is, whether the Supreme Court of Louisiana in its determination of the case gave due effect to a certain decree of the Circuit Court of the United States for the Eastern District of Louisiana, in a previous litigation between the same parties. That question is presented upon the following case:

The plaintiff in error is a corporation created by the laws of Louisiana, which, by an Act of the Legislature of that State, passed March 8, 1869, was invested with the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the City of New Orleans and the Parishes of Orleans, Jefferson and St. Bernard. The validity of this monopoly was sustained by the decision of this court in the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21: 394], on the ground that this grant of exclusive right or privilege was a police regulation for the health and comfort of the people within the power of the State Legislature, and not in violation of any provision of the Constitution of the United States. The Company continued thenceforward to use and enjoy its exclusive privileges until the adoption by the people of Lousiana of a new State Constitution in the year 1879. That [143] Constitution contained the following articles:

"Article 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits; *Provided*, No monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses

of any individual or corporation; *Provided*, The ordinances designating places for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization.

"Article 258. The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

The City of New Orleans, by ordinances adopted in 1881, proceeded to declare, under article 248 of the Constitution, within what limits in the Parish of Orleans animals, intended for food, might be slaughtered, in which the board of health of the State of Louisiana concurred. In March, 1880, the Butchers Union Slaughter-House and Live-Stock Landing Company, the defendant in error, became incorporated under the general law of Louisiana, and was authorized by its charter "To erect, at any point or place in the Parish of Orleans, wharves, stables, sheds, yards and buildings necessary to land, stable, shelter, protect and preserve all kinds of horses, mules, cattle and other animals, for the purpose of carrying on the live-stock landing and slaughter-house business, and for the purpose of sheltering and protecting all such cattle or other animals which may be sent to said Company destined for slaughter; and the said Company shall, as soon as practicable, build and complete a slaughter-house; also a sufficient number of sheds and stables and other buildings as may be deemed necessary for the carrying on said slaughtering business."

This Company having begun to acquire the necessary plant for conducting the live-stock and slaughtering business, in pursuance of its charter, the plaintiff in error, on the 23d of [144] November, 1881, filed its bill in the Circuit Court of the United States for the Eastern District of Louisiana against the defendant in error, setting up its exclusive right and privilege as claimed by it under its original charter and grant, alleging that the defendant was about to violate the same, and praying for an injunction to restrain that Company from carrying out its purpose. On the 29th of December, 1881, after notice and hearing, the judges of that court granted the injunction as prayed for *pendente lite*. On final hearing on the 8th of May, 1882, this injunction was made perpetual. On May 5, 1884, this decree of the circuit court was reversed by this court by a decision reported in 111 U. S. 746 [28: 585], on the ground that the exclusive right originally granted to the plaintiff in error was valid only as an exercise of the police power of the State, and was of that character, having reference to the public health, that it could not be made the subject of contract, protected against subsequent legislation by the Constitution of the United States.

In granting the preliminary injunction referred to, the plaintiff in error was required to and gave an injunction bond in the sum of $8,000, with Bertrand Saloy as surety, reciting the allowance of the injunction *pendente lite*, and conditioned to pay to the defendant in said injunction all such damages as it might suffer or had suffered in consequence thereof. The present action was begun in the Civil District Court for the Parish of Orleans on May 28, 1884, by the defendant in error against the plaintiff in error and Bertrand Saloy, by a petition in which a recovery is sought upon the bond against the defendants *in solido* for the sum of $8,000, with 5 per cent interest from judicial demand for a breach of its condition, and against the Company alone for the further sum of $70,000 damages, with 5 per cent interest from the date of the verdict, on the alleged ground of a malicious prosecution by the complainant therein of the said bill in equity for an injunction. This cause came on for trial by a jury when there was a verdict against both defendants for $6,588.80, with interest, and against the Crescent City Live-Stock Landing and Slaughter-House Company alone, upon the plea [145] of malicious prosecution, for the sum of $12,500 damages, and the further sum of $2,500 attorneys' fees. Upon the trial the defendant relied upon the decree of the Circuit Court of the United States, granting and perpetuating the injunction, as conclusive proof of probable cause for the institution and prosecution of the suit complained of. The rulings of the civil district court upon this defense are set out in several bills of exception. In one of them it appears that the judge left it to the jury to determine whether the decree of the circuit court constituted probable cause or not, adding that in his opinion it was both remarkable and extraordinary, and, as explanatory of that, the bill of exceptions signed by him contains the following statement: "I describe the action of the federal court as 'remarkable and extraordinary,' because it set at naught the decisions of the State Courts of Louisiana, of the Supreme Court of Louisiana, set at defiance the positive mandate of the State Constitution, and because it was held by the unanimous Supreme Court of the United States to have involved a usurpation of jurisdiction; such action was truly 'remarkable and extraordinary,' though not without deplorable precedent."

It also appears that the defendants requested the judge to charge the jury as follows:

"A plaintiff, whose asserted right was conferred by an Act of Legislature and has been in force for a number of years, has a right to test the legality of a subsequent repeal of said right, when the validity of such repeal or modification has not been finally settled, and the plaintiff is advised by competent counsel that the repeal is invalid. In such a case the plaintiff has probable cause for asserting his rights and instituting an action for such purpose. If, in the action instituted, the lower court being the Circuit Court of the United States, presided over by two judges, render a judgment in favor of the plaintiff, the existence of probable cause for instituting such suit is demonstrated by the finding of the judges of the circuit court, although their judgment was reversed on appeal."

This charge the judge refused to give, on the ground that it was unsound in law. Judgment [146] was rendered on the verdict February 24, 1885, and the cause was removed by a suspensive appeal to the Supreme Court of Louisiana for the final decision of that court, by which, on December 14, 1885, it was affirmed.

It is contended by counsel for the defendant in error that, in examining the record in this case, this court will only consider the opinion and judgment of the Supreme Court of Louisi-

ana in order to ascertain if the authority relied upon by the plaintiff in error was wrongfully disregarded by that tribunal, and that without reference to the rulings of the inferior court, the opinion of the supreme court being made a part of the record by law for that purpose. Such appears to be the law of Louisiana as recognized by the decisions of this court. Code, Prac. La. art. 905; *Parks* v. *Turner*, 53 U. S. 12 How. 43 [13: 885]; Hennen, Dig. p. 92, No. 3; *Cousin* v. *Blanc's Exrs.* 60 U. S. 19 How. 202 [15: 601]; *Grand Gulf R. R. & Banking Co.* v. *Marshall*, 53 U. S. 12 How. 165 [13: 938]; *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 634 [22: 443]; *Crossley* v. *New Orleans*, 106 U. S. 105 [27: 667]; *Caperton* v. *Bowyer*, 81 U. S. 14 Wall. 216 [20: 882].

It must therefore be conceded that the sole question to be determined is, Did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court?

It is argued by counsel for the defendant in error that this does not embrace any federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of "any privilege or immunity specially set up or claimed under the Constitution or laws of the United States." But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process, although, as was said by this court in *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130, 135 [22: 588, 590]: "No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances." *Embry* v. *Palmer*, 107 U. S. 3 [27: 346]. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question.

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The decree of the circuit court was relied upon in the state court as a complete defense to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The Supreme Court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever.

It is conceded that according to the law of Louisiana the action for a malicious prosecution is founded on the same principles, and subject to the same defenses, as have been established by the common law prevailing in the other States.

In the case of *Hubgh* v. *New Orleans & Carrollton R. R. Co.* 6 La. Ann. 495, it was said that "The dispositions of article 2294 are found in the Roman and Spanish laws. So far from being new legislation, that article embodies a general principle as old as the science of jurisprudence itself, and it must still be understood with the limitations affixed to it by the jurisprudence of Rome and Spain. Domat, Lois Civiles, title, *Dommages Causés par des Fautes*, p. 180, par. 1." In the same case the court said on a rehearing: "The article 2294 of our Code provides that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The provisions of this article, however general and comprehensive its terms may be, may be found more than once recited in terms equally general and comprehensive in the laws of the fifteenth title of the seventh *Partidas*. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a code, a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory whether it was formally enacted in a code or not."

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In the case of *Senecas* v. *Smith*, 9 Rob. (La), 420, it had been previously decided that "In cases of this kind it is well settled that malice and the want of probable cause in the original action are essential ingredients. Malice may be expressly proved or it may be inferred from the total want of a probable cause of action; but malice alone, however great, if there be a probable cause upon which the suit or prosecution is based, is insufficient to maintain an action in damages for a malicious prosecution."

In the case of *Gould* v. *Gardner*, 8 La. Ann. 11, it was determined that the defendants in the case were not without probable cause for the arrest of the plaintiff, which was the ground of the action, because they acted by the advice of eminent and learned counsel, though his opinion was held to be erroneous. The court refer to the case of *Stone* v. *Swift*, 4 Pick. 389, in Massachusetts, and that of *Foshay* v. *Ferguson*, 2 Den. 619, in New York, as sufficient authority in support of their opinion, and add as follows: "Our Code and statutes have not provided any rules to guide us on the trial of such actions, and we are governed in the absence of positive legislation by the rules laid down in the authorities quoted, because we consider them just and reasonable in themselves." In the opinion in the present case, the Supreme Court of Louisiana says that to sustain the charge of malicious prosecution it is necessary to show: "1, that the suit had terminated unfavorably to the prosecutor; 2, that in bringing it the prosecutor had acted without probable cause; 3, that he was actuated by legal malice, *i. e.* by improper or sinister motives. The above three elements must concur."

And when there is no dispute of fact, the question of probable cause is a question of law for the determination of the court. *Stewart* v.

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Sonneborn, 98 U. S. 187, 194 [25:116, 119]. Want of probable cause and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for a malicious prosecution to recover. So that if probable cause is shown, the defense is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of malice. If he had probable cause to institute his action, the motives by which he was actuated and the purposes he had in view are not material.

How much weight as proof of probable cause shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question. It does not appear to have been judicially determined in Louisiana. In the case of *Griffis* v. *Sellars*, 4 Dev. & B. L. 177, Ruffin, *C. J.*, said "That probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court." In *Whitney* v. *Peckham*, 15 Mass. 243, such a judgment was held to be conclusive in favor of the existence of probable cause. To the same effect is *Herman* v. *Brookerhoff*, 8 Watts, 240, in an opinion of *Chief Justice* Gibson. The decision in the case of *Whitney* v. *Peckham*, *ubi supra*, however, was questioned by the Supreme Court of New York in the case of *Burt* v. *Place*, 4 Wend. 591, 598, where Marcy, *J.*, delivering the opinion of the court, said that the Massachusetts decision rested entirely upon *Reynolds* v. *Kennedy*, 1 Wilson, Rep. 232, which had been qualified by the decision of Eyre, Baron of the Exchequer, in *Johnstone* v. *Sutton*, 1 Term Rep. 505, and by what was said by *Lord* Mansfield and *Lord* Loughborough in the same case, which came before them on a writ of error. 1 Term Rep. 512. The effect of these English authorities, as stated by Marcy, *J.*, in *Burt* v. *Place*, *ubi supra*, is as follows: "That if it appears by the plaintiff's own declaration that the prosecution, which he charges to have been malicious, was before a [150] tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause."

In that case the judgment relied upon by the defendant was held not to be conclusive. The reason is stated to be as follows: "Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by causing him to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defense to the actions."

Commenting on this case, the Court of Appeals of Kentucky in *Spring* v. *Besore*, 12 B. Mon. 551, 555, says: "The principle settled in the case last cited we understand to be that such a judgment will not in every possible state of case be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means." That court proceeds to state the rule as follows: "The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree and show that it was obtained by fraud; and, in that case, it is indispensable that such matter should be alleged in the plaintiff's declaration; for, unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and shows that a judgment or decree has been rendered against the [151] plaintiff. To counteract the effect of the judgment or decree and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit and obtained a judgment in his favor."

The limitations upon the general principle declared in *Burt* v. *Place*, *ubi supra*, were followed by the Supreme Court of Maine in *Witham* v. *Gowen*, 14 Me. 362, and both decisions were referred to in the subsequent case of *Payson* v. *Caswell*, 22 Me. 212, 226, where the court said: "In these two cases, we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject matter, not obtained by undue means, it will be conclusive evidence of probable cause."

The propriety of this limitation of the rule seems to have been admitted by the Supreme Judicial Court of Massachusetts in *Bacon* v. *Towne*, 4 Cush. 217, 236, though in later cases it reiterated the broader rule as originally stated in *Whitney* v. *Peckham*, *ubi supra*. *Parker* v. *Huntington*, 7 Gray, 36.

This seems to reconcile the apparent contradiction in the authorities, and states the rule, which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

It is, perhaps, not material in this case to define the rule with precision, and to attempt to state with accuracy the precise effect to be given to a judgment or decree of the court as proof of probable cause under all circumstances, because in the present case the decree of the Circuit Court of the United States was adjudged to be entitled to no effect whatever as evidence in support of the defense of the plaintiff in error.

The ground on which the Supreme Court of [152]

Louisiana proceeded, as stated in its opinion, is explained to be as follows:

Shortly after the adoption of the Constitution of 1879, the plaintiff in error instituted a suit in the State Court of Louisiana, which was finally decided by the Supreme Court of the State in *Crescent City Slaughter-House Company* v. *New Orleans*, 33 La. Ann. 934. The object of the suit was to obtain a writ of injunction "restraining the City of New Orleans from entertaining any petitions for, and from ever designating any place or places for, the landing, yarding, sheltering or slaughtering any animal or animals intended for human food in the Parishes of Orleans, Jefferson, and St. Bernard, other than at the slaughter-houses and premises of the petitioner, and above the United States barracks on the east or left bank of the Mississippi River, and above the depot of Morgan's Louisiana and Texas Railroad, on the west or right bank or side of the Mississippi River."

There was a judgment dismissing the plaintiff's suit, and dissolving the injunction provisionally granted, from which the plaintiff appealed to the Supreme Court of Louisiana. That court affirmed the judgment, holding that the articles of the new Constitution had destroyed the monopoly claimed by the plaintiff, and that this was a valid exercise of power on the part of the State of Louisiana, not in violation of any provision of the Constitution of the United States. Speaking of the action of the present plaintiff in error in bringing that suit, the Supreme Court of Louisiana, in its opinion in the present case (37 La. Ann. 874, 876), says: "The questions involved were serious and important. Defendant's right to assert judicially the validity of his contract, and to resist by all legal remedies the execution of any state law which impaired it, was unquestioned. The question involved was federal in its nature, and the courts of the State, and perhaps of the United States, were equally open to it for the vindication of its alleged right; and, in either forum, it was entitled to appeal to the Supreme Court of the United States for the final and conclusive settlement of the question." And, referring to the judgment in that suit, it also says: "It is important to estimate the scope and effect of this decision. It was an authoritative [153] judicial determination, by a competent court, of questions submitted to it at the instance of the Company itself. In denying the rights claimed by the Company, and in affirming the right of the city to regulate slaughtering within her limits and to designate places for the conduct of such business, it necessarily affirmed the right of persons complying with such regulations to transact that business at such places, and denied the right of this Company to interfere with them. If there was error in the decision, that error could be corrected by one tribunal only, the Supreme Court of the United States. Until the questions involved had been determined differently by that high tribunal, the decision of this court was entitled to be accepted as the law by this litigant. Technical principles of *lis pendens* and *res judicata* might not debar the Company from prosecuting another suit against a different party involving the same subject matter; but if such suit rested exclusively upon the assertion of rights which this court had directly determined that the Company did not possess, it could find no protection against the charge of being a malicious prosecution, save in the production of a decision of the Supreme Court of the United States holding that our opinion was error."

The following extracts from the same opinion are on the same point:

"We are bound to hold that there was entire absence of probable cause. The suit involved absolutely nothing but questions of law. Those identical questions had been submitted to this court by this very prosecutor in a case precisely analogous, and had been determined against him. It was thus authoritatively advised what the law was. If it was dissatisfied with the opinion, its remedy was clear by appeal to the United States Supreme Court, and it had actually availed itself of that remedy on a writ of error which was pending and determined when this suit was brought. It must be carefully observed that, though the Butchers' Union Company was not technically a party to the suit against the city, the questions of right between it and the Crescent City Company were as directly involved as if it had been a party. If the city had the right to regulate slaughtering [154] within her limits, and to designate places for its lawful conduct, obviously persons complying with such regulations had the right to transact the business. If she had not that right, no person could lawfully slaughter elsewhere than at the old Company's slaughter-house. * * *

"But it is claimed that the prosecutor acted under the advice of counsel learned in the law. That is certainly true, and would ordinarily protect. But here the client was in possession of the opinion of this court on the very point in its own case, involving the same subject matter. It had no need for advice of counsel. That advice was simply that the opinion of this court was error. Counsel had the undoubted right to entertain such opinion, and so to advise its client; the only lawful remedy under such advice consisted in an appeal to the United States Supreme Court. If it chose to act otherwise on such advice it acted at its peril, and can take no protection therefrom. The only lawful action it could take under such advice had already been taken in the writ of error from the United States Supreme Court. * * *

"Nor does the decision of the judges of the Circuit Court of the United States afford a better shield. They are not vested with authority to review or reverse the decisions of this court. The effect of their action was not only to overrule our opinion, but practically to reverse our decree; for of what avail was the right decreed by us in favor of the city, to regulate slaughtering and to designate places therefor, if persons complying with those regulations could be enjoined by the United States Circuit Court from conducting the business at such places? It is obvious that the entire subject matter of the injunction suit was embraced in and disposed of by our decree; and that though the Butchers' Union Company was not nominally a party, its rights and those of all persons to transact the business of slaughtering in this city, being subsidiary to and springing directly from the right of the city, were necessarily involved in and protected by our decree. * * *

"But the ground on which we rest our conclusion on the question of probable cause is

that our decree in the suit, to which the defendant corporation was a party, was, until reversed, the law to it so far as the subject matter [155] thereof is concerned; that the prosecution of a suit which had no foundation, except in the assumption that our decree was not law, was without probable cause; and that neither the advice of counsel, nor the opinions of judges of a co-ordinate court that our decree was error, could furnish any cause whatever for the prosecution of such suit."

It is conceded by the Supreme Court of Louisiana, in this opinion, that its prior judgment in the case between the plaintiff in error and the City of New Orleans could not operate as an estoppel upon the principle of *res judicata*, in the suit which the plaintiff in error brought in the Circuit Court of the United States, the prosecution of which is charged against it as being malicious, because it was between different parties. It is also admitted that the judgment was not a final one, but by reason of the federal question involved was subject to review and possible reversal by a writ of error from the Supreme Court of the United States. The prosecution of such a writ of error, which was in fact actually sued out but subsequently dismissed, is declared by the Supreme Court of Louisiana to be the only lawful course which the plaintiff in error had a right to pursue. The failure to prosecute that writ of error is charged against the plaintiff in error, so as not only to deprive him of the benefit of the defense of probable cause, but as sufficient proof of malice in the subsequent institution of his suit in the Circuit Court of the United States; and these consequences, in the opinion of the Supreme Court of Louisiana, are not alleviated by the admitted fact that the plaintiff in error acted under the advice of counsel. Notwithstanding such advice, the client itself, the Supreme Court of Louisiana declared, was bound at its peril to take notice of its legal rights as defined in that opinion of the Supreme Court of the State.

It is not shown in the present record on what grounds counsel proceeded in their advice, or the plaintiff in error in failing to prosecute the writ of error from that judgment. It will be observed that the only relief sought in that suit was a writ of injunction against the City of New Orleans from taking the preliminary steps under the ordinances of the city in reference to entertaining petitions, and designating places, [156] for the prosecution of the business of which it claimed to have a monopoly under its charter.

In a similar case of the *Crescent City Live-Stock Landing and Slaughter-House Company* v. *Police Jury, Parish of Jefferson, right bank*, decided by the Supreme Court of Louisiana, 32 La. Ann. 1192, the plaintiff, who is the plaintiff in error herein, sought to enjoin the defendant from granting permission to any one to establish a slaughter-house in the Parish of Jefferson, on the ground that such a grant of authority would be in violation of the exclusive rights given to it under its charter; a case precisely analogous to that between the plaintiff in error and the City of New Orleans, 33 La. Ann. 934. In the case against the Police Jury of Jefferson Parish, the appeal and the petition of the plaintiff were dismissed. In disposing of the case, the court says (p. 1196): "The averments of the petition disclose a clear case of prematurity of complaint. It will be time enough for the plaintiff to apply for an injunction upon a sworn averment of proper facts if, after the police jury will have passed the resolution or given the permission, some party assumes to act upon that resolution and permission. For the determination of the motion to dismiss an opinion necessarily had to be expressed, not upon the merits, for none as yet exist, but upon the sufficiency of the sworn averment to justify the injunction."

It might, therefore, on the authority of this decision of the Supreme Court of Louisiana, be argued that the expression of its opinion in the case of *Crescent City Slaughter-House Company* v. *New Orleans*, 33 La. Ann. 934, was unnecessary to the decision of the cause, and *obiter dictum*, and for aught that appears counsel may have advised that a writ of error to reverse that judgment in the Supreme Court of the United States would fail on the ground that the record did not disclose the existence of a federal question necessarily to be passed on; for it has been the uniform doctrine of this court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a federal question not necessary to the decision of the cause. *Murdock* v. *Memphis*, 87 U. S. [157] 20 Wall. 590, 634 [22:429, 443]; *Jenkins* v. *Lowenthal*, 110 U. S. 222 [28: 129]; *Erwin* v. *Lowry*, 48 U. S. 7 How. 172 [12:655]; *Gibson* v. *Chouteau*, 75 U. S. 8 Wall. 314 [19:317].

However that may be, we are of the opinion, on other grounds, that the Supreme Court of Louisiana in this case erred in not giving due effect to the decree in question of the Circuit Court of the United States. The latter is a court co-ordinate to the Supreme Court of Louisiana in authority, and equal in dignity, being the highest federal court sitting in that State, whose judgments and decrees are final and conclusive, subject only to review and reversal in the Supreme Court of the United States. In the case in which the decree complained of was pronounced the circuit court did not act without jurisdiction, the subject matter of the suit being a controversy arising under the Constitution of the United States. The argument of the counsel for the defendant in error to the contrary, which deduces what the judge of the inferior court in his charge to the jury alleged to be a usurpation of jurisdiction, merely from the fact that its decree was reversed by this court, could only be true if the general proposition were true that all judgments reversible for error are void for want of jurisdiction. Having jurisdiction of the parties and of the subject matter of the suit, the judges of the circuit court were bound to declare the law of the case between the parties in the light of their own convictions, and under a sense of their official responsibilities, not being under any legal obligation to regard the decision of the Supreme Court of Louisiana upon a question of federal law as controlling by reason of its authority, whatever respect and deference they might see fit to accord to it by way of persuasion and argument. And their judgment or decree when rendered is binding and perfect between the parties until reversed, without re-

gard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would [158] be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate; and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceeding.

Neither was there anything in the situation or conduct of the plaintiff in error that could deprive it of the protection of the decree of the Circuit Court of the United States in this action. The fact that it had exercised an election to bring its suit against the City of New Orleans in the state court could have no legal effect upon its right afterwards to bring a similar suit against other parties in the Circuit Court of the United States. Its right of choice was not exhausted by a single exercise, and justified it in subsequently invoking the jurisdiction of the courts of the United States, no matter with what motive or for what purpose. As we have already seen and declared, the existence of express malice, however flagrant or unjustifiable, could not affect the exercise of this right, or deprive the party of the benefit of the judgment of the court as proof of a probable cause for the institution of the suit. Neither was the plaintiff in error bound to reject the advice of its counsel on the ground of its own presumed knowledge of the law, as declared in the opinion of the Supreme Court of Louisiana in the prior suit. It had a right to test the soundness of that judgment by seeking the jurisdiction of a co-ordinate court, whose decision would be of equal authority and dignity with that of the Supreme Court of the State, both being final between the parties to the particular litigation until reversed by the Supreme Court of the United States. The plaintiff in error owed no allegiance to the courts of the State greater than that due to the courts of the United States; it had an equal right in both to vindicate what it [159] claimed to be its rights by remedies appropriate to that purpose, and against all parties infringing them. The fact that the Supreme Court of Louisiana had spoken first gave no additional weight to its decision. Whatever deference may be due to the decisions of the state court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same State, where the questions involved and decided relate to rights arising under the Constitution and laws of the United States.

But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him as a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned except by direct process from superior authority. The integrity and [160] value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle.

That principle has been disregarded in the present case by the Supreme Court of Louisiana in failing to give due effect to the decree of the Circuit Court of the United States as sufficient evidence in support of the defense of the plaintiff in error in this action, so far as it is an action for the recovery of damages for a malicious prosecution.

The judgment of the Supreme Court of Louisiana on the bond itself, for damages occasioned by its breach, against the principal and surety, is not attacked in this proceeding. *It is so far affirmed.* But that part which constitutes a judgment against the Crescent City Live-Stock Landing and Slaughter-House Company solely, for damages for the malicious prosecution, *is reversed, and the cause is remanded for further proceedings therein not inconsistent with this opinion; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HIBERNIA INSURANCE COMPANY OF NEW ORLEANS, *Appt.*, [166]

v.

ST. LOUIS AND NEW ORLEANS TRANSPORTATION COMPANY ET AL.

(See S. C. Reporter's ed. 166-169.)

Insurance—negligence—inevitable accidents—fraud.

Upon a bill filed by an Insurance Company against a Transportation Company, engaged in transporting merchandise on the Mississippi River by means of towboats and barges, and its vendee, to recover certain amounts paid by the complainant, as insurer, to the owners of goods lost through the negligence

of the Transportation Company, and to have a sale of its property by said Company to the other defendant declared fraudulent as against the complainant, it is held that the losses complained of were the results of inevitable accidents, falling within the excepted dangers of the river and of navigation.

[No. 137.]

Argued and submitted Jan. 17, 1887. Decided Jan. 31, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri. Reported below, 5 McCrary, 397. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **O. B. Sansum**, for appellant.

Mr. Given Campbell, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Missouri, by the Hibernia Insurance Company, a Louisiana Corporation, against the St. Louis and New Orleans Transportation Company and the Babbage Transportation Company, two Missouri Corporations, and Henry Lowery, a citizen of Missouri.

The bill alleges that in August, 1879, the Babbage Company, of which Lowery was president and director, being engaged in transporting merchandise for hire on the Mississippi River from St. Louis to New Orleans by means of certain steam towboats and barges which it owned, contracted with the firm of Gordon & Gomila to transport for it from St. Louis to New Orleans a quantity of wheat, "the dangers of the river, fire, and collision only excepted;" that it loaded [167] a part of the wheat on the barge Sallie Pearce, which it took in tow by its towboat John Means; and that by negligent navigation on the part of the Babbage Company, the barge broke away from the towboat, and was allowed to drift down the river until she brought up against a steamboat which was lying at rest along the bank on the Missouri side of the river, and was broken and crushed, so that some of the wheat was lost in the river and some of it was damaged by water.

The bill also alleges that in September, 1879, one Pleasants owned certain rye, corn, oats and hay, which were at St. Louis, on the barge Colossal; that the Babbage Company contracted with Pleasants to carry those goods on that barge from St. Louis to New Orleans, "the dangers of navigation, fire, explosion, collision, bridges, and all other known and unknown obstructions excepted;" and that the Company, by its towboat E. M. Norton, took the barge in tow, and the towboat was so negligently managed that she drew the barge against an obstruction then visible and known to the master, pilot, and officers of the towboat, and the barge was broken, and allowed by them to remain, without any attempt to rescue the goods, and nearly all of them were lost.

The bill also alleges that the plaintiff, as insurer of the goods in both cases, paid to Gordon & Gomila and Pleasants, $19,633.16.

The bill also alleges that, in January, 1880, the Babbage Company, by Lowery, as its president, sold all its property, consisting of four steam towboats and thirteen barges, to the St. Louis Company; that such sale was without consideration, and fraudulent as against the rights of the plaintiff as a creditor of the Babbage Company; and that Lowery and the St. Louis Company had notice of the fraud.

The bill waives an answer on oath, and prays that the court will decree payment of said debt to the plaintiff, with interest; that the St. Louis Company be restrained from disposing of any of said property until the plaintiff's debt shall be paid; and that until that time the plaintiff have a lien on said property.

The defendants demurred to the bill for want of equity; for want of privity between the plaintiff and the defendants; and for multifariousness. The court (3 McCrary, 368) dis- [168] missed the bill as to Lowery, and overruled the demurrer as to the other defendants, with leave to them to answer, holding that it was not necessary that the plaintiff should recover a judgment at law against the Babbage Company before bringing this suit.

The defendants then put in a plea to that part of the bill which relates to the transfer of the property, and asks for relief by a lien and an injunction, denying the fraud and alleging the *bona fides* of the transaction. They, at the same time, put in an answer to the part of the bill not covered by the plea, denying the negligence, and averring that the losses were due to the perils of navigation. There were special replications to the plea and the answer.

Proofs being taken on the plea, the court (4 McCrary, 432) overruled it, on a hearing, holding that the allegations of the bill involved in the plea were established, and that the debts of the Babbage Company could be enforced in equity against the other Company to the extent of the property received by the latter.

The case was afterwards brought to a hearing on proofs on the issues raised by the answer, and the court (5 McCrary, 397) dismissed the bill. The plaintiff has appealed. The circuit court held, as to The Sallie Pearce, that the contract was that of a common carrier; that, as to The Colossal, it was immaterial whether the contract was that of towage merely, or that of a common carrier; and that each disaster was caused by an inevitable accident, falling within the excepted dangers of the river and of navigation, alleged in the bill as forming part of each contract. We concur in this conclusion. In the first case a sand reef had been recently formed in the channel; the pilot of the towboat had no reason to suppose it was there; and she was being handled with skill and care when the accident occurred. In the second case, The Colossal was unseaworthy when she started. The towboat was prudently navigated, but the river bank had shortly before caved in, and a tree from the land had fallen into the river, its presence being unknown, and The Colossal struck it under water, causing the ac- [169] cident, there being no want of care, skill, or attention on the part of those in charge of the towboat, either before or after the occurrence, in regard to the navigation or the saving of the cargo of The Colossal.

The appellees have contended in this court that the rulings of the circuit court as to the demurrer and the plea were erroneous, but, without passing on those questions, *we affirm the decree, for the reason stated.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[223] GEORGE M. EVERHART, *Appt.*,
v.
HUNTSVILLE FEMALE COLLEGE ET AL.

HUGH L. CLAY, Admr. *de bonis non* of A. R. ERWIN, Deceased, *Appt.*,
v.
HUNTSVILLE FEMALE COLLEGE ET AL.

(See S. C. Reporter's ed. 223, 224.)

Jurisdiction—pleading—residence—citizenship—costs.

1. An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States.
2. Upon a reversal of a decree for want of jurisdiction in the court below costs are allowed against the complainant, he having failed to put on record the facts necessary to show jurisdiction.

[Nos. 144, 471.]

Argued and submitted Jan. 20, 1887. Decided Jan. 31, 1887.

APPEALS from the Circuit Court of the United States for the Northern District of Alabama. *Reversed.*

Mr. Milton Humes, for George M. Everhart.

Mr. S. F. Rice, for Hugh L. Clay, administrator.

Messrs. **John D. Brandon**, *L. P. Walker* and *D. D. Shelby*, for the Huntsville Female College.

Mr. Chief Justice **Waite** delivered the opinion of the court.

These are appeals from a decree dismissing the original bill and a cross bill in a suit begun in the Circuit Court of the United States for the Northern District of Alabama, by George M. Everhart against the Huntsville Female Academy, George W. F. Price, Martha T. Rison, Myra J. Erwin, Robert M. Erwin, William H. Erwin, Joseph B. Erwin, and Marcus A. Erwin, and in which Hugh L. Clay, as administrator *de bonis non* of Abraham R. Erwin, deceased, was afterwards added as a defendant; [224] but on looking into the record we find no sufficient evidence of the jurisdiction of the circuit court, which depends alone on the citizenship of the parties. It is stated in the original bill that Everhart is a resident of Wisconsin, and the same fact is also shown by the testimony; but this, as it has often been held, is not enough. An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States. According to the pleadings the Huntsville Female Academy is an Alabama corporation, and the other defendants are residents of either Alabama or Tennessee. The decree dismissing both the original and cross bills is reversed, because the record fails to show the jurisdiction of the circuit court; but as the fault rests alone on Everhart, the complainant in the original bill, whose duty it was to put on record the facts necessary to show the jurisdiction, the reversal will be at his costs in this court. This whole subject has already been considered twice during the present term, once in *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 [*ante*, 380], and again in *Peper* v. *Fordyce*, *Id.* 469 [*ante*, 435]. The reasons for our judgment sufficiently appear in the opinions delivered in those cases. If on the return of the case to the circuit court it is made to appear that the citizenship necessary for the jurisdiction existed at the time the suit was brought, it will be for that court to determine whether an amendment of the pleadings ought to be allowed, so as to cure the present defects.

The decree of the Circuit Court is reversed, at the costs of the appellant Everhart, and the cause remanded for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

KING IRON BRIDGE AND MANUFACTURING COMPANY, *Plff. in Err.*, [225]
v.
COUNTY OF OTOE, IN THE STATE OF NEBRASKA.

(See S. C. Reporter's ed. 225-227.)

Jurisdiction—presumption against—suit by assignee of warrants—Act of March 3, 1875—practice—amendments.

1. On writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court below. This court will consider this question, although it is not raised by the parties.
2. Unless the contrary appears affirmatively from the record, the presumption, upon error or appeal, is that the court below was without jurisdiction.
3. Under the Act of March 3, 1875, affecting suits by assignees of contracts, a suit on two warrants, one payable to a third person and the other to his order and not indorsed by him, is not within the jurisdiction of the courts of the United States, unless such third person might have maintained an action thereon in said courts.

[No. 938.]

Submitted Jan. 7, 1887. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nebraska. Reported below, 27 Fed. Rep. 800. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **N. S. Harwood** and **John H. Ames**, for plaintiff in error.

Mr. **John C. Watson**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought, November 10, 1885, by the King Iron Bridge and Manufacturing Company, a corporation of Ohio, against Otoe County, in the State of Nebraska, to recover the amount of two county warrants or orders, each signed by the chairman of the county commissioners of the County and countersigned by the county clerk. One was dated October 9, 1878, and directed the "Treasurer of Otoe County to pay to Z. King, or order, sixteen hundred and five dollars, and charge to account of special bridge fund," and the other, dated January 9, 1879, directed the "Treasurer of Otoe County to pay to Z. King, sixteen hundred and five dollars, and charge to account of special bridge fund." The first one being presented for payment on the 23d of October, 1878, was indorsed by the treasurer, "Presented and not paid for want of funds." The other was presented on the 15th of January, 1879, and re-

ceived a like indorsement. The petition states, in respect of each warrant, that it had been for a valuable consideration "sold, transferred and delivered" by Z. King to the plaintiff, who sues as the holder and owner thereof.

[226] Judgment was asked for $3,210, with 10 per cent interest on $1,605 thereof from October 23, 1878, and for $1,605 with like interest from January 15, 1879.

The defense was the limitation of five years prescribed by the local law for an action "Upon a specialty, or any agreement, contract, or promise in writing or foreign judgment." The court below overruled a demurrer to the answer and dismissed the action.

This case was argued upon the question of limitation. But we have no occasion to consider that question; for it does not appear that the circuit court had jurisdiction of the action. Unless the contrary appears affirmatively from the record, the presumption, upon writ of error or appeal, is that the court below was without jurisdiction. *Robertson* v. *Cease*, 97 U. S. 646 [24: 1057]; *Grace* v. *Am. Cent. Ins. Co.* 109 U. S. 283 [27: 934]; *Bors* v. *Preston*, 111 U. S. 252 [28: 419]. That the point as to jurisdiction was not made here by either party is immaterial, because, as said in *M. C. & L. M. R. Co.* v. *Swan*, 111 U. S. 382 [28: 464]: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." See also *Hancock* v. *Holbrook*, 112 U. S. 231 [28: 715].

The Act of March 3, 1875, section 1, excludes from the cognizance of a Circuit or District Court of the United States "Any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court [227] to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." One of the warrants is payable to Z. King and the other to Z. King, or order. The latter is not indorsed by him in blank or to the order of the plaintiff. Plainly, therefore, upon any view of the statute the plaintiff, as the holder or owner of the warrants, could not maintain a suit in the court below, unless King could have sued in that court, had he not sold the warrants. But it does not appear that King could have maintained the suit. There is no averment as to his citizenship, nor does his citizenship otherwise appear from the record. We must, therefore, presume, on this writ of error, that the circuit court was without jurisdiction.

It will be for the court below to determine whether an amendment of the pleadings upon the point of jurisdiction will be proper.

The plaintiff in error must pay the costs in this court.

Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF QUINCY, *Appt.*, [241]
v.
JAMES W. STEEL.

(See S. C. Reporter's ed. 241-249.)

Jurisdiction—bill by stockholder against corporation and another—Rule 94—failure to comply with.

Upon a bill filed in the circuit court by a stockholder in a gas company against said company and a municipal corporation, the defendants being citizens of the same State, to enforce the payment of a claim alleged to be due from the latter to the former, it is *held:* that the allegations of the bill touching the efforts of the complainant to secure action by the gas company are insufficient under Rule 94; that the proceeding appears to be an attempt to have a common-law action tried in a court of equity, and to bring the case within the jurisdiction of the federal courts; and that the bill should have been dismissed by the court below.

[No. 1250.]

Submitted Jan. 4, 1887. Decided Jan. 31, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **L. H. Berger, George A. Anderson, Joseph N. Carter** and **Wm. H. Govert,** for appellant:

Before the complainant is entitled to sue in a court of equity in his own name as a stockholder, he must show that the directors of the corporation have been guilty of fraud.

Dodge v. *Woolsey*, 59 U. S. 18 How. 343 (15: 406); *Hawes* v. *Oakland*, 104 U. S. 450 (26: 827); *Detroit* v. *Dean*, 106 U. S. 537 (27: 300); Rule 94 of Rules of Practice for Courts of Equity of the United States.

We insist that even if a proper request had been made by complainant to the directors, and proper and reasonable time given for them to comply, still under the allegations of this bill it would not have been sufficient to authorize the complainant to file it in his own name, without first having submitted the matter of suing for these demands to the stockholders.

Foss v. *Harbottle*, 2 Hare, 461; *Hawes* v. *Oakland*, and *Detroit* v. *Dean*, *supra*.

Mr. **Wm. McFadon,** for appellee:

In view of the facts involved, we say, upon the question of the right of the stockholder to sue, it is to be remembered that this case is one of nonfeasance and neglect on the part of the directors of the gas company, and as such we insist the allegations of the bill are up to the requirements of *Detroit* v. *Dean*, 106 U. S. 542 (27: 302); *Davenport* v. *Dows*, 85 U. S. 18 Wall. 627 (21: 988); *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 (15: 401).

Mr. Justice **Miller** delivered the opinion of the court: [242]

This is an appeal from the Circuit Court of the United States for the Southern District of Illinois.

James W. Steel, the complainant in the circuit court, is a citizen of Alabama, and he brings his bill against the City of Quincy, a municipal Corporation of the State of Illinois, and the Quincy Gas Light and Coke Company, also a corporation of that State. He sets out a contract between the City of Quincy and the

gas company, dated February 14, 1877, the only parts of which in this connection of any importance being that the gas company was to furnish a certain number of lighted lamps for the streets of said City, for which the City agreed to pay a fixed price per annum. This contract was to continue for five years. The City failed to pay the full amount due for gas in any one year, but paid a part of the bill on each year as long as the gas company continued to furnish the gas. On May 11, 1881, the City passed an ordinance declaring that it no longer recognized as binding the agreement between it and the gas company, under which the gas had been furnished, and notifying the company of that fact. The company, however, continued to furnish gas until November, 1883.

Instead of a suit by the gas company against the City of Quincy, in an action at law to enforce the rights of the company by a judgment, and by an appropriate writ of *mandamus* if the City did not pay the judgment, the present suit is brought by Mr. Steel in his own name, on the ground that he is a stockholder in the gas company; and, as the allegations on this branch of the subject, on which he relies as his authority to maintain this suit, are important, they are given here verbatim from the bill.

He says: "That your orator is advised and believes, and so states the fact to be, that the said company has a just and valid claim against said City of Quincy, and one recoverable in the courts by some suit or suits in the name of said company; that your orator has at different times endeavored to induce the board of directors of said company to institute a suit or suits to recover the said claim against said City; that your orator now is, and for more than four years last past has been, a stockholder in said company; that he now has, and during the entire period last aforesaid has had, seventy-five shares of the capital stock of said company; that said last named endeavors have been made while your orator was said stockholder; that so far, and up to now, your orator has not succeeded in persuading said directors to institute as aforesaid; that your orator, on August 1, 1885, caused to be addressed to said board a communication in writing, directing and requiring said board to resolve to at once institute suit against said City of Quincy, in the name of said company, in such court or courts as were proper, for the recovery of said claim; that said board of directors laid said communication upon the table, as your orator is informed and believes and therefore so states, and refused to agree to comply with the request therein contained; that whatever claim said company has by reason of the matters and things above alleged will be barred in considerable part before a meeting of the stockholders of said company will occur; that a part of said claim either has been or is about to be barred by the Statute of Limitations; that further delay in bringing suit will result in a part of said claim being barred by the Statute of Limitations; and that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim."

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The decree of the court below was rendered on a demurrer to the bill filed by the City of Quincy, which, being overruled, the City refused to plead further, and decree was thereupon rendered against it. This decree, made on the 1st day of March, 1886, among other things, "Orders, adjudges and decrees that said The Quincy Gas Light and Coke Company have and recover of said defendant City of Quincy the sum of $36,116.21." It then makes provision for the enforcement of this decree by certain orders concerning future annual appropriations to be made by the City for payment out of its annual tax levy.

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We are of opinion that the demurrer of the City of Quincy should have been sustained, for the reason that Mr. Steel shows no sufficient ground why he should have been permitted as a stockholder of the gas company to sustain this bill. In order to do this the circumstances must be such as to justify the court, in the interest of justice, to override two cardinal principles of federal jurisprudence. One of these is that the litigants in the federal courts, where the right to sustain such litigation depends upon the citizenship of the parties, shall be citizens of different States. In this case the real right of action and the real contest before the court, if it had proceeded, would have been between the two corporations, organized under the laws of Illinois, and existing and doing business in the same place; to wit, the gas company and the City of Quincy. By sustaining this bill the gas company recovers a judgment in terms against the City for the amount in controversy under the contract.

The other principle which it is necessary to override is that in the federal courts the distinction between actions at law and suits in equity has always been kept up. In the present case it is but a plain suit to recover damages on a written contract by the one corporation against the other on account of a violation of that contract, except as Mr. Steel endeavors to bring himself into the case as having rights which he cannot enforce in a court of law. It is purely and simply a suit to recover money on a written contract in an action in the nature of assumpsit.

If, therefore, Mr. Steel, by virtue of being a citizen of Alabama, has any right to prosecute this suit in a court of the United States, and in a court of equity instead of a court of law, it is very obvious that he should make this right plain.

Prior to 1875 cases had come into the courts of the United States, especially into the circuit courts, where citizenship had been simulated, and parties improperly made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable in the circuit courts originally, or removable thereto from the state courts; and as it very frequently occurred that both plaintiffs and defendants were willing to seek that court in preference to the state courts, it had been found very difficult to prevent these improper cases from being tried in those courts. In the Act of March 3, 1875, an attempt was made to correct this evil, and by the fifth section of that Act it was declared "That if, in any suit commenced in the circuit court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially

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involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from whence it was removed, as justice may require."

In the cases of *Hawes* v. *Oakland*, 104 U. S. 456 [26: 830], and *Huntington* v. *Palmer*, Id. 482 [26: 838], the question of the growth of the form of invoking federal jurisdiction, where it does not otherwise exist, by the attempt of a corporation which cannot sue in the federal court to bring its grievance into that court by a suit in the name of one of its stockholders who has the requisite citizenship, was very much considered. In order to give effect to the principles there laid down this court at that term adopted Rule 94 of the Rules of Practice for Courts of Equity of the United States, which is as follows:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and [246] the causes of his failure to obtain such action."

The bill in the present case, although verified by oath, is far from complying with the letter or the spirit of this rule. It does not contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, although the allegation on that subject includes a part of the time in which the City of Quincy failed to pay for its gas; but inasmuch as the sworn allegation in the bill was made on the 18th day of August, 1885, and he there swears that he had been the owner of the stock on which he brings this suit over four years, it is easy to suppose that he acquired this stock after the 11th day of May, 1881, on which day the City by its official action notified the gas company that it repudiated the contract and would no longer be bound by it. And it is not an unreasonable supposition that the gas company, foreseeing litigation which it might be desirable for that company to have carried on in a federal court, immediately after receiving notice of that resolution had this stock placed in the hands of Mr. Steel for the purpose of securing that object, and though the suit was delayed for two or three years it was probably because the City continued to pay some part of the demand for the gas furnished by the company. The bill does not contain the allegation expressly prescribed by this rule, that "The suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." The allegation of the bill, "That this suit is brought in good faith, and for the collection of and to compel the collection of what your orator believes to be a meritorious claim," is by no means the equivalent of this provision of the rule; for it may very well be understood that the party who is seeking to enforce a debt which he believes to be due is acting in good faith for the purpose of compelling its collection, while he may be well aware that he is imposing upon the court to which he actually resorts a jurisdiction which does not belong to it.

The rule also requires that he must set forth with particularity his efforts to secure action on [247] the part of the managing directors or trustees of the corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. In the case before us he seems to have made but a single effort to induce the directors of the gas company to institute a suit against the City to recover the money, and this was by a communication in writing addressed to the board August 1, 1885. No copy of that letter is produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon that subject is produced; no effort at conversation with any of the directors, or any earnest effort of any kind upon his part to induce the directors to bring the suit is shown in the bill; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the City was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the City, is shown. The most meager description possible of a bare demand in writing, made sixteen days before the institution of this suit, is all we have of the efforts which he should have made to induce this corporation to assert its rights. This letter was addressed to the board of directors August 1, 1885, from what point is not stated, but it may reasonably be inferred that it was from Alabama, of which State he was a citizen. The bill itself is sworn to the 13th day of August thereafter. How long a time was left for the consideration of this question by the board of directors, and what earnest efforts Mr. Steel may have made to induce their favorable action, may be easily inferred from the speed with which the bill was sworn to in Alabama and filed after he addressed his letter to the board. The inference that the whole of this proceeding was a preconcerted and simulated arrangement to foist upon the Circuit Court of the United States jurisdiction in a case which did not fairly belong to it, is very strong.

In the case of *Hawes* v. *Oakland*, 104 U. S. 461 [26: 832], in speaking of this perfunctory effort to induce the trustees of the corporation to act, it is said: "He (the plaintiff) must make an earnest, not a simulated, effort with the [248] managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it

could not be done, or it was not reasonable to require it." Again it is said: "He merely avers that he requested the president and directors to desist from furnishing water free of expense to the City, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. * * * No attempt to consult the other shareholders to ascertain their opinions or obtain their action. But within five days after his application to the directors this bill is filed."

In the case of *Huntington* v. *Palmer*, 104 U. S. 483 [26: 834], the court says: "Although the company is the party injured by the taxation complained of, which must be paid out of its treasury, if paid at all, the suit is not brought in its name, but in that of one of its stockholders. Of course, as we have attempted to show in the case just mentioned (*Hawes* v. *Oakland*, *supra*, 450), this cannot be done without there has been an honest and earnest effort by the plaintiff to induce the corporation to take the necessary steps to obtain relief." See *Detroit* v. *Dean*, 106 U. S. 537 [27: 300].

We think upon the face of the bill in this case there is an entire absence of any compliance with the rule of practice laid down for equity courts in such cases, and of any evidence of an earnest and honest effort on the part of the complainant to induce the directors of the gas company to assert the rights of that corporation. On the contrary, the clear impression left upon reading the bill is that it is an attempt to have a plain common-law action tried in the court of equity, and the rights of parties decided in a court of the United States who have no right to litigate in such a court, and that there is no sufficient reason in the bare fact that Mr. Steel is a stockholder in the corporation which justifies such a proceeding.

[249] If other evidence were wanting of the soundness of our inferences on this subject, it is to be found in the fact that while the decree in this case was rendered on the first day of March, 1886, a suit was commenced by the gas company against the City of Quincy, on the same causes of action, in the Circuit Court of Adams County, in the State of Illinois, on the 31st day of March of the same year. This fact was brought to the attention of the Circuit Court of the United States at the same term in which the decree now appealed from was rendered, by a petition to vacate and set aside the decree, which that court overruled. It seems very obvious that the gas company, having obtained through the instrumentality of this collusive suit by Mr. Steel a decree settling its rights against the City of Quincy, then brought in its own name a suit in the state court, which it had not dared to do until those rights were adjusted in a court of the United States.

We are of opinion that the demurrer to the plaintiff's bill ought to have been sustained and the bill dismissed.

The decree is, therefore, reversed, and the case remanded to the Circuit Court with instructions to that effect.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*,
v.
CLEMENT HUGH HILL ET AL. [169]

(See S. C. Reporter's ed. 169-183.)

Fees of clerk of district court—section 833 R. S., construction of—fees in naturalization cases not included.

1. In the construction of a doubtful and ambiguous law, the contemporaneous and uniform construction by executive officers charged with its execution, is entitled to great weight.

2. In an action on the official bond of the clerk of a district court to recover damages for an alleged breach in a failure to account for fees charged by him in naturalization cases, it is held that such fees are not within section 833 R. S., requiring such clerks to account for all fees and emoluments of their offices, of every name and character.

[No. 1193.]

Argued Dec. 20, 1886. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. Reported below, 25 Fed. Rep. 375. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for plaintiff in error:

Proceedings connected with naturalization are judicial proceedings of the highest importance.

Spratt v. *Spratt*, 29 U. S. 4 Pet. 398 (7:897); *The Acorn*, 2 Abb. U. S. 444.

There is no difficulty encountered in applying the tariff of fees prescribed by section 828 R. S.

It seems that in the District of Massachusetts the opinion has become inveterate that the administration of oaths, the filing of papers, the making of records and copies thereof, and affixing seals of courts in connection with proceedings in naturalization are all services entirely outside the statute, for which the court may authorize any fees they see proper, and with which the clerks are not chargeable.

If Mr. Hill or his predecessors had made known to the fiscal department of the Government that they were withholding certain fees from their returns, and the practice had been acquiesced in by the department, the case might have been different. But no such case is presented, and there is nothing to show that the executive branch of the Government had any knowledge of the practice in question until the discovery made by the examiner of the Department of Justice.

It is therefore quite inadmissible to say that this practice in violation of law has become so rooted by time and governmental sanction that it cannot be corrected except by legislation, and that until such legislation is had the clerk of the District Court of the District of Massachusetts shall continue to enjoy exemption from accountability for certain fees which the clerk of the circuit court of that district, and every other clerk in every other district, regularly accounts for.

Mr. **John Lowell**, for defendants in error:

If it be granted—as we submit that it must be—that the statute does not prescribe the fees for naturalization, then they are not to be returned. However general and comprehensive the language requiring returns may be, it will be confined to the fees regulated by the statute itself and later statutes on the same subject,

according to the familiar rule of construction that general words are controlled by the specifications.

Moore v. *American Trans. Co.* 65 U. S. 24 How. 1 (16:674); *Commonwealth* v. *Hartnett*, 3 Gray, 450; *Appleton* v. *Hopkins*, 5 Gray, 530; *Kitchen* v. *Shaw*, 6 Ad. & El. 729; *Sandiman* v. *Breach*, 7 Barn. & C. 96; *Ex parte Dawes*, L. R. 17 Q. B. Div. 275; *Staniels* v. *Raymond*, 4 Cush. 314.

Contemporaneous construction by all the judges and officers concerned, and its continuance for forty years, will have great, if not controlling weight with the court.

U. S. v. *Richardson*, 28 Fed. Rep. 61; *The Queen* v. *Outbush*, L. R. 2 Q. B. 379; *Packard* v. *Richardson*, 17 Mass. 144.

[170] *Mr. Justice* **Blatchford** delivered the opinion of the court:

On the 5th of February, 1879, Clement Hugh Hill was duly appointed clerk of the District Court of the United States for the District of Massachusetts, by the judge of that court. On the same day he and William Goodwin Russell and another person executed a joint and several bond to the United States in the penal sum of $20,000, conditioned that Hill, "by himself and by his deputies," should "faithfully discharge the duties of his office, and seasonably record the decrees, judgments and determinations of the said court, and properly account for all moneys coming into his hands, as required by law." The statute requiring a bond, in force at the time, was section 3 of the Act of February 22, 1875, chap 95, 18 Stat. at L. 333, which required the clerk to give a bond, with sureties, "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk."

This suit was brought by the United States against Hill and Russell on said bond by a writ dated December 4, 1884, claiming $22,000 damages. The declaration alleges, as a breach of the bond, that Hill "has not properly ac-
[171] counted for all moneys coming into his hands, as required by law, according to the condition of said bond." The answer of the defendants denies that allegation, and avers that Hill "has made full and sufficient returns of all moneys received by him, as required by law, and that he owes no sum of money to the said United States."

The following agreed statement of facts was filed July 1, 1885, signed by the attorneys for the respective parties, and upon it the case was, by written agreement, submitted to the decision of the court:

"The defendant Hill was appointed clerk of said court on the fifth day of February, 1879, and duly qualified as clerk, and the defendants gave the bond, a copy of which is annexed to the declaration. As clerk, he has made half yearly returns of fees and emoluments received by him, but he has not included in the same the amounts received by him for the naturalization of aliens in the district court.

"It has been the custom in the United States Courts in the District of Massachusetts, for a long time, not less than forty-five years before the date of the writ in the present action, and known and approved by the judges, for the clerk to charge one dollar as a fee for a declaration of intention to become a citizen, and two dollars as a fee for a final naturalization and certificate thereof; and the clerk of the district court has never included these in the fees and emoluments returned by him, and this has been known to the judges to whom the accounts have been semi-annually exhibited, and by whom they were passed without objection in this particular. Following this custom, and believing and being informed that these fees formed no part of the emoluments to be returned to the Government, the defendant Hill has not included these amounts in his accounts, and this was known to the judge when his accounts were examined, and he made on each a certificate in the form hereto annexed; and his accounts, so made out, up to July 1, 1884, have been examined and adjusted by the accounting officers of the Treasury Department.

"The clerks of the several courts of the State of Massachusetts made similar charges for like services, and made no returns to the [172] treasurers of the counties of the fees so received until the passage of the Statute of the State of 1879, chap. 300.

"If, upon the facts before stated and agreed, the court shall be of opinion that the said fees, charged by the defendant Hill, in respect to naturalizations, or any part thereof, should have been returned in his accounts to the United States as part of the emoluments of the clerk, from which his compensation is to be taken, in accordance with section 833 of the Revised Statutes, and that the settlements and adjustments of his several accounts, as above mentioned, constitute no defense to this action, the case shall be sent to an assessor to ascertain the amount due the United States, in accordance with the law as laid down by the court, unless the parties shall, within fifteen days after the announcement of the opinion of the court, agree upon the amount.

"The blanks used for the report of clerks' fees and emoluments, and the blanks used in naturalization of aliens, may be considered as part of the record of the case.

"The instructions of the Department of Justice to the several clerks, dated January, 1879, may be read for any purpose for which they are properly applicable; but neither the defendant Hill nor his deputy, Mr. Bassett, has any recollection of receiving or seeing such a circular before October, 1884.

"The court may draw such inferences from the above facts as a jury might."

Section 833 of the Revised Statutes provides that every clerk of a district court shall, "On the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such return the fees and emoluments payable under the Bankrupt Act. * * * Said returns shall be verified by the oath of the officer making them."

Section 839 of the Revised Statutes provides [17
that "No clerk of a district court * * * shall

be allowed by the Attorney-General * * * to retain of the fees and emoluments of his office, * * * for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk, * * * or exceeding that rate for any time less than a year."

Section 844 provides that every clerk shall "At the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

Section 845 provides, that in every case where the return of a clerk "Shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his department, and an account to be opened with such officer in proper books to be provided for that purpose."

The foregoing provisions of sections 833, 839, 844, and 845 were taken from section 3 of the Act of February 26, 1853, chap. 80, 10 Stat. at L. 165, 166, the supervision being changed from the Secretary of the Interior to the Attorney-General by section 15 of the Act of June 22, 1870, chap. 150, establishing the Department of Justice. 16 Stat. at L. 164.

Section 846 provides that the accounts of clerks "Shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in the case of other public accounts." This provision was taken from section 1 of the Act of August 16, 1856, chap. 124, 11 Stat. at L. 49.

The blank used for the report of clerks' fees and emoluments, and the oath appended to the report and the certificate of the judge upon it, were in the following form, as contained in the record: [174]

"[Blank for emolument return, to be filled up when a return is due, and forwarded to the Attorney-General of the United States, with the necessary vouchers. Should the return be verified before any officer other than a judge or clerk of a court of the United States, the additional certificate of authentication should be appended, as the printed instructions of July 13, 1870, require. Similar blanks will be furnished for each semi-annual return.]

Return of fees and emoluments of , clerk of the Court of the United States for the district of , from to , and of moneys paid out by him during the same period for the expenses of his office; also of the receipt or non-receipt of fees and emoluments previously returned by him as "not received."

DISTRICT COURT.	Dollars.	Cents.
Fees and emoluments earned from the United States, received		
Do. do. do. do. do. not received		
Fees and emoluments earned from individuals, received		
Do. do. do. do. not received		
Do. do. do. do. in cases in bankruptcy, received		
Do. do. do. do. do. do. not received		
Total gross emoluments earned in the District Court $		

OFFICE EXPENSES PAID OUT OF GROSS EMOLUMENTS, AS AUTHORIZED BY LAW AND REGULATIONS.

	District Court.		
Amount paid for rent of office	Voucher No. 1		
Do. do. furniture for office	do. 2		
Do. do. clerk hire	do. 3		
Do. do. fuel	do. 4		
Do. do. lights	do. 5		
Do. do. stationery	do. 6		
Total amount of office expenses.	$		

RECAPITULATION.

	District Court.	
Total amount of earnings, received and not received, brought down		
Deduct amount paid for necessary office expenses		
Net amount of emoluments earned		
Deduct maximum personal compensation		
Balance due to the United States $		
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received		
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received		
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received		
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received		

[175] I, , clerk of the Court of the United States for the district of , do solemnly swear that the foregoing account is, in all respects, just and true, according to my best knowledge and belief; and that I have neither received, directly or indirectly, nor directly or indirectly agreed to receive, or be paid, for my own or another's benefit, any other money, article, or consideration than therein stated; nor am I entitled to any emoluments for the period therein mentioned, other than those therein specified; and that I have taken all reasonable pains to collect from individuals amounts due to the United States for services in my office: So help me God.

——— ———.

Signed and sworn to before me this day of , 188 .

——— ———.

I, , judge of the Court for the district of , do hereby certify that I have carefully examined the vouchers referred to in the foregoing return; that the disbursements charged therein for clerk hire and office expenses were necessary to the convenient transaction of the business of the clerk's office; and that the sums paid therefor are, in my opinion, reasonable.

——— ———.

NOTE 1.—No money can be paid from the Treasury to any clerk while his emolument return shall remain in arrear."

On the foregoing facts and statutes it was contended by the United States, before the circuit court, held by the circuit judge and the district judge, that the sums received as fees in naturalization proceedings were "fees and emoluments" within the meaning of section 833, and ought to have been included by the clerk in his returns, on the ground that they were received for services rendered by the clerk in his official capacity, and he was, therefore, bound to account for them, whether they were or were not chargeable under section 828, prescribing fees for clerks. The circuit court held [176] that the action could not be maintained and entered a judgment for the defendants, to review which the United States have brought a writ of error.

The opinion of the circuit court, which accompanies the record, and is reported in 25 Fed. Rep. 375, gives the following statement as to the former and the existing legislation of Congress on the subject and as to the action of the courts and of the executive departments of the Government: "By the Act of March 8, 1791, 1 Stat. at L. 217, § 1, the compensation of the clerks was fixed at five dollars a day for attending court, and their travel. To this was added by the Act of May 8, 1792, 1 Stat. at L. 277, § 3, such fees as were allowed in the Supreme Court of the State, with a provision that for discharging duties not performed by the clerks of the state courts, and for which the laws of the State made no allowance, the court might allow a reasonable compensation. Under these Acts the clerks were allowed to retain all their fees, and were not required to render any account of them to the Government. The first law requiring returns to be made was the Act of March 3, 1841, 5 Stat. at L. 427. This Act established the compensation of clerks of courts at $4,500 a year, above clerk hire and office expenses, payable from fees only, and required them to pay the overplus into the public Treasury, under such rules and regulations as might be prescribed by the Secretary of the Treasury. The next in order of time was the Act of May 18, 1842, 5 Stat. at L. 488. That Act required the clerks to make to the Secretary of the Treasury semi-annual returns, embracing all the fees and emoluments of their office, of every name and character, distinguishing those received or payable under the Bankrupt Act from those received or payable for any other service. It authorized the clerk of the district court to retain from the fees and emoluments of his office, above office expenses and clerk hire, as his personal compensation, $3,500 a year, and required him to pay the surplus into the Treasury. It has been stated that the provision in this Act as to bankruptcy fees was inserted to change the law, as ruled by *Judge* Story, that the clerks were not bound to account for fees earned under the Bankrupt Act of August 19, 1841. The Act of March 3, 1849, 9 Stat. at L. [177] 395, § 4, establishing the Department of the Interior, transferred the supervision of the accounts of clerks to the Secretary of the Interior. Until the Act of February 26, 1853, 10 Stat. at L. 161, the official fees of the clerks remained in substance as fixed by the Acts of 1791 and 1792. The Act of 1853 was the first uniform statute regulating the fees of the clerks and other officers of the courts throughout the United States. It established the present fee-bill, and is reproduced in sections 828 to 857 of the Revised Statutes. Its provisions in regard to returns to be made by the clerks were the same as in the Act of 1842, except that they were to be made to the Secretary of the Interior, as directed by the Act of 1849, instead of to the Secretary of the Treasury. Since the Act of June 22, 1870, creating the Department of Justice, the returns have been made to the Attorney-General, and supervision of these accounts has been exercised by that officer of the Government."

Referring then to the fee-bill of February 26, 1853, as found in sections 828 *et seq.* of the Revised Statutes, the court proceeds: "Upon an examination of the statute it will be seen that it applies to taxable costs in all ordinary litigation, whether at law or in equity, or admiralty, and undoubtedly governs the taxation in all such actions, suits and proceedings, civil and criminal, *in personam* and *in rem*, in the courts of the United States. But it has not usually been considered, at least in this district, as applying to certain special and peculiar cases, of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court, and from the nature of the case no costs are taxable as in ordinary litigated suits. Of such a character are proceedings under the naturalization laws, under the shipping commissioners' Act, and applications to be admitted to practice as an attorney. Thus *Judge* Shepley early refused to allow the clerk to tax costs by the fee-bill on applications under the shipping commissioners' Act of June 7, 1872, 17 Stat. at L. 272, Rev. Stat. § 4544, for the money and effects of deceased seamen deposited in the circuit court by the shipping commissioner.

"In respect to naturalization cases, it has [178]

never been hitherto understood, either by the judges or the departments, that the fees of the clerk were for services rendered in his official capacity. At times, especially before elections, these applications are extremely numerous. The papers are usually prepared by the parties themselves or their friends, or more frequently by agents of candidates. The hearings are *ex parte*, at no stated times, and it is rare that any person appears in opposition. It has, therefore, been necessary, both in the interest of the applicants, and for the due and orderly execution of the law, and to enable the court to dispose of the cases, that the papers should be looked over and corrected by some person familiar with the law and practice, and in many instances that the witnesses should be examined before the cases were presented to the court for final action. It was for this service that the clerk has been allowed to make these charges to the parties. These are duties which the court has the undoubted right to have performed by some other person than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case, and form the basis of the orders and decrees of the court in the cause.

"It was with this view, to regulate the practice in naturalization cases, and define the duties required of the clerk, that *Judge* Sprague, in 1855, adopted the following rules, which have ever since been in force:

"'Ordered, by the court, that applications by aliens to be admitted to become citizens of the United States shall be presented to the court while in session, and that proof of the facts whereof the court is required by law to be satisfied, shall be made by at least two credible and disinterested witnesses, who are citizens of the United States, to be produced and examined in open court.

[179] "'Ordered, that before such applications are presented, all necessary papers shall be filed with the clerk, who shall report to the court, when the application is made, that he has examined the same, and whether they are all in due form and in conformity with the requirements of law, or how otherwise.'"

This fact, as to these rules made in 1855, was not made a part of the agreed statement of facts, but the counsel in the cause, in this court, stipulated in open court, that the fact should be taken as agreed.

The opinion of the circuit court then proceeds: "It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose; as by the district attorney, or a commissioner of the circuit court, or an attorney, or any suitable person not an officer of the court.

"Reference has been made to the circular of Attorney-General Devens of January 14, 1879, issued to the clerks. In it he says, referring to section 833: 'This language embraces every possible fee or emolument accruing to you by reason of your official capacity, and does not allow the withholding of any. Whatever is done by you that you could not do if out of office has an official color and significance that brings it within the compass of the language of the statute.' This is undoubtedly a forcible and accurate statement of the meaning of the statute. But the naturalization fees do not come within this rule. They did not accrue to the clerk by reason of his official capacity, and were for work which might as well have been done by him when out of office as when in. It is also to be noticed that this circular calls upon the clerks for 'a statement of sums received for searches, for all copies for naturalization papers and oaths, and all other sums received through your office,' but makes no mention in terms of naturalization fees. Reg. Dep. Just. 1884, p. 223.

"No complaint of these fees has ever come to the ear of the court from any quarter. On the contrary, this service performed by the clerks has been of great advantage to those seeking to be admitted as citizens. It has had the effect, as originally intended, to simplify the process of becoming a citizen, and to make it more expeditious and inexpensive. It saves the parties the expense of employing an attorney, and the fee charged therefor is much less than would be allowed by the fee-bill, if the application is to be treated and entered on the docket of the court as an ordinary suit. In rejected cases no fee has been charged. This practice has prevailed for more than forty years, ever since the Act of 1842, which first required returns, and has been perfectly well known to everybody conversant with the courts. It was begun by *Judge* Story and *Judge* Sprague, and has had the approval of all the judges of this district since their day. It has also had the sanction successively of the Department of the Treasury, the Department of the Interior, and the Department of Justice. Until this suit was brought it has never been called in question by any accounting officer of the Government; nor has Congress seen fit to put a stop to it by legislation. This construction of the statute in practice, concurred in by all the departments of the Government, and continued for so many years, must be regarded as absolutely conclusive in its effect. *Edwards' Lessee* v. *Darby*, 25 U. S. 12 Wheat. 206 [6:608]; *U. S.* v. *Temple*, 105 U. S. 97 [26:967]; *Ruggles* v. *Ill.* 108 U. S. 526 [27:812]; *U. S.* v. *Graham*, 110 U. S. 219 [28:126]. [180]

"It was stated at the bar that a bill was introduced in the last Congress to require the clerks to make returns of all fees which they should receive for naturalizations and as masters and commissioners, but failed to become a law. If a change in the practice should be thought desirable, it is obvious that it should be made by Congress, and not by the courts.

"It is also to be noticed as significant, that the clerks of the courts of Massachusetts, under a fee-bill much like ours, and a statute requiring them to make to the county treasurer yearly a return 'of all fees received by them for their

official acts and services,' were never required to include in their returns the fees received in [181] naturalization cases. Rev. Stat. 1886, chap. 88, § 15; Gen. Stat. 1860, chap. 121, § 22. This was changed by the Act of 1879, chap. 300, which defined what the fees in such cases should be, and directed the clerks to include them in their returns.

"The decision of the court is that, upon the agreed facts in this case, this action cannot be maintained."

Viewing the whole subject in the light in which it appears on the face of the statute, in regard to the fees of the clerk, we are met by the fact that section 828 of the Revised Statutes, taken from section 1 of the Act of February 26, 1853, chap. 80, 10 Stat. at L. 161, provides that "the following, and no other, compensation shall be taxed and allowed" to clerks of the district courts. This applies *prima facie* to taxable fees and costs in ordinary suits between party and party, prosecuted in a court. There is no specification of naturalization matters in the fees of clerks. From as early as December, 1839, the practice set forth in the agreed statement of facts has obtained in the District Court of Massachusetts, of charging the fees of $1 and $2, as gross sums, in naturalization proceedings, without any division for specific services, according to any items of the fee-bill. The Act of March 3, 1841, before referred to, the first one on the subject of returns, implied that there should be reports of "fees and emoluments" by the clerk to the Secretary of the Treasury. The Act of May 18, 1842, provided for semi-annual returns to that officer, and included, specifically, fees and emoluments under the Bankrupt Act. But the clerk never has included in these returns his fees and emoluments for naturalization proceedings, and his action from 1842 to and including 1884 has been with the knowledge of the successive district judges, to whom his accounts have been semi-annually exhibited. From 1842 to 1849 these accounts went to the Secretary of the Treasury; from 1849 to 1870, to the Secretary of the Interior; and since 1870 they have gone to the Attorney-General. From 1856 the statute has required that these accounts before going forward, "shall be examined and certified by the district judge," and that, after being sent to the several heads of departments, they shall be subject to revision on their merits [182] by the accounting officers of the Treasury Department. The agreed statement of facts shows that this course has been pursued; that the district judge has examined and certified the accounts, knowing that they did not include naturalization fees; and that those accounts have been revised on their merits by these accounting officers, for this long series of years, and been examined and adjusted by them with the naturalization fees not included.

With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.

In *Edwards' Lessee* v. *Darby*, 25 U. S. 12 Wheat. 206, 210 [6:603, 604], it was said: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." To the same effect are *U. S.* v. *Dickson*, 40 U. S. 15 Pet. 141, 145 [10:689, 691]; *U. S.* v. *Gilmore*, 75 U. S. 8 Wall. 330 [19:396]; *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374, 382 [23:47, 50]; *U. S.* v. *Moore*, 95 U. S. 760, 763 [24:588, 589]; *U. S.* v. *Pugh*, 99 U. S. 265, 269 [25:322, 323]; *Hahn* v. [183] *U. S.* 107 U. S. 402, 406 [27:527, 529]; and *Five Per Cent Cases*, 110 U. S. 471, 485 [28:198, 202]. In the case of *Brown* v. *U. S.* 113 U. S. 568 [28:1079], the same doctrine was applied, the cases in this court on the subject being collected, and it being said that a "contemporaneous and uniform interpretation" by executive officers charged with the duty of acting under a statute "is entitled to weight" in its construction, "and in a case of doubt ought to turn the scale." A still more recent case on the subject is *U. S.* v. *Philbrick*, 120 U. S. 52 [*ante*, 559] where this language is used: "A cotemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous it ought not now to be overturned."

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BANK OF MAYSVILLE, *Plf. in Err.*, [268]
v.
JOHN CLAYPOOL, ET AL.

(See S. C. Reporter's ed. 268-270.)

Removal of causes—citizenship—application after verdict, barred.

1. To bar a removal on the ground of citizenship under the Act of March 3, 1875, the case must be actually on trial by the court, all the parties acting in good faith, before the application is made.
2. Such an application after a verdict, subject only to the decision by the court of questions presented by a demurrer to the evidence, is barred.

[No. 143.]

Submitted Jan. 20, 1887. Decided Jan. 31, 1887.

IN ERROR to the District Court of the United States for the District of West Virginia. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **B. H. Smith**, for plaintiff in error:

If there is any doubt about the application for removal being made in time, any objection to the jurisdiction of the district court on that ground was completely waived by the defendants when, after being informed by the supreme court that the proper way in which to raise and enforce such objection was by a motion to remand, they decline and neglect to make that motion for so long a period; and a motion to remand, coming two and a half years after the submission of the cause, and while the court was holding the same to consider of its final judgment, should not have been granted or entertained.

The time of removal is not a jurisdictional question, but matter of form, and may be waived.

Canal etc. Street R. R. Co. v. *Hart*, 114 U. S. 654 (29: 226); *Ayers* v. *Watson*, 113 U. S. 598 (28: 1094); *French* v. *Hay*, 89 U. S. 22 Wall. 244 (22: 856); Dill. Removal of Causes, § 66, p. 83, and cases cited in note; *Texas & Pac. R. R. Co.* v. *Kirk*, 115 U. S. 1 (29: 319).

The plaintiff's claim is just and fully proved.

The defense is purely technical and rests upon an oversight of plaintiff's counsel, and is entitled to no consideration, except such as it must receive from the most rigid construction of principles of law and rules of practice.

Mr. **J. Holdsworth Gordon**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error for the review of an order of a district court, having circuit court jurisdiction, remanding a cause which had been removed from a state court under section 2 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, on the ground of citizenship. The record shows a suit begun by the Bank of Maysville in the Circuit Court of Kanawha County, West Virginia, September 24, 1877, against Claypool, as maker, and Thayer, as indorser, of a promissory note. After a demurrer, which was overruled, a plea was filed November 26, on which the parties went to trial the same day before a jury. After the evidence on the part of the plaintiff was all in, the defendant Thayer prayed judgment because on the facts proven no case had been made out against him. The [269] jury, under instructions from the court, found the amount due on the note, "subject to the judgment of the court on the demurrer to the evidence," and were discharged. Afterwards, on the 10th of January, 1878, the Bank moved for leave to amend its declaration so as to show that it was a corporation created by the laws of the State of Kentucky, "and existing in said State of Kentucky." This motion was denied, and the Bank then moved for leave "to withdraw its joinder to the defendants' demurrer to the plaintiff's evidence," and that the verdict be set aside and a new trial granted. While these motions were pending undisposed of, the Bank filed its petition for the removal of the suit to the District Court of the United States sitting at Charleston, on the ground that the plaintiff was a Kentucky corporation and the defendants were citizens of West Virginia. Objection was made by the defendants, on the 4th of November, 1879, to the entry of the case in the district court, but this objection was overruled, and the cause docketed by order of the court November 17, 1880. Thereupon the demurrer to the evidence was argued and submitted to the court.

On the 6th of December, 1880, there was filed in this court a petition by the defendant Thayer, sworn to September 13, 1880, for a rule on the district judge to show cause why a *mandamus* should not issue requiring him to remand the suit. In this petition it did not appear that the court had taken any action in the matter, and it was denied because no application had been made for an order to remand. In the opinion it was said: "We cannot doubt that if such an application is made it will be promptly granted, if the facts are as they are stated here. The petition for removal was not filed in the state court until after both trial and verdict, when the law requires it should be filed before or at the term at which the cause could be first tried, and before the trial thereof." Afterwards, May 7, 1883, a motion to remand was made by Thayer and at once granted by the court. To review that order this writ of error was brought.

In the *Removal Cases*, 100 U. S. 457 [25: 593], which were decided December 15, 1879, it was held that a petition for removal under the Act of 1875 to be in time must be "presented to the [270] court before the trial is in good faith entered upon," and we there said, p. 473 [599]: "There may be exceptions to this rule; but we think it clear that Congress did not intend, by the expression 'before trial,' to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to put himself on record as having begun the trial is enough. The case must be actually on trial by the court, all the parties acting in good faith, before the right of removal is gone." This rule was recognized and followed in *Jifkins* v. *Sweetzer*, 102 U. S. 179 [26: 130], and *Alley* v. *Nott*, 111 U. S. 472 [28: 491], and must now be considered as settled. Clearly, therefore, this application for removal came too late. When it was filed, the trial had not only begun, but it had progressed far enough to get a verdict of a jury, subject only to the decision of the court on the questions presented by the demurrer to the evidence.

In this connection it is proper to say that the ruling in the *Removal Cases* [*supra*] was not probably known to the district judge when his order to docket the cause was made, because the volume of our reports in which those cases are found was not published and generally distributed until a very considerable time after our adjournment for the term in May, 1880. The court did not actually proceed in the case after it was docketed, further than to take it on the submission of the demurrer to the evidence made at that time; and the order to remand was granted as soon as a motion to that effect was made by the Bank.

The order remanding the case is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[227]

UNITED STATES, *Appt.*,
v.
PACIFIC RAILROAD CO.

PACIFIC RAILROAD CO., *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 227-240.)

Military necessity—reconstruction of bridges by the government—railroad company not liable.

*1. The United States are not responsible for the injury or destruction of private property caused by their military operations during the late civil war; nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations.

2. Accordingly, where bridges on the line of a railroad were destroyed during the civil war by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with, the owner of the railroad, imposes no liability upon such owner.

[Nos. 728, 1308.]

Submitted Jan. 10, 1887. Decided Jan. 31, 1887.

CROSS appeals from the Court of Claims. Reported below, 20 Ct. Cl. 200. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **E. M. Watson,** *Assistant Attorney*, for the United States:

The first paragraph of the finding of facts shows a definite proposal by General Rosecrans, as the representative of the defendant, to rebuild such bridges as the claimant could not rebuild at once, upon condition that the Government should be reimbursed the outlay incurred by retention of sums to become due for transportation over the road when repaired.

The Company at once set vigorously to work repairing the road, and, with full knowledge of General Rosecrans' understanding of the conditions upon which the Government aided in the work of repairing, not only did not object while the Government was building the four bridges in controversy, but actually co-operated with it in the work.

The circumstances prove assent to the proposal as satisfactorily as any formal instrument that could be drawn.

The right of the United States to compensation, as claimed, is unaffected by the fact that the Osage and Moreau bridges were destroyed by the federal forces as a military necessity.

Thomas Frothingham's Case, Am. St. Papers, 199; *Jumonville de Villiers' Case*, Am. St. Papers, 885; *Rosalie Deslonde's Case*, Am. St. Papers, 752; *Perrin* v. *U. S.* 4 Ct. Cl. 543; *Respublica* v. *Sparhawk*, 1 U. S. 1 Dall. 357 (1:174); *Taylor* v. *Nashville & C. R. R. Co.* 6 Cold. 646; *Parham* v. *The Justices*, 9 Ga. 348; *Surocco* v. *Geary*, 3 Cal. 69; *American Print Works* v. *Lawrence*, 1 Zab. 248; *Russell* v. *The Mayor, etc.* 2 Den. 461; Whittney, War Powers, 340, 341.

Here there was no use and occupation of the property to offset value of improvements. The Government built bridges that were imperatively demanded by the Company's necessities; turned them over to the Company when built; the Company accepted them, used them, derived profit from them, and charged the Government full rates for service performed by their use, which could not have been performed without them.

Messrs. **John F. Dillon** and **James Coleman,** for the Pacific Railroad Company, claimant:

The Pacific Railroad is not liable, either generally or under the special circumstances of the case, to reimburse the Government the expense of replacing bridges destroyed by the Confederate and Union Armies and rebuilt by the Government as a military necessity.

The Railroad Company owed no duty, at least none of perfect obligation, to the United States, to restore the bridges, even those which had been destroyed by the enemy; and a request to the United States to perform such duty for the Company or to replace the bridges at the Company's expense cannot be implied from the relation between the Company and the United States. Nor can it be implied from the fact that the Company afterwards used the bridges built by the Government. Use under such circumstance constitutes no ground of liability, for the reason that the Company had no choice but to use the bridges placed upon its line.

Wilson v. *School Dist.* 32 N. H. 118; *Davis* v. *School Dist.* 24 Me. 349; *Lane* v. *School Dist.* 10 Met. 462; *Pratt* v. *Swanton*, 15 Vt. 147; *Sikes* v. *Hatfield*, 13 Gray, 347.

And even as to personal property, it is uniformly held that where there is "no privity of contract established between the plaintiff and defendant, possession and use or conversion of personal property will not sustain an implied assumpsit."

Hills v. *Snell*, 104 Mass. 173, 177; *Boston Ice Co.* v. *Potter*, 123 Mass. 28.

If the owner of land gives permission to another to erect a house thereon, this is a license, and the utmost effect of it is that it relieves the act from the character of a trespass, and may amount to a permission to remove the structure. No case can be found in which the courts have deduced from a license of this character an obligation on the part of the owner of the land to pay the value of the house erected under such a license.

Wells v. *Banister*, 4 Mass. 514.

Justice requires that this court should leave the Company and the Government just where the events of the war left them; and there is no reason why the courts should invent or uphold a fiction to sustain the Government's demand for compensation for an expenditure which natural justice and equity would require it to make.

Mr. Justice **Field** delivered the opinion of the court: [228]

The Pacific Railroad Company, the claimant in this case, is a Corporation created under the laws of Missouri, and is frequently designated as the Pacific Railroad of that State, to distinguish it from the Central Pacific Railroad Company incorporated under the laws of California, and the Union Pacific Railroad Company incorporated under an Act of Congress, each of which is sometimes referred to as the Pacific Railroad Company.

*Head notes by *Mr. Justice* FIELD.

From the 14th of August, 1867, to the 22d of July, 1872, it rendered services by the transportation of passengers and freight, for which the United States are indebted to it in the sum of $136,196.98, unless they are entitled to offset the cost of labor and materials alleged to have been furnished by them, at its request, for the construction of certain bridges on the line of its road. The extent and value of the services rendered are not disputed. It is only the offset or charge for the bridges which is in controversy; and that charge arose in this wise: During the civil war, the State of Missouri was the theater of active military operations. It was on several occasions invaded by confederate forces, and between them and the soldiers of the Union conflicts were frequent and sanguinary. The people of the State were divided in their allegiance, and the country was ravaged by guerilla bands. The railroads of the State, as a matter of course, were damaged by the contending forces, as each deemed the destruction of that means of transportation necessary to defeat or embarrass the movements of the other. In October, 1864, Sterling Price, a noted confederate officer, at the head of a large force, [229] invaded the State and advanced rapidly towards St. Louis, approaching to within a few days' march of the city. During this invasion, thirteen bridges upon the main line and southwestern branch of the Company's road were destroyed. General Rosecrans was in command of the federal forces in the State, and some of the bridges were destroyed by his orders, as a military necessity, to prevent the advance of the enemy. The record does not state by whom the others were destroyed; but their destruction having taken place during the invasion, it seems to have been taken for granted that it was caused by the confederate forces, and this conclusion was evidently correct. All the bridges except four were rebuilt by the Company. These four were rebuilt by the Government, and it is their cost which the Government seeks to offset against the demand of the Company. Two of the four (one over the Osage River and one over the Moreau River) were destroyed by order of the commander of the federal forces. The other two, which were over the Maramec River, it is presumed, were destroyed by the confederate forces.

Soon after the destruction of the bridges, and during the same month, General Rosecrans summoned to an informal conference, in St. Louis, several gentlemen regarded as proper representatives of the Railroad Company, being its president, the superintendent and the engineer of the road, and several of the directors. The court below makes the following finding as to what there occurred:

"By General Rosecrans it was stated that the immediate rebuilding of the bridges was a military necessity; that he should expect and require the Company to do all in their power to put the roads in working order at the earliest possible moment; and that he intended to have what work they did not do done by the Government, and withhold from the freight earnings of the road a sum sufficient to repay the Government for such outlays as in law and fact it should be found entitled to have repaid.

"The gentlemen present assured General Rosecrans that they would do all in their power to rebuild the bridges and put the roads in working order at the earliest moment; but they at the same time represented that several of the bridges, as they believed, had been destroyed [230] by the proper military authority of the United States, and that in such cases the Government was properly responsible for the loss, and should replace the bridges. Those which the public enemy had destroyed they conceded that the Company should replace.

"General Rosecrans replied in substance: 'Gentlemen, the question of the liability of the Government for repairing damages to this road is one of both law and fact, and it is too early now to undertake the investigation of that question in this stirring time. I doubt myself whether all the damages which you say the Government should be responsible for will be found liable to be laid to the charge of the Government. Nevertheless, whatever is fair and right I should like to see done. You tell me now, and I have been informed by some of your representatives individually, that the Company's means are insufficient to make these large repairs and make them promptly. Therefore I want to say to you that, as a military necessity, we must have the work done, and shall be glad to have the Company do everything it can; and I will undertake to have the remainder done, and we will reserve out of the freights money enough to make the Government good for that to which it shall be found to be entitled for rebuilding any or all of the bridges, and we will return the freights to you or settle with you on principles of law and equity.'

"The gentlemen interested in the Company reiterated their view of the case, that the Company should pay for bridges destroyed by the the public enemy, and that the Government should replace at its own cost the bridges destroyed by its own military authorities."

The court also finds that these mutual representations and assurances were not intended or understood on either side to form a contract or agreement binding on the Government or the Company; that no formal action upon them was taken by the board of directors; and that there was no proof that they were ever communicated to the directors, except as may be inferred from subsequent facts and circumstances mentioned; but that the Company, through its directors and officers, promptly exerted itself, to its utmost power, to restore the roads to run- [231] ning order, and to that end co-operated with the Goverment.

At the same time, General Rosecrans informed the Secretary of War that the rebuilding of the bridges was "essential, and a great military necessity" in the defense of the State, and requested that Colonel Myers should be authorized "to have them rebuilt at once, the United States to be reimbursed the cost out of freight on the road." The Secretary referred the matter to the Quartermaster-General, who recommended that General McCallum, Superintendent of Military Roads, be directed to take the necessary measures immediately for that purpose. The Secretary approved the recommendation, and General McCallum was thereupon ordered to cause the bridges to be rebuilt by the quickest and surest means possible. It does not appear that the Company had any notice of these communications or of the order.

The bridge over the Osage River was destroyed on the 5th of October, 1864, by order of the officer commanding the central district of Missouri, acting under instructions from General Rosecrans to "use every means in his power to prevent the advance of the enemy." The court finds that the destruction was ordered for that purpose, and that the exigency appeared to the officer, and in fact was, of the gravest character, and an imperative military necessity. The Government rebuilt the bridge at an expense of $96,152.65; and this sum it seeks to charge against the Company.

The bridge across the Moreau was also destroyed by command of the same officer, under the same military exigency. The Company commenced its reconstruction, but, before it was completed, the work was washed away by a freshet in the river. The Government afterwards rebuilt it at an expense of $30,801; and this sum it also seeks to charge against the Company.

The two bridges across the Maramec were destroyed during the invasion, as already stated, but not by the forces of the United States. They were, however, rebuilt by the Government as a military necessity, at an expense of $54,595.24; and this sum, also, it seeks to charge [232] against the Company. The court of claims allowed the cost of three of the bridges to be charged against the Company, but rejected the charge for the fourth—the one over the Osage River. The United States and the claimant both appealed from its judgment; the claimant, because the cost of the three bridges was allowed; the United States, because the charge for one of the four was disallowed.

The cost of the four bridges rebuilt by the Government amounted to $181,548.89. The question presented is whether the Company is chargeable with their cost, assuming that there was no promise on its part, express or implied, to pay for them. That there was no express promise is clear. The representations and assurances at the conference called by General Rosecrans to urge the rebuilding of the bridges were not intended or understood to constitute any contract; and it is so found, as above stated, by the court below. They were rebuilt by the Government as a military necessity, to enable the federal forces to carry on military operations, and not on any request of or contract with the Company. As to the two bridges destroyed by the federal forces, some of the officers of the Company at that conference insisted that they should be rebuilt by the Government without charge to the Company, and, although they appeared to consider that those destroyed by the enemy should by rebuilt by the Company, there was no action of the board of directors on the subject. What was said by them was merely an expression of their individual opinions, which were not even communicated to the board. Nor can any such promise be implied from the letter of the president of the Company to the Quartermaster General in November, subsequent to the destruction of the bridges, informing him that the delay of the War Department in rebuilding them had prompted the Company to "unusual resources;" that it was constructing the bridges over the Gasconade and the Moreau Rivers, and that the only bridge on the main line to be replaced by the Government was the one over the Osage River, the Company having replaced all the smaller and was then replacing all the larger ones. The letter only imparts information as to the work done and to be done in rebuilding the bridges on the main line. It contains no promise, as the court below seems to have thought that, if the Goverment would rebuild the bridge over the Osage River, it should be reimbursed for any other it might rebuild on [233] the main line of the Company. Nor do we think that any promise can be implied from the fact that the Company resumed the management and operation of the road after the bridges were rebuilt; but on that point we will speak hereafter. Assuming for the present that there was no such implication, we are clear that no obligation rests upon the Company to pay for work done, not at its request or for its benefit, but solely to enable the Government to carry on its military operations.

It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The inhabitants of the Confederate States on the one hand, and of the States which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended and the courts of each were closed to the citizens of the other. *Brown* v. *Hiatts*, 82 U. S. 15 Wall. 184 [21:130].

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequaled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction [234] which followed necessarily from these causes no compensation could be claimed from the Government. By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways, in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justi-

fied this. The safety of the State in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex*.

These views are sustained in treatises of text writers, by the action of Congress, and by the language of judicial tribunals. *Respublica* v. *Sparhawk*, 1 U. S. 1 Dall. 357 [1:174]; *Parham* v. *The Justices*, 9 Ga. 341; *Taylor* v. *Nashville & C. R. R. Co.* 6 Cold. 646; *The Mayor* v. *Lord*, 18 Wend. 126.

Vattel, in his Law of Nations, speaks of damages sustained by individuals in war as of two kinds—those done by the State and those done by the enemy. And after mentioning those done by the State deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart, or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: "But there are other damages, caused by inevitable necessity; as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will [235] admit of it; but *no action* lies against the State for misfortunes of this nature—for losses which she has occasioned, not willfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the State strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the State would be obliged to contribute his share in due proportion, a thing utterly impracticable." Book III, chap. 15, p. 402, § 232.

Three cases in Congress, one before the House of Representatives in 1797, and two before the Senate, one in 1822 and one in 1872, illustrate this doctrine. In the first of these a Mr. Frothingham, of Massachusetts, presented a petition to the House of Representatives, asking compensation for a dwelling house, the property of his mother, burned at Charlestown, in March, 1776, by order of General Sullivan, then commanding the American troops at that place. The committee on claims, to whom it was referred, made a report that they found that the house, for which compensation was [236] sought, was, with several other buildings in the vicinity at that time, in possession of the British troops; and that, for the purpose of dislodging them, the general sent a party of troops with orders to set fire to the buildings, which was done accordingly; and that they apprehended that the loss of houses and other sufferings by the general ravages of war had never been compensated by this or any other government; that in the history of our Revolution, sundry decisions of Congress against claims of this nature might be found; and that the claim presented rested upon the same basis with all others where sufferings arose from the ravages of war. As the government had not adopted a general rule to compensate individuals who had suffered in a similar manner, the committee were of opinion that the prayer of the petitioner could not be granted; and no further action was had upon the claim. Am. State Papers, Class 14, Claims, p. 199.

In the second of the cases referred to, a Mr. Villiers, of Louisiana, presented a petition to the House of Representatives, stating that during the invasion of the British in 1814-15, after the enemy had landed near the City of New Orleans, in order to prevent him from bringing up his cannon and other ordnance to the city, General Morgan, commanding the Louisiana militia, caused the levee to be cut through, at or near the plantation of the petitioner, whereby the greater part of his plantation was inundated, and remained so till after the departure of the invading army from the State; that in consequence, the petitioner had suffered great losses in the destruction of his sugar cane, cane plants, and in the expenses of repairing the levee, appraised at $19,250; for which he prayed compensation. The committee on claims, to whom the petition was referred, recommended that its prayer should not be granted, on the ground that the losses were sustained in the necessary operations of war, for which the United States were not liable; and their recommendation was adopted. American State Papers, Class 14, Claims, p. 835; Annals of Congress, 17th Cong. 1st Sess. Part 1, p. 311.

The third of the cases referred to is that of J. Milton Best, which was much discussed in the Senate. His claim was for the value of a dwelling house and contents destroyed by order of the officer commanding the Union forces in defense of the City of Paducah, Kentucky, [237] in March, 1864. The city being attacked by the Confederates in force, the federal troops, numbering seven hundred, were withdrawn into Fort Anderson. The claimant's house, which was about one hundred and fifty yards from the fort, was taken possession of by the sharpshooters of the enemy, who did great execution picking off men at the guns within the defenses. They were driven from the house by shells from the fort and gunboats, and late that night the Confederates retired from their assault without success. They appeared with reinforcements the next morning, and the Union officer, regarding his command in great peril, his ammunition being nearly exhausted, gave orders for the destruction of all houses within musket range of the fort. The claimant's loyalty was unquestioned. The officers in command at the post from time to time during the war testified to his reliability and the effective aid he rendered the Union cause.

The senate committee on claims reported the case as one presenting the "simple question of who shall pay for the destruction of a loyal citizen's property, destroyed by the order of a commanding officer to save his imperiled army, at the claimant's home, a place never in possession of the enemy, and in a nonseceding State." Upon this question they say: "It appears to your committee that the facts establish a just claim against the Government for private prop-

erty taken and destroyed to prevent a greater destruction of its own property and the massacre of its troops."

They reported that "The injuries to the claimant's house, by shelling out the rebels in the battle of the 25th of March (the day preceding the destruction of the property), may be regarded as a casualty by the general ravages of war, which might properly be deducted from the amount of loss proved by claimant," and they made what they deemed a proper deduction on that account in the bill presented by them for the payment of the damages. The bill was intended to cover the value of his property at the time it was burned to prevent its use by the reinforced enemy on the following day. In the debate which followed, it was contended by advocates of the bill, that while the damage by shelling from our own fort during the battle came within the ravages of war, the [238] subsequent burning of the house to prevent its being used by the sharpshooters of the enemy was a taking by the Government, of private property for public use, for which compensation should be made.

The bill passed in the Senate January 5, 1871, but was not acted upon by the House during that Congress. It again passed in the Senate April 8, 1872, and in the House May 18, 1872. It was vetoed by the President June 1, 1872. In his message to the Senate the President, after speaking of the claim as one for compensation on account of the ravages of war, and observing that its payment would invite the presentation of demands for very large sums of money against the Government for necessary and unavoidable destruction of property by the army, said: "It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the Government for public uses (in which case, under the Constitution of the United States, the owner is entitled to just compensation), but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations, is generally considered to fall within the last mentioned principle. If a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right." Cong. Globe, 42d Cong. 2d Sess. Part V, p. 4155.

The message was referred to the committee on claims, and on the 7th of February, 1873, it was reported back with a recommendation that the bill be passed, the objections of the President to the contrary notwithstanding. On the 24th of the same month, the bill was reached on the calendar and was passed over upon objection. No further action was ever taken upon it in the Senate, and consequently it never reached the House.

The claim has been repeatedly presented to [239] Congress since, but has never been considered by either House. The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."

In what we have said as to the exemption of Government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war, or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 54 U. S. 13 How. 134 [14: 83]; *U. S.* v. *Russell*, 80 U. S. 13 Wall. 623 [20: 474].

While the Government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true: that private parties cannot be charged for works constructed on their lands by the Government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the Government, or to pay for such works when erected by the Government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the Government. [240]

It is true that in some instances the works thus constructed may afterwards be used by the owner; a house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of the subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. *Zottman* v. *San Francisco*, 20 Cal. 96, 107. Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structure shall be built, or the repairs be made, and the materials to be used; but upon none of these matters was the Company consulted in the case before us. The Government regarded the interests only of the

army; the needs or wishes of the Company were not considered. No liability, therefore, could be fastened upon it for work thus done.

We do not find any adjudged cases on this particular point: whether the Government can claim compensation for structures erected on land of private parties, or annexed to their property, not by their request, but as a matter of military necessity, to enable its armies to prosecute their movements with greater efficiency; and we are unable to recall an instance where such a claim has been advanced.

It follows from these views, that the Government can make no charge against the Railroad Company for the four bridges constructed by it from military necessity. The court will leave the parties where the war and the military operations of the Government left them.

The judgment of the Court of Claims must, therefore, be reversed, and judgment be entered for the full amount claimed by the Railroad Company for its services; and it is so ordered.

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[241] UNITED STATES, *Appt.*, *v.* ATLANTIC AND PACIFIC R. R. CO.

[No. 729.]

Decided Jan. 31, 1887.

Mr. Justice **Field** delivered the opinion of court:

It is agreed by counsel of the parties that this case involves the same question as that decided in *United States* v. *Pacific Railroad*, [*ante*, 634], and, therefore, on the authority of that decision, the judgment below is *affirmed*.

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[256] INDIANAPOLIS ROLLING MILL COMPANY, *Plff. in Err.*,

v.

ST. LOUIS, FORT SCOTT AND WICHITA RAILROAD COMPANY.

(See S. C. Reporter's ed. 256-260.)

Corporations—release of contract by officers—validity of, under by-laws of corporation—ratification of release by acquiescence—payment by third party, sufficient consideration to support release.

1. The release of a contract for the sale of iron by the treasurer of a Rolling Mill Company, at the direction of another, who was both president and superintendent, is held, under the by-laws of the Company, to be a valid release of the contract.

2. The failure of the board of directors formally to disaffirm the action of their agents for a period of two years, or to bring suit until six months had passed, amounts to a ratification of the release.

3. The payment by a third party of an obligation already due on the contract is a sufficient consideration to support such release.

[No. 988.]

Submitted Jan. 7, 1887. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Kansas. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **H. C. McDougal**, for plaintiff in error:

The contract released was a part of the assets of the Rolling Mill Company.

State v. *Staten*, 6 Cold. 248; *Davies* v. *McKeeby*, 5 Nev. 369; Cooley, Const. Lim. 3d ed. 263.

The president and treasurer of the Rolling Mill Company had no authority, ex officio, to execute the release; nor did the board of directors give them such authority.

Upon its face the release purports to have been executed by Thomas and in his name. Hence it was not the act of Jones.

Story, Ag. 7th ed. 147, 172; Whart. Ag. § 284.

But if executed by both it would be no better, because they could not, ex officio, release the claims of their Corporation against anyone.

Hodge v. *Nat. Bank*, 22 Gratt. 51; *Fulton Bank* v. *N. Y. etc. Co.* 4 Paige, 134; *Brouwer* v. *Appleby*, 1 Sandf. 158; *Union Gold Co.* v. *Rocky M. Bank*, 2 Col. 565; *Olney* v. *Chadsey*, 7 R. I. 224; *Titus* v. *R. R. Co.* 37 N. J. L. 98; *Walworth Co. Bank* v. *Farmers Loan, etc., Co.* 14 Wis. 351.

They could not even set off debts, nor could they assign choses in action in their Company.

Brown v. *Weymouth*, 36 Me. 414; *Jackson* v. *Campbell*, 5 Wend. 572; *Knight* v. *Lang*, 2 Abb. Pr. 227.

Express authority to buy and sell material and make contracts for the same does not include the power to release a contract or sell or give away corporate assets.

Jackson v. *Campbell*, 5 Wend. 572

To authorize an agent to execute such a release he must be appointed by the directors and by a written vote properly taken.

Smith v. *Gas Co.* 1 Adol. & E. 526; *Osborn* v. *Bank*, 22 U. S. 9 Wheat. 738 (6:204); *Bates* v. *Bank of Ala.* 2 Ala. N. S. 451.

Even if Jones had been granted authority to release this contract, as the thing to be done required discretion and judgment, he could not delegate that power to Thomas.

Ins. Co. v. *Chase*, 56 N. H. 341, and cases cited; *Brewster* v. *Hobart*, 15 Pick. 302; *Percy* v. *Millaudon*, 3 La. 568; *McCormick* v. *Bush*, 38 Tex. 314.

Unauthorized acts of officers of corporations are null and void.

R. Co. v. *Allerton*, 85 U. S. 18 Wall. 233 (21: 902); *Bank of Ky.* v. *Schuylkill Bank*, 1 Pars. Sel. Cas. 180; *Brooklyn etc. Co.* v. *Slaughter*, 33 Ind. 185.

It is not only not within the implied power of the board of directors to alienate property needed for the continuance of the corporate business (*Rollins* v. *Clay*, 33 Me. 132; *Church* v. *Duru*, 19 La. Ann. 302; *Abbott* v. *American etc. Co.* 21 How. Pr. 193), but it is against public policy to permit them to do so; and their action "cannot be sustained on the ground of estoppel, admission or acquiescence."

Ohio & M. R. Co. v. *Ind. & C. R. Co.* 5 Am. Law. Reg. N. S. 739.

There was no consideration for the execution of the release. Moran Brothers were the agents of the Railroad Company and as such paid out of the funds of their principal the $54,000.

The Railroad Company was under a legal obligation to pay the drafts; and the payment of this just debt was no consideration for the release executed by Thomas.

Harris v. *Watson*, Peake, 72; *Stilk* v. *Myrick*, 2 Camp. 317; *Smith* v. *Bartholomew*, 1 Met. 276; *Reynolds* v. *Nugent*, 25 Ind. 328; *Ritenour* v. *Mathews*, 42 Ind. 7; *Fensler* v. *Prather*, 43 Ind. 119; *Smith* v. *Boruff*, 75 Ind. 412.

The release was void on grounds of public

policy. Jones and Thomas, two officers and directors of the Rolling Mill Company, were indorsers on the draft that went to protest, and, for the purpose of protecting themselves, acted in concert in securing payment of the amount due their Company. Such contracts are against public policy and are always voidable at the instance of the corporation or its shareholders.

San Diego v. *San Diego & L. A. R. Co.* 44 Cal. 106; *Rice's Appeal*, 79 Pa. 168; *Alford* v. *Miller*, 32 Conn. 548; *Port* v. *Russell*, 36 Ind. 60; *Pacific R. Co.* v. *Seely*, 45 Mo. 212.

And this is true whether the officer entered into the contract at its inception or subsequently acquired an interest in it.

Ryan v. *Leavenworth, A. & N. R. Co.* 21 Kan. 365, and cases cited; *European & N. A. R. Co.* v. *Poor*, 59 Me. 277; *Warnell* v. *U. P. R. Co.* 5 Cent. L. J. 527.

Messrs. **John F. Dillon** and **J. H. Richards**, for defendant in error:

A waiver of a legal right at the request of another is a sufficient consideration for a promise made by him.

Smith v. *Weed*, 20 Wend. 184; *Farmer* v. *Stewart*, 2 N. H. 97; *Millers' App.* 16 Pa. 300.

A payment by a third person of a less amount than is due upon such demand is a complete satisfaction of such demand whether it be liquidated or unliquidated.

Belshaw v. *Bush*, 11 C. B. 197, note; 1 Suth. Damages, 429; *Leavitt* v. *Morrow*, 6 Ohio St. 71; 2 Pars. Cont. 536, 541, 561; *Brooks* v. *White*, 2 Met. 283.

A person competent to make a contract is competent to release it.

Develin v. *Riggsbee*, 4 Ind. 464; *Gavin* v. *Burton*, 8 Ind. 69; *Alexander* v. *Frary*, 9 Ind. 481.

An act of a director of a board, with knowledge of his acts by the board, whether he be authorized by formal meeting and resolution or not, is binding upon the corporation.

Holmes v. *Board of Trade of Kansas City*, 81 Mo. 143; *Scott* v. *R. R. Co.* 86 N. Y. 200.

Tacit consent or acquiescence of the principal may be deduced from the usual habits of transacting business.

Story, Ag. §§ 95, 260; *Edwards* v. *Thomas*, 66 Mo. 468.

A party cannot be permitted to perform a compromise in part and repudiate it in part. He cannot enjoy the fruits of the agreement and repudiate the agreement itself.

Reid v. *Hibbard*, 6 Wis. 175; *Evans* v. *Wells*, 22 Wend. 324.

Whatever a corporation can authorize its officers to do it can ratify when done.

McLaughlin v. *Detroit & M. R. R. Co.* 8 Mich. 100; *Middleton* v. *Kansas City, etc. R. R. Co.* 62 Mo. 579.

Unauthorized acts of agents may be given the force of precedent authority by the ratification of their corporations.

Chouteau v. *Allen*, 70 Mo. 290; *Walker* v. *Detroit Transit R. Co.* 47 Mich. 338; *Dunn* v. *Hartford & W. Horse R. R. Co.* 43 Conn. 434.

A principal who neglects promptly to disavow an act of his agent by which the latter had transcended his authority makes the act his own.

Green's Brice, Ultra Vires, 562-564; *Kelsey* v. *Nat. Bank*, 69 Pa. 426; *Bredin* v. *Dubarry*, 14 Serg. & R. 30; *Gordon* v. *Preston*, 1 Watts, 387; *Bank of Pa.* v *Reed*, 1 Watts, & S. 101.

Repudiation must be done, if at all, within a reasonable time after the performance of the act sought to be repudiated.

U. S. Rolling Stock Co. v. *Atlantic & G. W. R. R. Co.* 34 Ohio St. 450.

When the principal is informed of what has been done he must dissent and give notice of it promptly. If he does not, his assent will be presumed.

Bank of Pa. v. *Reed, supra; Dunn* v. *Hartford & W. Horse R. R. Co.* 43 Conn. 434.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Kansas.

The plaintiff in error, which was also the plaintiff below, is a corporation existing under the laws of Indiana, and doing business in that State. The defendant in error is a corporation of the State of Kansas. The latter Company, while building its railroad, contracted, on the 8th day of October, 1881, with the former for the purchase of iron rails. The contract was for ten thousand tons, to be delivered, during the period between October and June inclusive, on board of the railroad cars at Indianapolis. [257
A jury was waived and the case was tried before the court, which made a finding of facts on which it declared the law to be for the defendant, and rendered judgment accordingly.

During the trial the defendant Company produced a release, apparently executed by the plaintiff Company, from the obligation of the contract to receive and pay for the iron, except so far as it had been fulfilled; and upon the validity of this release the decision depends.

It appears from the facts found by the court that the plaintiff was in the habit of receiving payment for iron delivered, by drafts on the defendant, payable in New York, and that Moran Brothers were the financial agents of the defendant, through whom such payments were made; that drafts to the amount of $54,000 were due on the 4th day of October, 1882, and the Company, being hard pressed for money, asked an extension of payment, which was granted for four months; that when these drafts again fell due they were protested for nonpayment, and the defendant Company was insolvent, which fact was well known to the plaintiff. It appears, also, that Mr. Thomas, who was the treasurer of the plaintiff Company, visited New York and called upon the firm of Moran Brothers, at whose banking house said drafts were payable, and endeavored to induce them to pay the drafts, but that Moran Brothers, who had no funds of the defendants at the time, declined to do so, but finally said: "We, Moran Brothers, will pay these drafts if you will sign a release for the balance of the contract." To this Mr. Thomas replied that he was not authorized to execute such a release; but he communicated with Mr. Jones, who was the president and superintendent of the Company, and obtained from him authority to accept the money and sign the release. This was accordingly done, the release being dated "New York, 8th February, 1883," and signed "In-

dianapolis Rolling Mill Co., by J. Thomas, treasurer."

It is said by the plaintiff that Mr. Thomas had no authority to execute this release, or to [258] make this contract, and therefore it is void. Bearing upon this proposition it is found as a matter of fact by the court that Mr. Jones was president and Mr. Thomas treasurer at the time of this transaction. The original contract for the sale of the iron is executed by Mr. Jones, as president, without the seal of the Company; and there is no evidence of any resolution of the board of directors authorizing or approving that contract. The by-laws of the plaintiff Corporation, as the court finds, declare that the superintendent, who in this case was Mr. Jones, "shall have charge of the works, property, and operations of the Company, and shall employ all operatives and certify all wages due and other expenditures to the secretary, * * * and shall, with the approval of the president, buy and sell material and make all contracts for the same, and for work," etc. And the court further finds that under this by-law Mr. Jones had the power to buy and sell material, and to make all contracts for the same. Another by-law declares that "The superintendent and all other persons shall in all cases be subject to the control of the board of directors, in everything where the board shall elect to exercise such control," and the court finds that in the making of the original contract sued on, and in the extension of the time for the payment of drafts, as hereinafter mentioned, the board of directors of plaintiff did not at any time or in any way elect to exercise the control over its officers given said board by said by-laws

The court further finds "That, after the return of Mr. Thomas from the City of New York to Indianapolis, some time in March, there was a meeting of the board of directors of plaintiff, at which the validity of the release executed by Mr. Thomas was discussed, but the records do not show that at that particular meeting any definite action was taken; that the directors at that meeting did in fact agree to submit the question to counsel of plaintiff, let him investigate it, and then act upon his advice; that about two years after this meeting, and a year and a half after this suit was commenced, a *nunc pro tunc* entry was made upon the records of plaintiff of the proceedings of plaintiff's board of directors, which showed a repudiation upon the part of the board of directors of the release so exe- [259] cuted, and that this suit was originally instituted in this court at the first term hereof after the execution of the release."

We concur with the court below, that on the facts thus stated the release was a valid release. Its execution was of that class of business which, under the by-laws of the Corporation and the course of business between these parties, had been confided to the president and superintendent, both of which offices were held by Mr. Jones. The direction given by Mr. Jones to the treasurer, Mr. Thomas, both of whom were also directors in the Corporation, was within the line of his authority. He had under this same authority, without any express resolution or ratification of the board of directors, made the contract on which this suit is brought; and it would seem that, not being under seal, a simple contract concerning the ordinary business of the Company, the same power which enabled him to make it was sufficient to enable him to release it, unless the power had been withdrawn.

Another principle leads to the same result. These by-laws show that the board of directors retained the power in their hands to control the president and superintendent in any transaction, whenever it was thought proper to do so. This matter was reported to the directors; they had a meeting upon the subject some six weeks after the whole thing had been consummated, and after they had received the benefit of the release by the payment of their drafts. The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and if, after a reasonable time they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance it came too late, as it was commenced some six months after they had knowledge of the release. As was stated in the somewhat analogous case of the *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 592 [23:331], "The authorities to the point of [260] the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him that option, are numerous. * * * The more important are as follows: *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 [17:836]; *Harwood* v. *R. R. Co.* 84 U. S. 17 Wall. 78 [21:558]; *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 [22:482]; *Vigers* v. *Pike*, 8 Cl. & Fin. 650; *Wentworth* v. *Lloyd*, 32 Beav. 467; *Follansbe* v. *Kilbreth*, 17 Ill. 522." See also *Gold Mining Co* v. *National Bank*, 96 U. S. 640 [24:648]; *Law* v. *Cross*, 66 U. S. 1 Black, 533 [17:185].

It is said that the release was without consideration, because Moran Brothers had the means in their hands to pay the drafts,—of the property of the defendants; but we think the finding of facts clearly disproves that; indeed, the court found, as a matter of fact, that the defendants were then insolvent, and that Moran Brothers had no funds in their hands out of which they could have paid the drafts. It is obvious, therefore, that the consideration for this release was the voluntary payment by Moran Brothers of the existing protested drafts of the plaintiff Company out of their own means and not out of the means of the defendant Corporation. We think this was a sufficient consideration to support the release.

The judgment of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[206] MEYERS & LEVI, Composed of JOHN MEYERS ET AL.; MEYER WEILL; LEHMAN, GODCHAUX & CO., Composed of A. LEHMAN ET AL.; MICHAEL FRANK; AND MAX DINKELSPEIL AND MRS. L. B. CAIN, EXR. and EXTX. of SAMUEL FRIEDLANDER, Deceased, *Plffs. in Err.*,

v.

DAVID BLOCK.

SAME, *Plffs. in Err.*,

v.

SOLOMON ISAACS.

(See S. C. Reporter's ed. 206-214.)

Injunction bonds—construction of—may cover prior claims—practice—jurisdiction.

1. A bond conditioned to pay all damages occasioned by wrongfully suing out an injunction is held to conform to an order for a bond to save the defendant harmless from such injunction.
2. Although a surety cannot be held beyond the terms or legal effect of his engagement, if, from the nature of the case, the subject of guaranty is a past transaction in whole or in part, and the language of the engagement, taken in its natural sense or legal effect is broad enough to cover it, such language may properly be so construed.
3. A court of equity may impose any terms in its discretion as a condition of granting or continuing an injunction.
4. It seems that an action lies in a state court on an injunction bond given in and by order of a federal court.
5. Bein v. Heath, Bk. 13, distinguished.

[Nos. 95, 96.]

Argued Dec. 15, 16, 1886. Decided Jan. 31, 1887.

IN ERROR to the Supreme Court of the State of Louisiana. Reported below, 35 La. Ann. 221. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John H. Kennard** and *William Wirt Howe*, for plaintiffs in error.

Mr. **Gus A. Breaux**, for defendants in error.

[207] *Mr. Justice* **Bradley** delivered the opinion of the court:

These are suits on injunction bonds given by the plaintiffs in error to the defendants in error, respectively, Friedlander being a surety.

On the 20th of January, 1874, Meyers & Levi, Lehman, Godchaux & Co. and Michael Frank filed a petition in the District Court of the United States for the District of Louisiana to have their alleged debtors, Block Brothers, a firm composed of Simon and Joseph Block, declared bankrupts; and the petition charged, amongst other things, that the alleged bankrupts had, on the 9th of January preceding, sold a certain store of goods, situated at Opelousas, to Solomon Isaacs, their brother-in-law, with intent to defraud their creditors. At, or immediately after the filing of the petition in bankruptcy, the petitioning creditors filed a special petition for an injunction to prevent Isaacs from disposing of the store or its contents. A similar petition was filed against David Block, a brother of the members of the firm of Block Brothers, alleging that the bankrupts had sold to him another store of goods at Opelousas with intent to defraud their creditors. Writs of arrest and provisional seizure were issued against the bankrupts, and injunctions against Solomon Isaacs and David Block, in accordance with the prayers of the several petitions. Applications were immediately made by the parties to set these proceedings aside, and such a showing was presented to the district court that on the 31st of January the following order was made, to wit:

"The rules to set aside the arrest, provisional seizure and injunction came up, * * * when, after hearing the pleadings, evidence and arguments, it is ordered by the court that the writs of arrest and provisional seizure be set aside, but that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction in such sum as will be fixed by the court upon ascertaining the value of the property, and to that end the parties shall take their evidence before Register Kellogg." [208]

Evidence having been taken under this order, the court on the 7th of February, 1874, made the following order, to wit:

"After hearing counsel on both sides, it is ordered by the court that the complaining creditors do give bond and security in the sum of $5,000 in favor of Solomon Isaacs, and another bond in the sum of $1,500 in favor of David Block, to save the parties harmless from the effects of the injunction issued in this cause."

Bonds were accordingly given in pursuance of these orders, and the injunctions were retained. Motions to dissolve them, however, were pressed, and after a large amount of evidence had been taken and laid before the court, they were dissolved on the merits on the 18th and 20th of March, 1874.

The bonds referred to were executed for the respective penalties required, but the conditions did not follow the precise terms of the orders. The bond given to Isaacs (with which that given to Block corresponded) was in the following words, to wit:

"Know all men by these presents that we, Meyers & Levi [Lehman, Godchaux & Co.], Meyer Weill, Michael Frank, and Samuel Friedlander, are held and firmly bound, jointly and severally, unto Solomon Isaacs in the sum of $5,000, lawful money of the United States of America, to be paid to the said Solomon, etc. Dated 19th February, 1874.

"*Whereas*, The said Meyers & Levi, Meyer Weill, and Michael Frank have presented a petition to the honorable, the District Court of the United States for the District of Louisiana, praying for a writ of injunction against the said Solomon Isaacs: Now, the condition of the above obligation is, that we, the above bounden Meyers & Levi, Meyer Weill, and Michael Frank and ———, will well and truly pay to the said Solomon Isaacs, the defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued."

Signed "*Meyer Weill, M. Frank, Lehman, Godchaux & Co., Meyers & Levi, Sam'l Friedlander.*"

In January, 1875, suits were brought on these [209] bonds by Solomon Isaacs and David Block, respectively, in the Sixth District Court for the Parish of Orleans, to recover the damages sustained by reason of the injunctions; and on the 30th day of March, 1876, judgment was rendered

in favor of Isaacs for the sum of $3,250, with interest from judicial demand, and costs; and on the 22d of November, 1877, judgment was rendered in favor of Block for $1,500 (the whole penalty of the bond), with interest and costs.

These judgments were severally appealed to the Supreme Court of Louisiana, and, after much consideration were affirmed. The cases are now here on writs of error to the latter court; and the same errors are assigned in both cases; namely,

First. The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the federal court.

Second. The Supreme Court of Louisiana erred in holding that the bond was regular.

Third. The Supreme Court of Louisiana erred in holding that an action could be maintained on the bond in suit before its condition was broken.

Fourth. The Supreme Court of Louisiana erred in holding that the bond in suit, construed with the order requiring it, could cover and bind the obligors for damages which had been sustained before it was given.

For supporting the first three assignments of error reliance is mainly placed on the case of *Bein* v. *Heath*, 53 U. S. 12 How. 168 [13:939]. There an injunction had been obtained in the Circuit Court of the United States for the Eastern District of Louisiana to suspend proceedings of seizure and sale under a mortgage; and to obtain the injunction the complainants were required, by order of the court, to give bond, with sureties, to answer all damages which the defendant might sustain in consequence of said injunction being granted, should the same be thereafter dissolved. The bond given was conditioned that the principal and sureties would pay to the defendant in the injunction (the plaintiff in the case of seizure and sale) all such damages as she might recover against them [210] in case it should be decided that the said injunction was unlawfully obtained; being in nearly the same form as the bonds now in controversy. The case proceeded to hearing, and a decree was made establishing the mortgage and dissolving the injunction, which decree was affirmed on appeal to this court. The mortgage debt was over $11,000, besides interest and costs. The property mortgaged was sold for $7,000. Suit was then brought, in the same court, on the injunction bond, the plaintiff claiming not only damages for expense and delay, but 10 per cent per annum on the amount of the debt. The cause was tried by the court without a jury. On the trial, the court allowed the plaintiff, in proof of damages sustained, to give evidence of counsel fees and other expenses incurred by the plaintiff before the injunction was issued, and of the value of lawyers' services in this court not paid for, and of the amount of the rents and profits of the mortgaged premises pending the suit; to all of which exceptions were taken; and judgment was rendered for the penalty of the bond, the court being of opinion that the damages from the injunction were greater than that amount.

This court, on writ of error brought, reversed the judgment, *Chief Justice* Taney delivering the opinion. The bond was regarded by this court as a departure from the order requiring it, and as being in effect equivalent to an injunction bond given to suspend seizure and sale under the Louisiana practice, which operates as a security for the debt, as well as the damages arising from the injunction, the same as a recognizance in error in the English practice. Such a bond requires a recovery against the parties before the condition is broken; that is, a judgment for the debt in suit. This the court considered as entirely different from the bond required by a court of equity as a condition of granting an injunction, and different from the bond required by the order of the court in that case. "In proceeding upon such a bond," said the Chief Justice, "the court would have no authority to apply to it the legislative provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would [211] certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit." The Chief Justice also referred to the fact that no recovery had been had against the parties—nothing but a seizure and sale of the mortgaged premises—and a dissolution of the injunction; and, therefore, as the court construed the bond, the contingency on which the obligors agreed to pay had not happened, and the condition of the bond was not broken. Under the construction given to the bond in that case, the court could not well do otherwise than reverse the judgment of the circuit court.

But, according to our view, the bonds sued on in the cases before us do not demand any such construction. It is plain that they could not be intended as security for any debt or demand in litigation, but as security only for the damages that might be sustained by the issuing of the injunctions. The condition is to pay "all such damages as he [Isaacs, in the one case, and Block, in the other] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." Recover, how? By the law of Louisiana damages may be recovered for suing out an injunction without just cause, independently of a bond. *Florance* v. *Nixon*, 8 La. 291. But this cannot be done in the United States Courts. Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself. Otherwise it is senseless and vain. Construed in this way it is in strict conformity with the order which required it. It is in this [212] way that the bonds in question were finally construed by the Supreme Court of Louisiana, and we think that its construction was right. In its opinion in the *Block Case* the court says:

"Under our construction we find no difference in the obligation of parties 'to save David Block harmless from the effects of an injunction issued against him,' and the obligation contracted in this bond, 'to pay to David Block, the defendant in said injunction, all such damages as he may recover against the obligors in case it should be decided that the said writ of injunction was wrongfully issued.' We, therefore, hold that the bond in this case did comply with the condition prescribed in the judge's order, and that it was a valid bond." The court not only construed the bonds in this way, but decided the cases upon this view as to their meaning and effect, awarding to the plaintiffs respectively only such damages as arose from the effects of the respective injunctions. The actions were brought to recover such damages. The petition in each case set forth the facts, showing the injuries which the plaintiff sustained as the immediate result of the injunction, and based his claim to a recovery entirely on the damages arising from such injuries. The evidence was directed to the establishment of these facts, and conformed to the allegations of the petition. The court, in its opinion in the case of David Block, after showing that the bond must be construed as intended to cover these damages, says: "After a careful examination and consideration of the evidence in the record, we are satisfied that plaintiff suffered damages to the full extent of the amount allowed him by the lower court. The judgment appealed from is therefore affirmed." In the case of Isaacs, the court at first reversed the judgment of the inferior tribunal, conceding that the order of the district court required security for the entire damages, past as well as future, but considering the bond as not framed in conformity with it, and as not covering any damages but such as arose after it was given, as to which there was no distinct evidence. Supposing, however, that damages might be recovered against the plaintiffs in the injunction, independently of the bond, the court reserved to Isaacs the right to bring a suit for that purpose. But on a rehearing of the case, and [213] after the argument and decision in the *Block Case*, the court came to a different conclusion, and held that the bond was in substantial conformity with the order, and was to be construed as intended to save the parties harmless from the effects of the injunction, adopting in all things the views expressed in the opinion in the *Block Case*. It then adds: "This leaves open for consideration the question of the *quantum* of damages allowed by the judgment appealed from. We have gone over the evidence on this point with care and deliberation, and reviewed all the authorities cited bearing on this point, the same in both cases, and are satisfied that the amount awarded by the judgment is fully justified and sustained by the proof and the law." The court thereupon set aside its former judgment and affirmed that of the inferior court.

The fourth assignment of error is that the court erred in holding that the bond, construed with the order requiring it, bound the obligors for damages sustained before it was given. The solution of the question raised by this assignment depends upon the fair construction of the order, and of the bond given in pursuance of it, and read (as it should be read) in the light of it. The order was "that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from *the effects of said injunction*." The last words clearly mean *all the effects* of the injunction. The condition of the bonds was to pay "all such damages as he [the obligee] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." It seems plain to us that all the damages arising from the wrongful issue of the injunctions were intended to be covered by the bond as well as by the order; in other words, that the bond was intended and understood as a compliance with the requirements of the order. That is the natural and obvious meaning of its language when the two are read together; and the parties signing the bond must be presumed to have been cognizant of the order under which it was given.

It is unnecessary to review the authorities on this subject. It is undoubtedly true that a surety cannot be held beyond the terms or legal effect of his engagement; and when that has [214] respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively, and not retrospectively. But if, from the nature of the case, the subject of guaranty is a past transaction in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to do so.

As to the power of a court of equity to impose any terms in its discretion, as a condition of granting or continuing an injunction, there can be no question. This subject is considered in the case of *Russell* v. *Farley*, 105 U. S. 433 [26: 1060].

We see no error in the judgments of the Supreme Court of Louisiana in these cases, and they are affirmed, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*, [183
v.
FRITZ H. RADDIN, Special Admr. of SEWELL RADDIN, Deceased.

(See S. C. Reporter's ed. 183-197.)

Life insurance—application—incomplete answer—waiver of objection—acceptance of premium as—general rules—representations of assured, not the consideration for promise of insurer—practice—bill of exceptions.

1. Where, upon the face of an application for a policy of life insurance, a question appears to be not answered at all, or to be imperfectly answered, the issue of a policy without further inquiry is a waiver of the want or imperfection, which renders immaterial the omission to answer more fully.

2. The issue of a policy of life insurance, with knowledge of a breach of a condition of the policy, is a waiver of the right to avoid the policy for such breach.

3. The expression in a policy of insurance that it is made "in consideration of the representations made in the application," and of certain sums paid and to be paid, does not make such representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

4. This court cannot consider an exception to an instruction where there is nothing in the bill of exceptions to show what was proved, or what any of the evidence tended to prove.

5. This court strongly condemns the practice of making the entire charge to the jury a part of the bill of exceptions.

[No. 104.]

Argued Dec. 20, 21, 1886. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **M. F. Dickinson, Jr.,** for plaintiff in error:

There was a fatal variance between the declaration of the defendant in error and his proof. The consideration of a contract must be proved as alleged.

Woodruff v. *Wentworth*, 133 Mass. 309; *Stone* v. *White*, 8 Gray, 594.

Question 28 consists of four interrogatories, grouped closely together and all relating to one topic. The answer, as given, purports to be a reply to the whole inquiry, and occupies substantially the whole space opposite said question. Fairly construed, it means that no application has been made to this or any other company, except to the Equitable Life Assurance Society for $10,000, which has been accepted.

See *Cazenove* v. *British Assur. Co.* 6 C. B. N. S. 437; *S. C.* on appeal, 29 L. J. C. P. 160.

Where the parties have stipulated that the contract shall be void if the statements are untrue, the only question to be decided is, Are the statements true, or false?

Thompson v. *Weems*, L. R. 9 App. Cas. 671; *Jeffries* v. *Life Ins. Co.* 89 U. S. 22 Wall. 47 (22: 833); *Ætna Life Ins. Co.* v. *France*, 91 U. S. 510 (23: 401); *Ins. Co.* v. *Trefz*, 104 U. S. 197 (26: 708).

Statements concerning prior insurance and prior rejected applications are material.

See *Carpenter* v. *Providence, etc. Ins. Co.* 41 U. S. 16 Pet. 495 (10: 1044); *London Assurance* v. *Mansel*, L. R. 11 Ch. D. 363; *McDonald* v. *Law Union Ins. Co.* L. R. 9 Q. B. 328; *Edington* v. *Ætna Life Ins. Co.* 77 N. Y. 564; *Same* v. *Same*, 100 N. Y. 536.

The willful suppression of the facts touching the prior insurance and the prior rejected applications vitiated the policy.

London Assurance v. *Mansel*, L. R. 11 Ch. D. 363; *Rivaz* v. *Gerussi*, L. R. 6 Q. B. D. 222; *M'Lanahan* v. *Universal Ins. Co.* 26 U. S. 1 Pet. 170 (7: 98).

Question 28 is prolonged into four clauses, for the purpose of calling the attention of the applicant to the several points on which information is desired. As grouped together, and spaced, and ruled with lines, it does not call for four separate answers, but rather for one answer that shall cover and reply to all the clauses.

Moulor v. *Ins. Co.* 101 U. S. 708 (25: 1077).

Messrs. **Robert M. Morse, Jr.,** and *Wm. M. Richardson*, for defendant in error:

The issue of a policy on an application which contains no answer to certain questions is a waiver of such answer.

Connecticut M. L. Ins. Co. v. *Luchs*, 108 U. S. 498 (27: 800); *Liberty Hall Asso.* v. *Housatonic M. F. Ins. Co.* 7 Gray, 261; *Bardwell* v. *Conway M. F. Ins. Co.* 122 Mass. 90; *Hall* v. *Peoples M. F. Ins. Co.* 6 Gray, 185; *Lorillard Fire Ins. Co.* v. *McCulloch*, 21 Ohio St. 176.

A case identical in its facts to the present one has been decided by the Supreme Court of Mississippi.

Amer. Ins. Co. v. *Mahone*, 56 Miss. 180.

The cases *Towne* v. *Fitchburg M. F. Ins. Co.* 7 Allen, 51; *Brennan* v. *Security Ins. Co.* 4 Daly, 296; *Fowkes* v. *Manchester, etc. Ins. Co.* 8 Post. & F. 440; *London Assur. Co.* v. *Mansel*, 48 L. J. Ch. 331; *Bennett* v. *Anderson*, 1 Irish Jur. 245; *Re General Prov. Co.* 18 W. R. 396; are distinguished from the *Mississippi Case*, and the case in suit, by the fact that although in each several interrogatories were grouped under one head, the answer made was not a true or complete answer to any one of the separate interrogatories.

To the same effect as the *Mississippi Case* see also *Carson* v. *Jersey City Ins. Co.* 43 N. J. L. 300.

Mr. Justice **Gray** delivered the opinion of the court: [186]

This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance, dated April 25, 1872, the material parts of which were as follows:

"*This policy of assurance witnesseth*, That the Phœnix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents, to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the County of Essex, State of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life."

"This policy is issued and accepted by the assured, upon the following express provisions and agreements;" namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." [187]

The application was signed by Sewell Raddin, both for his son and for himself, and contained twenty-nine printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"10. Is the party addicted to the habitual use of spirituous liquors or opium?	No
"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this Company, state the No. of policy?	$10,000, Equitable Life Assurance Society.

"29. Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon? Yes.

"It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue or fraudulent answers, any suppression of facts, or should the applicant become, as to habits, so far different [188] from condition now represented to be in as to make the risk more than ordinarily hazardous, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon."

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Assurance Society for $10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of $10,000; whereas, in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society and to the New York Life Insurance Company for additional insurance upon the son's life, each of which had been declined.

The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule: first, that the answer to question 28 was untrue, and therefore no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore he could not recover; and third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know and the plaintiff [189] was bound to communicate."

But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that if the Company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question."

The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested and to the rulings aforesaid present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us.

Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulor* v. *American Ins. Co.* 111 U. S. 335 [28:447]; *Campbell* v. *New England M. L. Ins. Co.* 98 Mass. 381; *Thomson* v. *Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 [10:1044]; *Jeffries* v. *Life Ins. Co.* 89 U. S. 22 Wall. 47 [22:833]; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; *Macdonald* v. *Law Union Ins. Co.* L. R. 9 Q. B. 328; *Edington* v. *Ætna Life Ins. Co.* 77 N. Y. 564; and 100 N. Y. 536.

Where an answer of the applicant to a direct question of the insurers purports to be a com- [190 plete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove* v. *British Equitable Assur. Co.* 29 Law Jour. N. S. C. P. 160, affirming *S. C.* 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. *Connecticut M. L. Ins. Co.* v. *Luchs*, 108 U. S. 498 [27:800]; *Hall* v. *People's M. F. Ins. Co.* 6 Gray, 185; *Lorillard Ins. Co.* v. *McCulloch*, 21 Ohio St. 176; *American Ins. Co.* v. *Mahone*, 56 Miss. 180; *Carson* v. *Jersey City Ins. Co.* 14 Vroom, 300; 15 Vroom, 210; *Lebanon M. Ins. Co.* v. *Kepler*, 106 Pa. 28.

The distinction between an answer apparently complete, but in fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against

fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. *Towne* v. *Fitchburg Ins. Co.* 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols* v. *Fayette M. F. Ins. Co.* 1 Allen, 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are [191] part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object: the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a [192] ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of *London Assurance* v. *Mansel*, L. R. 11 Ch. D. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions: the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete and therefore untrue. As applied to the first question, it disclosed only some and not all of the proposals which had in fact been made; and as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of *Sir* George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions.

For these reasons, our conclusion upon this branch of the case is that there was no error, of which the Company had a right to complain, [193] either in the refusals to rule, or in the rulings made.

Another defense relied on at the trial was that after the issue of the policy Charles E. Raddin became, as to habits of using spirituous liquors, so far different from the condition he was represented to be in at the time of the application, as to make the risk more than ordinarily hazardous, and thus to render the policy null and void.

The bill of exceptions, after showing that in support of this defense the defendant introduced evidence which it is now unnecessary to state, because the exception to its admission was abandoned at the argument, contains this statement: "In rebuttal of the foregoing defense of change of habits on the part of the assured after the issuing of the policy, the plaintiff not only denied the fact, but offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice

to Sewell Raddin of its intention to cancel the policy. Evidence to the contrary was introduced by the defendant; and the questions of change of habits, knowledge thereof by the Company, notice to Sewell Raddin, receipt of premium after knowledge, and waiver, were all submitted to the jury."

The whole charge to the jury is made part of the bill of exceptions, in accordance with a practice which this court for more than half a century has emphatically condemned, and has by repeated decisions, as well as by express rule, constantly endeavored to suppress. As long ago as 1822, *Mr. Justice* Story, speaking for the whole court, said: "The charge is spread *in extenso* upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the case." *Evans* v. *Eaton*, 20 U. S. 7 Wheat. 356, 426, 427 [5: 472, 489, 490]. Opinions to the same effect have been delivered in many later cases. *Carver* v. *Jackson*, 29 U. S. 4 Pet. 1, 80, 81 [7: 761, 789]; *Ex parte Crans*, 30 U. S. 5 Pet. 190 [8: 92]; *Conard* v. *Pacific Ins. Co.* 31 U. S. 6 Pet. 262, 280 [8: 392, 398]; *Magniac* v. *Thompson*, 32 U. S. 7 Pet. 348, 390 [8: 709, 728]; *Greng* v. *Sayre*, 33 U. S. 8 Pet. 244, 251 [8: 932, 935]; *Stimpson* v. *Westchester R. R. Co.* 44 U. S. 3 How. 553 [11: 722]; [194] *Zeller* v. *Eckert*, 45 U. S. 4 How. 289, 297 [11: 979, 982]; *U. S.* v. *Rindskopf*, 105 U. S. 418 [26: 1131]. And in 1832 this court adopted a rule, which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the circuit and district courts should not allow any bill of exceptions containing the charge of the court at large to the jury in trials at common law, upon any ground of exception to the whole of such charge; but also "that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only be inserted in the bill of exceptions, and allowed by the court." Rule 38 of 1832, 6 Pet. iv. and *1 How. xxxiv; Rule 4 of 1858 and 1884, 21 How. vi, and 108 U. S. 574.

The disregard of this rule has caused the principal embarrassment in dealing with the question now under consideration.

The substance of the instructions to the jury on this part of the case was as follows: The judge directed the jury that if they should find that the assured was addicted to the habitual use of spirituous liquors at the date of the policy, or his habits afterwards changed in this respect so as to make the risk more than ordinarily hazardous, they would consider whether there had been a waiver on the part of the Insurance Company. The judge then told the jury that the plaintiff not only claimed that any misrepresentation as to the habits of the assured, or failure to inform the Company of a change in those habits, had been waived by the Company by accepting payment of a premium on or about April 25, 1881, after it had knowledge of the habits of the assured, or of the change in those habits; but further claimed that mere silence of the Company, after knowledge of such change in habits, was a waiver of the violation of the provision of the policy. And the judge did charge the jury upon both the supposed grounds of waiver, instructing them that if the defendant had knowledge of the change in the habits of the assured before receiving the premium of April 25, 1881, the acceptance of that premium would be a waiver, which would estop the Company to set up that the policy was forfeited for a breach of that provision; and further instructing them that if the Company, having knowledge of the change in the habits of the assured, [195] did not give notice to the plaintiff of that change, and he was prejudiced in any way by the failure of the Company to give such a notice, and by reason of this silence of the Company did any act, or omitted to do any act, which prejudiced him, there was a like waiver and estoppel on the part of the Company.

The bill of exceptions, after setting out the charge of the court, proceeds as follows: "To so much of the foregoing instructions as related to notice and waiver the defendant excepted, and asked the court to instruct the jury: 1. That no notice of the cancellation of the policy or termination of the risk was necessary, if the jury find the fact to be that the habits of the assured had so far changed from the condition represented to be in as to make the risk more than ordinarily hazardous. 2. That even if any notice were necessary at all under any circumstances until the Company had completed its investigations, if the Company acted in good faith and with reasonable dispatch, they were not bound to give the notice; also that the receipt of the last premium, April 25, 1881, pending such investigations, would not amount to a waiver, especially if a much larger sum was tendered back when full knowledge was had by the Company. The court refused these requests, and the defendant excepted thereto."

But the bill of exceptions does not state what the investigations and the tender were which are mentioned in the second request for instructions, or at what time or for what purpose either was made; nor does it show that any evidence had been introduced of prejudice to the plaintiff in consequence of the defendant's silence, or any other evidence upon the question of waiver, except that already mentioned; namely, that "The plaintiff offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy," and that "evidence to the contrary was introduced by the defendant."

It does not therefore appear that the instructions requested, or the instructions given, except so far as they related to the effect of accepting payment of the last premium with previous knowledge of the habits of the assured, [196] had any application to the case on trial. Except as just mentioned, the bill of exceptions is in the same condition as that of which *Mr. Justice* Miller, delivering a former judgment of this court, said: "There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of the reference to it in the charge

*For rules complete to January 7, 1884, see Book 30, this edition, page 901. [Ed.]

of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical and wholly unwarranted by any testimony before the jury." *Worthington* v. *Mason*, 101 U. S. 149, 151 [25: 848, 849].

It follows that the only question upon the instructions of the court to the jury, which is open to the defendant on this bill of exceptions is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. *Insurance Co.* v. *Wolff*, 95 U. S. 326 [24:387]; *Wing* v. *Harvey*, 5 D. M. & G. 265; *Frost* v. *Saratoga Mut. Ins. Co.* 5 Denio, 154; *Bevin* v. *Connecticut M. L. Ins. Co.* 23 Conn. 244; *Insurance Co.* v. *Stockbower*, 26 Pa. 199; *Viele* v. *Germania Ins. Co.* 26 Iowa, 9; *Hodsdon* v. *Guardian L. Ins. Co.* 97 Mass. 144.

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of $152.10 and of an annual premium of $304.20, while the policy showed the consideration to be the representations made in the application as well as pay-
[197] ment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN N. BOFINGER ET AL., Composing the Late Firm of STILLWELL, POWELL & COMPANY, AND WALKER R. CARTER, Surviving Copartner of the Late Firm of CARTER & CONN, *Plffs. in Err.*, [198]

v.

JULES TUYES ET AL.

(See S. C. Reporter's ed. 198-206.)

Action on appeal bond—compromise and payment amounting to accord and satisfaction—parol evidence, inadmissible to vary written instruments—pleading—motion to quash execution—res judicata.

In an action on an appeal bond it is *held*: that the right of the defendants to appeal from a decree against them, and their declaration of intention to do so, created such a dispute in respect to their liability as made it a proper subject of compromise; that the payment by them of certain sums agreed upon as a compromise of their liability amounted to an accord and satisfaction, and discharged their liability on the bond; that parol evidence to prove another condition of the contract is inadmissible; and that an accord and satisfaction may be pleaded in bar of such an action.

[No. 135.]

Argued Jan. 14, 17, 1887. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **O. B. Sansum**, for plaintiffs in error.

Messrs. **Richard H. Browne**, *Charles E. Schmidt* and *Charles B. Singleton*, for defendants in error.

Mr. Justice **Matthews** delivered the opin- [199]
ion of the court:

In a maritime cause of collision arising on the waters of the Mississippi River, the owners of the steamboat Sabine filed their libel in the District Court of the United States for the Eastern District of Louisiana, against the steamboat Richmond, to recover damages for the loss alleged to have been occasioned by the fault of the latter. The owners and claimants of The Richmond, being the plaintiffs in error in this cause, defended against the libel filed by the owners of The Sabine, and also filed a cross libel, alleging damage to The Richmond in the collision caused by the fault of The Sabine, and claiming damages therefor. A decree was rendered in this cause June 5, 1878, against the steamboat Sabine and her owners, Sarah C. Shirley, R. F. Fuller, and America B. Selby, and Nathaniel C. Selby, her husband, together with Alfred Moulton, Charles Cavaroc, Jules

Tuyes, and Achille Chiapella, the four last named being sureties for the owners of The Sabine in a bond for the sum of $8,000, conditioned to pay any damages adjudged in favor of the owners of The Richmond as cross libelants in the suit, which the libelants had been required by the court to give. The amount of the decree against the owners of The Sabine, as principals was $9,750 damages, besides costs, and against each of the four named sureties the sum of $2,000; that being the amount limited in the obligation as the several liability of each. From this decree all the parties appealed to the Circuit Court of the United States for the Eastern District of Louisiana. For the purpose of perfecting the appeal, Fuller, Moulton, Cavaroc, Tuyes, and Chiapella executed and filed an appeal bond in the sum of $20,000, the condition of which was that if they should prosecute their appeal to effect, and answer all damages and costs, and satisfy whatever judgment might be rendered against them if they failed to make their appeal good, the obligation should be void; and on this bond J. W. Hinks and Pierre S. Wiltz, two of the defendants in error, were sureties each in the sum of $5,000. The cause was heard on this appeal in the circuit court on the 11th of March, 1876, when a decree was rendered in the cause, dismissing the original libel, maintaining the cross libel, and condemning the original libelants, the owners of the steamboat Sabine, together with their sureties in the original bond of $8,000, viz., Moulton, Cavaroc, Tuyes, and Chiapella, to pay to the owners of the steamboat Richmond as damages the sum $7,392.60, with costs. The decree of the circuit court as against Moulton, Cavaroc, Tuyes, and Chiapella, sureties as aforesaid, was several as against each in the sum of $2,000, that being the amount for which [200] they respectively bound themselves. From this decree of the circuit court the owners of the steamboat Sabine, the original libelants, together with the Merchants' Mutual Insurance Company, the Mechanics and Traders Insurance Company, the Factors and Traders Insurance Company, the New Orleans Mutual Insurance Company, the Sun Mutual Insurance Company, the New Orleans Insurance Association, the Crescent Mutual Insurance Company, and the Commercial Insurance Company, all which insurance companies were libelants and intervenors in certain other similar causes consolidated with that of the original libel of the owners of The Sabine against The Richmond, joined in an appeal to the Supreme Court of the United States from the several decrees rendered in the consolidated causes, including that in which the present defendants in error were parties. The bond given for the prosecution of that appeal to the supreme court was in the sum of $500, and did not operate as a *supersedeas*. The defendants in error in this cause were not parties to this appeal. The appeal from the decree of the circuit court was heard at the October Term, 1880, of the supreme court, when it was ordered and decreed that the decree of the circuit court appealed from should be and the same was affirmed. Subsequently an execution was issued on the decree of the circuit court, running against Moulton, Cavaroc, Tuyes, and Chiapella, for the sum of $7,392.60 with interest at 5 per cent per annum from March 11, 1876, and costs. Motions were made on May 8, 1881, on behalf of Moulton and Tuyes, defendants in that execution, to quash the same on the ground that the said decree, as against each of the said sureties, had been satisfied and discharged. These motions came on to be heard June 16, 1881, on consideration whereof they were allowed, and the writ of *fieri facias* quashed, and the marshal ordered to desist from any further proceedings thereunder.

The plaintiffs in error thereafter, on the 7th of March, 1882, being the owners of the steamboat Richmond, or their representatives, commenced this action against the defendants in error as parties to the appeal bond given for the prosecution of the appeal from the original [201] decree of the district court to the circuit court. The defendants rely upon two defenses: 1, that the matters in controversy were finally adjudged in their favor by the circuit court on the motion to quash the execution issued against them on its decree, so as to constitute an estoppel upon the principle of *res judicata;* 2, that the decrees of the circuit court against them respectively were discharged by payments made and accepted in full satisfaction thereof, by way of compromise, prior to the appeal taken by the other parties to the Supreme Court of the United States. The cause came on to be heard before the circuit court on May 29, 1883, when the parties, having duly waived the intervention of a jury, submitted the cause to the court; on consideration whereof the court rendered judgment in favor of the defendants. The object of the present writ of error is to reverse that judgment.

It appears from the bill of exceptions taken on the trial that the plaintiffs below, to maintain the issues on their part, put in as evidence in said cause the appeal bond, decree and final judgment, and the mandate of the Supreme Court of the United States, as the same are described and referred to in the plaintiffs' petition, and also the amount of costs taxed in the cause, amounting to the sum of $1,593.45, and rested their case. Thereupon the defendants, to maintain the issues on their part, put in evidence, among other matters, the following:

1. The decree rendered by the district court against the owners of The Sabine in favor of the cross libelants, the owners of The Richmond, showing the amount decreed against the sureties on the bond of $8,000 to be the sum of $2,000 each.

2. The decree of the circuit court in the same cause in the amount of $7,392.60 *in solido* against the owners of the steamer Sabine, and against the sureties on the original bond for $8,000 in the sum of $2,000 each.

3. The petition and allowance of the appeal from that decree to the Supreme Court of the United States, together with the appeal bond for the prosecution thereof.

4. The record of the proceedings in the circuit court on the motion to quash the execution, together with the judgment of the court allowing said motion and quashing the said execution. [20

5. Four written papers signed by Kennard, Howe & Prentiss, attorneys of record for the owners of the steamer Richmond in the proceedings in admiralty, showing payments made

by the parties respectively in satisfaction of the decree of the circuit court against them, which papers are as follows:

"U. S. Circuit Court.

"Sarah C. Shirley et al. *vs.* St'r Richmond.

"Rec'd, New Orleans, July 3, 1876, from Jules Tuyes, Esq., security on the bond given by libelants in the above cause to respond to the cross libel filed by N. S. Green *et al.*, claimants of the steamer Richmond, the sum of eleven hundred and sixty-six $\frac{66}{100}$ dollars in full satisfaction of decree rendered against him in above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the st'r Richmond.

(Signed)

"KENNARD, HOWE & PRENTISS,
"*Att'ys for Owners of Richmond.*"

"Received, New Orleans, Sept. 28, 1876, from Home Ins. Co., fifteen hundred dollars in full of all claims against said company arising out of a certain bond given in case No. 7057, U. S. Circuit Court (admiral. appeal), entitled Sarah C. Shirley & others *vs.* St'r Richmond & others, and Merchants' Mutual Ins. Co. *vs.* St'r Sabine & others (consolidated); said bond, signed for $2,000 by Alf. Moulton for the Home Co., being given to secure the payment of whatever judgment The Richmond and owners, cross libelants, should obtain against The Sabine owners. The above sum is in full settlement as a compromise of the Home Ins. Co.'s liability.

(Signed)

"KENNARD, HOWE & PRENTISS,
"*Att'ys for Richmond & Owners.*"

"U. S. Circuit Court.

"Sarah C. Shirley et al. *vs.* St'r Richmond.

"Received, New Orleans, July 3, 1876, from the New Orleans Insurance Association, for account of Mr. C. Cavaroc, security on the bond given by libelants in the above cause to respond to the cross libel filed by N. S. Green & al., claimants of the st'r Richmond, the sum of $1,166.66 dollars, in full satisfaction of decree rendered against said C. Cavaroc in above entitled cause, and I hereby subrogate the said New Orleans Insurance Association to the rights of N. S. Green and owners of the st'r Richmond.

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"$1,166.66. (Signed)

KENNARD, HOWE & PRENTISS,
"*Att'ys for Owners of Richmond.*"

"U. S. Circuit Court.

"Sarah C. Shirley & al. *vs.* St'r Richmond.

"Received, New Orleans, July 3, 1876, from Mr. A. Chiapella, security on the bond given by libelants in the above cause to respond to the cross libel filed by N. S. Green & al., claimants of the st'r Richmond, the sum of eleven hundred and sixty-six $\frac{66}{100}$ dollars, in full satisfaction of decree rendered against him in above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the st'r Richmond.

(Signed)

"KENNARD, HOWE & PRENTISS,
"*Att'ys for Owners of Richmond.*"

It was then proved by John Kennard, a member of the firm of Kennard, Howe & Prentiss, that he signed the papers by the firm name of Kennard, Howe & Prentiss, who were the attorneys for the steamer Richmond; that he received the sums of money in the said papers severally mentioned, and that he executed the said papers under plenary authority from the plaintiffs to make the compromise. The plaintiffs then offered to prove by the same witness that the proctors for the owners of the steamer Sabine opened a negotiation with him to compromise said case, and offered to pay the sum of $5,000 for a compromise of the litigation then pending between the parties, and threatened an appeal from the decree and judgment of the circuit court, which had been rendered in favor of the owners of the steamer Richmond, unless said money should be accepted and said compromise effected; and that for the purpose of ending said litigation he accepted said money and compromised said case; that it was expressly agreed by the parties to that cause that said litigation was then ended, and that no appeal should be taken from the said decree and judgment of the circuit court. To this offer and evidence the defendants objected, on the ground that the papers in evidence constituted a contract in writing between the parties, and that no parol evidence impeaching them could be received. The court sustained the objection, and refused to hear the evidence; to which ruling the plaintiffs excepted.

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It is not important to determine what effect, if any, should be given to the proceedings and order of the circuit court on the motion of the defendants Tuyes and Moulton to quash the execution issued on the decree against them. It does not appear from the record of these proceedings on what ground the judgment of the court was placed; and in its terms it is not final, as it merely quashes the particular writ of execution then in the marshal's hands, and directs him to take no further proceedings thereunder. If it had been based upon a finding of a payment of the decree, or of an accord and satisfaction equivalent to payment, and had directed satisfaction of the decree to be entered of record, as it clearly had power to do in such a proceeding, the judgment would have been conclusive as a defense to the bond in suit, notwithstanding the summary character of the proceeding. *U. S.* v. *McLemore*, 45 U. S. 4 How. 286 [11:977]; *Perkins* v. *Fourniquet*, 55 U. S. 14 How. 328 [14:441]. But the introduction of the record of these proceedings as evidence did not prejudice the plaintiffs in error; for the other evidence in the cause, and which no doubt is the same on which the circuit court acted in that proceeding, shows an accord and satisfaction equivalent to a payment of the decree, and, in equity, to a satisfaction and discharge. It is so expressed in each of the papers executed at the time, which, although they are in one sense receipts acknowledging the payment of money, are also written evidence of an executed agreement by which the money was received in full payment and settlement of the decree and of the bond given for its payment now sued on. It is shown that the attorneys for the owners of The Richmond, who signed those receipts, were fully authorized to do so. The contract in each case is with the individual defendant for a satisfaction

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of the decree rendered against him severally. The payment and receipt of the money in pursuance of the agreement amounted to a release of errors, so that there was a valuable consideration to sustain the contract whereby a less sum than the amount due by the decree was received in full payment.

The offer on the part of the plaintiffs in error to prove by parol another condition of the contract; viz., that the other defendants, the owners of the steamboat Sabine, and the intervenors and other parties, the several insurance companies who had become parties to the appeal, should not take and perfect an appeal to the Supreme Court of the United States, was rightly rejected, because such parol evidence necessarily varied and contradicted the written agreement of the parties. The papers in evidence established a complete accord and satisfaction fully performed, in pursuance of an agreement to extinguish the liability of the defendants by reason of the original decree, and so to satisfy the obligation of the bond on which they are sued. The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in respect to their liability as made it a proper subject of compromise. A compromise was made and fully performed on their part; they paid the money, which was received in payment of the decree, and took no appeal. It is not now open to the plaintiffs in error to treat this payment merely as a credit on account and hold the defendants to their original liability. *U. S.* v. *Child*, 79 U. S. 12 Wall. 232 [20: 360]; *Oglesby* v. *Attrill*, 105 U. S. 605 [26: 1186].

The technical difficulty, that there can be no satisfaction and discharge of a judgment or decree, except by matter of record (*Mitchell* v. *Howley*, 4 Denio, 414, 47 Am. Dec. 260), cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have the same effect. In the present case the action is not on the decree, but on the appeal bond, and for the recovery of damages arising from the breach, as to which matters *in pais*, such as payment or accord and satisfaction, were always a good plea.

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Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

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[260] ALANSON W. BEARD, Collector of Customs for the REVENUE DISTRICT OF BOSTON AND CHARLESTOWN, *Plff. in Err.*,

v.

NATHAN NICHOLS ET AL., Copartners, under the Firm Name of NICHOLS & FARNSWORTH.

(See S. C. Reporter's ed. 260-263.)

Duties on webbing made of India rubber, wool and cotton.

In the latter part of 1878 and early part of 1879 "webbing made of India rubber, wool and cotton," used for gores and gussets in Congress boots, was subject to a duty of only 35 per cent ad valorem under the second clause of section 2504 R. S., said webbing not falling within the first clause of said section.

[No. 112.]

Argued Dec. 22, 1886. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

The case appears in the opinion.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for plaintiff in error.

Mr. **Charles Levi Woodbury**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [261]

The single question in this case is as to the duty payable in the latter part of 1878 and the early part of 1879 on "webbing made of India rubber, wool and cotton," and known as "wool elastic webbing," as distinguished from "union elastic webbing," made of rubber, silk and cotton, and "cotton elastic webbing," made of rubber and cotton. It is used for gores and gussets in the manufacture of Congress boots, and without the rubber would not be adapted to that use. In its manufacture it is not wrought by hand or braided by machinery, but is woven in a loom.

In the court below, three clauses of section 2504 of the Revised Statutes were brought under consideration, to wit:

First. Schedule L, "Wool and woolen goods" (Revised Statutes, page 475): "Webbings, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress trimmings, head nets, buttons, or barrel buttons or buttons of other forms for tassels or ornaments, wrought by hand or braided by machinery, made of wool, worsted, or mohair, or of which wool, worsted, or mohair is a component material: 50 cents per pound, and in addition thereto, 50 per cent ad valorem."

Second. Schedule M, "Sundries" (Revised Statutes, page 477): "India rubber, articles composed of.—Braces, suspenders, webbing or other fabrics, composed wholly or in part of India rubber, not otherwise provided for, 35 per cent ad valorem."

Third. Schedule L, "Wool and woolen goods" (Revised Statutes, page 475): "Woolen cloths, woolen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not herein otherwise provided for: 50 cents per pound, and, in addition thereto, 35 per cent ad valorem." [262]

In this court, however, it was conceded by the solicitor-general, in his argument for the Collector, that, as the third clause does not specifically provide for webbing, and both the others do, that clause would not be relied on here. The precise question to be determined is, therefore, whether these goods are dutiable as "webbing * * * composed wholly or in part of India rubber," at 35 per cent ad valorem, or as "webbing * * * made of wool, * * * or of which wool * * * is a component material," at 50 cents per pound, and, in addition thereto, 50 per cent ad valorem. The Collector exacted the larger duty, and this suit was brought to recover back the difference between that and the smaller one. The court below gave judgment against the Collector, and to reverse that judgment, this writ of error was sued out.

In the Tariff Act of August 30, 1842, chap. 270, § 5, subdivision tenth, 5 Stat. at L. 555, was this provision: "On India rubber oil-cloth, webbing, shoes, braces, or suspenders or other fabrics or manufactured articles composed wholly or in part of India rubber, 30 per centum ad valorem." In the Act of July 5, 1846, chap. 74, § 11, schedule C. 9 Stat. at. L. 44, this was the language: "Braces, suspenders, webbing, or other fabrics composed wholly or in part of India rubber, not otherwise provided for." The same provision was made in the Act of March 2, 1861, chap. 68, § 22, 12 Stat. at L. 191, and in the Act of July 14, 1862, chap. 163, § 18, 12 Stat. at L. 566, which increased the duties on these articles 5 per centum ad valorem. In the last of these Acts, section 8, p. 552, was the following provision: "On manufactures of India rubber and silk, or of India rubber and silk and other materials, fifty per centum ad valorem." These provisions of the Acts of 1861 and 1862 were re-enacted in substantially the same language as part of the Revised Statutes. That in relation to manufactures of India rubber and silk, and India rubber and silk and other materials, is found in section 2504, immediately preceding the second of the clauses above referred to.

In 1873, while the Acts of 1861 and 1862 were in force, and before the enactment of the Revised Statutes, Davies & Co. imported into New [263] York "suspenders or braces manufactured of rubber, cotton and silk," and the Collector exacted a duty of 50 per centum ad valorem as upon a manufacture of India rubber and silk and other materials; but this court held in *Arthur* v. *Davies*, 96 U. S. 135 [24: 810], that they were only dutiable at the rate of 35 per centum ad valorem, as suspenders or braces composed wholly or in part of India rubber, and that they were not "otherwise provided for," as manufactures of India rubber and silk and other materials, because for thirty years before the importation in that case, "and in four different statutes, braces and suspenders, composed wholly or in part of India rubber, had been a subject of duty *eo nomine*." During the same year Faxon, Elms & Co. imported into Boston from Liverpool webbing which was a manufacture of India rubber, silk and cotton, known as "Union Gussett," "Union Web," or "Union Elastic Web," and used in the manufacture of the gores or gussets of Congress boots. In this case, also, the Collector exacted a duty of 50 per centum ad valorem, under section 8 of the Act of 1862, as on manufactures of India rubber, and silk and other materials; but this court held at its October Term, 1878, in *Faxon* v. *Russell*, not reported, on the authority of *Arthur* v. *Davies*, that the goods were only dutiable as webbing composed wholly or in part of India rubber.

These cases, with which we are entirely satisfied, are conclusive upon the questions here involved. Ever since 1842 "webbing" composed wholly or in part of India rubber has been a subject of duty *eo nomine*, and it is no more otherwise provided for, as webbing composed wholly or in part of wool, than it would be as a manufacture of India rubber and silk, or of India rubber and silk and other materials, if silk had been one of its component parts.

The judgment is affirmed.

True copy. Test:
James H. McKenny, Clerk, Sup. Court, U. S.

R. G. MERRIWETHER, *Plf. in Err.*, [354]
v.
THE JUDGE OF THE MUHLENBURG COUNTY COURT, IN THE STATE OF KENTUCKY.

(See S. C. Reporter's ed. 354-363.)

Mandamus *to compel tax to pay judgment on coupons of railroad bonds—construction of Kentucky Statutes.*

Under the Act of the General Assembly of Kentucky, of February 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company, justices of the peace of a county do not constitute a necessary part of the county court, when levying a tax to pay a judgment recovered on coupons of bonds issued by such court, in payment of a subscription to the capital stock of said company. The duty of the court is ministerial and imperative, and in its discharge the county judge may act alone.

[No. 115.]

Argued Jan. 5, 1887. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Kentucky. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Alexander Pope Humphrey**, *W. O. Dodd, J. L. Dodd, John Mason Brown* and *George M. Davie*, for plaintiff in error.

Mr. **Thomas W. Brown**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

Merriwether, the plaintiff in error, obtained a judgment in the court below against the County of Muhlenburg, in the State of Kentucky, for the amount of certain unpaid coupons of bonds, issued by it in payment of a subscription to the capital stock of the Elizabethtown and Paducah Railroad Company. Execution having been returned "no property found to satisfy the same or any part thereof," and the county court of the county having refused to levy a tax sufficient to pay the judgment, Merriwether filed the petition in this case against the Judge of that court, praying for a *mandamus* compelling the levy and collection of such tax. The plaintiff bases his right to relief upon the ninth section of an Act of the General Assembly of Kentucky, approved February 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company. That section provides:

"That in case any county, city, town, or election district shall subscribe to the capital stock of said Elizabethtown and Paducah Railroad Company, under the provisions of this Act, and issue bonds for the payment of such subscription, it shall be the duty of the county court of such county, the city council of such city, and the trustees of such town, to cause to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued and the cost of collecting such tax, and paying the interest, on all the real estate and personal [355] property in said county, city, or town, subject to taxation under the revenue laws of the State, including the amounts owned by residents of such county, city, or town, or election districts, which ought to be given in under the equalization laws." Sess. Acts 1867-8, p. 622.

This proceeding having been instituted against the Judge of the county court alone, a demurrer to the petition, on the ground of defect of parties, raised the objection that, within the meaning of the foregoing statute, the justices of the peace of the county must be a part of the court when making a levy for the purpose asked by the plaintiff. The court below, being of opinion that the point was well taken, sustained the demurrer. An amended petition was filed stating, among other facts, that there were no justices of the peace of the county; that the justices elected from time to time, and who had qualified, resigned their positions in order that there might be no officers in existence who could, under the theory of the defendant, levy the required tax. A demurrer to the amended petition having been sustained, and the plaintiff having elected not to amend further, the action was dismissed.

The only question necessary to be considered is whether the justices of the peace of Muhlenburg County constitute a necessary part of the county court when levying a tax to pay plaintiff's judgment.

The Constitution of Kentucky, adopted in 1850, provided for the organization of a county court in each county, to consist of a presiding judge and two associate judges, any two of the three to constitute a quorum; with power in the General Assembly to abolish the office of associate judges whenever it was deemed expedient, "In which event they may associate with said court any or all of the justices of the peace" elected in the several districts into which the county is divided. Const. art. IV. It is also declared in the same instrument that "The General Assembly may provide, by law, that the justices of the peace in each county shall sit at the court of claims and assist in laying the county levy and making appropriations." Id. § 37. The words "court of claims" are here employed to designate the county court when it sits for the purpose, among others, of ascertaining the claims against, and the expenses incurred by, the county, and of providing for their payment by appropriations out of the county levy; such levy being the annual tax imposed for county purposes, not upon property, but upon persons residing in the county, without reference to the value of their property. 1 Rev. Stat. Ky. 296, chap. 26. The county court is also described as "the county court of levy and disbursements" when reference is made to its duty "to erect and keep a sufficient county jail." Id. 329, chap. 27, art. 21, § 7.

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The Revised Statutes provide that the county courts shall have jurisdiction to lay and superintend the collection and disbursement of the county levy; to erect, superintend, and repair all needful county buildings and structures; and "To superintend and control the fiscal affairs and property of the county, and to make provision for the maintenance of the poor." Id. 327, chap. 27, art. XIX. They also provide that "The office of associate judge of the county court is abolished," and that "a county court shall be held in each county at the seat of justice thereof by a presiding judge of the court, on the days prescribed by law," except that "at the court of claims * * * the justices of the peace of the county shall sit with the presiding judge and constitute the court;" and "justices of the peace shall only compose a part of the court when it is engaged in laying the county levy, and in appropriating money, and in transacting other financial business of the county." Id. 328, art. XXI, § 2.

The same provisions substantially are to be found in the General Statutes of the State, which went into effect in 1873. Gen. Stat. Ky. 269, chap. 27; Id. 304, chap. 28, arts. 15, 16, 17.

It is clear that the levying and collection of a tax to meet a county subscription to the stock of a railroad company, is not a business connected with the laying of the county levy, or with appropriations of money out of such levy. But it is insisted that it is a matter relating to the "fiscal affairs" of the county, and is "financial business of the county," the control or management of which belongs, under the law, to the county court, composed of the presiding judge and the justices of the peace. On the other hand, the plaintiff in error contends, this case is taken out of the operation of the general statute by the fact that the special statute, under which the county made the subscription and issued the bonds in question, imposes upon the county court, held by the presiding judge, the absolute duty of levying the necessary tax.

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Upon this point there seems to be a settled course of decision in the highest court of Kentucky; and upon such a subject as the organization or composition of a tribunal established by the fundamental law of the State, those decisions are, at least, entitled to great weight. *Burgess* v. *Seligman*, 107 U. S. 20, 34 [27: 359, 365]; *Claiborne Co.* v. *Brooks*, 111 U. S. 400, 410 [28: 470, 474]; *Norton* v. *Shelby County*, 118 U. S. 425 [*ante*, 178].

The first case in the Court of Appeals of Kentucky upon this question is *Bowling Green & Madisonville R. R. Co.* v. *Warren County*, 10 Bush, 711, decided in 1875. That was a proceeding to compel the county court to execute and deliver bonds in payment of a subscription to the stock of the railroad company—a subscription sustained by a majority of the legal voters at an election held under the order of the county court, composed of the presiding judge alone. The defense was that the county court held by that officer, the justices being absent, was without authority to call the election there in question. The court speaking by Pryor, *J.*, after observing that, as a general rule, when reference is made to a county court, or the action of a county court, it is understood as a court presided over by the county judge alone, said:

"A county court, held by the county judge or by the judge in conjunction with the justices, has no power to impose such taxation as this on the people of the county, or to submit the question of taxation to the popular vote, without some special legislative enactment; and in the absence of any such original jurisdiction belonging to either mode of organization, it remains to be determined whether the legislative intent, to be gathered from the provisions of appellant's charter, and particularly the sixteenth section, was to empower the county judge alone to exercise this right, or to require that the justices of the county should be associated

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with him. If the direction of the Legislature had been imperative on the county court to enter the order submitting the question of subscription to the people, there would be little difficulty in determining this question; for if the county court had been deprived of all discretion and compelled to obey a mandatory Act, it would be immaterial whether the county court, composed of the justices, or the county judge, made the order, as either or both must obey.

"In this case the Legislature seems to have departed from the usual course of legislation with reference to such charters, and instead of exercising its own judgment as to the interests of the people in this particular locality, or of permitting them primarily to do so, required that the county court, preliminary to a vote on the question by the people, should first, in its discretion, determine the propriety of such legislative action. This action on the part of the county court was certainly not judicial. The appellant had no right or claim on the people to make the subscription, or upon the county court to order the vote. The company was empowered by this Act to make a request only of the county court, that it might in its discretion accede to or refuse. * * * It was a matter of vital importance to the people of the County of Warren, as well as the other counties to whom such a proposition might have been made by appellant, that they should fully understand the nature of the burden they were about assuming; and the Legislature in its wisdom saw proper to give them the benefit of the judgment of those who represented the various localities and interests in each county, in order that they might determine whether the benefits to be derived from the construction of this railway would be an equivalent for the large expenditure to be made."

[359] So the *mandamus* was refused, upon the ground that the special statute intended that the question of submitting a subscription to the vote of the electors should be determined, in the first instance, by the county court, composed of the judge and justices.

The same point again arose in the Court of Appeals of Kentucky in *Logan County* v. *Caldwell*, 1880, and in *Cook* v. *Lyon County*, 1884. Neither of these cases is reported in the printed volume of decisions, but a copy of the opinion in each has been submitted to us. The case of *Logan County* v. *Caldwell* involved the validity of a subscription to the capital stock of the Owensville and Russellville R. R. Co., and of the bonds issued in payment thereof—the subscription having been voted at a popular election called by the county court held by the judge alone. The court, speaking by *Chief Justice* Cofer, reaffirmed the rule announced in *Bowling Green & Madisonville R. R. Co.* v. *Warren County*, observing that it proceeded upon the idea that, as the justices of the peace are by law part of the county court in laying the levy, in making appropriations of money, and generally when the financial interests of the county are involved, it ought to be presumed, when a discretion is given by law to the county court in respect to a matter relating to the financial affairs of the county, that the Legislature intended by the phrase, "county court," that tribunal to which it had committed the management of the general financial interests of the county. Adhering to this rule, the court sustained the subscription and bonds of Logan County upon the ground that an Act, amendatory of the charter of the company, and which was in force when the election was held, imperatively required the county court to make the subscription and issue the bonds, in accordance with the vote of the majority; and hence, as held in the former case, it was "immaterial whether a court composed of the justices or held by the presiding judge alone made the order, as either must obey."

In *Cook* v. *Lyon County* the question was as to the validity of certain bonds and coupons issued in conformity with a popular vote at an election called by the county court, held by the presiding judge alone, upon the question of a [360] subscription to the stock of the Elizabethtown and Paducah Railroad Company, *under the very Act now before us*. The court said:

"It is urged that the bonds and coupons are not valid, because the county judge, in ordering the election to take the vote as to whether the county should subscribe stock to said road, and in making the subscription and issuing the bonds therefor, acted alone and without associating the justices of the county with him. The Act in question provides that all this shall be done by the 'county court,' and contains no language from which it can be even inferred that the Legislature intended that it should be done by the county levy or fiscal court of the county; and, although there is some reason in the claim that when the term 'county court' is used as to fiscal matters it refers to the fiscal court, yet, as a general rule, when reference is made to a county court, or the action of a county court, it means a court presided over by the county judge alone, and should be held to so mean when used in connection with fiscal matters if it relates to mere ministerial duties. Moreover, in this instance the direction of the Legislature to the county court to do these ministerial acts was imperative; and it is, therefore, immaterial whether it was done by the county judge alone or by him and the justices, even admitting (as we do not) that a *bona fide* holder of the bonds can be affected by such matters."

Taking these decisions as the basis upon which to rest our judgment in this case, it only remains to inquire whether the provisions of the Act of February 24, 1868, are mandatory in their character, or only invested the county court with a discretion in respect to the material matters involved in the subscription by Muhlenburg County. When the railroad company requests the county court of any county, through or adjacent to which it is proposed to construct the road, to subscribe, either absolutely or conditionally, a specified amount to its stock, the Act provides that "the county court shall forthwith order an election to be held," etc. The sections authorizing subscriptions by precincts, cities or towns are equally imperative. Secs. 5 and 6. When a county * * * subscribes under the provisions of the Act, "it shall be the duty [361] of the county court * * * to issue the bonds of such county," etc., to be signed by the "county judge and countersigned by the clerk." Sec. 7. In case of a subscription by an election district in any county, "it shall be the duty of the county court of such county to issue the

bonds of such district or districts in payment thereof," etc. Sec. 8. We have already referred to the ninth section, which provides that, upon a subscription by any county, "it shall be the duty of the county court of such county * * * to cause to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued and the cost of collecting such tax and paying the interest, on all real estate and personal property in said county," etc. On levying a tax as provided in the Act, to pay the interest on bonds issued by a county, "it shall be the duty of the county court * * * to appoint three resident taxpayers * * * who shall be styled the board of commissioners of the sinking fund of such county." Sec. 10. If dividends upon the stock subscribed prove to be insufficient to enable the county to pay its bonds at maturity, new bonds may be issued; but if the county deems that course inexpedient, "it shall be the duty of the county court * * * to cause a tax to be levied and collected on all property in such county * * * subject to taxation," etc. And so of all the remaining sections of the company's charter.

It would be difficult, we think, to frame an Act more mandatory in its character than that of February 24, 1868. None of its provisions leave room for the exercise of discretion by the county court, in respect to any matter upon which it is required to act. The learned court below announced that, except for the fourth section of this Act, it would decide—following the decisions in *Bowling Green & Madisonville R. Co.* and *Logan County* v. *Caldwell*—that the "county court" in the company's charter meant a court held by the presiding judge alone. That section provides: "4. That the person acting as sheriff at the several precincts shall return to the clerk of the county court within (three) days after the day of such election the poll books of their respective precincts, and on the next day thereafter the county judge and county clerk shall count the vote; and if it shall appear that the majority of those voting voted in favor of the subscription of stock as proposed, the county judge shall order the vote to be entered on the record, and the subscriptions to be made by the clerk on behalf of the county on the terms specified in the order submitting the question to a vote."

We are unable to concur in the suggestion that the use of the words "county judge," in the fourth section of the Act, in connection with the direction that the vote be entered on the record (that is, upon the records of the county court) is inconsistent with the idea that "county court," as used in the company's charter, meant merely the county court, held by the judge thereof. As the counting must have been by individuals, not by a court, the requirement that the county clerk and county judge should perform that duty, and that the latter should cause the result to be entered on the records of the court, does not, we think, show an intention to invest the county court with any discretion whatever in ordering the election, or in issuing the bonds, or in levying taxes to pay the bonds and the interest thereon. In the absence of that discretion, it is the duty of the county court, held by the presiding judge alone, to levy the required tax. Such was the decision in *Cook* v. *Lyon County*, to which the attention of the court below does not appear to have been called.

The counsel for the defendant in error refer to section 2, article XVII, chapter 28 of the General Statutes, 806, in force since December 1, 1873, which provides that "If, under the provisions of any law hereafter enacted, it is required of the county court to submit to the qualified voters of the county, or to the qualified voters of any local community therein, the proposition to take stock in any or to levy any tax other than for common-school purposes; or, if, under any law hereafter enacted, it is required that the county court shall decide upon the issue of any bonds of the county, or of any district or local community therein, to any railroad or other company, it shall be the duty of the county judge to cause all the justices of the peace of such county to be summoned to attend at the term of the court at which any such action is proposed to be taken, who shall be associated with the county judge and constitute the county court for the occasion." [363]

It is sufficient to say that, as that provision, by its terms, only applies to laws "hereafter enacted," that is, enacted after the General Statutes went into operation, it cannot affect the present case, which depends upon the construction to be given to an Act passed in 1868.

As the court below erred in sustaining the demurrer to the original petition, *the judgment is reversed, with directions to overrule that demurrer, and for such other proceedings as may be consistent with this opinion. Reversed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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BARTHOLD SCHLESINGER ET AL., Copartners, under the Style of NAYLOR & CO., *Plffs. in Errr.*, [264]

v.

ALANSON W. BEARD, Collector of Customs.

SAME *v.* UNITED STATES.

(See S. C. Reporter's ed. 264-268.)

Duties—"wrought scrap iron"—punchings and clippings of boiler plates and ends of boiler rods and beams, dutiable as—"actual use."

1. The duty on "scrap iron" is now laid without reference to whether it is new or old; and all waste or refuse iron is scrap iron if it has been in actual use, and is only fit for remanufacture.

2. Punchings and clippings of wrought iron boiler plates, resulting from the manufacture of boilers from such plates, and ends of bridge rods and beams of wrought iron, have been "in actual use" within the meaning of the statute, and are dutiable as "wrought scrap iron."

[Nos. 129, 180.]

Argued Jan. 15, 1887. Decided Jan. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **William S. Hall** and **L. S. Dabney**, for plaintiffs in error.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These cases involve substantially the same questions, and may be considered together. One is a suit by Naylor & Co., importers, against Beard, the Collector of Customs in Boston, to recover back duties alleged to have been illegally exacted; and the other is a suit by the United States against the same importers, to recover additional duties assessed on the liquidation of an entry after the delivery of the goods upon payment of estimated duties.

265] The facts are these: in October, 1879, Naylor & Co. imported into the Port of Boston from England 170 tons of wrought scrap iron, consisting "of the punchings and clippings of wrought iron boiler plates and wrought sheet iron, left after the process of the manufacture of the boiler plates into boilers was completed, and of the ends of bridge rods and beams of wrought iron, cut off to bring the rods and beams to the required length, and to remove imperfections." When the entry was made at the custom house the duties were estimated upon the whole at the rate of $8 per ton. On the payment of this estimate the iron was delivered to the importers. Afterwards, 263,332 pounds were classified by the customs officers as "new wrought scrap iron," and an additional duty of $1,611.92 charged thereon. For the recovery of this amount the suit in favor of the United States was brought.

In November, 1879, the same parties imported from England 200 tons of wrought scrap iron, consisting entirely of punchings and clippings, such as are described above. Upon this entry 280,995 pounds were classified as "old wrought scrap iron," and charged with duty at the rate of $8 per ton, and 138,400 pounds as "new wrought scrap iron," and charged at the rate of one cent a pound. The importers paid the duties assessed under protest as to the last item, and then sued to recover back $889.70, the difference between the duties at $8 per ton and the amount actually paid.

It was agreed that the punchings, clippings, and ends were all waste iron and incapable of being further used, and that they were only fit for remanufacture. The only actual use to which they had been subjected was in the making of boilers from the plates, out of which they had been cut in the process of manufacture, and in the building of bridges of which the rods and beams that had been cut to adapt them to their places formed a part. The importer claimed that all were dutiable as "wrought scrap iron," under schedule E of section 2504 of the Revised Statutes, p. 466; while the Collector claimed that the part classified as "new wrought scrap iron" was subject to a duty of one cent a pound, as "iron less finished than iron in bars and more advanced than pig iron," because it had not been in "actual use."

[266] The court below gave judgment in each of the suits against the importers, to reverse which these writs of error were brought.

The provisions of the Tariff Act on which the cases depend are the following clauses in schedule E of section 2504 of the Revised Statutes:

1. (p. 467.) "But all iron in slabs, blooms, loops, or other forms, less finished than iron in bars, and more advanced than pig iron, except castings, shall be rated as iron in bars, and pay a duty accordingly," *i. e.*, one cent per pound.

2. (p. 469.) "Cast scrap iron of every description: six dollars per ton.

"Wrought scrap iron of every description: eight dollars per ton. But nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured."

This particular form of provision as to scrap iron, both cast and wrought, appeared for the first time in the Act of July 14, 1870, chap. 255, § 21, 16 Stat. at L. 264, from which it was carried into the Revised Statutes. The earlier statutes were as follows:

1. An Act of July 14, 1832, chap. 227, § 2, clause 13, 4 Stat. at L. 588: "That all scrap and old iron shall pay a duty of twelve dollars and fifty cents per ton; that nothing shall be deemed old iron that has not been in actual use and fit only to be remanufactured; and all pieces of iron, except old, of more than six inches in length, or of sufficient length to be made into spikes and bolts shall be rated as bar, bolt, rod, or hoop iron, as the case may be, and pay duty accordingly."

2. An Act of August 30, 1842, chap. 270, § 4, clause 8, 5 Stat. at L. 552, which is substantially the same as the Act of 1832, excepting only that the duty is reduced to $10 per ton.

3. An Act of July 30, 1846, chap. 74, § 11, schedule 6, 9 Stat. at L. 45, which places among articles subject to a duty of 30 per cent ad valorem, "iron in bars, blooms, bolts, loops, pigs, rods, slabs, or other form not otherwise provided for; castings of iron; old or scrap iron."

4. An Act of March 2, 1861, chap. 68, § 7, clause 3, 12 Stat. at L. 181: "On old scrap iron, six dollars per ton; *Provided*, That nothing shall be deemed old iron that has not been in [267] actual use and fit only to be remanufactured."

5. An Act of June 30, 1864, chap. 171, § 3, 13 Stat. at L. 205, which is in the exact language of the Act of 1861, except that the duty is raised from $6 to $8 per ton.

It thus appears that in 1870 the form of the statutes on this subject was materially changed, and that now the duty is laid upon "scrap iron," without any reference to whether it is new or old, and that all waste or refuse iron is scrap iron, if it has been in actual use, and is only fit for remanufacture.

That the iron now under consideration was waste iron is conceded; and in our opinion it had been "in actual use" within the meaning of that term as employed in the statute. At one time it formed part of boiler plates used in the manufacture of boilers, or of rods or beams used in building bridges. In order to fit the plates, rods or beams to the places they were to occupy in the structures of which they were to form a part, these pieces were cut off as useless, and thrown away, or, in the language of the trade, "into the scrap heap." They had become, by the use to which they were put, "scrap iron," in the popular sense of that term, and nothing else. It is true the cuttings and clippings had never themselves been used in the boilers or in the bridges, but they had been used in making those structures, and thus had accomplished the purpose for which they

were originally manufactured. The plates, rods and beams of which they were once parts had been used, and these were the waste resulting from that use. They are not old in the sense of having been worn by use, but they are scrap, and no longer capable of any use until remanufactured, because in their use they have been rendered worthless for any purpose except to remanufacture. In the popular sense, as manufactured articles, they have been used up—made worthless by use; and this use has been actual, not colorable only. The plates, rods and beams were made to be used in a particular way. They have been so used, and these cuttings and clippings are the waste of that use. Consequently they are, in our opinion, "wrought scrap iron," and dutiable as such.

[268] *The judgment in each of the cases is reversed, and the causes remanded, with instructions to enter judgment upon the agreed facts in favor of the importers in the suit against the Collector and against the United States in the suit against the importers.*

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[271] ALBERT GRANT, *Appt.*,

v.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

SAME ET AL.

v.

SAME.

(See S. C. Reporter's ed. 271-273.)

Foreclosure of mortgage—order requiring receiver of rents to pay costs in this court—counsel fees.

On appeal from a judgment foreclosing a mortgage this court orders a receiver for the collection of the rents of the mortgaged premises during the pendency of the suit, to pay to the clerk the estimated balance of his fees and for the printer for the printing the record.

[Nos. 165, 1201.]

Submitted Jan. 17, 1887. Decided Jan. 31, 1887.

APPEALS from the Supreme Court of the District of Columbia.

On motion for the payment of costs and counsel fees out of the moneys in the hands of the receiver.

No. 165, the principal cause, is a foreclosure proceeding in which a receiver was appointed by the court below to collect the rents of the mortgaged premises pending the suit.

The other appeal is a collateral proceeding arising from the refusal of the tenant of part of said mortgaged premises to pay rent to said receiver, the appeal being from an order of the court below requiring him to make such payment.

The appellant, Grant, seeks by the present motion an order requiring the receiver to pay over to him from the funds in his hands the sum of $5,500 for the payment of costs and counsel fees.

Mr. **H. W. Blair**, for appellant, in support of motion.

Messrs. **W. F. Mattingly** and **M. F. Morris**, for appellee, *contra.*

Mr. Chief Justice **Waite** delivered the opin [272] ion of the court:

We find that the cost of printing the record in No. 165 has been $1,327 00
and that the estimated clerk's fees in the same case are..... 900 00

In all.....$2,227 00
Of this the appellant has paid:
1. To the printer.....$552
2. To the clerk..... 400 952 00

Leaving a balance of.....$1,275 00

which the appellant represents himself as unable to pay; and the printer will not allow the requisite number of the printed copies to be delivered for use at the hearing until his claim is satisfied. The money in the hands of the receiver has been collected from the rents of the mortgaged property during the pendency of the suit. We therefore direct that there be paid by the receiver to the clerk of this court the sum of $1,275, to be by him used in payment of the amount now due for printing the record, and the amount of his own taxable fees in the case, not already paid by the appellant. A [273] copy of this order may be certified to the court below so that it may be carried into effect by an appropriate order of that court upon the receiver.

The motion papers now on file do not show that the matters involved in the appeal in No. 1201 are of a character to make it proper to direct that the clerk's costs and the expense of printing the record in that case be paid by the receiver. Except as to the payment of clerk's fees and printer's charges in No. 165 as above, *the motions are overruled.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

In Parte:

In the Matter of LORENZO SNOW, *Petitioner, Appt.* [27

Criminal law—cohabitation, a continuing offense—separate indictments, convictions and sentences—jurisdiction—habeas corpus—appeal.

(See S. C. Reporter's ed. 274-287.)

1. A continuing offense, such as that of cohabiting with more than one woman in the sense of section 3 of the Act of March 22, 1882, can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted.

2. A grand jury cannot divide a continuous offense, arising under said Act of 1882, into arbitrary parts, call each part a separate offense, and find separate indictments therefor.

3. In the case presented there were three separate convictions on three separate indictments, charging the accused with unlawful cohabitation with the same seven women. Said indictments were found by the same grand jury, at the same time, and on the same testimony of the same witnesses, covering a continuous period of thirty-five months.

Held: that the court was without jurisdiction to inflict a punishment in respect of more than one of said convictions; that, the want of jurisdiction appearing on the face of the judgment, the objection may be taken on *habeas corpus*; and that under section 1909 R. S., an appeal lies to this court from the order and judgment of the District Court of Utah, refusing to issue said writ.

Ex parte Bigelow, Ex. 28, distinguished.

[No. 1282.]

Argued Jan. 20, 21, 1887. Decided Feb. 7, 1887.

APPEAL from the Third Judicial District Court, Salt Lake County, Territory of Utah. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George Ticknor Curtis** and **Franklin S. Richards**, for appellant:

When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon *habeas corpus*, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner.

Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 131 (18: 281, 299); *Tweed* v. *Liscomb*, 60 N. Y. 559, and cases there cited; *Lamphere's Case*, 27 N. W. (Mich.) 882; Church, Habeas Corpus, §§ 348, 362, 363.

In all courts having the power to issue writs of *habeas corpus* to inquire into a cause of commitment and imprisonment, a refusal to issue the writ is of the same legal effect and the same error as if the writ had been issued, and upon its return, the petitioner had been remanded, when the petition shows a legal cause for a discharge from custody.

Ex parte Milligan, supra.

The cohabitation having been continuous, covering every day of the entire time charged in the three indictments, from January 1, 1883, to December 1, 1885, and having been with the same women and at the same place, was one continuous indivisible transaction, and could constitute but one offense. The principle involved has been applied in numerous adjudicated cases which are analogous to this.

1 Whart. Crim. Law, § 931, 9th ed.; *Reg.* v. *Firth*, L. R. 1 C. C. 172; *Reg.* v. *Bleasdale*, 2 Carr. & K. 765; *Oreppe* v. *Durden*, 2 Cowp. 640; *U. S.* v. *M'Cormick*, 4 Cranch, C. C. 104; *State* v. *Lindley*, 14 Ind. 430; *State* v. *Nutt*, 28 Vt. 598; *Mayor* v. *Ordronaux*, 12 Johns. 122; *Sturgis* v. *Spofford*, 45 N. Y. 446; *Fisher* v. *N. Y. C. & H. R. R. R. Co.* 46 N. Y. 644; *State* v. *Comrs.* 2 Murph. 371; *State* v. *Egglesht*, 41 Iowa, 574.

In the case of *Commonwealth* v. *Connors*, 116 Mass. 35, relied on by the prosecutor in the trial court, and in the court below, it is held that, as the indictments covered two distinct periods of time, and as the "evidence that would have been competent on the one indictment would not have been competent on the other, and the same evidence could not convict in both cases," both indictments might stand. This rule of law—that "Where the offense consists of a series of acts which, taken together, constitute a criminal practice or occupation, time enters into the essence of the offense; and hence, it must be alleged with certainty, and evidence confined to acts done within the time charged—" does not prevail elsewhere than in Massachusetts. In Utah the evidence need not be confined to the period named in the indictment.

U. S. v. *Cannon*, 7 Pac. Rep. 379.

The rule there permitted the prosecution to introduce, on each trial, all the evidence of a continuous cohabitation during the entire time charged in the three indictments. This extreme injustice could not possibly have happened under the Massachusetts rule.

Commonwealth v. *Robinson*, 126 Mass. 261.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for the United States:

It is not pretended that the court that tried these cases had no jurisdiction of the offense of cohabiting with more than one woman.

The whole contention is that the judgments in the second and third cases were void because the indictments in those cases charged the same identical offense as was charged in the first case.

But if the court had jurisdiction over the offense, it had also jurisdiction to decide the question of the identity of the offenses charged in the three cases which were raised in the plea of *autrefois convict* in the second and third cases.

Jurisdiction of an offense necessarily carries with it the power to try and determine every matter that may be urged in bar of an indictment charging such offense. There can be no room for doubt or hesitation as to the soundness of this proposition, which has been repeatedly recognized by this court in several cases which are absolutely conclusive of the case at bar.

Ex parte Bigelow, 113 U. S. 328 (28:1005); *Ex parte Parks*, 93 U. S. 18 (23:787); *Ex parte Watkins*, 28 U. S. 3 Pet. 193, 202 (7:650, 653); *Ex parte Yarbrough*, 110 U. S. 651, 653 (28:274); *Ex parte Crouch*, 112 U. S. 178 (28:690); *Ex parte Royall*, Id. 181 (28:690); *Ex parte Gordon*, 104 U. S. 516 (26:814); *Smith* v. *Whitney*, 116 U. S. 167 (29:601).

In this last cited case the attempt was to make the writ of prohibition do the office of a writ of error, as in the other cited cases it had been to make the writ of *habeas corpus* perform that function.

The case at bar is but a repetition of these abortive efforts to induce this court on *habeas corpus* to look into the validity of judgments of other courts of competent jurisdiction, which are only voidable and reviewable on writ of error, if voidable and reviewable at all.

The appellant made the endeavor to bring all three of his cases before this court by writ of error, but failed.

Snow v. *U. S.* 118 U. S. 346 (*ante*, 207).

His present attempt is to do *per indirectum* what he could not do *per directum*. This the law will not allow.

Mr. Justice **Blatchford** delivered the opinion of the court: [275]

Section 3 of the Act of Congress approved March 22, 1882, chap. 47, 22 Stat. at L. 31, provides as follows: "Sec. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." [276]

The grand jury of the United States for November Term, 1885, in the District Court of the

First Judicial District in and for the Territory of Utah, on the 5th of December, 1885, presented and filed in that court, in open court, three several indictments, in the name of the United States, against Lorenzo Snow, each of them found December 2, 1885, designated as No. 741, No. 742, and No. 743. Each of them was founded on the foregoing statute; and they were alike in all respects, except that each covered a different period of time. No. 741 alleged that Snow, on the 1st of January, 1883, "at the County of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1883, and the thirty-first day of December, A. D. 1883, did then and there unlawfully live and cohabit with more than one woman; to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives." No. 742 alleged that Snow, on the first of January, 1885, "and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1885, and the first day of December, A. D. 1885, did then and there unlawfully live and cohabit with more than one woman; to wit, with" the seven persons above named, "and during all the period aforesaid" "did unlawfully claim, live, and cohabit with all of said women as his wives." No. 743 alleged that Snow, on the 1st of January, 1884, 'and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1884, and the thirty-first day of December, A. D. 1884, did then and there unlawfully live and cohabit with more than one woman; to wit, with" the seven persons above named, "and during all the period aforesaid" [277] "did unlawfully claim, live, and cohabit with all of said women as his wives."

At the time of filing each indictment it was properly indorsed "a true bill, etc., and with the names of the witnesses." The same sixteen witnesses were examined before the grand jury, "on one oath and one examination as to the alleged offense during the entire time mentioned in all of said three indictments, and" they were found "upon the testimony of witnesses given on an examination covering the whole time specified in said three indictments." On the 11th of December, 1885, the defendant was arraigned on each of the three indictments, and interposed a demurrer to each, which being overruled, he pleaded not guilty to each.

Indictment No. 742 was first tried, covering the period from and including January 1, 1885, to December 1, 1885. On the 31st of December, 1885, a verdict of guilty was rendered, and the court fixed the 16th of January, 1886, as the time for passing sentence.

Indictment No. 743 was next tried, covering the period from and including January 1, 1884, to December 31, 1884. The defendant orally put in an additional plea in bar, setting up his prior conviction on indictment No. 742; and that the offense charged in all of the indictments was one continuous offense and the same offense, and not divisible. On an oral demurrer to this plea, the demurrer was sustained. On the trial by the jury, a verdict of guilty was rendered on the 5th of January, 1886, and the court fixed the 16th of January, 1886, as the time for passing sentence.

Indictment No. 741 was next tried, covering the period from and including January 1, 1883, to December 31, 1883. The defendant orally put in an additional plea in bar, setting up his prior convictions on indictments Nos. 742 and 743; and that the offense charged in all of the indictments was one continuous offense, and the same offense, and not divisible. On an oral demurrer to this plea, the demurrer was sustained. On the trial by the jury, a verdict of guilty was rendered on the 5th of January, 1886, and the court fixed the 16th of January, 1886, as the time for passing sentence.

The record of the court states that on the last-named day the following proceedings took place, in open court: [278]

"(Title of Court and Cause.)

"The defendant and his counsel, F. S. Richards and C. C. Richards, Esq'rs (of counsel), came into court. The defendant was duly informed of the nature of the indictments found against him on the 5th day of December, 1885, by the grand jury of this court, for the crime of unlawful cohabitation, committed as stated in said indictments, and during the time, as follows, viz: Indictment No. 741, between the first day of January, A. D. 1883, and the thirty-first day of December, A. D. 1883; indictment No. 742, between the first day of January, A. D. 1885, and the first day of December, A. D. 1885; indictment No. 743, between the first day of January, A. D. 1884, and the thirty-first day of December, A. D. 1884; of his arraignment and plea of not guilty as charged in said three indictments, on the sixteenth day of December, A. D. 1885; of his trial and the verdicts of the juries; indictment No. 742, 'Guilty as charged in the indictment,' on December 31, 1885; indictment No. 743, 'Guilty as charged in the indictment,' on January 5, 1886; indictment No. 741, 'Guilty as charged in the indictment,' on January 5, 1886.

"The said defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that *whereas*, said Lorenzo Snow having been duly convicted in this court of the crime of unlawful cohabitation:

"*It is ordered, adjudged and decreed*, that said Lorenzo Snow be imprisoned in the penitentiary of the Territory of Utah for a period of six months, and that he do forfeit and pay to the United States a fine of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the U. S. Marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 741.)

"*And it is further ordered, adjudged and* [279] *decreed*, that at the expiration of the sentence and judgment rendered on said indictment No. 741, said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to

the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the U. S. marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 742.)

"*And it is further ordered, adjudged and decreed*, that at the expiration of the sentence and judgment, as last above rendered, on said indictment No. 742, said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the U. S. marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 743.)

"The said defendant Lorenzo Snow, is remanded into the custody of the United States Marshal for Utah Territory, to be by him delivered into the custody of the warden or other proper officer in charge of said penitentiary; and said warden or other proper officer of said penitentiary is hereby commanded to receive of and from the said United States Marshal, him, the said Lorenzo Snow, convicted and sentenced as aforesaid, and him, the said Lorenzo Snow, keep and imprison in said penitentiary for the periods as in this judgment ordered and specified.

ORLANDO W. POWERS, *Judge*."

On the 22d of October, 1886, the defendant filed in the District Court of the Third Judicial District of the Territory of Utah a petition setting forth that he is a prisoner confined in the penitentiary of the Territory of Utah, "by virtue of the warrant, judgment and proceedings of record, including three indictments against your petitioner, his arraignment thereon, and pleas thereto, respectively, as well as demurrers to such pleas, decisions thereof and [280] verdicts of the jury, being the record of said matters in the District Court of the First Judicial District of the Territory of Utah," copies of all which papers, sixteen in number, were annexed to the petition; that, under said judgment, and in execution thereof, he had been imprisoned in said penitentiary for more than six months; to wit, continuously since the 12th day of March, 1886, and had paid $300 in satisfaction of the fine adjudged against him, and "all the costs awarded and assessed against him on said prosecution;" that his imprisonment is illegal in that "the court had no jurisdiction to pass judgment" against him "upon more than one of the indictments or records referred to in its said judgment; for the reason that the offense therein set out is the same as that contained and set out in each of the other said indictments and records, and the maximum punishment which the court had authority to impose was six months' imprisonment and a fine of three hundred dollars;" and "that by his said imprisonment your petitioner is being punished twice for one and the same offense." The prayer is for a writ of *habeas corpus*, to the end that the petitioner may be discharged from custody.

On a hearing on the petition the following order was made by the court on the 23d of October, 1886:

"The petition of Lorenzo Snow for a writ of *habeas corpus* having been presented to the court, with the exhibits attached as a part thereof, and the court, having fully considered the application and petition and the exhibits attached, finds that the facts alleged and shown by the petition and exhibits are insufficient to authorize the issuance of the writ; and the court being of the opinion, from the allegations and facts stated in the petition and exhibits, that, if the writ be granted and a hearing given, the petitioner could not be discharged from custody, it is ordered and adjudged by the court that the said application for a writ of *habeas corpus* be, and the same is hereby, refused; to which ruling and refusal applicant, by his counsel, excepts."

From this order and judgment the petitioner has appealed to this court.

There can be no doubt that the action of the district court, as set forth in its order and judgment refusing to issue the writ, was, so far as [281] an appeal is concerned, equivalent to a refusal to discharge the petitioner on a hearing on the return to a writ; and that, under section 1909 of the Revised Statutes, an appeal lies to this court from that order and judgment.

It is contended for the United States that, as the court which tried the indictments had jurisdiction over the offenses charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceeding; that they cannot be reviewed on *habeas corpus*, by any court; and that they could only be re-examined here on a writ of error, if one were authorized. For these propositions the case of *Ex parte Bigelow*, 113 U. S. 328 [28: 1005], is cited. But, for the reasons hereafter stated, we are of opinion that the decision in that case does not apply to the present one.

The offense of cohabiting with more than one woman, in the sense of the section of the statute on which the indictments were founded, may be committed by a man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration, and not an offense consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named and "thereafter and continuously," for the time specified, "live and cohabit with more than one woman; to wit, with" the seven women named, and "during all the period aforesaid" "did unlawfully claim, live and cohabit with all of said women as his wives." Thus, in each indictment, the offense is laid as a continuing one, [282] and a single one, for all the time covered by the indictment; and taking the three indictments together, there is charged a continuing offense for the entire time covered by all three of the

indictments. There was but a single offense committed prior to the time the indictments were found. This appears on the face of the judgment. It refers to the indictments as found "for the crime of unlawful cohabitation committed" "during the time" stated, divided into three periods, according to each indictment. For so much of the offense as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted. Here each indictment charged unlawful cohabitation with the same seven women; all the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more. It was quite in consonance with this action that the prosecuting officer tried the indictments in the inverse order of the time to which each related, that for 1885 first, that for 1884 next, and that for 1883 last. Hence the defendant could not, on any trial plead or show that he had before been tried on an indictment in respect to a period of time antedating that laid in the indictment on trial. Then, after the verdicts, there [283] was not a separate judgment in each case; but only one judgment in form was rendered for all the cases. The judgment says, on its face, that the proper officer of the penitentiary is to imprison the defendant therein "for the periods as in this judgment ordered and specified," that is, for three successive periods of six months each, the first period to apply to the indictment thirdly tried; the second period to apply to the indictment first tried, and to begin when the sentence and judgment on the indictment thirdly tried should expire; and the third period to apply to the indictment secondly tried, and to begin when the sentence and judgment on the indictment first tried should expire.

No case is cited where what has been done in the present case has been held to be lawful. But the uniform current of authority is to the contrary, both in England and in the United States.

A leading case on the subject in England is *Crepps* v. *Durden*, 2 Cowp. 640. In that case the statute, 29 Car. II, c.7, provided "That no tradesman or other person shall do or exercise any worldly labor, business, or work of their ordinary calling on the Lord's Day, works of necessity and charity only excepted." A penalty of five shillings was affixed to each offense, and it was made cognizable by a justice of the peace. Crepps, a baker, was convicted before Durden, a justice, by four separate convictions, "of selling small hot loaves of bread, the same not being any work of charity, on the same day, being Sunday," in violation of that statute. Durden issued four warrants, one on each conviction, to officers who, under them, levied four penalties, of five shillings each, on the goods of Crepps. The latter sued Durden and the others, in trespass, in the King's Bench, in 1777, and had a verdict before *Lord* Mansfield, for three sums of five shillings each, subject to the opinion of the court. The first question raised was whether, in the action of trespass, and before the convictions were quashed, their legality could be objected to; and, next, whether the levy under the last three warrants could be justified. It was contended for the plaintiff that the last three convictions were in excess of the jurisdiction of the justice, because the offense created by the [284 statute was the exercising of a calling on the Lord's Day, and if the plaintiff had continued baking from morning till night, it would still be but one offense; that the four convictions were for one and the same offense; and that an action would lie against the justice and the officers. On the other side it was urged that, as the justice had general jurisdiction of the offense in question, the convictions must be quashed, or reversed on appeal, before they could be questioned. At a subsequent day, the unanimous opinion of the court was delivered by *Lord* Mansfield. He first considered the question whether the legality of the convictions could be objected to before they were quashed As to this he said: "Here are three convictions of a baker, for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on the identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end of the question; for there is no penalty at common law. On the construction of the Act of Parliament the offense is 'exercising his ordinary trade upon the Lord's Day;' and that without any fractions of a day, hours or minutes. It is but one entire offense, whether longer or shorter in point of duration; so, whether it consists of one, or of a number of particular acts. The penalty incurred for this offense is five shillings. There is no idea conveyed by the Act itself that, if a tailor sews on the Lord's Day, every stitch he takes is a separate offense; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day. And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day. Killing a single hare is an offense; but the killing ten more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here, repeated offenses are not the object which the Legislature had in view in making the statute; but singly, to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the three last convictions. How, then, can there be a doubt but that the plaintiff might take this objection

at the trial?" As to justifying the levy under the last three warrants, *Lord* Mansfield said: "But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: That because the plaintiff had been convicted of one offense on that day, therefore the justice had convicted him in three other offenses for the same act. By law that is no justification. It is illegal on the face of it; and, therefore, as was very rightly admitted by the counsel for the defendant, in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged. Most clearly, then, it was open to the plaintiff, upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that respect they should all four be held bad. But it goes upon the ground that the offense itself can be committed only once in the same day."

In the case at bar the statute provides that if any male person shall thereafter cohabit with more than one woman, he shall, on conviction, be punished thus and so. The judgment in the case, taken in connection with the other proceedings in the record and the statute, shows, within the principle of *Creppe* v. *Durden*, that there was but one entire offense, whether longer or shorter in point of duration, between the earliest day laid in any indictment and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on *habeas corpus*, when the sentence on more than one of the convictions is sought to be enforced. If such an objection could be taken in *Creppe* v. *Durden*, in a collateral action for damages, it can be taken on a *habeas corpus* [286] to release the party from imprisonment under the illegal judgment. These considerations distinguish the case from that of *Ex parte Bigelow*, *ubi supra*, and bring it within the principle of such cases as *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 131 [18:281, 299]; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 178 [21:872, 879]; and *Ex parte Wilson*, 114 U. S., 417 [29:89].

A distinction is laid down in adjudged cases and in text writers between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed *uno ictu*. The subject is discussed in 1 Wharton's Criminal Law, 9th ed. sections 27, 961, and the cases on the subject are cited.

The principle which governs the present case has been recognized and approved in many cases in the United States: *Washburn* v. *McIlvoy*, (1810) 7 Johns. 134; *Mayor* v. *Ordronaux*, (1815) 12 Johns. 122; *Tiffany* v. *Driggs*, (1816) 13 Johns. 253; *State* v. *Comrs.* (1818) 2 Murph. 371; *U. S.* v. *M'Cormick* (1830), 4 Cranch, C. C. 104; *State* v. *Nutt* (1856), 28 Vt. 598; *State* v. *Lindley* (1860), 14 Ind. 430; *Sturgis* v. *Spofford* (1871), 45 N. Y. 446; *Fisher* v. *N. Y. C. & H. R. R. R. Co.* (1871) 46 N. Y. 644; *State* v. *Egglesht* (1875), 41 Iowa, 574; *U. S.* v. *N. Y. Guaranty & Indemnity Co.* (1875) 8 Ben. 269; *U. S.* v. *Erie R. Co.* (1877) 9 Ben. 67, 68.

The case of *Commonwealth* v. *Connors*, 116 Mass. 35, gives no support to the view that a grand jury may divide a single continuous offense, running through a past period of time, into such parts as it may please, and call each part a separate offense. On the contrary, in *Commonwealth* v. *Robinson*, 126 Mass. 259, it is said that the offense of keeping a tenement for the illegal sale of intoxicating liquors on a day named, and on divers other days and times between that day and a subsequent day, is but one offense, even though the tenement is kept during every hour of the time between those two days, such offense being continuous in its character.

On the whole case we are unanimously of opinion that the order and judgment of the District Court for the Third Judicial District of Utah Territory must be reversed and the case be remanded to that court, with a direction to grant the writ of habeas corpus prayed for, and to take [287] *such proceedings thereon as may be in conformity with law and not inconsistent with the opinion of this court.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PENSACOLA ICE COMPANY, *Plff. in Err.*, [318]
v.
DAVID PERRY.

(See S. C. Reporter's ed. 318, 319.)

Ejectment—defective verdict.

In an action of ejectment a verdict for the plaintiff which does not state the quantity of the estate or describe the land will not sustain a judgment in his favor.

[No. 100.]

Submitted Dec. 20, 1886. Decided Feb. 7, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida. *Reversed.*

The case appears in the opinion.

Messrs. **C. W. Jones** and **Wm. A. Blount**, for plaintiff in error.

Mr. **E. A. Perry**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

A Statute of Florida, approved February 22, 1881, contains the following provisions: [319]

"Sec. 4. The verdict in actions of ejectment shall, when for the plaintiff, state the quantity of the estate of the plaintiff, and describe the land by its metes and bounds, by the number of the lot or other certain description.

"Sec. 5. The judgment awarding possession shall, in like manner, state the quantity of the estate, and give description of the land recovered."

This was an action of ejectment, and the verdict, which was for the plaintiff, did not state the quantity of the estate or describe the land. This is assigned for error, among others, and Perry, the defendant in error, in the brief which has been filed in his behalf, confesses that

the judgment in his favor is thereby vitiated. Without considering any of the other errors assigned, therefore, *we reverse the judgment on this ground alone and remand the cause for a new trial.*

Reversed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[327] UNITED STATES, *Plff.*,

v.

STEPHEN A. NORTHWAY.

(See S. C. Reporter's ed. 327-336.)

Criminal law—embezzlement, misapplication and abstraction of funds of national banking association—indictment under section 5209 R. S.—sufficiency of various counts—certificate of division in opinion.

1. Upon a certificate of division in opinion between the judges of the circuit court, this court declines to answer the question whether either of several counts in an indictment charges an offense under the laws of the United States, because too vague and general.

2. An allegation in the indictment charging the defendant with committing the acts therein charged against him, as "president and agent" of a national bank, is neither too uncertain nor contradictory.

3. A willful and criminal misapplication of the funds of a national banking association, as defined by section 5209 Revised Statutes, may be made by an officer or agent thereof without having previously received them into his manual possession. There is a distinction between said offense and embezzlement. In the former it is unnecessary to charge possession in the indictment; while in the latter, a charge of possession is required in describing the offense.

4. In an indictment charging the president of a national banking association with aiding and abetting the cashier in the misapplication of its funds, it is unnecessary to charge him with knowledge of the official character of the cashier.

5. To constitute the offense of abstracting the funds of a national banking association, within the meaning of said section, it is necessary that the funds of the association should be abstracted without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer thereof, or an agent appointed to examine its affairs.

6. The offense of abstracting the funds of such an association is not necessarily equivalent to the offense of larceny. The word "abstract," as used in the statute, has but one meaning, being that which is attached to it in its ordinary and popular use; and it is to be accepted with that meaning in framing an indictment.

7. The allegation in the indictment in question, that the defendant "was then and there president and agent of a certain national banking association * * * theretofore duly organized and established * * * under the laws of the United States," sufficiently states that said association was organized under the National Banking Act and to carry on business under the laws of the United States.

[No. 1064.]

Argued Jan. 4, 5, 1887. Decided Feb. 7, 1887.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Ohio.

The facts and case appear in the opinion.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for the United States.

Messrs. **A. J. Marvin, J. B. Burrows** and *W. W. Boyington*, for defendant.

[328] *Mr. Justice* **Matthews** delivered the opinion of the court:

On the 23d of April, 1885, the grand jury for the Eastern Division of the Northern District of Ohio returned an indictment, apparently founded upon section 5209 of the Revised Statutes, against Stephen A. Northway, as president and agent of the Second National Bank of Jefferson, a national banking association. On July 13, 1885, the record was, on motion of the district attorney, remitted to the circuit court. There are fifty-nine counts in the indictment; all of these were quashed except counts 2, 12, 15, 16, 28, 30, and 46, to each of which the defendant interposed a general demurrer. This demurrer came on for hearing before the circuit court, composed of the circuit judge and the district judge for that district, who certify to us that on the hearing they were divided and opposed in opinion on the following questions.

"1. Whether either of said counts charges defendant with an offense under the laws of the United States.

"2. Whether the charging of the defendant with committing the acts therein charged against him as 'president and agent' did not vitiate said counts of said indictment.

"3. Whether, under section 5209 of the Revised Statutes of the United States, it was necessary in the indictment to charge that the moneys and funds alleged to have been embezzled and misapplied, or either, had been previously entrusted to the defendant.

"4. Whether it is necessary, in charging said defendant with aiding and abetting Sylvester T. Fuller, cashier of said bank, as in counts sixteen, twenty-eight, and forty-six, with the misapplication of the funds of said bank, to charge, that the defendant then and there knew that said Fuller was such cashier.

"5. Whether said second count sufficiently describes and identifies the crime of abstracting the funds of the bank created by the Act of Congress. [329

"6. Whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the National Banking Act, or to carry on the business of banking under a law of the United States."

Section 5209 of the Revised Statutes, under which this indictment appears to have been drawn, is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

We proceed to dispose of the several questions certified to us in their order:

1. The question whether either of said counts charges said defendant with an offense under the laws of the United States, which is the first one certified, we decline to answer, for the reason that it is too vague and general, within the Act of Congress authorizing certificates of this character and the repeated decisions of this court.

2. We are of opinion that charging the defendant with committing the acts therein charged against him as "president and agent" did not vitiate the counts of the indictment in which that description is contained. The only grounds on which the contrary conclusion [330] could be predicated are that the allegation is either too uncertain or is contradictory. The allegation is not uncertain, as it might have been if it had been "president or agent." In that case it might have been urged that as the offense was charged to have been committed by the defendant either as president or agent, it was uncertain in which of these capacities he was charged. For, although it might be said that a president is *ex officio* agent of the association, there may be many agents who are not presidents. Here the description is that he was "president and agent," and committed the offense charged in some capacity described by both terms. Neither is the description contradictory, becaused he may be both president and agent. There is no repugnance in the two characters. Even on the supposition that the statute means to make a distinction between the two offices of president and agent, there is nothing in the nature of either to prevent them both being held at the same time by one person; and the acts charged may in contemplation of law have been committed by him in both capacities.

A fortiori may this be the case, if every president of such an association is to be held by virtue of his office to be also, within the meaning of the Act, an agent of the association. In that case, the use of the words "and agent" would be mere surplusage in the indictment. Being already included within the meaning of the word "president," it does not add anything to the description to introduce the words "and agent." This question is therefore answered in the negative.

3. The twelfth count of the indictment charges that the defendant, with proper allegations of time and place, "was then and there president and agent of a certain national banking association; to wit, 'The Second National Bank of Jefferson,' theretofore duly organized and established, and then existing and doing business, in the Village of Jefferson and County of Ashtabula, in the division and district aforesaid, under the laws of the United States; and the said Stephen A. Northway, as such president and agent, then and there had and received in and into his possession certain of the [331] moneys and funds of said banking association of the amount and value of twelve thousand dollars; to wit, * * * then and there being the property of said banking association, * * * and then and there being in the possession of said Stephen A. Northway, as such president and agent aforesaid, he, the said Stephen A. Northway, then and there * * * wrongfully, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his, said Stephen A. Northway's own use," etc.

The fifteenth count is for wrongfully, unlawfully and willfully misapplying certain described funds of the bank, with intent to injure the association, and without the knowledge and consent thereof, by paying and causing to be paid to certain persons, out of the moneys, funds and credits then and there belonging to the property of the association, a large sum of money in the purchase by him, the said Northway, for the use, benefit and advantage of himself, of a large number of shares of the capital stock of certain stock companies. It is not alleged in this count that the moneys and funds so alleged to have been misapplied had previously come into the possession of the defendant by virtue of his office and character of president and agent.

In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the Act, by an officer or agent of the association.

With respect to the fifteenth count, and other similar counts charging a willful misapplication of the funds of the bank, this allegation is omitted; that is, it is not alleged that the moneys and funds charged to have been misapplied had previously come into the possession of the defendant. Neither do we think this to be necessary to a description of the offense. A willful and criminal misapplication of the [332] funds of the association may be made by an officer or agent of the bank without having previously received them into his manual possession. In the case of *The United States* v. *Britton*, 107 U. S. 655, 669 [27: 520, 525], the offense of willfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a willful and criminal misapplication of the funds, as defined by section 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication evidently not embraced within the intention of section 5209. For that reason it was held, in that case, that it was necessary to specify the particulars of the application, so as to distinguish that charged in the indictment as willful and criminal from those others contemplated by the statute, which were unlawful but not criminal; and it was held to be of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant, or of some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person. Now, if in addition it be necessary to the commission of

the offense of willfully misapplying the funds of the bank that they should have come previously into the possession of the defendant in his official capacity, so that he could be said to have been intrusted with their possession, all distinction between the offenses of willfully misapplying the funds and of embezzlement would disappear. But it is evidently the intention of the statute not to use the words "embezzle" and "willfully misapply" as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them; or by virtue of his official relation to the bank he may have such control, direction and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication. And when it is charged, as in the counts of this indictment, that he did willfully misapply certain [333] funds belonging to the association, by causing them to be paid out to his own use and benefit in unauthorized and unlawful purchases, without the knowledge and consent of the association, and with the intent to injure it, it necessarily implies that the acts charged were done by him in his official capacity, and by virtue of power, control and management which he was enabled to exert by virtue of his official relation. This, we think, completes the offense intended by the statute: of a willful misapplication of the moneys and funds of a national banking association. We therefore answer the third question in the negative.

4. The fourth question is whether it is necessary, in charging the defendant with aiding and abetting Sylvester T. Fuller, the cashier of the bank, with the misapplication of its funds, to charge that the defendant then and there knew that said Fuller was such cashier. We answer this question in the negative. The counts in question charge Fuller with having made the misapplication of the funds of the bank as cashier. They further allege that the defendant, being president and agent of the association, willfully, knowingly, and unlawfully, and with intent to injure said banking association, before the misdemeanor was committed, "did aid, abet, incite, counsel and procure the said Sylvester T. Fuller, he, the said Fuller, then and there being cashier and agent as aforesaid, so as aforesaid to wrongfully, unlawfully, and willfully misapply," etc. We do not think it is necessary, in an indictment for this offense, to charge any *scienter* more distinctly. The acts charged against Fuller could only be committed by him by virtue of his official relation to the bank; the acts charged against the defendant likewise could only be committed by him in his official capacity. Both are alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the co-existence of this official relation on the part of both towards the same corporation. It is as cashier that Fuller was aided and abetted by the defendant in the commission of his offense. This allegation necessarily imputes knowledge of his official character.

5. The second count of the indictment is for the offense of abstracting the moneys and funds of the association. In substance it charges that the defendant was president and agent of the Second National Bank of Jefferson, theretofore duly organized and established, and then existing and doing business, under the laws of the United States; and that the defendant, being president and agent as aforesaid, did then and there "willfully and unlawfully, and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his, the said Stephen A. Northway's, own use certain moneys and funds of the property of said association, of the amount and value," etc. We see no reason to doubt the sufficiency of this description of the offense. It is true that the word "abstract," as used in this statute, is not a word of settled technical meaning like the word "embezzle" as used in statutes defining the offense of embezzlement, and the words "steal, take and carry away," as used to define the offense of larceny at common law. It is a word, however, of simple, popular meaning, without ambiguity It means to take or withdraw from; so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which under this section of the statute is made the offense of criminally abstracting the funds of the bank. To constitute that offense, within the meaning of the Act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs. All these elements are contained in the description of the offense in the count in question; the count is, therefore, sufficient within the decisions of this court upon similar statutes. *U. S.* v. *Mills*, 32 U. S. 7 Pet. 138 [8: 636]; *U. S.* v. *Simmons*, 96 U. S. 360 [24: 819]; *U. S.* v. *Carll*, 105 U. S. 611 [26: 1135]; *U. S.* v. *Britton*, *supra*. [334]

Unlike the word "misapply" as used in the same section, the word "abstract" is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word "abstract," as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning in framing an indictment under the section, which is not required, in order to be sufficient, to contain more than those allegations which are necessary, when added to the allegation of abstracting, to complete the description of the offense intended by the statute. This the count in question sufficiently does. [335]

It is contended, however, on behalf of the defendant, that the offense of "abstracting" the moneys and funds of the bank under this section of the statute is exactly equivalent to the offense of larceny, and that it can only be technically and appropriately described by the words used to describe the offense of larceny;

so that the charge should have been "did abstract, take, and carry away." The answer to this point, it seems to us, is twofold. If, as is contended, an analysis of the section of the statute demonstrates that the legislative intent was simply to describe the offense of larceny by an officer or agent of the bank of its funds, then there is no ambiguity or uncertainty in using the word "abstract" in the indictment, as used in the statute, fully to describe the offense charged; for, according to the argument, it can mean nothing else, and the Legislature, by substituting the word "abstract" for the words which are required technically to describe the offense of larceny, have justified the use of the same word in the indictment. But, in the next place, we do not admit the proposition that the offense of "abstracting" the funds of the bank under this section is necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi*, the intent to deprive the owner of his property; but under section 5209 an officer of the bank may be guilty of "abstracting" the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other [336] company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs. This intent may exist in a case of abstracting without that intent which is necessary to constitute the offense of stealing. We answer the fifth question, therefore, in the affirmative.

6. The sixth question is whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the National Banking Act, or to carry on the business of banking under the laws of the United States. The language of the indictment is that the defendant "was then and there president and agent of a certain national banking association; to wit, 'The Second National Bank of Jefferson,' theretofore duly organized and established and then existing and doing business at the Village of Jefferson and County of Ashtabula, in the division and district aforesaid, under the laws of the United States."

We do not understand the necessity of this question; the allegation seems to be perfectly explicit. The defendant is charged by virtue of his office as president and agent of a national banking association; to wit, the Second National Bank of Jefferson, which, it is further alleged, had been theretofore duly organized and established and was then existing and doing business under the laws of the United States. This can mean only that it was organized and established as a banking association under the Act of Congress authorizing the organization and establishment of national banks, and that it was in existence and doing business at the time of the alleged offense as such national banking association, because it could not be organized and established and existing and doing business under the laws of the United States in any other capacity. This question is accordingly answered in the affirmative. *These answers will be accordingly certified to the Circuit Court.*

True copy. Test:
James H. McKenney, Clerk. Sup. Court, U. S.

UNITED STATES, *Appt.*, [249]
v.
SUSANNA E. DUNN, Admrx. of the Estate of GEORGE DUNN, Deceased.

(See S. C. Reporter's ed. 249-255.)

Marine Corps.

1. The Marine Corps is a military body primarily belonging to the Navy, and under the control of the Secretary of the Navy, but liable to be ordered to service in connection with the Army.

2. The Act of March 3, 1883, providing for a credit for the actual time of service in the Army or Navy, includes services rendered by a member of the Marine Corps.

[No. 1026.]

Submitted Jan. 3, 1887. Decided Feb. 7, 1887.

APPEAL from the Court of Claims. Reported below, 21 Ct. Cl. 20. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. H. Garland,** *Atty-Gen.* and **E. P. Dewees,** *Assistant Attorney,* for appellant.

Messrs. **John Paul Jones and Robert B. Lines,** for appellee.

Mr. Justice **Miller** delivered the opinion of [250] the court:

The plaintiff brought her suit as administratrix of the estate of George Dunn, her husband, who died on the 29th of September, 1884, to recover the difference between what was paid her and what she claimed should have been paid on account of his service as gunner in the Navy from the 11th day of April, 1878, until the 10th day of December, 1883. The court of claims gave her a judgment for $2,288.10. This judgment was rendered upon the following finding of facts:

"1. George Dunn, the claimant's intestate, was appointed a gunner in the Navy, April 11, 1871, and served as such until January 1, 1883. He was subsequently retired, and has since died.

"2. Prior to his appointment in the Navy, he had served in the Marine Corps. He entered this corps first, June 10, 1843, in the eleventh year of his age as a boy, bound for ten years and twenty-two days, to learn music, and June 22, 1844, was rated as a fifer; discharged September 8, 1848.

"Re-enlisted September 9, 1848, for four years; discharged June 8, 1849, by order of the Secretary of the Navy, as a minor.

"Re-enlisted August 10, 1849, for four years, as a fifer; discharged June 9, 1853.

"On the same day, to wit, June 9, 1853, he re-enlisted for four years, as a fifer; discharged April 1, 1854, under a surgeon's certificate.

"Re-enlisted August 31, 1854, for four years, as a fifer; discharged February 24, 1857, under a surgeon's certificate.

"Re-enlisted May 19, 1857, for four years, as a fifer; discharged September 1, 1862, under a surgeon's certificate.

"The time of actual service from his first enlistment, June 10, 1843, to his last discharge September 1, 1862, amounts to sixteen years five months and twenty-six days.

"3. Between the dates of his first enlistment [251] and September 3, 1853, he served on board United States vessels of war, under the com-

mand of navy officers, for five years and two months.

"Where and under what command the remainder of his service was rendered does not appear.

"*Conclusion of Law.*

"Upon the foregoing findings of facts the court decides as conclusion of law:

"That the sixteen years five months and twenty-six days of service, shown in finding 2 to have been rendered by claimant's intestate as an enlisted man in the Marine Corps, should be credited to him in calculating longevity pay under the Act of March 3, 1883. 22 Stat. at L. 473.

"By so crediting this service the claimant is entitled to recover the sum of $2,238.10."

The controversy arises upon the construction to be given to the following clause in the Act making appropriation for the naval service, passed March 3, 1883, 22 Stat. at L. 473. Section 1 of that statute makes provision for the payment of the officers of the Navy, of which George Dunn, the plaintiff's intestate, was one at that time. After reciting the officers, clerks, and other persons, including naval cadets, whose compensation is embraced in the aggregate sum of $300,000, the section uses this language: "And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay, held by such officer since last entering the service."

The plaintiff asserted that in adjusting her claim for her husband's service with the accounting officers of the department she was entitled to the benefit of this provision on account of the service found to have been rendered by him in the second subdivision of the facts as found by the court. These accounting officers refused to make this allowance because, [252] as they said, the services thus rendered were in in the Marine Corps and not in the Army or Navy.

It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate "the Army, the Navy, and the Marine Corps," or "the Army and the Marine Corps," or "the Navy and the Marine Corps," in a manner calculated and intended to point out that it is not identical with either the Army or the Navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the Army or in the Navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as part of the duties to be performed by either the Army or the Navy. If there are services prescribed for that corps by the Statutes of the United States, or the regulations of either the Army or the Navy, which are not performed in immediate connection with the Army or the Navy, and under the control of the heads of the Army or Navy, either civil or military, we have not been made aware of it. The military establishment of this country is divided by the general laws of the United States into the Army and the Navy, and over each of these one of the great heads of departments, called secretaries, is appointed to preside, to manage and to administer its affairs. The administrative functions of the Executive are mostly under the President, distributed and allotted among the seven great departments, at the head of each of which is a minister for that department. Such is the theory of the distribution of executive administration established by the Statutes of the United States.

The Marine Corps is a military body, designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the Navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy yards mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the Army. The Statutes of the United States, in prescribing the duties which they may be required to perform, have not been very clear in [253] any expression which goes to show how far these services are to be rendered under the control of the officers of the Navy or of the Army. It is clear that they may be ordered to service in either branch; but we are of opinion that, taking all these statutes and the practice of the Government together, they are a military body, primarily belonging to the Navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the Army, and in that case under the command of army officers.

Section 1599 of the Revised Statutes of the United States enacts that no person under twenty or over twenty-five years of age shall be appointed from civil life as a commissioned officer of the Marine Corps until his qualifications for such service have been examined and approved under the directions of the Secretary of the Navy; and section 1600, immediately following, provides that all marine officers shall be credited with the length of time that they have been employed as officers or enlisted men in the volunteer service of the United States. Sections 1613, 1614, 1615 and 1616 very clearly place the non-commissioned officers, musicians, or privates of the Marine Corps under the orders of the Secretary of the Navy, with reference to their performance in the Capitol grounds, or the President's grounds, and with reference to their rate of pay and their rations. Section 1621 declares that the Marine Corps shall at all times be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President, and when so detached, shall be subject to the rules and articles of war prescribed for the government of the Army. Section 1628, which relates to the retirement of officers with rank and pay, enacts that, in the case of an officer of the Marine Corps, the retiring board shall be selected by the Secretary of the Navy, under the direction of the President. Two fifths of the board shall be selected from the medical corps of the Navy, and the remainder from the officers of the Marine Corps.

It seems to us that these provisions of the Revised Statutes, bringing together the enact-

ments of Congress on the subject of the Marine
[254] Corps, show that the primary position of that body in the military service is that of a part of the Navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately, for temporary duty, with the Army, and under the command of the superior army officers.

This view of the subject was taken by this court in the case of *Wilkes* v. *Dinsman*, 48 U. S. 7 How. 89 [12: 618]. Dinsman was a private in the Marine Corps under Commodore Wilkes in the exploring expedition, and his term of service having expired he entered into a contract for re-enlistment to serve until the return of the vessel. The Act which authorized his re-enlistment applied to seamen and to service of anybody enlisted for the Navy. Dinsman was subjected to severe discipline by the orders of Commodore Wilkes, for which he brought this suit in the nature of an action of trespass, and alleged that after the expiration of his service he was not lawfully re-enlisted, as he was not a seaman when enlisted for the Navy, by reason of his being in the Marine Corps. The court examined into this question and held that he belonged at that time to the Navy, saying, among other things: "Though marines are not, in some senses, 'seamen,' and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the Naval Code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines' indicates the place and nature of their duties generally. And beside the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part 'of the crews of each of said ships.' Act of March 27, 1794, 1 Stat. at L. 350, § 4. Their pay was also to be fixed in the same way as that of the seamen (§ 6, p. 351). So it was again by the Act of April 27, 1798, 1 Stat. at L. 552. And they have ever since been associated with the Navy, except when specially detailed by the President for service in the Army. * * * Thus paid, thus serving, and thus governed like and with the Navy, it is
[255] certainly no forced construction to consider them as embraced in the spirit of the Act of 1837 by the description of persons 'enlisted for the Navy.'"

And referring to the Act of June 30, 1884, the provision of which is found in section 1621 of the Revised Statutes, "that the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the Navy," the opinion says that this strengthens the conclusion of the court, and that that corps thus in some respects became still more closely identified with the Navy.

Whatever view may be taken it cannot be considered as a distinct military organization, independent of the departments of the Army and Navy and under the supervision and control of neither of them, having no superior outside of its own officers, except the President. Such a position is at war with the whole policy of the distribution of power among the executive departments as we have already shown; and while it may be true that it is not so exclusively a part of the Navy as ships and navy yards are, yet its general supervision and control remain with the Navy Department.

We think that the Act of 1883, under which this suit is brought, providing for a credit for the actual time of service in the Army or Navy, or both, is comprehensive enough to include the services of George Dunn, recited in the second finding of the court, as they *must* have been rendered either in the one or the other—either in the Army or the Navy—and if rendered in either, or part in one and part in the other, they still entitle the claimant to receive compensation on the basis of services coming within the statute.

The judgment of the Court of Claims is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS McNALLY, *Appt.*,
v.
[337]
THE STEAM TUG L. P. DAYTON, Her Tackle, etc., H. McKAY TWOMBLY, Claimant; THE STEAM TUG JAMES BOWEN, Her Tackle, etc., DANIEL SHEA, Claimant; AND THE FLOAT OR SCOW Called "NO. 4," HUGH J. JEWETT, Receiver, etc., Claimant.

(See S. C. "*The L. P. Dayton*," Reporter's ed. 337-353.)

Collision between two tugs—libel against both to recover damages for injury to tow—burden of proof—no presumption against either tug—a tug not a common carrier—pleading.

Upon a libel against two tugs, filed to recover damages resulting to a tow by reason of a collision between said tugs, it is *held* that the undisputed facts did not constitute a *prima facie* case against both tugs; that the burden of proof was upon the libelant to establish a case of negligence against each of the tugs separately and independently; that the tow was not in the position of a vessel at anchor, but was so far identified with its own tug as to be bound by the fault, if any, of the latter; that, as respects the other tug, the same burden of establishing the fault charged against it rests upon the libelant as the law would impose upon its own tug if she were the libelant; that, as between the tow and its tug, the contract of towage involves a responsibility for loss upon the tug only by reason of the want of ordinary care; that, upon the face of the pleadings, the question of where the fault lies is indeterminate, there being no presumption against either tug; that the burden of proof is not changed because the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents; and that one of the answers does not affirmatively show negligence and a violation of the rules of navigation.

[No. 145.]

Argued Jan. 21, 24, 1887. Decided Feb. 7, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. Reported below, 18 Blatchf. 411, 418. *Affirmed.*

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Edward D. McCarthy** and **Charles M. Da Costa**, for appellant:

That both these tugs should have been condemned is a necessary legal deduction from the following admissions: that the collision was

the result of want of ordinary care, or rather of gross negligence; that the respondents were actors, and that the libelant was a passive sufferer.

What the law presumes, to wit, that the actors had knowledge of all the facts in which they participated, each one of them here admits, by charging fault against the other.

The law also presumes that the libelant was ignorant of the facts leading up to the collision.

This presumption is always made in behalf of bailors against care takers; and it is on this presumption that carriers and depositaries are uniformly required to assume the burden of proof, at suit of their bailors.

A vessel tied as ours was is to be considered as cargo.

The Alabama and The Gamecock, 92 U. S. 697 (23: 764); *The Johnson*, 76 U. S. 9 Wall. 151 (19: 610); *Sproul* v. *Hemingway*, 14 Pick. 1; *Sturgis* v. *Boyer*, 65 U. S. 24 How. 110 (16: 591).

It can make no difference that in any case the fault has been committed by one person, or by many; by one vessel or by two. It is no reason why an innocent sufferer should not recover for his loss that it has been conferred upon him by two or more persons on whom the blame necessarily falls.

Neither is it any reason for dismissing his libel, that he cannot show whether one of the actors is more to blame than the other, or how much either is to blame; or, indeed, that one of them is not altogether blameless.

It is enough to say that there has been a wrong done, which should be redressed by those who, apparently, have contributed to it.

A perfect cause of action is made out in the admission of wrong on one side, and of helplessness on the other.

Admiralty courts have consistently apportioned the loss in all cases of inscrutable fault.

The Scioto, 2 Ware, 360; *The Nautilus*, 1 Ware (2d ed.), 531; 1 Bell, Com. 627.

"A vessel in tow and without fault is to be regarded as sustaining the same relation to the collision which is sustained by the cargo.

The Alabama and The Gamecock, and *The Johnson*, *supra*.

For the purpose of this argument it is sufficient to treat The Dayton merely as a bailee for hire, responsible only for the exercise of ordinary care. Still she bore the peculiar relationship to our barge of custodian and care taker, a species of bailment which imposed all the obligations of a common carrier, who has declined to be liable for risks not arising from his own negligence.

Against common carriers with notice, the common law presumes that a loss is attributed to the fault of the bailee, unless he shows that it is due to some excepted risk.

Clark v. *Barnwell*, 53 U. S. 12 How. 272 (13: 985); *Canfield* v. *Baltimore & O. R. R. Co.* 93 N. Y. 532.

Against wharfingers and warehousemen, also held for ordinary diligence only, the weight of proof is with the bailee to show the absence of fault, if the thing bailed is lost, injured or destroyed in the ordinary course of business.

Platt v. *Hibbard*, 7 Cow. 500; *Lichtenhein* v. *Boston & Prov. R. R. Co.* 11 Cush. 72; *Mackenzie* v. *Cox*, 9 Car. & P. 632; *Logan* v. *Mathews*, 6 Barr, 417; *Clark* v. *Spence*, 10 Watts, 335.

Even mere mandataries, gratuitous bailees, have frequently been held to proof of diligence, where the subject of bailment has been lost or injured in their hands.

Beardsles v. *Richardson*,* 11 Wend. 26; *Doorman* v. *Jenkins*, 2 Ad. & El. 256; Story, Bailm. § 213.

Messrs. **Joseph F. Mosher and James E. Carpenter**, for appellee, claimant of The L. P. Dayton:

The *onus* is upon the libelant to show negligence as against The L. P. Dayton, either presumptively or by direct proof.

This would be true, even if the libelant based his claim on a towage contract made for a valuable consideration. The owner of a towboat performing towage service is not a common carrier, nor even a bailee of the tow; he is only bound to reasonable skill and care.

Transportation Line v. *Hope*, 95 U. S. 297 (24: 477); *The Margaret*, 94 U. S. 494 (24; 146); *The Webb*, 81 U. S. 14 Wall. 406 (20: 774); *Wells* v. *Steam Nav. Co.* 2 N. Y. 204.

The burden is always upon him who alleges the breach of such a contract, to show that there has been negligence or unskillfulness, to his injury, in its performance.

The Webb, *supra*; *The Brazos*, 14 Blatchf. 446.

But the gist of the claim here, as well against The Dayton as against the other vessels, is negligence.

The tug is liable to the tow for a disaster of this kind, to the same extent as she would have been to a third and strange vessel injured by her negligence, and to no greater degree.

The Brooklyn, 2 Ben. 547; *The Deer*, 4 Ben. 352-355.

In order to prevail in a libel for damages resulting from alleged negligence, the libelant must do more than show or establish that his own vessel was free from blame. He must further show that the loss was occasioned by the fault of those in charge of the other vessel which he seeks to make responsible.

The New Champion, Abb. Adm. 202; *The Wm. Young*, Olcott, 38; *The Neptune*, Olcott, 488, 493; *The Breeze*, 6 Ben. 14; *The Columbus*, Abb. Adm. 384; *The Summit*, 2 Curt. C. C. 150; *The Erie*, 3 Cliff. 456, 460; *The Kallisto*, 2 Hughes, 128; *The Ligo*, 2 Hagg. Adm. 356, 360; *The Bolina*, 3 Notes of Cases, 209; *The Adolph*, 4 Fed. Rep. 780.

Indeed it is now held in England that the burden of proof is not on the claimant, even when he sets up matter strictly in justification, or by way of excuse, until a *prima facie* case of negligence is shown.

The Marpesia, L. R. 4 P. C. 212; *The Abraham*, 2 Asp. N. S. 84; *The Benmore*, L. R. 4 Adm. 132.

On the pleadings no negligence on the part of The L. P. Dayton is admitted or shown, and there is nothing to shift the burden of proof to that tug.

The mere fact that the collision occurred without fault of the libelant, while his boat was in charge of our tug, does not raise any presumption that this tug was in fault.

The Webb and *The Brazos*, *supra*; *The W. E. Gladwish*, 17 Blatchf. 77, 82; *The B. B. Saunders*, 23 Blatchf. 378, 383, 384.

*See note to this case in L. ed. [Ed.]

Mr. **William D. Shipman**, for claimants Shea and Jewett, Receiver.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellant, Thomas McNally, filed his libel in a cause of collision, civil and maritime, against the steam tug L. P. Dayton, the steam tug James Bowen, and the float or scow called No. 4, in the District Court of the United States for the Southern District of New York. The second article of the libel sets out the cause of action as follows:

"2. Heretofore; to wit, on the fourteenth day of February, 1879, the boat or barge Centennial, of the burden of about 300 tons, of which boat your libelant was master, was taken in tow by the steam tug L. P. Dayton at the pier foot of Fifty-Ninth Street, New York Harbor, [338] to be towed by the said tug to the Erie basin, near Atlantic docks, New York Harbor. She was taken at or about five and one-half o'clock in the afternoon of that day. She was loaded with a valuable cargo; to wit, six thousand four hundred and fifty bushels, or thereabouts, of red wheat. She was then staunch and seaworthy. When The L. P. Dayton left Fifty-Ninth Street pier she had in tow four boats or barges, of which the boat Centennial was one; these were placed two on the port side of the said tug and two on her starboard side. The Centennial was the inside starboard boat—that is, the one lashed to the starboard side of the tug Dayton. The Centennial was a boat one hundred and three feet in length, and when fastened to the tug, as aforesaid, her bow projected some twenty feet beyond the bow of the said steam tug. The evening was quite clear and starlit. The tug and tow being made up as aforesaid proceeded down the river, the tide being ebb, until about opposite Eagle pier, Hoboken, when the tug put into shore and there left one of the boats that had been fastened to her port side.

"After the port boat had been left at the Eagle pier as aforesaid, the tug, with the remaining three boats, resumed her course, proceeding down the river. When about opposite Pier 1, North River, and when about three hundred yards from the New York shore, the said boat Centennial was run into by the float or scow called Number Four, which was then in tow of the steam tug James Bowen, and received such injuries that she very soon thereafter sunk with her cargo. At the time of the collision darkness had set in, and your libelant is unable to speak of his own knowledge with entire accuracy of the movements of the vessels aforesaid. But he is informed and believes the truth to be as follows, that is to say:

"Before the collision aforesaid the steam tug James Bowen, having the float or scow Number Four lashed to her port side, was proceeding from some point on the East River to the Long Dock, Jersey City. She had rounded the Battery, and at the time of the collision was on a course opposite or nearly opposite the course then being taken by the tug L. P. Dayton, and [339] her tow. Through the carelessness of both of the persons in charge of The L. P. Dayton and of The James Bowen and the scow, the said tows were not kept clear of each other, though there was ample space of water in which to have done so, but were so negligently handled that the float or scow aforesaid bore right down on and struck full on her stem the boat Centennial, staving in her whole bow and causing her to sink in about ten minutes.

"Your libelant and his son were on board The Centennial at the time of the collision, but it was not possible for them to do anything to prevent the same. The Centennial was entirely under the control and subject to the direction of the tug boat L. P. Dayton, having neither propelling nor steering power of her own.

"Your libelant alleges that both the steam tugs aforesaid were in fault in the following respects:

"First. Neither tug boat observed the signals of the other, the observation of which might have and would have prevented danger.

"Second. Neither tug boat made use of the proper signals for avoiding a collision in time to avoid the same.

"Third. The tug boat Bowen did not reverse her movement, or did not do so in time to prevent a collision.

"Fourth. Neither tug boat was provided with a suitable and competent watch at and before the time of the collision.

"Fifth. The tug boat James Bowen improperly changed her course before the collision, having put her wheel to port and made an effort, apparently, to pass under the bows of The Dayton and her tow.

"But your libelant alleges, in general, negligence against both the said tugs, and requires them to make definite answer of the facts pertinent to the collision, which will clearly show either that both were equally to blame, or to blame in unequal degree, though neither entirely free from blame; but, for the reasons above mentioned, your libelant's boat, The Centennial, was in nowise to blame or responsible for the collision aforesaid."

And also alleged negligence against the steam tugs in addition, as follows:

"That on the night and at the time of the collision the tide was a strong ebb; that the tug [340] Bowen and her tow were proceeding against the tide; and that it was negligence in her not to have kept more to the westward than she did, and thereby have avoided the tug Dayton and her tow, as might easily have been done had the proper care been used in observing The Dayton's lights and signals.

"And, further, that the said tug Bowen and her tow kept too near the New York shore in rounding the Battery and making up the North River.

"That the tug Bowen was also negligent in respect of not having a proper light set on her port side, or in permitting the same to be covered and obscured by certain cars or carriages at that time on the deck of the float, which was on her port side.

"That the tug Bowen was also negligent in not answering the signals of the tug Dayton when they were approaching each other.

"That the tug Dayton was at fault in proceeding at too great a speed, the tide being a strong ebb and the wind northwest.

"That the tug Dayton was likewise negligent in not having a proper light set on the extreme starboard and forward end of her tow.

"That the person in charge of the wheel of

The Dayton at the time of and before the collision was unfit for such duty, being a man of near and imperfect sight, and generally incompetent.

"That the tug Dayton, after twice blowing her whistle, did not keep on her course, but ported her wheel and went to starboard, showing her red light to The Bowen and the float before reversing and attempting to back.

"That neither The Dayton nor The Bowen had a watchman or lookout on her forward deck."

Hugh J. Jewett, Receiver of the Erie Railway Company, claimant of the float or scow called No. 4, filed his answer on her behalf, in response to the charges of the libel. It was admitted, however, that no cause of action appeared against the scow No. 4, both in the courts below and upon the argument in this court. It is, therefore, not necessary to consider the answer filed on its behalf.

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Daniel Shea intervened as owner of the tug James Bowen, and answered the charges of the libel as follows:

"Third. That this respondent has no knowledge of the matters contained in the second article of said libel preceding the allegation in the said article contained, to the effect that the boat Centennial was run into by the float or scow Number Four, and he therefore neither admits nor denies the same, but leaves the libelant to make such proof thereof as he may be advised; that, so far as the allegations of the said article relate to the collision between the said boat Centennial and the float or scow called Number Four, which occurred on the 14th day of February, 1879, and the causes thereof, this respondent, upon information and belief, denies the said allegations of said article, and each and every of them, except so far as the same are hereinafter expressly admitted.

"And this respondent, upon information and belief, says that the facts in respect to said collision and the causes thereof are as hereinafter stated, and not otherwise, that is to say:

"On the evening of the 14th day of February, 1879, at about half past six o'clock, the said steam tug James Bowen, at Williamsburg, in the waters of the East River, took in tow the said float or scow Number Four, the said float or scow being lashed to the port side of said tug James Bowen, and the said tug James Bowen, with the said float or scow in tow as aforesaid, proceeded down the East River, bound for Long Dock, Jersey City; that the tide was ebb, the wind moderate from northwest; that the said tug James Bowen and the said float or scow were both staunch, properly manned and equipped; that the said tug was provided with a bright headlight on the forward end of her house, and with red and green lights on her port and starboard sides respectively, and with two white lights on the flagstaff aft, and that the said float was provided with a white headlight near the bow, all of said lights being properly placed and burning brightly; that the said tug James Bowen was provided with a competent pilot and lookout, properly placed on the tug, and that a lookout was also stationed forward on the roof of the float or scow; that the said tug James Bowen, with the said float or scow in tow as aforesaid, proceeded down the East River to the Battery, and on rounding the Battery into the North River encountered considerable ice, and in consequence was running very slow; that after getting clear of the ice the said tug, with the said scow in tow as aforesaid, was headed for the Jersey City abattoir. At this time there was outside of the said float, and about one hundred feet distant from the port side thereof, the steam tug W. H. Vanderbilt, with two barges in tow astern on a hawser; that said tug W. H. Vanderbilt, with her said tow, was proceeding in the same direction and at a little faster rate of speed than The James Bowen; that after the said James Bowen, with the said scow or float in tow, had gotten into clear water and was heading as last aforesaid, a boat was discovered by her pilot coming down the river with a tow, which subsequently turned out to be The L. P. Dayton; that at the time the said approaching tug and tow were discovered the green light of the tug L. P. Dayton was visible, and she appeared to those in charge of and navigating the tug James Bowen, including the lookout on the float, to be going to the eastward, between the said James Bowen and the New York shore, which was then about three hundred yards distant. At a proper distance the pilot in charge of The James Bowen blew two blasts of his steam whistle, to which the approaching tug, L. P. Dayton, responded with two blasts of her whistle, and the pilot in charge of the said James Bowen thereupon put his wheel to starboard, heading as close to the westward as could safely be done without danger of colliding with the tug W. H. Vanderbilt or the barges in tow thereof, which were, as before stated, on the port side of the said float, heading in the same direction; that notwithstanding the signal which had been given by The James Bowen, and which had been answered by The L. P. Dayton, the pilot of the said L. P. Dayton, instead of keeping his course or putting his wheel to starboard so as to pass the said James Bowen on her starboard side, so changed his course as to shut out his green light and bring his red light in view of those navigating The James Bowen; that thereupon, it being evident that the said tug L. P. Dayton could not cross the bow of The James Bowen and of the said float in tow thereof without imminent danger of collision, the pilot in charge of The James Bowen immediately rang his bells to slow, stop, and back; that said signals were promptly answered by the engineer of The James Bowen, and that at the time of the collision the heading of The James Bowen and of the float in tow thereof was about stopped, and that those in charge of the said L. P. Dayton and the canal boats or barges in tow thereof so navigated the same that the bow of the canal boat or barge on the starboard side of The L. P. Dayton was brought into collision with the bow of the said float or scow Number Four with such force as to break the tow line from the said scow or float Number Four to The James Bowen, and to crush in the bow of the said barge or canal boat on the starboard side of The L. P. Dayton, and that, as this respondent is informed and believes, the said barge or canal boat was the barge or canal boat called The Centennial in the libel in this cause mentioned, and that in consequence of said collision the said barge or canal boat Centennial subsequently sank; that

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the place where the said collision occurred was about opposite Pier 1, North River, and from three hundred to three hundred and fifty yards from the head of said pier.

"And this respondent, upon information and belief, says that the said collision was in no way occasioned by any fault on the part of the said float or scow Number Four, or of the said tug James Bowen, or of those in charge thereof, but was occasioned by and due wholly to the fault of those navigating and in charge of the said tug L. P. Dayton and the said barges or canal boats in tow thereof in the following respects:

"1. That the pilot in charge of the tug L. P. Dayton and of the said canal boats in tow thereof, including the said Centennial, was not a competent person for the purpose, being a man of near and imperfect sight and generally incompetent.

[344] "2. That The L. P. Dayton, at the time of the said collision, while navigating the waters of the Hudson River and engaged in towing canal boats or barges, failed and omitted to have white lights placed in the extreme outside of the tow on either hand.

"3. That the pilot in charge of the said tug L. P. Dayton and the canal boats or barges in tow thereof, after having received and answered the signal of two blasts from the steam whistle of The James Bowen, instead of keeping to the eastward and passing the said James Bowen on her starboard side, improperly changed his course so as to cross the bows of the said James Bowen, thereby bringing the bow of the said canal boat Centennial into collision with the said float or scow Number Four.

"4. That the said tug L. P. Dayton, when danger of collision became imminent, did not in season reverse her engine, so as to prevent a collision.

"5. That the said tug boat L. P. Dayton was not provided with a suitable or competent lookout, properly stationed at and before the time of the collision.

"6. That the said tug L. P. Dayton was also negligent in proceeding at too great a rate of speed, the tide being ebb and the wind from the northwest.

"7. That the said tug L. P. Dayton, after twice blowing her whistle as aforesaid, did not keep on her course, but ported her wheel and went to starboard, showing her red light to The James Bowen and the said float before reversing and attempting to go back.

"And this respondent, upon information and belief, says that the said collision was in no way due to any fault on the part of the said scow or float Number Four, or of the said tug James Bowen; and upon information and belief he denies each and every allegation in the said libel and in the supplement filed thereto contained, charging or imputing any fault or negligence whatever to the said float, or those in charge thereof, or the said tug James Bowen, or those in charge thereof, and each and every allegation in the said libel contained respecting the said collision, except as hereinbefore expressly admitted."

[345] Arthur B. Twombly, as surviving partner of Whitney & Twombly, intervened as owner of the steam tug L. P. Dayton, and answered the libel as follows:

"Second. This respondent admits that on the 14th day of February, 1879, the boat Centennial, of the burden of about 300 tons, and of which the libelant was master, was taken in tow by the steam tug L. P. Dayton, at the pier foot of Fifty-Ninth Street, New York, to be towed to the Erie basin, at about half-past five o'clock P. M., and that she was loaded with a cargo of wheat, of the quantity of which he is not informed, nor is he informed whether the said boat was then staunch and seaworthy, but leaves the libelant to make such proof in reference thereto as he shall be advised.

"He admits that when The Dayton left Fifty-Ninth Street pier she had in tow four boats, two on each side, and that The Centennial was the inside starboard boat; that she was one hundred and three feet in length, and that her bow projected some twenty feet beyond the bow of the steam tug L. P. Dayton; that the evening was clear and starlit and the tide ebb, and that the tug landed one of the boats that had been on her port side at the Eagle pier, Hoboken, and that she thereafter pursued her course with the remaining three boats, and that when about opposite or a short distance above Pier No. 1, North River, and about three hundred yards from the piers on the New York shore, The Centennial was run into by the scow Number Four, which was then in tow of the steam tug James Bowen, and received such injuries that she sank with her cargo.

"And he admits that the said scow was lashed on the port side of The James Bowen and that said tug and scow were proceeding from a point in the East River to the Long Dock, Jersey City, and that at the time of the collision she was on a course opposite or nearly opposite the course then being taken by The L. P. Dayton and her tow.

"He denies that it was through any carelessness of the persons in charge of The L. P. Dayton that said tows were not kept clear of each other.

"He admits that The Centennial was under the control and subject to the direction of The L. P. Dayton, having neither propelling nor steering power of her own. [346]

"And as to the various allegations of fault on the part of The L. P. Dayton, he denies the same and each one of them.

"And as to the allegations in said libel in respect to the damages sustained by the libelant, he has no knowledge and leaves the libelant to his proof thereof.

"And he further avers that said tug L. P. Dayton was wholly without fault which caused or contributed to said collision, and the same was wholly caused by fault of those on board and in charge of the said tug James Bowen and said scow Number Four, as alleged in said libel.

"And he alleges that the tug L. P. Dayton was well and properly manned and had the requisite lights set and burning brightly according to law, and that the tow was in all respects properly made up; that the two tugs were approaching in such a way that the proper course was for each to pass on the starboard side of each other, and that the proper measures were taken by said tug L. P. Dayton to pass in that manner and the proper signals were blown, but that said tug James Bowen failed to give heed to said signals and to take proper measures to pass on the starboard hand of said tug L. P.

Dayton and the boats in her tow, but so negligently navigated as to bring the said scow against the said boat Centennial and also the boat on the port side of The L. P. Dayton."

The case was heard in the district court on the pleadings without testimony, and a decree was passed dismissing the libel. 10 Ben. 430. On appeal to the circuit court, the case was again submitted on the pleadings alone, when the same decree was rendered. 18 Blatchf. 411. The present appeal is from that decree, and presents the single question of law whether upon the pleadings, without testimony, there is error in that decree.

The ground on which the circuit court proceeded is that, as the libel alleges negligence and fault in various particulars as against the tug L. P. Dayton and the tug James Bowen, [349] which is denied in the several answers of the respective claimants, in opposition to which the libelant has proven no negligence or fault on the part of either, the libel must be dismissed, as the burden of proof lies upon the libelant to establish a case of negligence against one or the other, or both of the respondents, and that this burden of proof is not changed or shifted by reason of any allegations of fault contained in the answer of either respondent as against the other. On the other hand, it is contended on the part of the libelant that while it is true that each of the defendants denies the negligence charged against it, yet both the answers show that the loss must have been occasioned by the fault of one of the defendants; and that being so the law casts upon each defendant the burden of making good its allegations of fault against the other, in order to exonerate itself.

The proposition is stated by one of the counsel for the appellant, in his printed argument, as follows: "A vessel, without propelling or steering power, lashed to the side of a tug, is sunk as the result of a collision between such tug and another one. In a libel filed by the tow against both tugs to which answers are interposed, in neither of which is negligence causing or contributing to the collision attributed to the tow, and by which each tug seeks to exculpate itself and inculpate the other, a *prima facie* case of negligence arises, without the necessity of proving the specific acts of negligence by either or both tugs; and the decree to be entered in favor of the libelant, either against one tug alone, or against both, is dependent entirely upon the nature of the evidence which it is incumbent upon the tugs to produce in order to determine, as between themselves, the issues so made by them by their respective answers."

The propriety and soundness of this rule is supposed in argument to rest upon two general grounds: 1. It is contended that the tow which was injured by the collision is in the same category, as respects both tugs, as that of a vessel at anchor injured by a collision with a moving vessel, where the burden of proof is upon the latter to show that it was without fault, or that the disaster was the result of fault on the [350] part of the complaining party. 2. That where it appears, as in the present case, that the tow, being helpless as to its own navigation, was without fault on its part, and it is manifest, from the circumstances appearing on the pleadings, that the collision was caused either by the fault of one or the other of the tugs, or was the result of inevitable accident, the burden of proof rests upon each to establish such facts as excuse it. The argument is that such a disaster could only occur from fault of navigation, or from that *vis major* which is styled inevitable accident; that by the supposition the appellant is free from fault; that consequently it must be that either there was fault on the other side or inevitable accident, in either of which cases it is incumbent upon the respondent affirmatively to establish its excuse.

It is also contended for the appellant that if the truth of the general rule must be admitted, that he who seeks judicially to establish a claim based upon an alleged default of his adversary must affirmatively establish by proof the facts which justify his complaint; and that the burden of proof, as a principle of general jurisprudence, is assumed by the plaintiff, unless the cause of action is confessed or admitted judicially by the defendant; yet, it is also true, that if the defendant accompanies a general denial of the alleged cause of action with the admission of such facts as in law constitute his liability, the plaintiff's case is in fact admitted without other proof; and that, in this aspect, the libelant was entitled to a decree below on the basis of certain admissions of fact in each of the answers inconsistent with the general denials of fault.

In our opinion, the burden of proof was upon the appellant to establish a case of negligence against each of the tugs separately and independently. The rule which presumes fault in a case of collision against a vessel in motion in favor of one at anchor does not apply. In the present case, the tow which was injured was not at rest, as respects either of the tugs. As against The Bowen, the movement and navigation of the tow was under the control and management of The Dayton; and in a suit against The Bowen, the tow can have no other or greater rights, and no other or better standing in court, than would The Dayton have had in case the collision had been directly with her, because [351] the tow in such a suit is identified with its own tug, so far, at least, that she cannot escape the consequences if the collision was caused wholly or in part by the fault of that tug. *The Civilta and The Restless*, 103 U. S. 699 [26: 599]; *Sturgis* v. *Boyer*, 65 U. S. 24 How. 110 [16: 591]; *The J. H. Gautier*, 5 Ben. 469; *The Cleadon*, Lush. 158.

It follows, therefore, that as respects The Bowen, the same burden of establishing the fault charged against it rests upon the libelant in this case, as the law would impose upon The Dayton if she were the libelant prosecuting for damages on its own behalf, as to which there could be no question.

As between the tow and its tug, The Dayton, the contract of towage involves a responsibility for loss upon the tug only by reason of the want of ordinary care; for a tug is not a common carrier, and does not insure the safety of its tow. In some cases the facts of the collision, as admitted in the pleadings, might constitute a *prima facie* case of negligence, which would impose upon the tug the duty of explanation and exoneration; but no such presumption of fault arises in the present case. Here there was a collision between the tow of one tug and the

tow of another, which may have been caused by a fault of navigation upon the part of one or both of the tugs. Each charges fault against the other. As the matter stands, it is indeterminate, being a mere matter of controversy to be adjudged between them upon proof of all the circumstances. In favor of the injured tow, the libelant in this case, there is no presumption of fault as against either nor against both jointly. There is no presumption against The Bowen for the reason we have already stated; and there is none against The Dayton, because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations in the answer of The Bowen. To hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defense against the presumption of its negligence. There is no ground in reason or authority for making such an exception to the general rule, which requires the plaintiff, in the first instance, to establish by proof the allegations of its complaint. It does not tend to establish such an exception that it appears by the record that one or the other of the respondents must have been so in fault as to be liable for the consequences. It still remains that there is a controversy as to which of the two is guilty, and no decree can pass without affirming the liability of one or both. That affirmation must stand upon proof, unless it appears on the record which one of the two is at fault, or that both are.

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Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libelant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties. And perhaps it is counterbalanced by the corresponding interest on the part of each set of witnesses to fix the fault upon the opposing vessel.

It is further argued on the part of the appellant that it was entitled to a decree below, as against The Bowen, on the ground of admissions, in the answer filed on its behalf, affirmatively showing negligence and a violation of the rules of navigation tending to produce a collision. This aspect of the case was disposed of by the circuit court in the opinion of *Mr. Justice* Blatchford, which we adopt, as follows:

"It is urged for the libelants that the answer of The Bowen shows that she had The Dayton on her starboard side, with the courses of the two vessels crossing so as to involve risk of collision, and that, therefore, under Rule 19 of section 4233 of the revised Statutes, it was the duty of The Bowen to keep out of the way of The Dayton, and, as she did not, a *prima facie* case of negligence is thus made out against her by her answer This is an error. The facts stated in the answer of The Bowen do not show that the courses of the two tugs were crossing when The Bowen discovered The Dayton. On the contrary, the green light of The Dayton was then visible to The Bowen, and not her red light, and The Dayton appeared to be going between The Bowen and the New York shore, to the eastward, and in a direction which would cause her green light to still be visible to The Bowen, and her red light to be still invisible. This would insure safety and no collision; and to insure it still more The Bowen blew two whistles, and The Dayton answered with two whistles. After that The Bowen starboarded. Even if—before so starboarding, and while so starboarding—The Bowen is to be considered as having the Dayton on her starboard side, with the courses of the two vessels crossing (which is by no means clear on the averments in the answer of The Bowen), her answer shows that she took proper measures to keep out of the way of The Dayton; and that such measures were assented to at the time by The Dayton as proper, and that then The Dayton changed her course and went across the bow of The Bowen. Under these circumstances The Bowen slowed, stopped, and backed.

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"The answer of The Bowen states substantially that there was imminent danger of collision if she kept on. There is nothing in all this to show negligence in The Bowen. When The Dayton so came suddenly across the bow of The Bowen, a case was not made within Rule 19, although in that position The Bowen had The Dayton on her starboard side, and their courses were crossing; and even if it were, the answer shows that The Bowen did all she could to keep out of the way of The Dayton.

"The libel, so far from alleging that it was a fault in the Bowen to slow, stop, and back, alleges, as a fault in her, that she did not reverse, or did not do so soon enough. The isolated fact of her slowing, stopping, and backing cannot be taken away from the connection in which it is found in the answer and separated from the circumstances under which the answer states it occurred, particularly as the libel states distinctly that it was a fault in her not to reverse." 18 Blatchf. 411, 418.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MARTIN DURAND ET AL., *Plffs. in Err.*, [366]

v.

SAMUEL B. MARTIN.

(See S. C. Reporter's ed. 366-375.)

Public lands—indemnity school lands in California—construction of the Act of March 1, 1877—classes of defective selections.

1. The Act of March 1, 1877, "relating to indemnity school selections in the State of California," ratified all lists of such selections before certified to that State by the United States, however defective or insufficient such certificates might have been, if the lands included in such lists did not fall within section 4 of the Act, and if they had not been preempted in good faith prior to the date of the certificate.

2. In the case presented, the land in question was selected by the agent of the State in 1862. The State, in 1863, issued a certificate of purchase to the defendant in error; in 1870, it was listed to the State by the United States Government, and in 1871 the

State patented it to defendant in error. Said land was embraced in the exterior boundaries of a valid Mexican grant, but was not embraced within the surveys of said grant, or within the patent issued to the claimants. In 1876 plaintiffs in error entered as preemption settlers. In an action brought by defendant in error to recover possession, *held:* that the land was not open to preemption settlement when plaintiffs in error entered into possession; that, since the acceptance by the claimants under the Mexican grant of their patent, there has been no one who could dispute the title of the State or its grantees, except the United States; that it is immaterial that the state selection was bad when made, as it was good when presented, there being no intervening rights of third parties; and that, if the title of the defendant in error was defective because of the invalidity of the original selection, such defect was cured by the Act of March 1, 1877.

[No. 128.]

Submitted Jan. 24, 1887. Decided Feb. 7, 1887.

IN ERROR to the Supreme Court of the State of California. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **M. Mullany,** for plaintiffs in error:

Defendant in error has no right or title to the land in controversy; his state patent is void, and he has, consequently, no right to the possession of the land.

While the land was held and claimed under the Mexican grant, the officers of the United States Land Department had no authority or jurisdiction to list it to the State, or dispose of it in any other way, in advance of the satisfaction of the claim of the Mexican grant under which it was held.

10 Stat. at L. 246; *Van Reynegan* v. *Bolton*, 95 U. S. 36 (24: 352); *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 (23: 634); *Newhall* v. *Sanger*, 92 U. S. 761 (23: 769); *Mahoney* v. *Van Winkle*, 21 Cal. 552; *Riley* v. *Heisch*, 18 Cal. 198; *Cornwall* v. *Culver*, 16 Cal. 429.

The listing of lands to a State, by the United States land officer, which are not of the character that are subjected to be listed, "shall be perfectly null and void."

10 Stat. at L. 346.

The land not having been listed, the State took nothing by its patent to defendant in error.

Chant v. *Reynolds*, 49 Cal. 217; *Churchill* v. *Anderson*, 53 Cal. 212.

The location of the land by the agent of the State, and the issuance of the state certificate of purchase, took place before the land was surveyed, and were therefore void proceedings, even if it be assumed that the land was not held or claimed under the Mexican grant.

Chant v. *Reynolds*, 49 Cal. 214; *Medley* v. *Robertson*, 55 Cal. 396; *Finney* v. *Berger*, 50 Cal. 248.

A confirmation may make a defeasible estate good, but cannot work upon an estate that is void, or, more properly speaking, cannot confirm a title where there is no title to be confirmed.

Co. Litt. 295; *Polk's Lessee* v. *Wendal*, 13 U. S. 9 Cranch. 87 (3: 665); *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 (18: 849); *Moore* v. *Hill*, 33 Ill. 439; *Miller* v. *Lindsey*, 1 McLean, 32.

Mr. **E. D. Wheeler,** for defendant in error:

The title of the defendant in error was perfected by operation of the Act of Congress of March 1, 1877.

The land in controversy was not open to preemption, because it was not unoccupied land, being at the time of the entry of plaintiffs in error in the possession of the defendant in error, holding under a state patent.

Davis v. *Scott*, 56 Cal. 165; *McBrown* v. *Morris*, 59 Cal. 64; *Atherton* v. *Fowler*, 96 U. S. 513 (24: 732); *Hosmer* v. *Wallace*, 97 U. S. 575 (24: 1130); *Trenouth* v. *San Francisco*, 100 U. S. 251 (25: 626).

Even if the land was subject to preemption, the plaintiffs in error did not comply with the requirements of the statute upon the subject.

The defendant in error was entitled to a judgment in his favor on the ground of prior possession alone.

Mr. Chief Justice **Waite** delivered the opinion of the court: [367]

This was a suit brought by Samuel B. Martin, the defendant in error, on the 20th of March, 1878, in the District Court of Contra Costa County, California, against Martin Durand and Anthony Thompson, the plaintiffs in error, to recover the possession of the E. ½ sec. 13, T. 2 S., R. 1 E., Mount Diablo meridian. The facts found at the trial were in brief these:

The land in dispute was agricultural land, and it was located by the locating agent of California on the 20th of October, 1862, at the request and in the name of Martin, in lieu of the E. ½ sec. 16, T. 22 S., R. 6 E., of the same meridian. In making this selection, which was for indemnity school lands, the agent acted under color of the authority of section 7 of the Act of March 3, 1853, chap. 145, 10 Stat. at L. 247. This township twenty-two has never been surveyed by the United States, and the east half of section 16 is within the boundaries of a Mexican grant known as San Miguelito, confirmed to one Gonzales, the final survey of which was approved in 1859, and the lands afterwards patented to Gonzales or his assigns.

On the second of March, 1863, the State of California issued a certificate of purchase to Martin for the land in dispute. On the 8th of September, 1870, it was listed to the State by the United States Government, and, on the third of February, 1871, it was patented by the State to Martin under his certificate of purchase. The plat of the United States survey of township two, embracing the land, was filed in the United States land-office in San Francisco on the 10th of June, 1865.

On the 10th of April, 1839, the Mexican Government granted to José Noriega and Robert Livermore a tract of land known as Las Pocitas. The claim under this grant was confirmed on the 14th of February, 1854, by the land commissioners appointed under the Act of March 3, 1851, chap. 41, 9 Stat. at L. 631, and afterwards, on appeal, by this court, at December Term, 1860. After the decision of the land [368] commissioners, a deputy surveyor, under instructions from the Surveyor-General of the United States for California, made a survey which purported to show the boundaries of the claim confirmed, and this survey was approved by the surveyor-general May 7, 1854, but nothing further appears to have been done under it. In March, 1869, after the decree of confirmation by this court, the surveyor-general caused the claim so confirmed to be again surveyed and designated, and this survey was approved

by him May 11, 1870, by the Commissioner of the United States General Land-Office March 1, 1871, and by the Secretary of the Interior June 6, 1871. On the 20th of August, 1872, the United States issued a patent to Noriega and Livermore, their heirs and assigns, for the land so surveyed and designated in March, 1869. The land now in dispute was embraced within the exterior boundaries of the grant adjudged to be valid by the decree of the board of land commissioners affirmed by this court, but was not embraced within the surveys of 1854 or 1869, or in the patent issued to Noriega and Livermore.

On the 16th of May, 1876, Thompson entered into the possession of the south half and Durand into the possession of the north half of the half section in dispute. When these entries were made Martin was in possession of the land, though it was not then, nor had it ever been, fully inclosed or fenced. Within a few days afterwards Martin notified Thompson that he claimed to own the land under a patent from the State of California, which he exhibited; but, notwithstanding this, both Thompson and Durand maintained actual and exclusive possession, and kept Martin out until this suit was brought. Each of the parties entered for the purpose of availing himself of the preemption laws of the United States, having the necessary personal qualifications therefor. They each made application at the proper land-office to perfect their respective claims, but the officers refused to permit them to do so. Upon this state of facts the Supreme Court of California affirmed a judgment of the district court in favor of Martin, and to reverse that decision this writ of error was brought.

[369] Upon the facts as found we have no hesitation in deciding that the title of Martin, under his patent from the State of California, was perfect when his suit was brought, and that the judgment in his favor was right. The land in dispute had not only been selected by the State as indemnity school lands, and certified or listed as such by the proper officer of the United States, when Durand and Thompson made their respective entries as preemption settlers, but it had been patented to Martin and he was in actual possession under color of that title. These are facts specially found by the court below, and the evidence on which this finding was made cannot be considered here. Such being the case, the land was not open to preemption settlement as against Martin when Durand and Thompson entered on his possession. *Atherton* v. *Fowler*, 96 U.S. 513 [24: 732]; *Trenouth* v. *San Francisco*, 100 U. S. 251, 256 [25: 626, 628]; *Mower* v. *Fletcher*, 116 U.S. 381 [29: 593].

If the title of Martin was ever at all defective it was because, at the time of the selection, the land was within the boundaries of a claim under a Mexican grant, and therefore not then, in a strict legal sense, public land; but the United States has never objected to the title of the State because of this. On the contrary, after a survey had been made and approved by the Surveyor-General of the United States for California, which excluded the land from the grant, the proper officer of the United States listed it to the State under the Act of August 3, 1854, chap, 201, 10 Stat. at L. 346, now section 2449 of the Revised Statutes, as indemnity school lands which had been properly selected, and from that day to this, so far as the record shows, the United States has never disputed the title of the State or its grantee. This survey was made in 1869, the claim having been finally confirmed in 1860. As the survey was not made until more than ten months after the Act of July 23, 1866, chap. 219, 14 Stat. at L. 218, "To quiet land titles in California" had become operative, its approval by the surveyor-general had the effect, under the ruling of this court in *Frasher* v. *O'Connor*, 115 U. S. 102 [29: 311], of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or preemption entry as public lands, subject only to a defeat of title, if in the end the survey as [370] made should be set aside and the boundaries of the grant finally extended so as to include the selection or the entry. In the present case, however, the survey was accepted by the owners of the grant and a patent taken for the land within its boundaries, in full satisfaction of their original claim as confirmed by the commissioners and by this court. This was in 1872, and from that time certainly there has been no one, according to this record, who could dispute the title of the State or its grantee except the United States. The owners of the Mexican grant abandoned their claim to the excluded land when they accepted their patent, and no one could enter upon the land by the laws of the United States as a preemption settler, because Martin was in the actual possession under his claim of title. It is not contended that this title of Martin is even technically defective, unless it be for the reason that the selection was actually made when the land was not in law public land. But when the Commissioner of the General Land-Office in 1870 certified this with other land to the State as land which had been selected as indemnity lands, it was an existing selection at that date, and there were no intervening rights to prevent its operation as such. By accepting the certificate the State treated the selection as a valid selection existing at the time of the certificate, and the list thus certified operated under the Act of 1854 as a transfer of the title from the United States to the State which immediately inured to the benefit of Martin under his patent. It is true that the certificate of the commissioner to a list of lands which were not open to selection at the time they were selected, nor at the time they were certified, would not pass title out of the United States because he had no authority in law to make such a certificate. But the case is quite different when the State presents for certification as an existing selection one that was bad when made, but good when presented. Under such circumstances, if the rights of no third parties have intervened, there is nothing to prevent the commissioner from treating the selection as if made on the date of its presentation, and certifying accordingly. His certificate is of selections claimed by the State at the time of its date, and if the State had a [371] right to the title under the circumstances existing then, it was within his official authority to make the transfer. It is a matter of no moment that the selection was bad at the time it

was made, if at the time of its presentation for title it was good, and there were no intervening rights to be injured by reason of its acceptance and ratification by the United States.

This would be sufficient to sustain the title of Martin if there were nothing more. But there is more. All must agree that, even if the title was defective because of the invalidity of the original selection, it was within the power of the United States to cure such a defect by a release to the State or its grantee of all their interest in the land remaining after the lists were certified by the Commissioner of the Land-Office, provided no other person had in the meantime acquired rights superior to those of Martin. This, we think, was done by the Act of March 1, 1877, chap. 81, 19 Stat. at L. 267, "relating to indemnity school selections in the State of California." That Act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selections by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

"Sec. 2. That where indemnity school selections have been made and certified to said State, and said selections shall fail, by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *Provided*, That if there be no such sixteenth or thirty-sixth section and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person; *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

"Sec. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter, not exceeding the prescribed legal quantity under the homestead or preemption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior; *And provided further*, That the claim of such settler shall be presented to the register and receiver of the district land-office, together with the proper proof of his settlement and residence, within twelve months after the passage of this Act, under such rules and regulations as may be established by the Commissioner of the General Land-Office.

"Sec. 4. That this Act shall not apply to any mineral lands, nor to any lands in the City and County of San Francisco, nor to any incorporated city or town, nor to any tide, swamp or overflowed lands.

This statute was, in our opinion, a full and complete ratification by Congress, according to its terms, of the lists of indemnity school selections which had been before that time certified to the State of California by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been, if the lands included in the lists were not of the character of any of those mentioned in section 4, and if they had not been taken up in good faith by a homestead or preemption settler prior to the date of the certificate. The history of the times, which is exemplified by the facts of this case, shows that such must have been the intention of Congress. Almost from the beginning many of the titles under these indemnity selections had been in doubt because of the delay which attended the settlement of Mexican claims, and the records of this court contain a large number of cases in which claimants under the preemption and homestead laws of the United States have sought to establish their titles, as against purchasers from the State under indemnity selections who had been many years in possession, because of some real or supposed defect in the title of the State. This statute was passed twenty-three years after the original grant to the State of the right to select indemnity lands for lost school sections, and more than fourteen years after the lands now in dispute had been selected by the State under this grant and sold to Martin. Eight years before the statute the proper officer of the United States had made a certificate which, if authorized by law, transferred an absolute estate in fee simple to the State that inured at once to the benefit of Martin. This certificate had never been disputed by the United States, and no attempt had ever been made by anyone in authority to set it aside. This, as we know from our own records, is but one of many cases of a similar character, and read in the light of these facts the statute has to us no uncertain meaning.

In its first section all such certificates are expressly confirmed where the only objection to their validity is that a selection was made before the Mexican grant within which the original school section was actually situated had been surveyed, and the survey finally approved. In this class of cases the State was entitled to its indemnity lands, and the United States in effect formally waived any and all irregularities in making the selections.

In the second section cases were provided for in which the selection failed: 1, because the school section in lieu of which indemnity was claimed and taken was not actually within the limits of a Mexican grant; and 2, because it was "otherwise defective or invalid." This language is certainly broad enough to include every defective certificate; and, in order that the United States might be protected from loss, it was provided that, if the sixteenth or thirty-

sixth section, in lieu of which the selection
[374] was made, should be found outside the Mexican grant, the United States would accept that in lieu of the selected land, and confirm the selection. If, however, there was no such sixteenth or thirty-sixth section, and the land certified was held by an innocent purchaser from the State for a valuable consideration, such purchaser would be allowed to purchase the same from the United States at the rate of one dollar and twenty-five cents per acre, not exceeding three hundred and twenty acres for any one person.

The statute relates only to such selections as had been certified to the State, and, taken as a whole, it meets the requirements of all the cases of defective selection which could be so certified. These are: 1, cases where the State was entitled to indemnity, but the selection was defective in form; 2, cases where the original school sections were actually in place, and the State was not entitled to indemnity on their account; and 3, cases where the State was not entitled to indemnity, because there never had been such a section sixteen or section thirty-six as was represented when the selection was made and the official certificate given. As to the first of these classes, the certificate was simply confirmed because the State was entitled to its indemnity, and nothing was needed to perfect the title but a waiver by the United States of all irregularities in the time and manner of the selections. As to the second, the selection was confirmed, and the United States took in lieu of the selected land that which the State would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the State. And as to the third, in lieu of confirmation, *bona fide* purchasers from the State were given the privilege of perfecting their titles by paying the United States for the land at a specified price. Under these circumstances, it was a matter of no moment to the United States whether the original selection was invalid for one cause or another. If the State was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the State claimed and got indemnity when it ought to have taken the
[375] original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the State had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States.

It may be, as was claimed in argument, that when the bill was originally prepared the framer had it in mind only to provide for selections made in lieu of school sections within Mexican grants before the final survey of the grants, and for selections made in lieu of sections not finally included within the survey of a grant; but to our minds it is clear that before the bill finally became a law Congress saw that, as ample provision had been made for the protection of the United States in all cases, it was best to include all certificates which were defective, no matter for what cause, and so the words "or are otherwise defective or invalid" were added in what seemed to be the most appropriate place to carry that purpose into effect. No selection was made good unless it had been certified, and not then unless the United States got an equivalent either in land or in money, or in carrying out their original school land grant. In this way the titles of all *bona fide* purchasers from the State were or could be perfected without loss to the United States, and that, we have no doubt, was the intention of Congress when the statute was enacted.

It is true that Durand and Thompson had entered on the land, and had excluded Martin from the possession, before the statute was passed; but that gave them no rights either under this statute or any other. As we have already shown, their entry was of no avail under the general preemption laws; and this statute saves the rights of no homestead or preemption settlers, except such as had entered on the lands in good faith prior to the date of their certification to the State.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL B. MARTIN, *Plff. in Err.*, [376]

v.

ANTHONY THOMPSON.

(See S. C. Reporter's ed. 376, 377.)

Jurisdiction—action to recover crop against one holding adversely—federal question.

In an action against a preemption settler to recover a crop raised by him on lands held adversely against the plaintiff, a writ of error to a decision of a state court put entirely on the ground that the owner of land out of possession cannot recover, from one in possession holding adversely under claim of title, crops raised by him, does not present a federal question.

[No. 167.]

Submitted Jan. 24, 1887. Decided Feb. 7, 1887.

IN ERROR to the Supreme Court of the State of California. Reported below, 62 Cal. 618, and 45 Am. Rep. 663. *Dismissed.*

On motion to dismiss.

The facts of the case sufficiently appear in the opinion of the court.

Mr. **M. Mullany**, for defendant in error, in support of motion.

No brief was filed on behalf of plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Martin the defendant in error in *Durand & Thompson* v. *Martin*, just decided [*ante*, 675] to recover of Thompson, one of the plaintiffs in error, a crop of wheat raised by him during the year 1878 on the land described in that case, which he took from the possession of Martin in 1876, and occupied adversely thereafter. The court has found as a fact that Martin never had possession of the crop before the commencement of this suit, and that it was raised by Thompson with his own labor and at his own expense while he

held exclusive possession of the land adversely to Martin and claiming title.

From this it is clear that the question of the title to the land was not necessarily involved in this case, and on looking into the opinion, which in California forms part of the record, we find that the decision was put entirely on the ground that the owner of land out of possession cannot recover, from one in possession holding adversely under claim of title, the crops raised by him in cultivating the soil. 377] The remedy in such a case is by an appropriate action for the recovery of the possession of the land and damages for the detention. This does not present a federal question, and *the motion to dismiss is granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

319] CHARLES A. W. SHERMAN, Admr. of CHARLOTTE SHERMAN, Deceased, MARIA CAMERON ET AL., *Appts.*,

v.

DAVID H. JEROME AND CHARLES W. GRANT, Exrs. of SARAH E. LITTLE, Deceased.

(See S. C. Reporter's ed. 319-326.)

Wills—attempt by executors to set aside bond and mortgage to meet a certain legacy—legatees, not found.

A written instrument, made by the executors of a will, setting aside an overdue bond and mortgage to be held by them in trust to meet a certain legacy, there being no evidence of the consent of the legatees, or any order of any court on the subject, is held not to have amounted to an irrevocable act transmuting the property. The written instrument was of no greater effect than would have been a mere mental reservation.

[No. 102.]

Argued Dec. 17, 1887. Decided Feb. 7, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George W. Miller** and *James C. Smith, Jr.*, for appellants:

The execution of the instrument in question is an *ex parte* act of only two of the three executors of this will. Until ratified by all the trustees it stands as an unaccepted offer to transfer the bond and mortgage, and they continue part of the general estate.

Admitting, *arguendo*, that the respondents had authority to invest $4,000 for the purpose of this trust, they have not done so. They have made no investment whatever. The execution of said instrument, without the order of the court, without notice to the beneficiaries, and without their knowledge or consent, was no investment of moneys. It was not even an assignment of the securities by executors to trustees, and can no more affect the rights of the appellants than if the papers had been placed in an envelope and marked "Sherman legacy." The respondents might as well have determined in their minds to hold the bond and mortgage for purposes of this trust, as was done in *Miller* v. *Congdon*, 14 Gray, 114.

The essential elements of consent by the beneficiaries, in person or by a trustee legally representing them, is wholly wanting; and without this the act of the respondents was void and the estate continues liable.

Leitch v. *Wells*, 48 N. Y. 585; *Norman* v. *Storer*, 1 Blatchf. 598; *King* v. *Talbot*, 40 N. Y. 76; *Slack* v. *Wiggin*, 1 Demarest, 568.

Messrs. **J. H. McGowan** and *Benton Hanchett*, for appellees:

It was the defendants' duty, as executors under the will, to make an investment of $4,000 and pay the interest accruing from such investment to Charlotte Sherman during her life, holding the securities in their hands until her death, and then pay the principal to the legatees in remainder.

Saunderson v. *Stearns*, 6 Mass. 37; *Dorr* v. *Wainwright*, 18 Pick. 328; *Towne* v. *Amidown*, 20 Pick. 535; *Lansing* v. *Lansing*, 45 Barb. 183; *Drake* v. *Price*, 5 N. Y. 430; *Claggett* v. *Hardy*, 3 N. H. 147; *Haddon* v. *Hemingway*, 39 Mich. 615; *Miller* v. *Congdon*, 14 Gray, 114.

It was the duty of the defendants as such executors to separate the fund from the remainder of the estate and provide for this legacy within a reasonable time.

Fowler v. *Colt*, 25 N. J. Eq. 202.

The investment by real estate security was the proper mode of investment.

Ackerman v. *Emott*, 4 Barb. 626, 636, 645; *King* v. *Talbot*, 40 N. Y. 76, 88, 97; 1 Perry, Trusts, §§ 458, 459; *Wheeler* v. *Perry*, 18 N. H. 307.

It was proper to permit the investment already made to remain, it being believed to be good, and being secured by real estate mortgage.

Hill, Trustees, p. *361; Perry, Trusts, §§ 465, 466.

Those securities are separated from the estate, and the proceedings of the complainants should be to compel the execution of that trust by turning over the securities, or for directing the defendants to collect the security and pay the proceeds, or otherwise to account for such specific trust.

Anderson v. *Earle*, 9 S. C. (N. S.) 460; *Anderson* v. *Earle*, 1 Am. Prob. Rep. 472; Hill, Trustees, 214.

Mr. Justice **Blatchford** delivered the opinion of the court: [320]

In 1872, Sarah E. Little, then a resident of Perry, Wyoming County, New York, died at that place, leaving a last will and testament executed August 30, 1872, and a codicil thereto, executed September 9, 1872. The will, after giving sundry money legacies, proceeded as follows: "Fourth. I give and bequeath to Charlotte Sherman the interest of four thousand dollars during the term of her natural life, and at her decease the said sum of four thousand dollars shall be equally divided between Maria Cameron, Sarah E. Morse, and James Sherman, children of C. A. W. Sherman, or so many of them as shall then be living." By subsequent articles other money legacies were given, and then followed these articles: "Twenty-second. All bequests herein contained to persons residing in New York and that to Maria Cameron, I desire paid and the remainder as fast as the money is avai-

able." "Twenty-sixth. I hereby appoint Henry N. Page my executor for carrying out the provisions of this my last will and testament, so far as they relate to parties and property in this State (in New York), and Charles W. Grant, of East Saginaw, and D. H. Jerome, of Saginaw City, Michigan, my executors for everything, so far as they relate to parties and property in the State of Michigan and elsewhere; and my executors are hereby authorized and empowered to sell and convey [321] any real estate of which I may be possessed as they shall deem for the best interest of the legatees."

On the 24th of December, 1881, the present suit in equity was brought in the Circuit Court of the United States for the Eastern District of Michigan, by Charles A. W. Sherman, as administrator of Charlotte Sherman, deceased; Maria Cameron, James Sherman and Sarah E. Morse, against David H. Jerome and Charles W. Grant. The bill sets out the foregoing provisions of Little's will and states these facts: Charles A. W. Sherman is the C. A. W. Sherman named in the will. Charlotte Sherman was his wife, and died in May, 1880, and he was appointed her administrator in December, 1881. In January, 1873, the will of Little was proved before the surrogate of Wyoming County, New York, and letters testamentary were issued to Page, named in it as executor. In March, 1873, letters testamentary on the will of Little were issued by the Probate Court for Saginaw County, Michigan, to Grant and Jerome. Page, in New York, and Grant and Jerome, in Michigan, entered upon their duties as executors. In New York, Little left property not exceeding a few hundred dollars in amount, which went into the hands of Paige, and was used in defraying funeral expenses, leaving nothing in his hands with which to pay the legacies. Little left a large real and personal estate in Saginaw County, Michigan, which came into the hands of Grant and Jerome, as executors; and they have now in their hands a greater amount of the estate than is sufficient to pay to the plaintiffs their legacies and to pay all the other legacies. Grant and Jerome paid to Charlotte Sherman the interest on the $4,000 down to April 1, 1876, but nothing more has been paid on the legacies to the plaintiffs. Maria Cameron, Sarah E. Morse, and James Sherman were living at the time of the death of Charlotte Sherman, and are still living. The bill prays for an accounting by the defendants, as executors, and for the payment to the plaintiffs of the amounts due to them for the legacies.

The answer admits that a part of the estate left by Little in Michigan came into the hands of Grant and a part into the hands of Jerome. [322] It avers that, aside from the Coats bond and mortgage hereafter mentioned, Grant has none of the estate now in his hands, and Jerome has $9,621.75, including any fees, commissions or compensation for his services. Accounts of receipts and disbursements by each defendant, as executor, are annexed to the answer. It then sets forth that the defendants believed it to be their duty to set apart and invest, out of the estate, $4,000, the interest of which, as they should be able to collect it, should be paid to Charlotte Sherman during her lifetime, and the principal be retained by them in such investment, and, after her decease, be paid over to Maria Cameron, Sarah E. Morse, and James Sherman; that for that purpose, they took out of the estate and set apart a bond executed by one Coats to Little, in the penalty of $10,000, dated May 1, 1869, conditioned to pay $1,000 May 1, 1871, $1,000 May 1, 1872, and $3,000 May 1, 1873, with interest annually on all sums unpaid at 10 per cent, and a mortgage given to secure the bond, bearing the same date, executed by Coats to Little, mortgaging a parcel of land in East Saginaw, Saginaw County, Michigan, and recorded in the office of the register of deeds for Saginaw County; that, to set apart the bond and mortgage, they, on the 20th of October, 1874, executed and acknowledged the following instrument in writing, which was recorded in the office of said register of deeds on the same day:

"*Whereas*, by the last will and testament of Sarah E. Little, the interest of sum of four thousand dollars is bequeathed to Charlotte Sherman for her life, and upon her decease the said sum of four thousand dollars is to be divided between parties therein named;

And whereas, among the assets of the estate of said Sarah E. Little is a bond and mortgage made by Alice L. Coats to said Sarah E. Little, dated May 1, 1869, for the sum of five thousand dollars, on which there is now due four thousand dollars, and which mortgage is recorded in the office of the register of deeds of Saginaw County, Michigan, in liber O of mortgages, on pages 324 and 325:

Now, therefore, we, the undersigned, executors of the said will, do hereby set apart for [323] the benefit of said Charlotte Sherman, and to be held by us in trust for the purpose of paying the said interest, and upon her decease for distribution among the persons named in said will, the said bond and mortgage.

In witness whereof, we have hereunto set our hands and seals, this twentieth day of October, A. D. 1874.

David H. Jerome. [L. S.]
Charles W Grant. [L. S.]

Signed, sealed, and delivered in presence of—
Benton Hanchett,
D. R. Richardson.

State of Michigan, }
County of Saginaw, } *ss.*

On this 20th day of October, A. D., 1874, before me, a notary public in and for said county, personally came the above named David H. Jerome and Charles W. Grant, to me known to be the executors of the last will of Sarah E. Little, deceased, and acknowledged the foregoing instrument by them subscribed to be their free act and deed.

Benton Hanchett,
Notary Public.;"

by means whereof they set apart the bond and mortgage, as an investment in their hands, to be held by them as executors under the will, in trust, from which to collect the interest on the sum of $4,000, represented by the bond and mortgage, as principal, and pay the same to Charlotte Sherman, and to collect and receive the principal, and pay the same, in pursuance of the direction of the will, to Maria Cameron, Sarah E. Morse, and James Sherman; that they

made the investment properly, and in accordance with their duty; that their action was, in effect, the same, in all respects, as if they had taken the sum of $4,000 in money and purchased a security for that amount, or had loaned that sum on security for the purpose of obtaining interest and retaining the principal to meet the payment of the legacy; that the investment was made according to the best of their judgment, and in good faith; that they [324] then believed the security was ample, and that the bond and mortgage were a desirable security for providing for the legacy; that Coats was then believed by the defendants to be worth, in her own right, the sum of at least $75,000 over and above the real estate covered by the mortgage; that they then believed also that the real estate was a good and sufficient security by itself to secure the payment of the $4,000 and interest thereon; that the money secured by the bond and mortgage was not collected from Coats, because they believed the security, as it stood, was an entirely satisfactory and altogether desirable one, and an investment as good as they could make; that on such setting apart of the security, Charlotte Sherman was informed thereof, and thereafter Grant collected from Coats, on the bond and mortgage, four sums of $200 each, which he paid to her, he having, in January, 1874, paid to her $200, all on account of her legacy; that no other sums have since been collected by the defendants on the bond and mortgage, and there is due thereon $4,000 of principal, and interest from May 1, 1876; that when the interest ceased to be paid the defendants notified Charlotte Sherman thereof, and asked her advice and direction as to foreclosing the mortgage, and since her death they have requested the advice and direction of the plaintiffs in regard to collecting the bond and mortgage, and have advised them of the setting apart of the security; that the defendants have offered, and now offer, to transfer the bond and mortgage to the plaintiffs; that they have paid $132.43 for taxes on the mortgaged land, which were a lien on it, and which should be reimbursed to them; that since the investment, Charlotte Sherman and the plaintiffs have had no right to claim payment of any part of the legacy out of the estate of Little; and that the investment has remained the sole fund out of which the legacy should be paid. The answer then admits that the amount which came into the hands of the defendants from the estate of Little was sufficient, after paying all the debts of Little, to pay the legacy to the plaintiffs, and all the other legacies payable before that legacy, according to the directions of the will, but such [325] amount and the estate was not sufficient to pay all the legacies, not including the residuary legacy. It then avers that, according to the provisions of the will, it was not their duty to pay over the $4,000 to Charlotte Sherman; and that the other legatees under the will always objected, after such investment had been made, to any other provision or payment being made out of the estate on account of that legacy.

It was stipulated by the parties that Charles A. W. Sherman was administrator of Charlotte Sherman, and that Page had not, at the time of the filing of the bill, or at any time, any funds in his hands belonging to the estate of Little, except as alleged in the bill.

The case was heard on bill and answer. A decree was made providing that the defendants, as executors, have in their hands and hold said bond and mortgage, in trust for the payment to the plaintiffs of the legacy specified in the fourth clause of the bill; that the plaintiffs are entitled to the payment of the proceeds of the bond and mortgage, after deducting therefrom the expenses of the collection thereof, and the amounts paid and to be paid by the defendants for taxes on the property covered by the mortgage, to preserve the lien thereof, and the costs of this suit; and that the defendants foreclose and collect the bond and mortgage, by proper legal proceedings, and out of the proceeds retain the necessary and reasonable costs and expenses of such foreclosure and collection, and the amounts so paid, and to be paid, by them for taxes, and their costs of this suit, and pay the balance of the proceeds to the plaintiffs in payment and discharge of the legacy. From this decree the plaintiffs have appealed.

The only question necessary or proper to be disposed of on this appeal, in view of the pleadings and of the terms of the decree below, is whether the special matter alleged in regard to the setting apart of the bond and mortgage is a defense to the suit.

At the time of the execution of the paper of October 20, 1874, the unpaid $4,000 secured by the bond and mortgage had been overdue more than seventeen months. There is no suggestion that any of the legatees named in the fourth article of the will consented to the set- [326] ting apart of the bond and mortgage, or that there was any order of any court on the subject. The fourth article gives directly to Charlotte Sherman the interest of $4,000 for life, and at her decease gives directly to such of the other three persons named as shall then be living, "the said sum of four thousand dollars," to be equally divided among them. Under these circumstances, the execution of the paper of October 20, 1874, by the defendants, setting apart the bond and mortgage to be held by them in trust, even though the paper was put on record, amounted to no more than if they had retained the bond and mortgage, without executing any such paper, and had merely made a mental resolution to consider the bond and mortgage as set apart for this legacy. There was no second party to the paper, no transfer in it, no contract, and the beneficiaries never assented to it, or ratified it, or waived their rights; and, in the absence of any such action by the beneficiaries, it was revocable at any time. Without deciding what course, if any, might lawfully have been taken by the defendants at the time in question, to effect the object they sought, we are of opinion that what they did was of no more avail to that end than the mere mental determination of the executor in *Miller* v. *Congdon*, 14 Gray, 114. Even though the mental determination took the shape of a written declared purpose, it did not amount to the decisive and irrevocable act which must exist to have the effect to transmute the property.

The decree of the Circuit Court is reversed.

and the case is remanded to that court, with a direction to take such further proceedings therein as shall not be inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[363] JACOB M. HARMON ET AL. *Plffs. in Err.*,
v.
CHARLES V. McADAMS, and THOMAS C. MOORE, Exrs. of JACOB HARMON, Deceased.

(See S. C. Reporter's ed. 363-366.)

Negotiable paper—action on promissory note—unilateral agreement as a defense—what must appear.

In an action upon a promissory note, where the defendant relies on a verbal promise by the payee to release him from the payment of the principal on condition of the payment by him of a certain rate of interest during the life of the payee, it is incumbent upon him to show full performance of the condition.

[No. 1203.]

Submitted Jan. 10, 1887. Decided Feb. 7, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The case and facts appear in the opinion.

Messrs. **Charles H. Wood,** and **Robert Doyle,** for plaintiffs in error:

An agreement to pay interest for a specified time after a note becomes due furnishes a sufficient consideration for the promise to extend time of payment. It is a further investment for a definite period for the creditor, and an extension of credit for the same time for the debtor. The legal effect of the agreement was to disable the former from enforcing the collection and the latter from paying for the period named.

Chute v. *Pattee*, 37 Me. 105; *Fowler* v. *Brooks*, 13 N. H. 240; *Davis* v. *Lane*, 10 N. H. 156; *Wheat* v. *Kendall*, 6 N. H. 508; *Robinson* v. *Miller*, 2 Bush (Ky.), 188; *Stallings* v. *Johnson*, 27 Ga. 564.

The facts offered to be proved show a binding contract, which the court should have enforced.

In the year 1879 the interest laws of Illinois were so changed as to make 8 per cent per annum the maximum rate of interest that could be contracted for.

Hurd, Gen. Stat. ed. 1885, chap. 74, p. 736.

The waiver of a legal right at the request of another person is a good consideration for a promise from him.

Farmer v. *Stewart*, 2 N. H. 101.

To constitute a consideration it is not necessary that a benefit should accrue to the promisor. It is sufficient that something valuable flows from the promisee, and that the promise is the inducement to the transaction.

Violett v. *Patton*, 9 U. S. 5 Cranch, 142 (3: 61).

A valuable consideration, however small or nominal, if given or stipulated in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract.

Lawrence v. *McCalmont*, 43 U. S. 2 How. 427 (11: 326).

The agreement to pay interest in advance constitutes a sufficient consideration to support the contract.

Lime Rock Bank v. *Mallett*, 34 Me. 547; *Grafton Bank* v. *Woodward*, 5 N. H. 105; *Crosby* v. *Wyatt*, 10 N. H. 318; *Abel* v. *Alexander*, 45 Ind. 523; *Redman* v. *Deputy*, 26 Ind. 338; *Flynn* v. *Mudd*, 27 Ill. 323; *U. S.* v. *Howell*, and *Harris* v. *Brooks*, 2 Am. Lead. Cas. 4th. ed. 418, 425, notes and cases there cited.

Nor will the agreement to pay interest upon interest affect the validity of the consideration.

Montague v. *Mitchell*, 28 Ill. 481; *Witmer* v. *Ellison*, 72 Ill. 301; *Myers* v. *First Nat. Bank*, 78 Ill. 257; *Harbert* v. *Dumont*, 3 Ind. 346; *White* v. *Whitney*, 51 Ind. 124; *Grafton Bank* v. *Woodward*, 5 N. H. 106.

Mr. **John P. Wilson,** for defendants in error:

"Where an accord is relied upon it must be executed. Readiness to perform is not sufficient, nor is part performance sufficient. An accord is always to be entirely executed, and not executory in any part."

Simmons v. *Clark*, 56 Ill. 96, 101.

This is the law everywhere; and out of a vast number of cases which hold the general doctrine, we cite a few which are analogous in their facts to the cases at bar.

Simmons v. *Hamilton*, 56 Cal. 498; *White* v. *Gray*, 68 Me. 579; *Hall* v. *Smith*, 10 Ia. 45; *Flack* v. *Garland*, 8 Md. 188; *Blackburn* v. *Ormbsy*, 41 Pa. 97; *Cary* v. *Bancroft*, 14 Pick. 315; *Bagley* v. *Homan*, 32 E. C. L. R. 419.

In the case at bar it was the performance of the alleged promise and not the promise itself which was to satisfy the notes. If the plaintiffs in error would pay interest so and so until the testator's death, then the notes should be canceled.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action of assumpsit brought in the Circuit Court of the United States for the Northern District of Illinois, on September 25, 1885, the plaintiffs being executors of Jacob Harmon, deceased, citizens of Indiana, and the [364] defendants citizens of Illinois. The action was founded on a promissory note signed by the defendants, dated March 1, 1875, payable one year after date to the order of Jacob Harmon, for $15,000, with interest at 10 per cent per annum from date until paid, with a proviso that if the note was collected by suit the judgment should include a reasonable fee for the plaintiffs' attorney. A copy of the note, with the indorsements thereon, was set out with the declaration, showing that the interest thereon had been paid to March 1, 1885. The plea was the general issue. The case was tried by a jury, who returned a verdict in favor of the plaintiffs below, the judgment on which is brought into review by this writ of error.

From the bill of exceptions it appears that the following took place on the trial:

"Upon the said trial the defendants introduced proof tending to show that there was a verbal agreement between themselves and Jacob Harmon, the payee of the note, that if they would pay the interest regularly, at the rate of 10 per cent per annum, as called for by the note, until his death, they should be acquitted

of the payment of the principal; in other words, that the money represented by the note was given to them upon condition that they should pay the interest thereon during the life of Jacob Harmon at the rate of 10 per cent per annum.

"The defendants also offered to prove that in the fore part of the year 1880, after the said note in suit had become due, they offered to pay Jacob Harmon the amount then due on said note, with interest, and proposed to do so, unless he would reduce the interest; whereupon, the said Jacob Harmon verbally agreed that if they would continue to pay him the interest upon the sum of money represented by said note during his life, and pay in November of each year the interest in advance for four months, or, if they failed to pay the interest in advance for four months, should pay interest upon the interest so unpaid, then the said defendants should be acquitted of and released from the payment of the principal sum of said note at the death of said Jacob Harmon, which the court refused to be permitted to be proved, and the defendants then and there excepted.

"And the court being of opinion that the facts so offered in evidence by the defendants, and the said facts which the defendants offered to prove, would not make a sufficient defense at law, if proven in the said case, directed the jury to return a verdict for the plaintiff therein, and the verdict was taken accordingly; to all of which the defendants then and there duly excepted."

These rulings of the court are now assigned for error. In support of the assignments of error, the plaintiffs in error maintained this proposition; viz., that an agreement by the payor, after the note becomes due, to keep the money and pay interest thereon at the rate of 10 per cent per annum till the death of the payee, constitutes a sufficient consideration for an agreement on the part of the payee that he will then consider the note canceled and paid, where the payor from the time of such agreement continues to pay such interest on the note until the death of the payee. This proposition should be considered in connection with the fact that in the year 1879, and therefore after the note in suit had become due, the interest laws of Illinois were so changed as to make 8 per cent per annum the maximum rate of interest that could be thereafter contracted for. Hurd, Gen. Stat. 1885, chap. 74, p. 736.

The agreement proved and that to prove which evidence was offered were both unilateral. The promise alleged was by the payee of the note, not in consideration of a promise on the part of the payor, but on condition that he perform what was to be done; viz., payment of the interest at the rate and in the mode agreed until the death of the payee. It became essential, therefore, to the defense, to establish the fact that this undertaking had been fully performed, by proof of the payment of the interest as agreed until the death of Jacob Harmon. This fact is assumed in the brief of the counsel for the plaintiffs in error, but it nowhere appears in the record. The bill of exceptions does not state when Jacob Harmon died; it does not appear elsewhere in the record. All we can know from that is that he [366] must have died before the institution of the suit, which was begun by his executors on September 25, 1885, but whether before or after March 1, 1885, we cannot infer, that being the date up to which interest was paid. If he died after that date, then the condition on which his promise could be enforced against his executors had not been fulfilled. On this point, therefore, the defense failed.

Judgment affirmed.

JEREMIAH P. HARMON, *Plff. in Err.*,
v.
CHARLES V. MCADAMS *et al.*, Exrs. of Jacob Harmon, Deceased.

[No. 1204.]

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Same counsel and dates as in preceding case.

Mr. Justice **Matthews** delivered the opinion of the court:

The record in this case involves no other questions than those just decided in the foregoing case.

The judgment is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JESSE P. FARLEY, *Appt.* [303]
v.
NORMAN W. KITTSON, JAMES J. HILL, AND ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

(See S. C. Reporter's ed. 303-318.)

Equity pleading—office of plea—distinction between plea and demurrer—plea as evidence—railroads—reorganization.

1. The proper office of a plea in equity is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large.

2. At a hearing upon a plea, replication and proofs, no fact is in issue between the parties but the truth of the matter pleaded.

3. An objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea.

4. A plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill.

[No. 6.]

Argued Mar. 29, 30, 1886. Ordered for reargument Oct. 25, 1886. Reargued Dec. 8, 9, 1886. Decided Feb. 7, 1887.

APPEAL from the Circuit Court of the United States for the District of Minnesota. [304] Reported below, 4 McCrary, 188, and opinion published 14 Fed. Rep, 114. *Reversed.*

Statement of the case by *Mr. Justice* **Gray**:

This was a bill in equity by Jesse P. Farley against Norman W. Kittson, James J. Hill, and the St. Paul, Minneapolis and Manitoba Railway Company, which, as amended by leave of court, contained the following allegations:

That in 1876 the plaintiff and Kittson and Hill agreed together to acquire by purchase or contract, for their joint and equal benefit, all

that could be obtained of the bonds of the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company, two corporations existing under the laws of Minnesota, and owning railroads in that State, those bonds being then outstanding and for sale at a large discount, and secured by mortgages upon the railroads; then in process of foreclosure; that the object of the agreement was to buy the railroads at the foreclosure sales, using the bonds in payment, and thereby to acquire the railroads; that it was also agreed that, in order to obtain from one Donald A. Smith and other capitalists the funds required for the enterprise, Kittson and Hill might use or give them an interest therein, but that all the interest not so used or given should be retained and held for the joint and equal benefit of the plaintiff and Kittson and Hill.

That it was further agreed between the plaintiff and Kittson and Hill that the details of the negotiations for procuring the necessary funds and for the purchase of the bonds should be principally conducted and managed by Kittson and Hill, and the persons so given an interest in the enterprise, and that the plaintiff "should furnish such facts, information and advice, and render such aid and assistance therein, from time to time, as should be required of him."

That the plaintiff "had knowledge, not possessed by any of the other parties, as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby and the channel through which the [305] same could be reached and procured; also in respect to the situation, amount, character and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages; and that the services of the plaintiff in respect to all of said matters, and his co-operation, were indispensable to the success of said enterprise."

That thereupon Kittson procured funds from Smith and one George Stevens, and agreed to give them a share in the enterprise, the amount of which was unknown to the plaintiff, but was believed by him to be one half; and that the rest belonged to the plaintiff, Kittson and Hill in equal shares.

That, pursuant to the agreement between the plaintiff and Kittson and Hill, negotiations were opened in 1877 and carried on until 1879, resulting in the purchase of bonds amounting in the aggregate, at their face value and interest, to more than $25,000,000; and that the purchases of bonds were made by and in the name of Smith, Stevens, Kittson and Hill, but for the purpose of being used in the purchase of the railroads when offered for sale under foreclosure decrees, and under and in pursuance of the agreement between the plaintiff and Kittson and Hill.

That "Throughout said negotiations for the purchase of said bonds, and in the purchases thereof, the plaintiff was continuously called upon by the said Kittson and Hill for facts and information, advice and co-operation in respect thereto, and at their request furnished and rendered the same, pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of the plaintiff, and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements."

That most of the purchases of bonds were made under an agreement with the holders that they should not be paid for till the railroads were sold under decrees of foreclosure, and that the sellers of the bonds should then have the option of being paid in cash, or of taking new [306] bonds issued by a company to be organized by the purchasers, and secured by mortgage upon the same property.

That nearly all the bonds were owned in Holland, and that one John S. Kennedy was agent of a large majority of the bondholders, with full authority to take such action in respect to them as he thought best, and was a trustee in all the mortgages, except one for $15,000,000 on the First Division of the St. Paul and Pacific Railroad, and was the agent of the holders of more than $11,000,000 of the bonds secured by that mortgage; and that all the foreclosure suits had been commenced by his order, and were prosecuted under his general control and direction.

That the plaintiff "was appointed receiver of the property of the St. Paul and Pacific Railroad Company, and was made general manager of the lines of road of the First Division of the St. Paul and Pacific Railroad Company, under the trustees in said mortgages in possession thereof, upon the recommendation and at the instance and request of said Kennedy."

That after the agreement between the plaintiff and Kittson and Hill, and before the decrees of foreclosure, and before the purchase of any of the bonds, and while negotiations were pending for the purchase of the bonds represented by Kennedy, "The plaintiff informed the said Kennedy of his said interest and connection with the said Kittson and Hill in the project for the purchase of said bonds; and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same;" that the negotiations for the purchase of the bonds were mainly had with Kennedy as agent of the bondholders, and the bonds purchased were placed in the hands of Kennedy and his partner, one Barnes, to be held until paid for as agreed, and were so held, and only delivered upon being so paid for; and that Kennedy strongly recommended the bondholders to sell their bonds upon the terms offered by Smith, Stevens, Kittson and Hill, as the best disposition of them that could be made.

That "To all inquiries made by said Kennedy, or any of the trustees in said mortgages, or [307] by any of the holders of any of the bonds secured thereby, or by anyone interested in the property under his charge as manager or receiver, he [the plaintiff] at all times gave full and true answers and information to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith towards all persons interested in the property under his control as receiver and manager as aforesaid."

That the defendant Railway Company was a corporation organized under the laws of Minnesota in May, 1879, by Kittson, Hill, Smith and Stevens, for the purpose of taking, holding and managing the mortgaged railroads, for the use and benefit of the parties interested in the purchase of the bonds; and that those four persons were directors and officers of this Company and had control of it.

That in March and April, 1879, foreclosure decrees were entered in the pending suits, directing the sale by auction of the mortgaged railroads, and allowing outstanding bonds to be taken in payment for an amount equal to what they would be entitled to by way of dividends under those decrees; that in May and June, 1879, the railroads were sold accordingly, and, by direction and procurement of Kittson, Hill, Smith and Stevens, purchased by the defendant Railway Company, for the use and benefit of the parties interested in the purchase of the bonds as aforesaid, including the plaintiff, and all the bonds purchased were then used in payment; that the defendant Company paid nothing for the railroads, but took them without consideration, except the consideration furnished and provided by the plaintiff and Kittson, Hill, Smith and Stevens, which consideration, aside from the bonds, was furnished by Smith and Stevens as aforesaid; that property worth in all over $15,000,000 was thereby vested in the Company, for the use and benefit of the plaintiff and Kittson, Hill, Smith and Stevens, in proportion to their respective interests; and the Company had notice at the time of the purchase that the plaintiff was jointly interested with Kittson and Hill.

[308] That the defendant Company in June, 1879, issued and negotiated new bonds to the amount of $3,000,000, secured by mortgage of the railroads, and with these bonds paid for all the bonds purchased as aforesaid, and all other expenses of the enterprise; and had since, under the control and management of Kittson, Hill, Smith and Stevens, held and operated the railroads and made large net profits.

That the capital stock of this Company was $15,000,000, which represented the property acquired, and was part of the profits resulting from the enterprise; that other profits amounting to many hundred thousand dollars had also been divided between Kittson, Hill, Smith and Stevens; and that a large amount of stock had been distributed among them, of which Kittson and Hill received 57,646 shares, being part of that to which the plaintiff, Kittson and Hill were entitled under the arrangement with Smith and Stevens, but that the Company neglected and refused to deliver any of the stock to the plaintiff.

That Kittson and Hill never questioned, but always admitted, the plaintiff's right to share equally with them, until after the organization of the defendant Company in May, 1879, and then at first only suggested to him that his share ought not to be equal to theirs, because they had, as they claimed, been required to advance some money in carrying out the enterprise; but now the defendants, confederating to defraud the plaintiff, refused to account with him, or to deliver to him any stock, or to pay him any of the profits of the enterprise, and ignored and disregarded all his rights in the premises.

The bill prayed for a discovery, for an account, and that the plaintiff be adjudged to be entitled to an equal share with Kittson and Hill in the enterprise and its profits; and they be ordered to pay and turn over to him one third of the moneys, bonds and stocks received by them; and the Railway Company be ordered to issue to him his proportion of stock, and to recognize his rights in its stock and property as equal to those of Kittson and Hill; and for further relief.

To this bill the St. Paul, Minneapolis and Manitoba Railway Company demurred for want of equity, and Kittson and Hill filed a plea.

The plea, after setting out with particularity [309] the various issues of bonds, secured by mortgages, by the St. Paul and Pacific Railroad Company, and by the First Division of the St. Paul and Pacific Railroad Company, and the appointment of successive trustees under those mortgages; and alleging that, upon a bill filed in 1873 by Kennedy and others, on behalf of all the bondholders under a mortgage of $15,000,000 on the first of those railroads, Farley was appointed by the court, on August 1, 1873, receiver of that railroad, and accepted the trust, and took possession of and managed the road from that date until it was sold and delivered to the defendant Railway Company under a decree of foreclosure, as stated in the bill; that on October 9, 1876, Kennedy and two others, as trustees, under and pursuant to mortgages on the second of those railroads, took possession of it; and that from that date until it was delivered to the purchaser under a decree of foreclosure, those trustees held and operated it, and Farley was the general manager of it for them, and had full control of the management thereof; continued and concluded as follows:

"That the said plaintiff never at any time informed the said Kennedy, nor any of the holders of any of said mortgage bonds, of his interest in the project for purchasing said bonds, or of his interest in the project of acquiring by means of said bonds the said mortgaged property, which he alleges in his bill of complaint; nor did the said Kennedy, nor any of said bondholders, know, suspect or have any information or belief, at any time until after the confirmation of all said foreclosure sales, that the plaintiff ever claimed to have any such interest, or any interest in said projects, or either of them.

"And these defendants say that as receiver of said lines covered by said $15,000,000 mortgage the said plaintiff could not lawfully make the agreement with these defendants mentioned in the bill of complaint, or engage in the enterprise, therein mentioned, of purchasing the bonds of said $15,000,000 issue, or in the enterprise of purchasing the said mortgaged property; and that the making of such an agreement and the embarking in such an enterprise by him was a breach of trust on his part as such receiver, and a fraud on the holders of the bonds of said $15,000,000 issue, and [310] was a fraud upon this court, whose receiver he was.

"And that as general manager for the trustees in said mortgages of the lines of railroad of said First Division Company the said plaintiff

occupied a position of trust and confidence toward his employers, the said trustees, and towards the holders of the bonds secured by said mortgages; and that by making the agreement and engaging and continuing in the enterprise of purchasing the said bonds and said mortgaged property mentioned in his said bill, the said Farley was guilty of a breach of trust towards and a fraud upon the said trustees and the said bondholders.

"And these defendants say that by reason of the said fiduciary positions occupied by the plaintiff, as aforesaid, he is not entitled to the aid of a court of equity to enforce as against these defendants any of the agreements mentioned in said bill or any rights claimed by him and growing out of said agreements.

"Therefore these defendants do plead all and singular the matters aforesaid in bar to the plaintiff's said bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to the said bill, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained."

Annexed to the plea were a certificate of counsel, that it was in their opinion well founded in point of law; and an affidavit of the defendant Hill, that the plea was true in point of fact, and was not interposed for delay, and that the defendant Kittson was absent from the State and District of Minnesota.

The plaintiff filed a general replication to the plea, and on his motion the demurrer of the Railway Company and the plea of Kittson and Hill were set down for hearing. The demurrer of the Company was overruled, and on its application it was ordered that the plea of Kittson and Hill should stand as the joint and several plea of all the defendants.

The case was then heard upon the bill, plea, replication and proofs. The only evidence introduced was a stipulation in writing, of counsel, [311] that the averments of the plea, preceding those above quoted in full, were true; the bill on which the plaintiff was appointed receiver; an order passed by the court on that bill on May 31, 1878, reciting that Stevens, Smith, Kittson and Hill, under an agreement between them and the bondholders, dated March 18, 1878, were the equitable owners of $11,400,000 of the $15,000,000 issue of bonds, and authorizing Farley as receiver to finish the roads with money to be supplied by them; and the deposition of the plaintiff, the substance of which was, that before the completion of the purchase of the bonds he informed Kennedy by a letter (which could not be found) that Kittson and Hill had offered him an interest in it, in answer to which Kennedy, on February 25, 1878, wrote him a letter (which he produced), acknowledging the receipt of his letter, and saying: "We think it will pay you to take an interest with Kittson and Hill, and we are glad to hear that they have offered it to you;" but that the plaintiff did not disclose to Kennedy that he had already the same interest that Kittson and Hill had, because he had agreed with them that he would not make the fact public, for fear that the stockholders might hear of it and apply to the court to have him removed and another receiver appointed, to the detriment of the enterprise, and of the interests of the bondholders; and that he did not inform the court of his interest when the order of May 31, 1878, was made.

The circuit court, assuming it to be proved that the plaintiff informed Kennedy of his interest, yet held that the agreement of the plaintiff with Kittson and Hill was unlawful and void, and on that ground sustained the plea and dismissed the bill. 4 McCrary, 138.

The plaintiff appealed to this court.

Messrs. **Henry D. Beam, George F. Edmunds** and *Edward D. Cooke*, for appellant.

Messrs. **George B. Young, William M. Evarts** and *H. R. Bigelow*, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

A brief abstract of the pleadings will help to make clear what is presented for decision upon this record. [312]

The suit was brought by Farley to enforce an agreement by which he and the defendants Kittson and Hill agreed to purchase, for their joint and equal benefit, the bonds, secured by mortgages, of two railroads, of one of which he was receiver, by appointment of the court, and of the other of which he was the general manager, by appointment of the trustees named in the mortgages.

The bill alleged the making of the agreement; that its object was, by means of the bonds so purchased, to purchase the railroads at sales under decrees of foreclosure in suits then pending; that it was agreed that Kittson and Hill should conduct the negotiations for procuring the necessary funds and purchasing the bonds, and the plaintiff should furnish such facts, information and advice, and render such assistance, from time to time, as should be required of him; that the plaintiff had knowledge, not possessed by the other parties, as to who held the bonds and at what rate, and how they could be procured, and as to the nature and value of the railroads, and as to the pending suits for foreclosure, and his services and co-operation were indispensable to the success of the enterprise; that he performed the agreement on his part; that Kittson and Hill obtained the requisite funds from other persons, and purchased the bonds from the bondholders through one Kennedy, the authorized agent of the latter, and afterwards purchased the railroads at sales under decrees of foreclosure; that pending the negotiations for the purchase of the bonds, the plaintiff informed Kennedy of his interest and his connection with Kittson and Hill in the project to purchase them; that the plaintiff at all times, to the best of his knowledge and ability, gave full and true answers and information to all inquiries made by Kennedy, or by any of the trustees or bondholders, or by any person interested in the property under his charge as receiver and as manager, and kept Kennedy fully informed of all matters coming to his knowledge affecting the property, and in all things acted honestly and in good faith towards all persons interested in it; that Kittson and Hill had organized a new corporation, which was joined as a defendant; and that the defendants had thereby obtained a great amount of [313] property and of profits, and had refused to account to the plaintiff for his share. The bill

prayed for a discovery, an account, and other relief.

The individual defendants filed a plea, which, on the motion of the defendant Corporation, was ordered to stand as its plea also, consisting of three parts:

First. A restatement in detail of some of the facts alleged generally in the bill.

Second. Averments that the plaintiff never informed Kennedy or any of the bondholders of his interest in the project for purchasing the bonds and thereby acquiring the mortgaged property, as alleged in the bill; and that neither Kennedy nor the bondholders knew, suspected, or had any information or belief that the plaintiff had or claimed to have any interest in the project until after the foreclosure sales.

Third. Averments that the making by the plaintiff of the agreement sued on, and his engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were, as to that railroad of which he was receiver, unlawful, a breach of his trust as such receiver, and a fraud upon the bondholders and the court; and, as to the railroad of which he was general manager for the trustees under the mortgages, a breach of trust towards the trustees and the bondholders, and a fraud upon them; and that by reason of the fiduciary positions so occupied by him the plaintiff was not entitled to the aid of a court of equity to enforce the agreement or any rights growing out of it.

To this plea the plaintiff filed a general replication, and the hearing in the circuit court was upon the issue thus joined.

The pleader and the court below appear to have proceeded upon the theory that by a plea in equity a defendant may aver certain facts in addition to or contradiction of those alleged in the bill; and also not only, if he proves his averments, avail himself of objections in matter of law to the case stated in the bill, as modified by the facts proved; but even, if he fails to prove those facts, take any objection to the case stated in the bill, which would have been open to him if he had demurred generally for want of equity. [314]

But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitf. Pl. 4th ed. 14, 219, 295; Story, Eq. Pl. §§ 649, 652.

The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitf. Pl. 302, 303; Story, Eq. Pl. § 697. That practice in this particular has been twice recognized by this court. *Hughes* v. *Blake*, 19 U. S. 6 Wheat. 453, 472 [5: 303, 308]; *Rhode Island* v. *Mass.* 39 U. S. 14 Pet. 210, 257 [10: 423, 445]. But the case of *Rhode Island* v. *Massachusetts*, arose within its original jurisdiction in equity, for outlines of the practice in which the court has always looked to the practice of the court of chancery in England. Rule 7 of 1791, 1 Cranch, xvii, and 1 How. xxiv; *Rule 3 of 1858 and 1884, 21 How. v, and 108 U. S. 574. And the case of *Hughes* v. *Blake*, which began in the circuit court, was decided here in 1821, before this court, under the authority conferred upon it by Congress, had established the Rules of Practice in Equity in the Courts of the United States, one of which provides that "If upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." *Rule 19 in Equity, of 1822, 7 Wheat. xix; Rule 32 in Equity, of 1842, 1 How. li. The effect of this rule of court when the issue of fact joined on a plea is determined in the defendant's favor need not, however, be considered in this case, because it is quite clear that at a hearing upon plea, replication and proofs, no fact is in issue between the parties but the truth of the matter pleaded. [315]

In a case so heard, decided by this court in 1808, *Chief Justice* Marshall said: "In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded." *Stead* v. *Course*, 8 U. S. 4 Cranch, 403, 418 [2: 660, 663]. In a case before the House of Lords a year afterwards, *Lord* Redesdale "observed that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded." "Upon a plea allowed, nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea." "Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true." *Roche* v. *Morgell*, 2 Sch. & Lef. 721, 725-727.

The distinction between a demurrer and a plea dates as far back as the time of *Lord* Bacon, by the 58th of whose Ordinances for the Administration of Justice in Chancery, "a demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like." Orders in Chancery, Beames' ed. 26. *Lord* Redesdale, in his Treatise on Pleadings, says: "A plea must aver facts to which the plaintiff may

*See rules complete, as revised and promulgated Jan. 7, 1884, in Book xx of this edition.

reply, and not, in the nature of a demurrer, rest on facts in the bill." Mitf. Pl. 297. And Mr. Jeremy, in a note to this passage, commenting on the ordinance of *Lord* Bacon, observes: "The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill;" in other words, a plea which avers that a certain fact is not as the bill affirms it to be sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea is so well established that it has been constantly assumed and therefore seldom stated in judicial opinions; yet there are instances in which it has been explicitly recognized by other courts of chancery, as well as by this court. *Billing* v. *Flight*, 1 Madd. 230; *Steff* v. *Andrews*, 2 Madd. 6; *Varick* v. *Dodge*, 9 Paige, 149; *Phelps* v. *Garrow*, 8 Edw. Ch. 189; *Rhode Island* v. *Mass.* 39 U. S. 14 Pet. 210, 258, 262 [10: 423, 446, 447]; *National Bank* v. *Ins. Co.* 104 U. S. 54, 76 [26: 698, 702].

[316]

It only remains to apply these elementary principles of equity pleading to the case before us.

The averments in the first part of the plea, restating in detail some of the facts alleged in the bill, were admitted by stipulation of counsel in writing to be true, and no controversy arose upon them.

The substance of the averments in the second part of the plea was that neither Kennedy nor the bondholders, whose agent and representative he was, had any notice or knowledge that the plaintiff had or claimed to have any interest in the project set forth in the bill, until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff (in connection with Kennedy's letter to him), which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, before the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest, or that it had been already acquired. The want of any notice to Kennedy and the bondholders, averred in the plea, was thus disproved.

The plea, indeed, is supported by the affidavit of one of the defendants that it is true in point of fact. But the oath of the party to its truth in point of fact is added only for the same purpose as the certificate of counsel that in their opinion it is well founded in matter of law, in order to comply with the 31st Rule in Equity, the object of which is to prevent a defendant from delaying or evading the discovery sought, without showing that the plea is worthy of the consideration of the court. *Ewing* v. *Bright*, 8 Wall. Jr. 134; *Wall* v. *Stubbs*, 2 Ves. & B. 354. An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill. *Seitz* v. *Mitchell*, 94 U. S. 580 [24: 179]. But a plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill. *Hearit* v. *Corning*, 3 Paige, 566.

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The allegations of the bill that the plaintiff, at all times, to the best of his knowledge and ability, gave full and true answers to all inquiries made by Kennedy or any of the trustees or bondholders, or any person interested in the property under his charge as receiver and as manager, and in all things acted honestly and in good faith towards all persons interested in it, were not denied by the plea, and therefore, for the purposes of the hearing thereon, were conclusively admitted to be true. So much of the plaintiff's testimony as tended to show that he intentionally concealed his interest from the stockholders and from the court, was outside of the averments of the plea, and therefore irrelevant to the issue to be tried.

The plaintiff having neither moved to set aside the plea as irregular for want of an answer supporting it, nor set down the case for hearing upon the bill and plea only, but having replied to the plea, and the only issue of fact thus joined having been determined by the evidence in his favor, it is unnecessary to consider whether the averments of fact in the second part of the plea ought to have been supported by an answer, or whether, if proved, they would have made out a defense to the bill.

The averments in the third part of the plea that, by reason of the plaintiff's position as receiver and general manager of the railroads, his entering into the agreement sued on and engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads were unlawful, and did not entitle him to the aid of a court of equity to enforce the agreement or any rights growing out of it, were averments of pure matter of law, arising upon the plaintiff's case as stated in the bill, and affecting the equity of the bill, and therefore a proper subject of demurrer, and not to be availed of by plea.

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The result is that the principal question considered by the court below and argued at the bar is not presented in a form to be decided upon the record before us; and that, for the reasons above stated, and as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the 34th Rule in Equity, to answer the bill.

Decree reversed and case remanded, with directions to overrule the plea, and to order the defendants to answer the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*,

v.

S. P. MEYER ET AL., Partners, as MEYER, HAY & COMPANY.

Fraudulent estimates of engineer—jurisdiction at law—contract—"water excavation"—questions for jury.

1. Where the plaintiffs contracted to do certain work on sections of a railroad line, estimates to be made by the engineer of the Railroad Company, of

its quantity, character and value, which should be conclusive, without recourse or appeal, and the plaintiffs sued at law, alleging that in pursuance of a fraudulent combination between the defendant Railroad Company and its chief and resident engineers to injure and defraud plaintiffs, the resident engineer made a false, untrue and fraudulent estimate by classifying excavation in water as "rock excavation," and the defendant did not plead to the jurisdiction, or demur for that reason, but denied the fraud or collusion, and admitted the estimates as inaccurate, and set up other estimates made by its present engineer, who was not such engineer when the work was accepted, and on the trial, when evidence was offered that estimates were inaccurate and fraudulently made, objected that the issue could not be tried at law, but claimed that the estimates were final until set aside in equity, the circuit court overruled the objection, holding, that waiving the delay in making the objection and the fact that defendant admitted the estimates were inaccurate, yet if for any cause, not the fault of the plaintiffs, the contemplated estimate, as a condition precedent, becomes impossible, an action could be maintained.

2. The court also overruled the objection of defendants to the introduction of the testimony of experts to prove that certain work was excavation in water, under the definition thereof in the contract; and the court refused to instruct the jury that "water excavation" was not the making of a cut for the road bed of defendant, but the deepening of the channel of a running stream for the purpose of continuing such channel to carry off water.

3. The court also refused to put certain questions to the jury, as to whether the estimates were the result of fraudulent combination, and whether the excavation was done in deepening channels in running water.

4. The judges of the supreme court being equally divided in opinion, the judgment of the circuit court stands affirmed.

[No. 114.]

Argued Jan. 3, 4, 1887. Decided Feb. 7, 1887.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

This case has not been reported below, and the facts are stated in the opinion, delivered in the circuit court on motion for a new trial, which is as follows:

Barr, *J.:*

The plaintiffs are contractors, and agreed with defendant to do certain work on sections 5, 6 and 7 of its road. The parties made a written contract, in which the prices for the work was specified by classifications. The contract, after providing that during the progress of the work, and until its completion, monthly estimates should be made by the engineer of the defendant of the quantity, character and value of the work, and that 80 per cent of this estimate should be paid as the work progressed, and that the work when completed shall be estimated by the engineer according to the terms of the agreement, provided as follows: And it is expressly agreed between the parties to this contract that the monthly and final estimates of the engineer shall be conclusive, the former for the time being and the latter for all time, without recourse or appeal. The plaintiff sued at law in Jefferson Court Common Pleas, and this suit was, upon the petition of defendant, transferred to this court. The plaintiffs alleged that they had done their work according to contract, and that the same has been accepted by the defendant. They alleged that the resident engineer, Mr. Bradford, has made an estimate of the work done by them on section 5, which is correct as to quantity and classification, and that he has also made estimates of their work on sections 6 and 7, which are correct as to quantity, but false as to classification.

These, they alleged, are the final estimates and "that the resident engineer, under the influence and direction of the chief engineer of defendant, and pursuant to a fraudulent combination between defendants and the engineers aforesaid to injure and defraud plaintiffs, made in the estimate of said section 6 a false, untrue, and fraudulent entry and estimate of 855 cubic yards of shaft excavation done by plaintiffs on said sections as aforesaid by classifying same as solid rock excavation; whereas, in truth and fact, it should have been reported as shaft excavation and estimated accordingly; and made in the estimate of said section 7 a false, untrue, and fraudulent entry and estimate of 9,525 cubic yards of excavation of water done by plaintiffs by classifying same as solid rock excavation, and including same in the item of that denomination in his said estimates; whereas, in truth and in fact, it should have been reported as excavation in water and estimated accordingly; and they say each and both of said false, untrue and fraudulent estimates were had, made, and obtained by the fraud of defendants." The defendant answered and traversed this allegation of fraud and collusion, but admitted the estimates were inaccurate, and filed and set up estimates made by Mr. Rice, who was at that time defendant's chief engineer, though he was not at the time the work was done or accepted.

The plaintiffs claimed a large balance due them after crediting defendant for the amounts paid, and the defendant claimed according to the revised estimates. There was a small overpayment for which it asked judgment. If the estimates filed by plaintiffs were assumed to be final and correct, there was still due plaintiffs $1,999.48; but if Mr. Rice's estimates are final and correct, the balance would be in favor of defendant. The defendant did not plead to the jurisdiction or raise the question by demurrer; but when plaintiffs offered evidence tending to prove the estimates were incorrect, and fraudulently made, the defendant objected, because, as they claimed, that issue could not be tried at law.

This objection was overruled, and after the evidence was all in the jury were asked to find whether or not the estimates made of the work done by plaintiffs on sections 6 and 7 by the resident engineer were fraudulent, and if fraudulent, how many cubic yards, if any, of the excavation done by plaintiffs under their contract on section 6 was shaft excavation as defined in the contract, and how many cubic yards of the excavation done by them on section 7 was excavation in water as defined in said contract.

The jury found these estimates were fraudulent ones, and that 855 cubic yards of the excavation done by plaintiffs on section 6 was shaft excavation, and 3,016 cubic yards of excavation on section 7 was excavation in water.

The defendant has moved for a new trial, and filed several grounds for this motion; I will only consider those which were argued by counsel.

It is insisted that even on plaintiffs' own showing the estimates made by the resident engineer are final unless they are fraudulent, and that no recovery can be had unless they are set aside for fraud, and that cannot be done in an action at law. Waiving the consideration of

the time when this objection to the jurisdiction of the common-law court was first made, and the fact that defendant does not in its pleadings claim that these estimates of the resident engineer are binding and conclusive on the plaintiffs, let us examine the question of jurisdiction.

The authorities have left the question in doubt.

In the absence of a statute an award cannot be impeached for fraud in the arbitrators, except in a court of equity. The reason for this is much weaker now than when the rule was established, but we assume it is still the law. The question in this case is whether the final estimates of the engineer are awards or are in the nature of awards, and are like judgments conclusive upon the parties until set aside in equity. The weight of the English cases is to the effect that a covenant to settle all controversies, which may thereafter arise under a contract, is against public policy, because it is an effort to oust the courts of the jurisdiction. 1 Wils. 129; 8 Term. Rep. 139. See also *Randel, Jr.* v. *Chesapeake & Del. Canal Co.* 1 Harr. 233; *Haggart* v. *Morgan*, 4 Sand. Sup. Ct. 198. The majority of the judges recognized this as settled law, in *Scott* v. *Avery*, 5 H. L. 811, and drew a distinction, which the Chancellor, *Lord* Cranworth, stated thus: If I covenant with A not to do particular acts, and it is agreed between us that any question which might arise should be decided by an arbitrator, without bringing an action, then a plea to that effect would be no bar to an action; but if we agreed that J. S. was to award the amount of damages to be recoverable at law, then if such arbitration did not take place no action could be brought.

Bramwell, *B.*, in a subsequent case, 2 L. R. Exch. 245, states this distinction—he was one of the counsel, and says: "We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below and by the House of Lords. That proposition was that if two persons, whether in the same or a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid, if something else happens, and that something else is that a third person shall settle the amounts, then no cause of action arises until the third person has so assessed the same."

In the agreement sued on the prices of the work are fixed, and only the quantity and classification is left to the decision of the engineer. It is therefore within the distinction taken. It is not an award, although so far as the engineer exercises his judgment in classifying the work, it is in the nature of an award. These estimates are properly conditions precedent to a recovery, and bind the parties to the contract, if honestly and impartially made.

The engineer is not a disinterested third party, but an employee selected and paid by the Railroad Company. If the Company have no engineer to make such an estimate, or if from any other cause, not the fault of plaintiffs, this condition precedent becomes impossible, an action could be maintained, although the condition precedent has not been performed.

The contract requires that the Railroad Company should employ and keep an engineer who can make these estimates, and I think also requires that these estimates shall be honestly made, and at least not fraudulently made by the collusion of the Company. This perhaps is not distinctly said in any common case, but the Chief Justice in *Clarke* v. *Watson*, 114 Eng. Com. Law, 282, said, in an action where the breach alleged was that the surveyor's certificate was wrongfully withheld by the collusion of the defendant: "If it had been alleged that the defendants fraudulently colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act."

In *Batterbury* v. *Vyse*, 2 Hurlst. & C. Exch. 44, the court overruled a demurrer to a declaration filed by a contractor against the owner of a building. The contract provided that no payment was due unless upon the production of the architect's certificate; and the declaration alleged performance, but that the architect unfairly and improperly neglected to certify, and so neglected in collusion with the defendant, and by his procurement, whereby plaintiff was unable to obtain payment.

See also *Livingston* v. *Ralli*, 5 El. & Bl. 133.

Considering these estimates as condition precedent to a recovery, if the performance is fraudulently permitted by the defendant, then a recovery should be had for the work done at the contract prices, and not merely damages. If these estimates were in fact fraudulent, plaintiffs should be in the same condition they would have been had they demanded estimates to be made, and they had been refused by defendant. A fraudulent estimate made by defendant's engineer should be without binding force upon the plaintiffs. Yet the fact that such a fraudulent estimate has been made should be sufficient, without requiring a new demand and new estimates to be made, before bringing an action.

If this suit had been brought in equity and the estimates been found fraudulent, that court would not simply have set aside the fraudulent estimate and required the plaintiffs to have had new estimates made by the defendant's engineer, and another suit, but it would have disregarded the fraudulent estimates, and had accounts taken between the parties, and a decree entered according to the rights of the parties under the contract. *Ambrose* v. *Dunmow Union*, 9 Beav. 508. This I understand to be admitted by one of the learned counsel, and is clearly sustained by the authorities.

This relief in equity must be upon the theory that the estimates having been made by the defendant's engineer fraudulently, none other will be required of him, and the court will go on and enforce the contract just as if no estimates had been required to be made before suit could be brought. If this can be done in equity, no good reason is perceived why it cannot be done at law. There is another test as to the jurisdiction of a court of law or equity, and that is whether there is a plain, adequate and complete remedy at law. This is the test which the Act of Congress makes. R. S. § 723. In

this case there were two issues which were clearly legal ones, and which could not have been tried, equity excluding the issues upon the estimates alleged to be fraudulent. But if these had not been in the case, this court would have had jurisdiction, if I am right in thinking that these estimates, if fraudulent, put the plaintiffs in the same legal position as if they had properly demanded of the defendant the estimates of the work to be done, and that had been refused.

The result of this trial shows that the remedy at law is plain, adequate and complete. That is, if the findings of the jury are correct the remedy following is plain and adequate.

It is true that there are many cases in which the estimates of engineers have been set aside for fraud, mistake or partiality, by courts of equity, but it is equally true that in many of these cases the jurisdiction of the court has been earnestly controverted. The only American case which announces that courts of equity have *exclusive* jurisdiction in cases like the one at bar is *Herrick* v. *Belknap and Vt. C.R.R. Co.* 27 Vt. 673, and in that case the jurisdiction of the court of equity was earnestly contested, and that was the question. The jurisdiction at common law in cases like this have been sustained in *Wilson* v. *York and Maryland R. R. Co.* 11 Gill & J. 71. See also *Canal Trustees* v. *Lynch*, 5 Gilm. 526: *Snell* v. *Brown*, 71 Ill. 135; *Crawford* v. *Wolf*, 29 Iowa, 575. I am therefore still of the opinion that this court had jurisdiction of the question of fraud or no fraud in the making of these estimates. The resident and chief engineer in this contract meant, I think, the engineers in the employ of the Company when the work was done, or at least the engineer in its employment when the work was accepted and received; and I do not think I erred in rejecting Mr. Rice's estimates, who did not become chief engineer until some time after the work was accepted and received, and who did not make the estimates until after the suit was filed.

The finding of the jury on the question of fraud in the estimates of the work done by plaintiffs on section 7 was perhaps different from that which I would have favored had I been trying the issue, but the issue was clearly made and presented to the jury, and there was evidence before it which tended to sustain the finding. The jury are properly the judges of the credibility of the witnesses and the weight of the evidence, and, in the exercise of that judgment upon conflicting evidence, they should not be revised by the court.

This, however, is not true, as to the finding of the jury on the question of fraud in the estimates on section 6.

There was no evidence given which sustains this finding of the jury. The utmost the plaintiffs proved upon this point was that, in the opinion of the resident engineer, Mr. Bradford, the 855 cubic yards of excavation done on this section should have been classified as shaft excavation. The contract provided that the chief engineer's judgment should control when there was a difference of opinion between him and the resident engineer. Mr. Morris', the chief engineer's, statement upon this subject is perfectly clear and satisfactory, and is rather confirmed than contradicted by Mr. Bradford. He says that the shafts had been made many years before, but that the cribbing at the top of the shaft had become in such a condition that the contractors were afraid to work in the tunnel below, and that at their request he had the *débris* cleaned out, and the top opening of the shaft enlarged for the purpose of building a house or new cribbing over it. This was done as extra work, and an account of the time and expense of the work was kept. The contract provided that extra work which was not in the specification was to be done by the contractors, and they were to be paid therefor the costs thereof, with 10 per cent added. He says that when the estimates were made out, enough of the excavation was reported solid rock excavation as would make an amount equal to the cost, with 10 per cent added. This was done to avoid the trouble of making out an extra bill of this work. No one contradicts this statement, although, if untrue, it could readily have been shown to be untrue. Mr. Bradford, plaintiffs' only witness upon this subject, sustains Mr. Morris by stating that he kept the time of the men while they were engaged in this work.

The finding of the jury should be set aside as to section No. 6, and a new trial granted, unless plaintiffs will abandon of record that part of their claim. If they abandon this part of their claim, the motion for a new trial will be overruled, and judgment go upon the other special findings of the jury.

Messrs. **Alexander Pope Humphrey** and **E. F. Trabue**, for plaintiff in error:

The contract provides that the contractors are to be paid according to the estimates of the engineer, and such estimates are declared final and conclusive on both parties without further recourse or appeal. In the petition were found estimates made by the engineer; but the contractors proposed to set aside these estimates and to have other amounts fixed as the measure of their recovery. They claim that the estimates are fraudulent and must therefore be annulled, and the true amounts fixed by the jury. We contend that the very nature of the relief claimed places it beyond the power of a court of law. Such contracts are not opposed to the rule that unexecuted agreements for arbitration will not be enforced.

Scott v. *Avery*, 5 H. L. 811; *Elliott* v. *Royal Exchange Assur. Co.* L. R. 2 Exch. 245.

This decision by the engineer, of what character and quality of work has been performed, is not a mere condition precedent to a right of action, for here the determination is essential to the cause of action. Until the determination is made there is no sum to which the employer's promise can apply.

M'Intosh v. *Great Western R. Co.* 13 Jur. 92, reported on appeal. 2 McN. & G. 74.

It being necessary to annul this judgment, we inquire, how can this be accomplished? Legal remedies are very few. A law judgment may be rendered for a specific sum or specific property. A court of law cannot annul any instrument. It may hear proof as to jurisdiction of subject matter or person in a suit on a judgment, or of illegality in promise, or consideration in an action on a covenant, or a fraud in the *factum* of any obligation. Such evidence is to show that the instrument never

had validity. A court of equity alone is capable of applying the remedy of cancellation as a relief against fraud.

Bigelow, Frauds.

The agreement was that the engineer was to fix the amount, and that such determination should be "conclusive" without further "recourse or appeal."

Bigelow, Frauds, 172; 2 Story, Eq. 1452-3; *Barlow* v. *Todd*, 3 Johns. 367; *Fletcher* v. *Hubbard*, 43 N. H. 58.

We contend for the substance of the contract, and insist that the parties selected the engineer as the judge between them, and agreed that his decision in the very matter he has decided should be conclusive.

M'Intosh v. *Great Western R. Co. supra; Monongahela Nav. Co.* v. *Fenlon*, 4 Watts & S. 211; *Stevenson* v. *Watson*, L. R. 4 Com. Pleas Div. 162; *Waring* v. *Manchester S. & L. R. Co.* 14 Jur. 614; *Baron de Worms* v. *Mellier*, L. R. 16 Eq. 557; *Pawley* v. *Turnbull*, 3 Giff. 70, 7 Jur. N. S. 792; *Kemp* v. *Rose*, 1 Giff. 258, 4 Jur. N. S. 924; *Mansfield & S. C. R. R. Co.* v. *Veeder*, 17 Ohio, 385; *Kihlburg* v. *U. S.* 97 U. S. 401 (24:1107).

These cases show that the engineer is likened to the arbitrator, is required to exercise good faith and an honest judgment, and his decision is upheld as final unless impeached for fraud. There is no reason why an award must stand until set aside by a direct attack in equity, and such a judgment as the contract here provides be incidentally disproved and annulled.

Herrick v. *Belknap's Estate*, 27 Vt. 679.

Among the cases cited to sustain the opposite view are *Clarke* v. *Watson*, 114 Com. Law, 278, but this was a case where the architect was not to determine the amount due, but simply whether the work had been done.

In *Batterbury* v. *Vyse*, 2 Hurls. & C. 443, the declaration was one in case, and there was no decision or award to be vacated, but simply a failure to make any award at all. We say therefore from the English books that no action at law can be maintained on such a contract as this, unless the parties are willing to take the certificate of the engineer as final; that without the certificate of the engineer, even fraudulently withheld, no action at law can be maintained, because the contract is to pay only such an amount as may be certified by the engineer.

That the relief is to be found in equity is shown not only from the cases we have cited, but from the many others found in the argument and opinion in *Scott* v. *Corporation of Liverpool*, 3 DeGex & J. 334. The American authorities cited by the learned district judge are not more conclusive against us.

In *Wilson* v. *York & Md. S. R. R. Co.* 11 Gill & J. 78, assumpsit was maintained, but the question of jurisdiction was not raised.

In *Canal Trustees* v. *Lynch*, 5 Gilm., the petition was dismissed and no question of jurisdiction was made.

In *Snell* v. *Brown*, 71 Ill. 135, no question of jurisdiction was raised and the judgment for the plaintiff was reversed.

In *Crawford* v. *Wolf*, 29 Iowa, 575, the defendant refused to recognize the contract.

The remedy here sought is of a twofold nature, pertaining in each respect to the exclusive jurisdiction of equity. The contractors seek concellation and specific performance. A court of equity could at once cancel a fraudulent award and by its master have a new one made, the latter being a substituted specific performance of the contract carried out under the direction of the court.

1 Story, Eq. § 692; 1 Pom. Eq. § 140, note.

Messrs. **William Stone Abert**, *E. E. McKay* and *F. P. Straus*, for defendants in error:

The action can be supported as an action of assumpsit upon a *quantum meruit*, the allegations of excuse for nonperformance being equivalent to performance of the contract.

U. S. v. *Peck*, 102 U. S. 64 (26:46); *Baltimore & O. R. R. Co.* v. *Polly*, 14 Gratt. (Va.) 447, 462; *Lynn* v. *Baltimore & O. R. R. Co.* 60 Md. 411.

The petition is sufficient as to form.—In an action *ex delicto*, for damages for a breach of the contract by the defendant in putting an end to the contract and preventing the plaintiffs from obtaining an honest certificate from the engineer, the value of the work is the measure of damage.

Batterbury v. *Vyse*, 2 Hurls. & C. 43.

The petition would have been adjudged sufficient on demurrer, and any pretended defect is cured by the verdict.

Lincoln v. *Cambria Iron Co.* 103 U. S. 412 (26:518).

As the defendant permitted plaintiffs to finish the work, it was evidence of a promise to pay for it; and in such a case if the original contract was under seal the action of *indebitatus assumpsit* is maintainable on the defendant's implied obligation; but the defendant may be allowed a recoupment for the damages he may have sustained from the negligence of the plaintiff.

Dermott v. *Jones*, 64 U. S. 23 How. 234 (16: 448); *Jewell* v. *Schroeppell*, 4 Cow. 564; *Phillips etc. Construction Co.* v. *Seymour*, 91 U. S. 650 (23:343); *Fresh* v. *Gilson*, 41 U. S. 16 Pet. 334 (10:984).

If the contract be laid as an inducement only, it seems that case, for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted.

1 Chitty, Pl. p. *152, 16 Am. ed.

And although the plaintiff declares as for a tort, still, so far as a tort rests on contract, the same rules are to govern as would if the contract itself had been declared on.

1 Chitty, Pl. 152; *R. R. Co.* v. *Brauss*, 70 Ga. 368; *Smith* v. *Eubanks*, 72 Ga. 286.

The Kentucky Code while abolishing the forms leaves the principles which govern actions unchanged. The Code changes the question simply into whether the petition shows a right of action in any form. If a right to recover at law before the adoption of the Code is shown, the court cannot refuse a recovery upon the same principles now.

Hill v. *Barrett*, 14 B. Mon. 85.

In the late English case decided in 1872 (*Mast* v. *Goodson*, 8 Wils. Rep. 348), the action was for wrongfully obstructing and hindering the plaintiff from landing goods upon a wharf contrary to a written agreement between him and the plaintiff; and it was held that the declaration was founded upon tort and not upon contract.

In *Hulle* v. *Heightman*, 2 East, 145, the plaintiff could not recover upon the contract because he had not completed the voyage; he should have declared specially for the injury preventing him from completing the voyage.

Chitty, Cont. *581, 5th Am. ed.; *U. S.* v. *Behan*, 110 U. S. 346 (28:171); 2 Hilliard, Torts, 292.

The doctrine that fraud in the engineer in making such estimates will vitiate them, and allow the contractor to recover against the defendant upon other proof of the quality and value of the work and services is established by the following authorities:

Lynn v. *Balt. & O. R. R. Co.* and *Balt. & O. R. R. Co.* v. *Polly, supra; Balt. & O. R. R. Co.* v. *Laffertys*, 14 Gratt. 485.

In actions at law the courts of the United States may proceed according to the forms of practice in the state courts.

Thompson v. *R. R. Co.* 73 U. S. 6 Wall. 138 (18: 767); Rev. Stat. U. S. § 914.

The absence of a plain and adequate remedy at law is the only test of equity jurisdiction; and a resort to chancery was not necessary to recover against the defendant for work and labor it had accepted.

Thompson v. *R. R. Co. supra.*

Section 8 of the Kentucky Code of Practice provides that an error of the plaintiff as to the form of action shall not be cause for abatement or dismissal, but merely for an amendment of the pleadings and transfer to the proper docket. Section 10 authorizes this change to be made on motion of the defendant. Section 15 provides that an error as to the kind of proceedings adopted in the action is waived by failure to move for its correction in the manner prescribed.

The assignment of errors has specified the objections of the defendant; and omitting the question of jurisdiction, it must be considered that all others not specified were waived, or that there was no ground upon which others could stand.

Evanston v. *Gunn*, 99 U. S. 665 (25: 307).

In the cases, recently decided by this court, of *Martinsburg & P. R. R. Co.* v. *March*, 114 U. S. 549 (29: 255); *Sweeney* v. *U. S.* 109 U. S. 618 (27: 1053), both actions were brought upon the contract, and there was no allegation in either case "of fraud or such gross mistake as would necessarily imply bad faith or failure to exercise an honest judgment" on the part of the engineer. *Quantum meruit* can be sustained where defendant prevented performance.

Jones v. *U. S.* 96 U. S. 27 (24: 646); *Humaston* v. *Telegraph Co.* 87 U. S. 20 Wall. 27 (22: 280); *U. S.* v. *Peck, supra; Chicago* v. *Tilley*, 103 U. S. 146 (26: 371).

The jurisdiction exists at law as well as in equity.

1 Whart. Cont. § 594; *Atlanta etc. R. R. Co.* v. *Mangham*, 49 Ga. 267; *Ludbrook* v. *Barrett*, 25 Weekly Rep. 649.

Mr. Chief Justice **Waite** announced that the judgment of the court below stands *affirmed by a divided court.*

SABINE ROBBINS, *Plf. in Err.*, [489]

v.

TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

(See S. C. Reporter's ed. 489-502.)

Constitutional law—regulation of interstate commerce—power of Congress—interstate commerce cannot be taxed—state tax on "drummers," invalid.

1. The power of Congress to regulate interstate commerce is exclusive when its subjects are national in character, or admit only of one uniform system or plan of regulation.

2. Where its power is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions.

3. A State cannot levy a tax, or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein.

4. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. Such commerce is not subject to state taxation, even though there be no discrimination between it and domestic commerce.

[No. 816.]

Submitted Jan. 8, 1886. Submission set aside and argument ordered March 8, 1886. Argued Nov. 5, 1886. Decided March 7, 1887.

IN ERROR to the Supreme Court of the State of Tennessee. Reported below, 13 Lea, 303. *Reversed.*

The history and facts of the case appear in the opinion of the court and in the dissenting opinon by the Chief Justice. See also the following case of *Corson* v. *Maryland.*

Messrs. **Luke E. Wright** and *F. T. Edmonson*, for plaintiff in error:

The Act in question is in violation of that part of article 1, section 8, of the Constitution of the United States, which declares that "The Congress shall have power to regulate commerce among the several States."

Congress is vested with the exclusive power to regulate commerce with foreign Nations and among the States.

County of Mobile v. *Kimball*, 102 U. S. 691 (26: 238); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196 (29: 158).

Congress has not only the right but it is the duty of Congress to take care that commerce is not obstructed by state legislation.

Pensacola Tel. Co. v. *W. U. Tel. Co.* 96 U. S. 1 (24: 708).

It is settled that a tax directly on commerce or aimed at commerce is unconstitutional.

State Freight Tax Case, 82 U. S. 15 Wall. 232 (21: 146); *State Tax on R. Gross Receipts*, 82 U. S. 15 Wall. 284 (21: 164).

The effect of the Act complained of is to draw a distinction between resident and nonresident merchants. Its object is not revenue, but exclusion. It allows the merchants of the Taxing District to do business on terms more favorable than nonresident merchants, and forbids the latter from coming into equal and fair competition with the former.

The right to tax carries with it the right to

NOTE.—*Constitutional law; interstate commerce; regulation of; power of Congress; how far exclusive.* See Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, 158, note.

exclude, so that, if this stands, the Legislature can declare that no person shall, on any terms, offer to sell goods in said District, unless he first establish a commercial house therein.

Mr. **S. P. Walker,** for defendant in error: The statute makes no reference whatever to the place of residence of the "drummer." He is equally subject to the tax whether he be a resident of the taxing district, or a resident of some other portion of the State, or of some other State. In any and all cases the privilege tax is alike imposed. Given the vocation of "drummer," and the statute applies, without any distinction or discrimination whatever. There is clearly, therefore, no violation of section 2, article 4, upon which the decision in *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418 (20: 449), was rested. The statute is not directed against the "drummer's" principal, but against the "drummer" himself, as pursuing a particular vocation declared to be a taxable privilege. But if the statute be looked upon as an effort to tax the principal through the agent (for which view, we submit there is no foundation), it would still be free from objections urged against it, for that it equally applies to all "drummers," without reference to principal's place of residence. "The general power of the State to impose taxes, in the way of licenses, upon all pursuits and occupations within its limits," is unquestionable.

Welton v. *Missouri*, 91 U. S. 278 (23:348).

The language of this court, in *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479, 481 (21: 470, 473), is equally pertinent here: "There was no discrimination in the taxation of Alabama between it (the plaintiff in error) and the corporations and citizens of that State. The tax for license was the same by whomsoever the business was transacted. There is nothing in the case, therefore, which brings it within the case of *Ward* v. *Maryland*. It seems rather to be governed by the principles settled in *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123 (19: 382)."

As is fully shown in the opinion of the state court, the classification of the statute is based on the character of the pursuit, and not on the fact of residence; and it is not subject to the objections that were sustained in *Ward* v. *Maryland, supra.*

[490] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the City of Memphis, in the State of Tennessee, in soliciting the sale of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper, and other articles of stationery, and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a "drummer." There was in force at that time a Statute of Tennessee, relating to the subject of taxation in the taxing districts of the State, applicable, however, only to the Taxing District of Shelby County (formerly the City of Memphis), by which it was enacted, amongst other things, that "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by [491] sample, shall be required to pay to the county trustee the sum of ten dollars ($10) per week, or twenty-five dollars per month, for such privilege; and no license shall be issued for a longer period than three months." Act of 1881, chap. 96, § 16.

The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than $5 nor more than $50, to exercise any of such occupations without having first paid the tax or obtained the license required therefor.

Under this law Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted and sentenced to pay a fine of $10, together with the state and county tax, and costs; and on appeal to the Supreme Court of the State, the judgment was affirmed. This writ of error is brought to review the judgment of the supreme court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several States.

On the trial of the cause in the inferior court, a jury being waived, the following agreed statement of facts was submitted to the court, to wit:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of ——, 1884, was engaged in the business of drumming in the Taxing District of Shelby County, Tenn.—*i. e.* soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or Taxing District police force and carried before the Hon. D. P. Hadden, president of the Taxing District, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' [492] are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the Taxing District of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

This was all the evidence, and thereupon the court rendered judgment against the defendant, to which he excepted, and a bill of exceptions was taken.

The principal question argued before the Supreme Court of Tennessee was as to the constitutionality of the Act which imposed the tax on drummers; and the court decided that it was constitutional and valid. [18 Lea, 303.]

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign Nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley* v. *Board of Wardens of Phila.* 53 U. S. 12 How. 299, 319 [13: 996, 1004], and was virtually involved in the case of *Gibbons* v. *Odgen*, 22 U. S. 9 Wheat. 1 [6: 23], and has been confirmed in many subsequent cases, amongst others, in *Brown* v. *Md.* 25 U. S. 12 Wheat. 419 [6: 678]; *Passenger Cases*, 48 U. S. 7 How. 283 [12: 702]; *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35, 42 [18: 745, 746]; *Ward* v. *Md.* 79 U. S. 12 Wall. 418, 430 [20: 449, 452]; *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 279 [21: 146, 162]; *Henderson* v. *Mayor of N. Y.* 92 U. S. 259, 272 [23: 543, 549]; *R. R. Co.* v. *Husen*, 95 U. S. 465, 469 [24: 527, 529]; *Mobile* v. *Kimball*, 102 U. S. 691, 697 [26: 238, 239]; *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196, 203 [29: 158, 161]; *Wabash, etc. R. Co.* v. *Ill.* 118 U. S. 557 [*ante*, 244].

[493] 2. Another established doctrine of this court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by *Mr. Justice* Johnson in *Gibbons* v. *Odgen*, 22 U. S. 9 Wheat. 1, 222 [6: 23, 76]; by *Mr. Justice Grier*, in the *Passenger Cases*, 48 U. S. 7 How. 283, 462 [12: 702, 777]; and has been affirmed in subsequent cases. *State Freight Tax Cases*, and *R. R. Co.* v. *Husen*, [*supra*]; *Welton* v. *Missouri*, 91 U. S. 275, 282 [23: 347, 350]; *County of Mobile* v. *Kimball* [*supra*]; *Brown* v. *Houston*, 114 U. S. 622, 631 [29: 257, 260]; *Walling* v. *Mich.* 116 U. S. 446, 455 [29: 691, 694]; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [29: 785]; *Wabash, etc. R. Co.* v. *Ill.* [*supra*].

3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for [494] a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may perhaps safely take his goods to the City of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no [495] person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade.

Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kinds of business, and would be en-

tirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders. If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the postoffice at his command, and may solicit orders through the mails. We do not suppose, however, that anyone would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is that, in numberless instances, the most feasible, if not the only practicable, [496] way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States Marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the [497] former, independent of the latter, and free from any interference or restraint from them.

To deny to the State the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true that if the goods when sold were in the State, and part of its general mass of property, they would be liable to taxation; but when brought into the State in consequence of the sale they will be equally liable; so that, in the end, the State will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston*, 114 U. S. 622 [29: 257]. When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown* v. *Houston*, *qua supra*; *Machine Co.* v. *Gage*, 100 U. S. 676 [25: 754]. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax Cases* [*supra*]. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show [498] that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents; and if they had, they are

not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition.

And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different States. The confusion into which the com- [499] merce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error must be discharged.

Mr. Chief Justice **Waite**, dissenting:

I am unable to agree to this judgment. The case, as I understand it, is this:

In January, 1879, the State of Tennessee abolished the charter of the City of Memphis and created the Taxing District of Shelby County as its successor. By a statute passed April 4, 1881, to provide means for the support of the Taxing District, it was, among other things, enacted "That all drummers and all persons not having a licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustees the sum of ten dollars per week, or twenty-five dollars per month, for such privilege, and no license shall be issued for a longer period than three months."

Sabine Robbins, a citizen of Ohio, employed by the firm of Rose, Robbins & Co., also citizens of Ohio, engaged in business as merchants at the City of Cincinnati, in that State, has been convicted of a violation of this statute because he solicited trade for his firm in the Taxing District, by the use of samples, without a license. This it is now decided was wrong because the statute under which the conviction [500] was had, in so far as it applies to the business in which Robbins was engaged, is a regulation of interstate commerce, and, therefore, repugnant to the commerce clause of the Constitution of the United States. To this I cannot give my assent.

The license fee is demanded for the privilege of selling goods by sample within the Taxing District. The fee is exacted from all alike who do that kind of business, unless they have "a licensed house of business" in the District. There is no discrimination between citizens of the State and citizens of other States. The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the State under whose authority the exaction was made, or a citizen of another State, unless there was discrimination against citizens of other States. In *Osborne* v. *Mobile*, 88 U. S. 16 Wall. 481 [21 : 472], it is said "The whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected." And I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals. But what can be the difference in principle, so far as this question is concerned, whether he takes a room permanently in a business block of the District where, when he comes, he sends his boxes and exhibits his wares, or engages a room temporarily at a hotel or private house and carries on his business there during his stay? Or even whether he takes his sample boxes around with him to his different customers and shows his wares from them? In either case he goes to the District to ply his trade and make his sales from the goods he exhibits. He does not sell those goods, but he sells others like them. It is true that his business was to solicit orders for his principals, but in doing so he bargained for them, carried on business for them in the District by means of the samples of their goods, which had been furnished him for that purpose. To all intents and purposes he had his goods with him for sale, for what he sold was like what he exhibited as the subjects of sale. I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler; and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixes a [501] license fee for all peddlers in the District, would be held to be unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again.

As the law is valid so far as the inhabitants of the State are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other States. This could never have been intended by the Legislature, and I cannot believe the Constitution of the United States makes such a thing necessary. The Constitution gives the citizens of each State all the privileges and immunities of citizens in the several States; but this certainly does not guarantee to those who are doing business in States other than their own immunities from taxation on that business to which citizens of the State where the business is carried on are subjected.

This case shows the need of such authority in the States. This Taxing District is situated on the western boundary of Tennessee. To get into another State it is only necessary to cross the Mississippi River to Arkansas. It may be said to be an historical fact that the charter of Memphis was abolished and the Taxing District established because of the oppressive debt of Memphis, and the records of this court furnish abundant evidence of the heavy taxation to which property and business within the limits of both the old corporation and the new have been for many years necessarily subjected. Merchants in Tennessee are by law required to pay taxes on the amount of their stocks on hand and a privilege tax besides. Under these circumstances it is easy to see that if a merchant from another State could carry on a business in the District by sending his agents there with samples of his goods to secure orders for deliveries from his stock at home, [502] he would enjoy a privilege of exemption from taxation which the local merchant would not have unless in some form he could be subjected to taxation for what he did in the locality. The same would be true in respect to all inhabitants of the State who were sellers by sample in this District, but who had no place of business there. And so they, like citizens of other States, were required to pay for the privilege. Thus all were treated alike, whether they were citizens of Tennessee or of some other State, and under these circumstances I can see no constitutional objection to such a taxation of citizens of the other States for their business in the District.

I have treated the case as a conviction of a "drummer" for selling goods by sample. That is what Robbins was found guilty of, and that is what this statute makes an offense. The license is only required of "drummers and all persons not having a licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample." The Supreme Court of Tennessee decided that this means nothing more than that any person who sells by sample shall pay the tax, and to that I agree. It will be time enough to consider whether a nonresident can be taxed for merely soliciting orders without having samples when such a case arises. That is not this case.

Mr. Justice **Field** and *Mr. Justice* **Gray** concur in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. CORSON, *Plff. in Err.*, [502]

v.

STATE OF MARYLAND.

(See S. C. Reporter's ed. 502-506.)

Constitutional law—state taxation of interstate commerce, invalid—licenses.

A State cannot levy a license tax, or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein.

[No. 8.]

Argued and submitted April 5, 1886. Reargument ordered May 10, 1886. Reargued and submitted Nov. 5, 1886. Decided March 7, 1887.

IN ERROR to the Court of Appeals of the State of Maryland. Reported below, 57 Md. 251. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Henry D. Loney** and **S. T. Wallis**, for plaintiff in error:

The power of Congress to regulate commerce between the States, whether legislatively exercised or not, in respect to any specific matter in controversy, is held to be exclusive without exception; save in matters of a local character and without any national bearing or application.

Brown v. *Houston*, 114 U. S. 622 (29: 257).

Of course, the case now under consideration belongs to the sphere of national commerce and control, if it is at all within the scope of the constitutional provision. The license here is imposed upon citizens and residents of other States than Maryland, contracting in respect to property situate beyond the limits of Maryland, and to be transported to that State, under the contract, by the usual channels of interstate commerce. If the legislation impeached interferes with the commerce, by which the goods sold and being in New York are to be transported to Baltimore, for the purpose of being mingled with the mass of property in Maryland, and before they are so mingled, it is plainly a state regulation of commerce and forbidden by the Constitution.

Welton v. *Missouri*, 91 U. S. 275, 281 (23: 347, 349).

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

County of Mobile v. *Kimball*, 102 U. S. 691 (26: 238).

Nor is the application of this principle to be varied or escaped by the substitution of a license for direct taxation of the merchandise sold and transported.

NOTE.—*Constitutional law; interstate commerce; regulation of; power of Congress; how far exclusive.* See Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, 158, note.

Cook v. *Pa.* 97 U. S. 570 (24: 1016); *Machine Co.* v. *Gage*, 100 U. S. 678 (25: 755).

The State of Maryland has no more right to tax the goods of a New Yorker, in New York, than those of an Englishman, in London. Nor can the temporary stay or residence of the foreign citizen in Maryland, without change of his residence or place of business, and without any removal of his goods to Maryland, render the taxation of those goods, by the latter State, any more allowable. This court has already held that illegal taxation is one of those deprivations of property which are within the scope of constitutional protection.

R. R. Co. v. *Jackson*, 74 U. S. 7 Wall. 262 (19: 88); *State Tax on Foreign Held Bonds*, 82 U. S. 15 Wall. 300 (21: 179); *Hagar* v. *Reclamation Dist.* 111 U. S. 701 (28: 569).

Messrs. Charles B. Roberts, Atty-Gen. of Maryland, and *Charles J. M. Gwinn*, for defendant in error:

The court of Appeals of Maryland decided, in this cause, that the provisions of the Maryland Code, amended by the Maryland Act of 1880, chapter 349, under which the particular indictment was found, required that all persons, whether residents or nonresidents of the State of Maryland, before offering to sell or selling, by sample in that State, packages of tea or other merchandise stored within the limits of any other State, should obtain the license so to do from the State of Maryland, which was required by article 56 of the Code of that State, as amended by the Act of 1880, chapter 349. The construction thus given by the Court of Appeals of Maryland to the scope of the license laws of Maryland, which are in controversy here, is authoritative in this court.

Christy v. *Pridgeon*, 71 U. S. 4 Wall. 196, 203 (18: 322, 325); *Aicardi* v. *State*, 86 U. S. 19 Wall. 635, 639 (22: 215, 216); *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34 (27: 359, 365); *Flash* v. *Conn*, 109 U. S. 371, 379 (27: 966, 970).

It is in general within the constitutional power of every State to tax occupations, within the control of a State, by requiring persons who wish to pursue them, to obtain, before doing so, a license from certain designated officers.

Nathan v. *Louisiana*, 49 U. S. 8 How. 80 (12: 995); *Welton* v. *Missouri*, 91 U. S. 278 (28: 348).

Such license is a tax. No employment thus under state control is absolutely exempt from the liability to be thus taxed. "The necessities of the goverment may require that the lowest employment, as well as the most lucrative, shall contribute to its support; and, if any are exempted, motives of policy will govern the discrimination."

Cooley, Tax. 1st ed. 385; Burr. Tax. § 77; *License Tax Cases*, 72 U. S. 5 Wall. 472, 473 (18: 501).

The selling of goods by sample within any particular State is conducting a business in such State. As a business it is subject to taxation, unless there be some constitutional reason exempting it from the burden.

Cooley, Tax. 1st ed. 384; *McCulloch* v. *Md.* 17 U. S. 4 Wheat. 428, 429 (4: 607); *State Tax on Foreign Held Bonds*, 82 U. S. 15 Wall. 319 (21: 186); *Shepherd* v. *Sumter Co. Comrs.* 59 Ga. 585.

The provisions of the Maryland Code, which are in controversy in this case, as amended by the Maryland Act of 1880, chapter 349, were not in violation of article 4, section 2, subsection 1, of the Constitution of the United States, because their provisions apply equally to citizens of the State of Maryland and to citizens of the other several States.

Machine Co. v. *Gage*, 100 U. S. 679 (25: 755).

The vendor appropriated the specific quantities of teas sold for the benefit of the vendee, and engaged that such specific quantities should be shipped to him. The vendee assented to the appropriation made by the vendor and upon his terms. The property in the goods therefore passed to the vendee.

Chitty, Cont. 11 Eng. ed. 357; *Gillett* v. *Hill*, 2 Cromp. & M. 535; *Dixon* v. *Yates*, 5 B. & Ad. 313; 27 E. C. L. 90; *Thompson* v. *Balt. & O. R. R. Co.* 28 Md. 405.

There was not only a constructive but also an actual delivery of the property in Maryland.

Magruder v. *Gage*, 33 Md. 348; *Kribs* v. *Jones*, 44 Md. 406.

Under such circumstances the effect of the sale to Kenney of the particular tea, and of its shipment to him as a purchaser, was to bring the property, thus sold and shipped, within the jurisdiction of the State of Maryland; to incorporate and intermix it with the mass of property in the State; to deprive it of its distinctive character as an import, and to subject it to the taxing power of that State.

Howell v. *State*, 3 Gill, 28; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 564 (7: 956); *Brown* v. *Md.* 25 U. S. 12 Wheat. 441-2 (6: 686); *Pervear* v. *Commonwealth*, 72 U. S. 5 Wall. 479 (18: 609); *Waring* v. *Mayor*, 75 U. S. 8 Wall. 122-3 (19: 346); *Woodruff* v. *Parham*, Id. 139 (19: 387).

Mr. Justice **Bradley** delivered the opinion of the court: [505]

This case does not differ materially from that of *Robbins* v. *Taxing District of Shelby County*, [*ante*, 694], just decided. The Code of Maryland, as amended in 1880, provides that "No person or corporation other than the grower, maker or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this State, without first obtaining a license in the manner herein prescribed." A violation of this law was made an indictable offense; and the plaintiff in error, a citizen and resident of New York, was indicted for offering to sell and for selling by sample, in the City of Baltimore, without license, certain goods for a New York firm, to be shipped from New York directly to the purchaser. The plaintiff in error demurred to the indictment, but it was sustained both by the court of original jurisdiction and by the Court of Appeals of Maryland on writ of error. The constitutionality of the law was duly raised, and the law was sustained.

The same principles apply to this case which were considered in that of Robbins, and the same result must be declared. [506]

The judgment of the Court of Appeals of Maryland is reversed, and the plaintiff in error must be discharged.

Mr. Chief Justice **Waite** concurring:

Mr. Justice **Field**, *Mr. Justice* **Gray**, and myself agree to this judgment, but on different grounds from those stated in the opinion of the court. It is not denied that the Statute of Maryland requires a nonresident merchant desiring to sell by sample in that State to pay for a license to do that business a sum to be ascertained by the amount of his stock in trade in the State where he resides and in which he has his principal place of business. This differs materially from the Statute of Tennessee, which was considered in *Robbins* v. *Taxing District of Shelby County*, just decided, and is in its effect, as we think, a tax on commerce among the States. The charge for the privilege to the nonresident is measured by his capacity for doing business all over the United States, and without any reference to the amount done or to be done in Maryland.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[517] COUNTY OF CARTER, *Plf. in Err.*,
v.
DAVID SINTON.

(See S. C. Reporter's ed. 517-526.)

Constitutional law—division of county after incurring indebtedness—Kentucky Act of January 30, 1878, authorizing county court to compromise—validity of—title, sufficient—parties—practice.

1. The provision of the Constitution of Kentucky, requiring that "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title," should receive a reasonable and not a technical construction. It is enough if the law has but one general effect, and that effect is fairly expressed in the title.
2. The Act of the General Assembly of Kentucky, of January 30, 1878, authorizing the County Court of Carter County to act for the parts of the Counties of Boyd and Elliott taken from Carter County, in compromising a bonded debt due from the old County, is valid; said parts of the Counties of Boyd and Elliott being still a part of Carter County for the purposes of the debt.
3. The County Court of Carter County had authority to issue negotiable securities under said Act.
4. An action lies on such securities against Carter County alone, and binds said parts of Boyd and Elliott Counties.
5. An objection to the form of the declaration not raised below cannot be considered by this court.

[No. 1287.]

Submitted Jan. 7, 1887. Decided March 7, 1887

IN ERROR to the Circuit Court of the United States for the District of Kentucky. Reported below, 28 Fed. Rep. 535. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **William Lindsay** and **Alvin Duvall**, for plaintiff in error.

Messrs. **George Hoadly, Edgar M. Johnson, Edward Colston, George Hoadly, Jr.**, and **James O'Hara**, for defendant in error.

[518] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This was a suit brought against the County of Carter to recover the amount due on certain bonds and interest coupons, issued under the following circumstances: By an Act of the General Assembly of Kentucky, "To incorporate the Lexington and Big Sandy Railroad Company," approved January 9, 1852, and an Act amendatory thereof, approved March 1, 1854, the County of Carter was authorized to subscribe $75,000 to the stock of the company, and to issue its bonds to raise the money to pay therefor. Under this authority the subscription was made and seventy-five bonds of $1,000 each issued by the County. These bonds were in the usual form of negotiable coupon bonds, payable to the order of the railroad company thirty [519] years from date, with interest at the rate of 6 per cent per annum, semi-annually at the Bank of America, New York. The railroad company indorsed them in blank, and all but one afterwards came into the hands of Joseph C. Butler and L. Worthington, citizens of Ohio, as purchasers for value before maturity.

In 1859, after this subscription was made, and while the bonds issued on that account were outstanding, the County of Boyd was created by the General Assembly of Kentucky, which included within its boundaries a part of the original County of Carter. In 1869 the County of Elliott was created, and this took in another part of Carter, but in each of the Acts creating the new counties it was provided:

"That nothing in this Act shall be construed so as to release the citizens and property now subject, or which may hereafter become subject, to taxation within the boundaries of Carter County, included in the first section of this Act, from being held and made liable for the bonds and interest, issued to the Lexington and Big Sandy Railroad Company, as though this Act had never been passed."

Default having been made in the payment of interest on the bonds, suits were brought by Butler against Carter County for the recovery of the amount due on coupons attached to the bonds he held. The suits resulted in judgments against the County. Afterwards the following Act, approved January 30, 1878, was passed by the General Assembly of Kentucky:

"An Act Authorizing the County of Carter, and Those Parts of Boyd and Elliott Taken from Carter County, to Compromise and Settle with the Holders of the Bonds and Coupons of Interest Executed by Carter County in Its Subscription to the Capital Stock of the Lexington and Big Sandy Railroad Company, and to Levy and Collect a Tax for That Purpose.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That power and authority is hereby given to the County of Carter, and those parts of the Counties of Boyd and Elliott taken from [520] Carter County, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company. Said compromise and settlement shall be made by the Carter County Court, composed of the county judge and a majority of the justices of the peace in commission of Carter County, for and on behalf of the County of Carter, and those parts of the Counties of Boyd and Elliott taken from Carter County. Said court may make said compromise through a commission appointed for

that purpose; but before the same shall become binding on the County of Carter it shall be approved by the Carter County Court, constituted as county levy courts are required by law to be constituted. Said court may execute to the holders of said bonds and coupons of interest, severally, the obligations of the County of Carter and those parts of the Counties of Boyd and Elliott taken from Carter County in their formation, which shall be signed by the county judge of Carter County, and attested by the clerk of said court. Said obligations shall contain such stipulations as to interest as may be agreed upon by the court and holders of said bonds and coupons of interest, or either of them, but not at a greater rate than 6 per cent per annum, payable semi-annually. Said obligations shall be due and payable at such times, and be for such amounts, as may be agreed for by the court and holder or holders of said bonds and coupons."

The next three sections of the Act contain provisions for the levy and collection of taxes, to pay the interest and principal of the compromise bonds, upon persons and property within the limits of Carter County, as it was when the debt was originally created. The fifth and last section is as follows:

"Sec. 5. This Act shall take effect and be in force from and after its passage; but nothing in this Act shall be so construed as to affect or make more valid the bonds and coupons of interest given by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company than they were before the passage of this Act."

Under the authority of this statute a compromise was made with the holders of the original bonds, by which the County Court of Carter County issued one hundred and nineteen new bonds of the County of Carter and those parts of the Counties of Elliott and Boyd taken from Carter County, each for the sum of $1,000, payable to Henry Peachey and Richard O. Butler, executors of Joseph C. Butler, or bearer, with semi-annual interest warrants at the rate of 6 per cent per annum attached. The principal of the bonds was made payable at different dates. [521]

David Sinton, the defendant in error, purchased nine of these bonds for value before maturity, and five hundred and forty of the coupons, and this suit was brought to recover the amount due thereon. Originally the suit included other bonds and coupons; but as it was discontinued so far as they were concerned, before judgment, no questions arise in this court as to them.

To a petition setting forth the foregoing facts the County demurred: 1, because the petition did not state facts sufficient to constitute a cause of action; and 2, because the petition shows a defect of parties, plaintiff and defendant. This demurrer was overruled. *Sinton* v. *County of Carter*, 23 Fed. Rep. 585. The defendant then filed an answer, some paragraphs of which were stricken out on motion, and others demurred to, and the demurrer sustained. As no point is made on this branch of the case, a further statement of it is not necessary.

The court gave judgment against the County for $29,121.54, and to reverse that judgment this writ of error was brought.

The principal points presented by the argument of the plaintiff arise on the demurrer to the petition, and they may be stated thus:

1. The Act of January 30, 1878, is void by the Constitution of Kentucky, because the subject to which it relates is not clearly expressed in its title. [522]

2. The Act is also unconstitutional and void because it vests in the County Court of Carter County the power to bind the parts of Elliott and Boyd Counties which had been set off from Carter.

3. The Act gave no authority to the County Court of Carter County to issue negotiable securities which pass by delivery and in the hands of innocent holders are free from defenses which would be good as between the original parties.

4. There is a defect of parties defendant, because Carter County is sued alone without joining "those parts of Boyd and Elliott Counties taken from Carter."

1. As to the title of the Act.

The provision of the Constitution of Kentucky relied on is article II, section 37, as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

Undoubtedly the design of this provision was, as is said in *Pennington* v. *Woolfolk*, 79 Ky. 20, "to prevent the use of *deceptive* titles as a cover for vicious legislation, by enabling members of the General Assembly to form such opinion of the nature of a bill by merely hearing it read by its title;" but as early as 1859 the court of appeals said in *Phillips* v. *Covington & Cin. Bridge Co.* 2 Met. (Ky.) 221: "This prohibition should receive a reasonable and not a technical construction; and looking to the evil intended to be remedied, it should be applied to such Acts of the Legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional when they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in its title." This is in accord with the decisions of this court in *Montclair* v. *Ramsdell*, 107 U. S. 147 [27: 431], where we followed the rulings of the Supreme Court of New Jersey upon a similar provision in the Constitution of that State; in *Jonesboro City* v. *Cairo & St. L. R. R. Co.* 110 U. S. 192 [28: 116], and *Mahomet* v. *Quackenbush*, 117 U. S. 509 [29: 982], where the Constitution of Illinois and the decisions of the Supreme Court of that State were considered; and in *Otoe County* v. *Baldwin*, 111 U. S. 1 [28: 331], which had reference to the Constitution of Nebraska and the settled rule of decision in that State, and in *Ackley School Dist.* v. *Hall*, 113 U. S. 185 [28: 954], which arose in Iowa. It is enough if the law has but one general object and that object is fairly expressed in its title. Cooley, Const. Lim. 1st ed. 144, § 2; 4th ed. 175. [523]

Here the title is "An Act Authorizing the County of Carter, and Those Parts of the Counties of Boyd and Elliott Taken from Carter County, to Compromise and Settle with the Holders of the Bonds and Coupons of Interest Executed by Carter County in Its Subscription to the Capital Stock of the Lexington and Big

Sandy Railroad Company, and to Levy and Collect a Tax for That Purpose." This clearly and distinctly expresses the whole object of the legislation, and there is nothing in the body of the Act itself which is not in every way germane to what is there expressed. No one interested in the subject matter of the law could be put off his guard by hearing the bill read by its title. True, it does not state that the County Court of Carter County is to act as the representative of the parts of Boyd and Elliott Counties, as well as the County of Carter, in making the compromise, or that bonds are to be issued for the purpose of carrying it out; but all this is matter of detail, suitable to the single purpose the Legislature had in view; namely, a settlement and compromise with the holders of bonds issued by Carter County before its division, and for which the present Carter County and those parts of Boyd and Elliott which were taken from the old county were liable. It is difficult to see how the subject of the legislation could be stated more clearly without making the title of the Act "a detailed statement, or an index or abstract of its contents," which all agree is not necessary. *Montclair* v. *Ramsdell*, 107 U. S. 155 [27: 433].

2. The authority of the County Court of Carter County to bind "those parts of the Counties of Boyd and Elliott taken from Carter County."

[524] If we understand correctly the position of the County as to this branch of the case, it is that the Legislature had no power to authorize the County Court of Carter County to act for these parts of counties in compromising the old debt for which they were held, because they were no longer parts of that County, and no opportunity was given them to participate in the arrangement. These parts of counties have no separate organization of their own, corporate or otherwise. For all county purposes, except this debt contracted by Carter County when they were included within its boundaries, they are subject to the government of the counties to which they now respectively belong; but for the debt, they still remain a part of Carter. Such is clearly the effect of that provision in the Acts establishing the new counties which declared that the liability of citizens and property in the territory set off from Carter for taxation on account of the bonds and interest should continue the same "as though this Act had never been passed." Had the Acts never been passed, no one would doubt the power of the Legislature to give the County Court of Carter the authority to make the settlement in the same way now provided for, even though these parts of the County did not have a justice of the peace in commission to take part in the deliberations. And this because the county court was made the agent of the County, and of those whose property was subject to taxation, for the transaction of this business. The Legislature might have appointed a commission for the same purpose, or it might have selected any other suitable agency. In order to bind the county or the taxpayers, it was not necessary that the taxpayers should vote on the subject, or that they should participate in an election of the body that was to act in the matter. All that was properly within the discretion of the Legislature. No new debt was to be created, and no new subscription to the stock of a railroad company was to be made. All that had to be done was to compromise and settle an existing debt, and to substitute new liabilities on terms to be agreed on for an old one. Certainly it was within the power of the Legislature to designate a suitable agency for that purpose, and what could be more suitable than that department of the governing body of Carter County which was entrusted with the management of its financial affairs? The cases of *Allison* v. *Louisville & H. C. & W. R. Co.* 9 Bush, 253; *S. C.* 10 Bush, 1; *Scuffletown Fence Co.* v. *McAllister*, 12 Bush, 312; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; and *Mercer Co. Court* v. *Kentucky River Nav. Co.* 8 Bush, 300, referred to in the argument of counsel, all relate to the creation of new liabilities, not to the settlement of old ones. [525]

3. The right to issue negotiable securities.

It is no doubt true that, without sufficient legislative authority, a municipality cannot issue commercial paper which will be free from equitable defenses in the hands of innocent holders; *Claiborne Co.* v. *Brooks*, 111 U. S. 400 [28: 470]; but, in our opinion, that authority was given here. The County of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription to the stock of the railroad company. This, all agree, was sufficient authority to issue bonds which were negotiable, and the averments in the declaration are that the bonds which were in fact issued had that character. The debt to be compromised, therefore, under the Act of 1878, was a debt which had been created by the issue of such bonds, and the authority was to execute to the "holders of said bonds and coupons of interest" "the obligations of said County of Carter and those parts of the Counties of Boyd and Elliott taken from Carter County in their formation, which shall be signed by the county judge of Carter County and attested by the clerk of said court." They were to contain such stipulations as to interest, not exceeding 6 per cent per annum, and to be made due and payable at such times as might be agreed on. As the new obligations were to be executed to take up and cancel old negotiable securities to a large amount, and were to be made payable at a future time, there cannot be a doubt of the intention of the Legislature to authorize the execution of "obligations" negotiable in form and in law, if necessary to secure a settlement. The authority to include in the obligations such stipulations as to interest as might be agreed on [526] clearly implies authority to attach interest coupons, and everything indicates a purpose to invest the court with all the powers as to the form of the obligations that were necessary to enable it to meet the requirements of the holders of the outstanding bonds and coupons in this particular.

4. The want of parties.

As we have already said the parts of Boyd and Elliott Counties which are interested in this matter have no separate organization of their own, and they remain for all the purposes of this debt a part of Carter County. A suit against Carter County on the bonds is therefore a suit against them, and a judgment against that County will be payable out of taxes collected within the boundaries of the original county under the provisions of the Act of 1878

A suggestion was made in the argument for the County of a variance between the bond described in the declaration and that which was actually issued; but this is a matter which we cannot consider, as there is no copy of the bond as issued in the record.

Another objection is made to the form of the declaration in that it does not meet the requirements of section 113 of the Civil Code of Kentucky, and set out distinctly in separate paragraphs each one of the sixty separate causes of action sued on. That objection cannot be taken by general demurrer, and besides it does not seem to have been made below.

The objection to the action of the court in respect to the answer is so little relied on that it is only necessary to say we see no error in what was done.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[511]

LACLEDE BANK AND J. T. CRAIG, Assignee of J. N. ISRAEL, *Appts.*,
v.
HARRISON B. SCHULER.

HARRISON B. SCHULER, *Appt.*,
v.
LACLEDE BANK AND J. T. CRAIG, Assignee, etc.

(See S. C. Reporter's ed. 511-517.)

Banking—check as equitable assignment—notice to bank, necessary to bind fund.

*1. Without deciding the mooted question whether a check or draft of a person on a bank in which he has deposits operates as an equitable assignment of the fund, so on deposit, to the holder of the check to the amount of it, it is clear that such check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise.

2. Until then, other checks drawn afterward may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice.

[Nos. 995, 1017.]

Submitted Jan. 7, 1887. Decided Mar. 7, 1887.

APPEAL and cross appeal from the Circuit Court of the United States for the Eastern District of Missouri. Reported below, 27 Fed. Rep. 424. *Reversed.*

The history and facts of the case appear in the opinion of the court. See also the following case of *Schuler* v. *Israel.*

Mr. **David P. Dyer,** for Schuler:

Drawing and delivery of the check set out in the bill was an appropriation of so much money of J. N. Israel in the custody of the Laclede Bank as was called for by the check.

Chouteau v. *Rowse*, 56 Mo. 65; *Union Bank* v. *Oceana Co. Bank*, 80 Ill. 212; *Merchants Bank* v. *State Bank*, 77 U. S. 10 Wall. 647 (19: 1019); *Morrison* v. *McCartney*, 30 Mo. 187.

J. N. Israel, prior to this assignment, had already surrendered control of the deposit by drawing and delivery of the check; and his assignee took the bank account as well as all other property of the assignor in its exact condition at the time of the assignment, subject to all legal and equitable claims.

The drawing of the check to Schuler operated in equity to transfer so much of the funds of J. N. Israel in the Laclede Bank as would pay the check.

Walker v. *Siegel*, 2 Cent. L. J. 108; *German Sav. Inst.* v. *Adae*, 8 Fed. Rep. 106; *First Nat. Bank* v. *Coates*, 8 Fed. Rep. 540.

As between the assignor and assignee, the claim of the assignee cannot rise higher than the right transferred to him by the assignor. He stands in the shoes of the assignor as to all property conveyed by the assignment, subject to the legal and equitable rights of all other persons.

Burrill, Assignments, § 391; *Rumsey* v. *Town*, 20 Fed. Rep. 558; *Stewart* v. *Platt*, 101 U. S. 738, 739 (25: 818).

As between Schuler and the Laclede Bank, the rights of Schuler are those existing on the morning of October 26, having relation back to the time of drawing the check by Israel. The right of set-off on the part of the Laclede Bank was defeated by the giving of the check.

Myers v. *Davis*, 22 N. Y. 489; *Xenia Bank* v. *Stewart*, 114 U. S. 224 (29: 101); *McGrade* v. *German Sav. Inst.* 4 Mo. 330.

The law will make application of the money in the hands of the Laclede Bank, according to its own notion of justice.

Nat. Bank v. *Mechanics Nat. Bank*, 94 U. S. 439 (24: 178).

The assignment of Israel to Craig is void under the laws of Texas.

Muller v. *Norton*, 19 Fed. Rep. 719; *Brown* v. *Knox*, 6 Mo. 302; *Keevil* v. *Donaldson*, 20 Kan. 168.

The assignment of Israel to Craig, even if valid under the laws of Texas, would not be enforced in Missouri, because in conflict with the laws of Missouri.

Askew v. *La Cygne*, 83 Mo. 366; *Green* v. *Van Buskirk*, 72 U. S., 5 Wall. 307 (18: 599); *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 671 (23: 1004); *Brown* v. *Knox*, 6 Mo. 302.

Mr. **J. E. McKeighan,** for the Laclede Bank and Craig:

The drawing of the Schuler check did not operate to transfer to Schuler any portion of the debt of the Laclede Bank to Israel, or to give him any lien thereon. There was no privity between Schuler and the drawee Bank. A single cause of action cannot be split up without the assent of the debtor.

Mandeville v. *Welch*, 18 U. S. 5 Wheat. 277 (5: 87); *Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152 (19: 897); *Dickenson* v. *Coates*, 79 Mo. 250; *Rosenthal* v. *Martin Bank*, 17 Blatchf. 318.

There is no assignment either at law or in equity where there is any power of revocation in the assignor, or where the holder of the fund cannot be compelled to pay although forbidden by the assignor. An order or check is not an equitable assignment, unless it is to pay out of a specified fund specified in the order.

Christmas v. *Russell*, 81 U. S. 14 Wall. 69 (20: 762).

A check is simply the written order of the

*Head notes by *Mr. Justice* MILLER.

depositor on his bank to make a certain payment. It is executory, and, as such, it is of course revocable at any time before the bank has paid it or committed itself to paying it.

Morse, Banking, 302, and cases there cited.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal and cross appeal from a decree of the Circuit Court of the United States for the Eastern District of Missouri.

Harrison B. Schuler, a citizen of the State of Kansas, brought his bill in that court against the Laclede Bank, a corporation under the laws of the State of Missouri, and J. T. Craig, a citizen of the State of Texas. The substance of the bill is that the plaintiff is the owner and holder of a draft, or bank check, drawn by C. W. Israel & Co. on the Laclede Bank, for the sum of $11,250, dated at Henrietta, Texas, October 20, 1885, in favor of the plaintiff, which was duly presented for payment on the 26th day of that month; and that payment was refused, as the Laclede Bank alleged, on the ground that C. W. Israel & Co., the drawers of the draft, had, on October 24, 1885, made an assignment under the laws of Texas for the benefit of their creditors, of which the said Laclede Bank had been advised by telegraph. The bill proceeds upon the idea that there were funds in the hands of the Laclede Bank to the credit of C. W. Israel & Co. on the presentation of said check for payment, which ought to be applied for that purpose, and charges that, notwithstanding the general assignment for the benefit of creditors made by C. W. Israel & Co. on October 24, 1885, the check in question, made in favor of the plaintiff on October 20, 1885, was an assignment or appropriation of so much of those funds to the benefit of complainant, which he is entitled to enforce in this suit.

[512]

J. T. Craig, who had become substituted for Davidson, the assignee of C. W. Israel & Co., was also made a party to the suit, and appeared and filed an answer.

The answer of the Laclede Bank, while admitting most of the statements made in the bill, is very long and recites many things not material to the issue as we look upon it, but relies upon two substantial defenses to the suit. The first of these is that, on the morning of the 26th day of October, 1885, it received the following telegram from C. W. Israel & Co.: "Henrietta, Texas, 24 (meaning the 24th of October), Laclede Bank, St. L.: We assigned this day in favor of S. Davidson; hold funds subject to his order. C. W. Israel & Co." It alleges that this telegram was forwarded to the Bank as a night message on Saturday night, and, although duly received at the telegraph office, was only delivered at 8 o'clock on Monday morning, and that the check in favor of complainant was presented at the opening of the Bank at 10:15 on the same morning, which was the first notice that they had of it. The answer insists that the general assignment, with the notice of it by telegraph, was a complete revocation of the Schuler check, as well as all other checks drawn against this defendant by C. W. Israel & Co., and that the assignment, with this prior notice to the Bank, vested in the assignee the better right to any funds of said C. W. Israel & Co. in the hands of the Bank. The answer also sets up transactions between C. W. Israel & Co. and the Bank by which said C. W. Israel & Co. would be indebted on a settlement of the transactions between the two Banks to the Laclede Bank, in a sum beyond anything which they then held on deposit to the credit of C. W. Israel & Co. A part, however, of the transactions which go to make up this claim of set-off against C. W. Israel & Co. consisted of a note or notes discounted by the Laclede Bank for said C. W. Israel & Co., but which had not yet matured. The answer also sets up that C. W. Israel & Co. and the Laclede Bank were corresponding Banks, one being in Texas and the other in Saint Louis, Missouri, and that there had been a long course of dealing between them, and for this reason they had discounted the notes of C. W. Israel & Co. without any other sufficient security.

[513]

Craig, as assignee for C. W. Israel & Co., filed a separate answer, in which he sets out mainly the same matters found in the answer of the Laclede Bank, and he also makes a part of his answer the assignment of C. W. Israel & Co. to Davidson for the benefit of all their creditors.

There were no replications to either of these answers, but a stipulation is filed in regard to facts that are agreed upon by the parties, which closes with this paragraph: "All other facts in the bill and answer not inconsistent herewith are to be taken as part of this agreed statement."

The decree of the court was as follows:

"This cause came on for hearing at this term of the court on the bill of complaint, answers of defendants, and stipulations on file, and the court, being fully advised concerning the premises, finds that at the date of the presentation to the said Laclede Bank of the check set out in the bill of complaint there was to the credit of the account of C. W. Israel & Co. in said Bank the sum of $5,912.41 subject to the payment of said check, and that said check operated in equity as an assignment of said sum as against said defendants to said complainant.

"*It is therefore ordered, adjudged and decreed* that the said complainant have and recover of and from said defendants the said sum of $5,912.41, together with interest at 6 per cent per annum from the 26th day of October, 1885, amounting to $6,078.99; and it is further ordered that execution issue therefor against said defendant, the Laclede Bank."

[514]

From this decree both Schuler and the Bank appealed. The assignee, Craig, did not appeal.

The question of how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment, to the payee of the check, of all or any portion of the funds or deposits to the credit of the drawer in the bank, is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them. *Marine Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 252 [17: 785]; *Bank of Republic* v. *Millard*, 77 U. S. 10 Wall. 152 [19: 897]; *Bank* v. *Whitman*, 94 U. S. 343 [24: 229].

But while this may be considered as the es-

tablished doctrine of this court in regard to the rights of the parties at law, and is probably the prevailing doctrine in nearly all the courts, it is urged in this case, and several respectable courts have so decided, that such a check is an appropriation of the amount for which it is drawn of the funds of the drawer in the hands of the bank. *Roberts* v. *Austin, Corbin & Co.* 26 Iowa, 315; *Forgarties* v. *State Bank*, 12 Rich. L. R. (S. C.) 518; *Munn* v. *Burch*, 25 Ill. 35; *German Sav. Inst.* v. *Adae*, 1 McCrary, C. C. 501.

But however this doctrine may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment—a question which we do not here decide—we are of opinion that, as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it or demand made upon it for its payment.

[515] In the case before us it is a conceded fact that before the Bank had any knowledge or notice whatever of the check on which the plaintiff brings this suit, it had received a distinct notification from the drawer of that check that he had made a general assignment for the benefit of his creditors, with an express direction to hold the funds subject to the order of the assignee. Therefore, even if the check could be considered as an attempt on the part of C. W. Israel & Co. to assign or appropriate this amount in the hands of the Bank to Schuler, the general assignment for the benefit of all their creditors of all their assets, including those in the hands of the Bank, was made and brought to the attention of the Bank with directions to turn them over to this assignee, before it had any notice of the check in favor of Schuler.

The learned judge who decided the case on the circuit rested his judgment, in an opinion which is found in the record, on the proposition that, as between these two equities,—namely, the equities of the general creditors under the assignment to Davidson, and this implied assignment in equity by the drawing of the check, —the latter was superior. In this it would seem that he was somewhat influenced by the fact that he was enabled to trace the sources of some of the deposits to the credit of C. W. Israel & Co., in the Laclede Bank, to money which in a roundabout way had been collected for the payment of a debt to Schuler, and had finally been deposited to the credit of C. W. Israel & Co. in the Laclede Bank. But there is no allegation in the bill, nor any evidence in the testimony, nor any reason to believe that the Bank knew anything of this connection between the sums received from several of the banks with which Israel was connected at different times and the debt of Schuler. This is expressly denied, and we can see no reason why the Bank should be held in any way to regard the deposit made by C. W. Israel & Co. as, in law or in equity, funds in which Schuler had an interest. It must therefore be left entirely out of the argument in the contest between the Bank and Schuler.

[516] Apart from this matter, it is not easy to see any valid reason why the assignment of an insolvent debtor, for the equal benefit of all his creditors, of all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker. The holder of this check comes into the distribution of the funds in the hands of the assignee for his share of those funds with other creditors. The mere fact that he had received a check, a few days before the making of the assignment, on the Bank, which had not been presented until after the general assignment was made and notified to the Bank, does not seem, in and of itself, to give any such superiority of right. The assignment was complete and perfect, and vested in the assignee the right to all the property of the assignor immediately upon its execution and delivery, with due formalities, to the assignee, and the check of this assignee, like the check of Israel & Co., could have been paid by the Bank with safety, if first presented. The check given by the same assignor a few days before was only an acknowledgment of a debt by that assignor, and became no valid claim upon the funds against which it was drawn until the holder of those funds was notified of its existence. This, we think, is the fair result of the authorities on that subject.

In the case of *Spain* v. *Hamilton's Admr.* 68 U. S. 1 Wall. 624 [17: 625], this court says:

"Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of the fund. The reason is that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

The same principle is also laid down in *Christmas* v. *Russell*, 81 U. S. 14 Wall. 69 [20: 762]; Story, Eq. Jur. §§ 1047, 1057, 1085*a*. See especially the authorities cited in note 1 to this latter section. See also *Ward* v. *Morrison*, 25 Vt. 599, and *Loomis* v. *Loomis*, 26 Vt. 198. [517

For these reasons we are of opinion that at the time of the presentation of the check to the Bank, the Bank held no funds subject to its payment, whether we consider the delivery of it by C. W. Israel & Co. to Schuler as intended to create an equitable assignment or not. An earnest effort is made in the argument of counsel in this court to impeach the general assignment as being void under the laws of Texas where it was made, and also the State of Missouri where this fund was. As there is nothing in the Statute of Missouri which would make this assignment absolutely void, and there is nothing brought to our attention to prove that it was void by the laws of Texas, and as the assignment, though mentioned in the original bill of complainant, is not assailed, nor any ground set forth to show its invalidity, we do not think there is any reason why it should not be held in this proceeding to be a valid assignment. As

this assignment had the effect when the Bank was notified of it to transfer to the assignee all right to any funds in its hands which Israel could assert, we need not consider the other questions connected with the case.

The result of these views is that the decree against the Bank must be reversed and the case remanded, with instructions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[506] HARRISON B. SCHULER, *Plff. in Err.*,
v.
J. N. ISRAEL AND THE LACLEDE BANK.

(See S. C. Reporter's ed. 506-510.)

Judgment as a bar—merger—defense of garnishee against attachment—insolvency of debtor.

*1. A judgment recovered in one court may be pleaded as a defense to a suit on the same cause of action pending in another when by law the cause of action is merged in the judgment.

2. A garnishee has a right to set up any defense against the attachment process which he could have done against the debtor in the principal action; and if the debtor be insolvent, and owes the garnishee on a note not due for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process.

[No. 1018.]

Submitted Jan. 10, 1887. Decided Mar. 7, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. Reported below, 27 Fed. Rep. 851. *Affirmed.*

The history and facts of the case appear in the opinion of the court. See the preceding case of the *Laclede Bank* v. *Schuler*.

Mr. **David P. Dyer**, for plaintiff in error.

Mr. **J. E. McKeighan**, for defendants in error.

[507] *Mr. Justice* **Miller** delivered the opinion of the court:

The plaintiff in error, who was plaintiff below, brought two separate suits in the Circuit Court of the City of Saint Louis, Missouri, on the same day against C. W Israel and J. N. Israel, as partners in the banking business. One case was brought upon a note for the sum of $10,000, and the other upon a draft made by C. W. Israel & Company for $11,250, on the Laclede Bank, on which payment was refused when presented at the Bank and the draft duly protested.

In each of these cases a writ of attachment was issued at the commencement of the suit, which was served by way of garnishment on the Laclede Bank, also of Saint Louis. An order of publication was made in the state court against C. W. Israel and J. N. Israel on account of their being nonresidents, and the two suits were removed into the Circuit Court of the United States for the Eastern District of Missouri, upon the application of the plaintiff, upon the ground that he was a citizen of the State of Kansas and the two Israels were citizens of the State of Texas. They were there consolidated and heard as one case.

*Head notes by *Mr. Justice* MILLER.

J. N. Israel appeared and filed an answer for himself alone, in which he made no defense to the suit on the check, but set up as a defense to the suit on the note, that before the institution of the present suit in the Missouri court the plaintiff had commenced an action on the same note in the Circuit Court of the United States for the Northern District of Texas, and had at the time of the plea filed, recovered a judgment against the defendant J. N. Israel, on said note, whereby he claimed that the note was merged in said judgment and no judgment could be rendered on it in this action. Judgment was rendered in favor of plaintiff for the amount of the check The suit was dismissed by plaintiff before hearing as to C. W. Israel. [508]

The Laclede Bank in its response to the garnishee process served on it under the attachment, and in answer to interrogatories propounded to it by the plaintiff, admitted that there was, on the 24th day of October, 1885, standing on its books to the credit of the three several banking companies of which J. N. Israel was a partner certain sums of money. The attachment process was served on the Laclede Bank November 2, 1885, and the Bank in its answer says that on the 24th of October the said Israel, being wholly insolvent, made, executed and delivered a deed of general assignment in conformity with the laws of the State of Texas, where he resided, for the benefit of all his creditors, which assignment is set forth in the answer, and that the Bank had notice of this assignment immediately after it was made. It further answered that the said J. N. Israel individually, and as a member of the several banking houses before referred to; namely, C. W. Israel & Company, the Exchange Bank of Harold, and the Exchange Bank of Wichita Falls, was indebted to the Laclede Bank in an amount exceeding all the sums on deposit with that Bank at the date of the service of the attachment.

The plaintiff demurred to the answer of the defendant Israel, setting up the judgment recovered in the United States Court for the Northern District of Texas on the note; and he demurred also to the answer of the Laclede Bank as garnishee, and the case was submitted to the court on these demurrers. The court rendered a judgment overruling both demurrers, finding for the defendant Israel in the suit upon the note and rendering judgment against him in the suit on the check. It also discharged the Bank as garnishee.

The plaintiff brings this case here by writ of error, and the two questions presented are, first, as to the sufficiency of the answer of J. N. Israel setting up the judgment in the action on the same note in Texas.

While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but when the matter is [509]

pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered. Freem. Judg. § 221; *Barnes* v. *Gibbs*, 2 Vroom, 317; *McGilvary* v. *Avery*, 30 Vt. 538; *Rogers* v. *Odell*, 39 N. H. 452; *Bank* v. *Wheeler*, 28 Conn. 433; *Eldred* v. *Bank*, 84 U. S. 17 Wall. 545 [21: 685]. The court below was right, therefore, in overruling the demurrer to the plea and rendering judgment for the defendant.

As regards the order discharging the garnishee, it seems to us that, without reference to the question of the validity of the assignment of Israel, the answer of the Bank sets up a sufficient defense in the fact of the insolvency of J. N. Israel and his indebtedness as partner in the various banking companies above mentioned to the Laclede Bank. The answer of the Bank states explicitly that at the time of the service of the summons in garnishment on it; namely, November 2, 1885, it had not, "nor has it since nor has it now, in its possession, custody or charge, any lands, tenements, goods, chattels, moneys, credits or effects belonging to the defendants in said cases or either of them. 2. At said date of garnishment it, the said Bank, was not indebted in anywise to said defendants or either of them, nor has it since become so indebted, nor is it now so indebted. 3. At said date of garnishment said Bank was not bound in any contract to pay said defendants, or either of them, any money not then due, nor has it since said date become so indebted."

The Bank then goes on to give a detail of its transactions with Israel and his various banks, in which it is shown that while there was in the Bank's hands certain moneys deposited by Israel and his several banking houses, Israel [510] was indebted to the Bank in various sums at the time of his failure, October 24, 1885, some of which had matured and others of which had not matured at the time of the service of the garnishee process. But, as Israel and all his banks were insolvent at the time of the service of the garnishee process, we are of opinion that the Bank had the right to appropriate any moneys in its hands to the security and payment of these obligations, whether due or not. If we are correct in this proposition, the answer of the Bank is sufficient.

As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account. And while it may be true that in a suit brought by Israel against the Bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the Bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity; and, as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity. *U. S.* v. *Vaughn*, 3 Binn. 394; *Shattuck* v. *Smith*, 16 Vt. 132; *Ex parte Stephens*, 11 Ves. 24; Drake, Attachment, §§ 528, 521.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court. U. S.

FREDERICK HOPT, *Plff. in Err.*, [430]

v.

PEOPLE OF THE TERRITORY OF UTAH.

(See S. C. Reporter's ed. 430-442.)

Criminal law—competence of jurors—judgment of the court—when conclusive—"statements in public journal" within Utah Statute—challenge for cause—when disallowance, no injury—evidence—opinion of physician as to direction from which blow was delivered, admissible—charge—reasonable doubt—final argument—reference to former trials.

* 1. Evidence, or what purports to be evidence, in a criminal case, printed in a newspaper, is "a statement in a public journal" within the meaning of the Act of Utah declaring that no person shall be disqualified as a juror by reason of his having formed or expressed an opinion upon the matter or cause to be submitted to him, "founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him."

2. The judgment of the court as to the competency of the juror upon his declaration under oath or otherwise, as above, is conclusive.

3. When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the jury is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done to the defendant, if until the jury is completed he has other peremptory challenges which he can use.

4. The opinion of a physician, after making a *post mortem* examination of the deceased, who came to his death by a blow inflicted upon his head, as to the direction from which the blow was delivered, is admissible in evidence.

5. If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous.

6. An allusion, in the final argument to the jury by the counsel for the prosecution, to the case as having been many times brought before the tribunals, is not a ground for reversing a judgment under the Statute of Utah, which declares that on a new trial the "former verdict cannot be used or referred to, either in evidence or argument."

[No. 1099.]

Submitted Jan. 21, 1887. Decided March 7, 1887.

IN ERROR to the Supreme Court of the Territory of Utah. *Affirmed.*

* Head notes by *Mr. Justice* FIELD.

The history and facts of the case appear in the opinion of the court.

Messrs. **Ben. Sheeks** and **P. L. Williams**, for plaintiff in error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for defendants in error.

[431] *Mr. Justice* **Field** delivered the opinion of the court:

The defendant below, the plaintiff in error here, Frederick Hopt, was indicted in the District Court of the Third Judicial District of Utah, in December, 1880, for the murder of John F. Turner on the third of the preceding July. He was four times convicted in that court, upon this indictment, of murder in the first degree. The judgment of death pronounced against him on each previous conviction was reversed by this court. The decisions are found in 104 U. S. 631 [26:873]; 110 U. S. 574 [28:262]; and 114 U. S. 488 [29:183]. The last conviction took place in September, 1885; judgment was passed in October following; [432] and on appeal to the Supreme Court of the Territory it was affirmed in January, 1886, except as to the time of its execution; that was to be fixed by the district court, to which the cause was remanded for that purpose. To secure a reversal of this judgment the case is brought before us on a writ of error.

The errors assigned are: 1, the ruling of the trial court upon challenges to several jurors; 2, the admission in evidence of the opinion of a witness, as to the direction from which the blow was delivered which caused the death of the deceased; 3, the instruction to the jury as to the meaning of the words "reasonable doubt;" and 4, the reference on the argument by the district attorney, to previous trials of the case.

1. Four persons summoned as jurors were examined on their *voir dire*, and challenged by the defendant: one for actual bias, under section 241 of the Act of the Territory regulating proceedings in criminal cases, passed in 1878; and the other three for both actual and implied bias. Actual bias is defined by that Act to be "The existence of a state of mind, on the part of a juror, which leads to a just inference in reference to the case that he will not act with entire impartiality."

The juror Young, challenged as having that state of mind, that is, for actual bias, testified that he had heard of the case, but had never talked with anyone who pretended to know about it; that he had impressions as to the guilt or innocence of the defendant, but could not say that he had ever formed any opinion on the subject, and did not remember that he had ever expressed any; that possibly his impressions were strong enough to create, from sympathy, some bias or prejudice, but he thought he could sit on the jury and be guided by the evidence, and try the case impartially as if he had never heard of it before. Upon this testimony, the court was of opinion that he was a competent juror; and accordingly the [433] challenge was disallowed. In this ruling we see no error. The juror was then peremptorily challenged by the defendant, and was excused.

That Act also provides, in section 242, that a challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being the party adverse to the defendant in a civil action, or having complaint against or being accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

5. Having served on a trial jury which has tried another person for the offense charged in the indictment.

6. Having been one of the jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.

9. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

The Act provides, in section 244, that, "In a challenge for implied bias, one or more of the causes stated in section 242 must be alleged." Laws, 1878, pp. 111, 112.

Another Act of the Territory, passed in March, 1884, declares that "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury [juror], founded upon public rumor, statements in public journals, or common notoriety; provided it [434] appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter." Laws 1884, p. 124.

The juror Gabott, challenged for both actual and implied bias, testified on his direct examination, in substance, as follows: that he had heard of the case through the newspapers, and read what was represented to be the evidence; that he had talked about it since that time; that he did not think he had ever expressed an opinion on the case, but that he had formed a qualified opinion; that is, if the evidence were true, or the reports were true; that he had an opinion touching the guilt or innocence of the accused, which it would take evidence to remove; but that he thought he could go into the jury box and sit as if he had never heard of the case, and that what he had heard would not make the least difference. On his cross examination, he testified that he knew nothing about the case,

except what he had read from time to time in the public press; that, if what he had heard turned out to be the facts in the case, he had an opinion, otherwise not; that is, his opinion was a qualified one; and that, according to his present state of mind, he could sit on the jury and determine the case without reference to anything he had heard; that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially; and that he thought he could try the case according to the law and the evidence given in court. On his re-examination he further stated that he would be guided by the evidence altogether, without being influenced by any opinion he might then have, or may have previously formed.

The court held that the juror was competent. By the express terms of the Statute of 1884 he could not be disqualified as a juror for an opinion formed or expressed upon statements in public journals, if it appeared to the court, upon [435] his declaration under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper is a "statement in a public journal" within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive.

The juror Winchester, who was also challenged for actual and implied bias, testified that he had heard of the case through the papers; that he had heard it talked of some years ago; that he believed he had heard what purported to be the evidence as given in the newspapers on previous trials, and believed he had formed and expressed an opinion as to the guilt or innocence of the accused, and though it was an unqualified opinion, it was not a fixed or settled one; that at the time he read the papers, he had formed such an opinion as would have required testimony to remove it from his mind, and if his memory was refreshed as to the testimony there would probably be a renewal of the opinion he had formed; that he had not talked with anyone, and could hardly tell the circumstances now; that he believed that his mind was free from any impression, and that he could sit on the jury and try the case precisely as if he had never heard of it or read of any of the facts. To inquiries of the court, the juror repeated, in substance, what he had previously said, that he thought he could sit in the jury box and try the case according to the evidence without reference to any opinion he may then or theretofore have formed; that he could try defendant impartially, according to the evidence, and that he would do so. The court thereupon held that he was competent, and the challenge was disallowed. This ruling disposed of the challenge, and the judgment of the court, for the reasons stated, was conclusive under the Statute of March, 1884. The defendant thereupon peremptorily challenged the juror, and he was excused.

The fourth juror, Harker, who was challenged for actual and implied bias, by the defendant, was examined on his *voir dire*, but [436] after hearing his testimony the challenge was disallowed; and thereupon the district attorney peremptorily challenged him, and he was excused.

The challenges for implied bias fell, as there was no specification of the grounds for such challenges, as required by section 242 of the Act of 1878.

In capital cases in Utah, the Government and the accused are each allowed fifteen peremptory challenges. Laws of Utah, 1884, chap. 48, § 24. Notwithstanding the peremptory challenges made by the defendant to two of the jurors, he had several such challenges which had not been used when the jury was completed. If, therefore, the ruling of the court in disallowing the challenges to the two for bias, actual or implied, was erroneous, no injury to the defendant followed. Those jurors were not on the jury, and impartial and competent jurors were obtained in their place, to whom no objection was made. *Hayes* v. *Missouri*, 120 U. S. 68 [*ante*, 578]; *Mimms* v. *State*, 16 Ohio St. 221; *Erwin* v. *State*, 29 Ohio St. 186. It is therefore only the ruling on the challenge to the juror Gabott which can properly be assigned as error here; and, for the reasons stated, that ruling was in our judgment correct.

2. The deceased came to his death from a blow inflicted upon the left side of his head, which crushed his skull. A *post mortem* examination of the body was made by a physician, who was allowed, against the objection of the defendant, to give his opinion as to the direction from which the blow was delivered, after he had stated that his examination of the body had enabled him to form an intelligent opinion upon that point. The ground of the objection was that the direction in which the blow was delivered was not a matter for the opinion of an expert, but one which should be left to the jury. The court overruled the objection and the defendant excepted. The witness stated, as his opinion, that the blow was delivered from behind and above the head of the person struck, and from the left toward the right. This testimony was supposed to have some bearing upon the case when considered in connection with the fact that the accused was a left-handed man. On the following morning, counsel on behalf of the prosecution moved that this evidence [437] should be stricken from the record, and the jury be instructed to disregard it. The counsel for the defendant did not object to that, but he wished the record to show that the application was made on the following morning. The court thereupon instructed the jury that the evidence was stricken out, and that they were not to consider it at all. The defendant now contends that it was error to admit the evidence, and that the error was not cured by striking it out and the instruction to the jury. To this the answer is: 1, that the evidence was admissible; and 2, that, if not admissible, the error was cured by the evidence being stricken out with the accompanying instruction.

The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able to properly make the observations, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination,

and the ability with which it is made. The court below, after observing that every person is competent to express an opinion on a question of identity, as applied to persons in his family or to handwriting, and to give his judgment in regard to the size, color and weight of objects, and to make an estimate as to time and distance, cited a great number of cases illustrative of this doctrine. We quote a passage containing them: "He may state his opinion," says the court, "with regard to sounds, their character, from what they proceed, and the direction from which they seem to come. *State* v. *Shinborn*, 46 N. H. 497; *Commonwealth* v. *Pope*, 103 Mass. 440; *Commonwealth* v. *Dorsey*, 103 Mass. 412. Nonexperts have been allowed to testify whether certain hairs were human (*Commonwealth* v. *Dorsey*); that one person appeared to be sincerely attached to another (*McKee* v. *Nelson*, 4 Cow. 355); as to whether another was intoxicated (*People* v. *Eastwood*, 14 N. Y. 562); as to whether a person's conduct was insulting (*Raisler* v. *Springer*, 38 Ala. 703); as to resemblance of foot tracks (*Hotchkiss* v. *Germania Ins. Co.* 5 Hun, 90); as [438] to value of property, when competent (*Brown* v. *Hoburger*, 52 Barb. 15; *Bank* v. *Mudgett*, 44 N. Y. 514; *Bedell* v. *L. I. R. R. Co.* 44 N. Y. 367; *Swan* v. *Middlesex Co.* 101 Mass. 173; *Snyder* v. *Western U. R. R. Co.* 25 Wis. 60; *Brackett* v. *Edgerton*, 14 Minn. 174); as to market value of cattle, derived from newspapers (*Cleveland, etc. R. R. Co.* v. *Perkins*, 17 Mich. 296); whether there was hard pan in an excavation (*Currier* v. *Boston & M. R. R.* 34 N. H. 498); whether one acted as if she felt sad (*Culver* v. *Dwight*, 6 Gray, 444); as to rate of speed of a railroad train on a certain occasion (*Detroit, etc.* v. *Von Steinberg*, 17 Mich. 99); as to whether noisome odors render a dwelling uncomfortable (*Kearney* v. *Farrell*, 28 Conn. 317); whether the witness noticed any change in the intelligence or understanding, or any want of coherence in the remark of another (*Barker* v. *Comins*, 110 Mass. 477: *Nash* v. *Hunt*, 116 Mass. 237)."

Upon the same principle, the testimony of the physician as to the direction from which the blow was delivered was admissible. It was a conclusion of fact which he would naturally draw from the examination of the wound. It was not expert testimony in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life. But, independently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the acompanying instruction, cured the error. It is true, in some instances there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it. We think the present case one of that kind. *State* v. [439] *May*, 4 Dev. Law, 330; *Goodnow* v. *Hill*, 125 Mass. 589; *Smith* v. *Whitman*, 6 Allen, 562; *Hawes* v. *Gustin*, 2 Allen, 406; *Dillin* v. *People*, 8 Mich. 369; *Specht* v. *Howard*, 88 U. S. 16 Wall. 564 [21 : 348].

3. The instruction to the jury, which is the subject of exception, relates to the meaning of the words "reasonable doubt," which should control them in their decision. The following is that portion which bears upon this subject:

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty, unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

The word "abiding" here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such [440] case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities.

In *Commonwealth* v. *Webster*, 5 Cush. 320, the Supreme Judicial Court of Massachusetts stated in its charge that it was not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged against the prisoner was more likely to be true than the contrary, and said: "The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt."

The difficulty with this instruction is that the words "to a reasonable and moral certainty" add nothing to the words "beyond a reasonable doubt;" one may require explanation as much

as the other. In *Commonwealth* v. *Costley*, 118 Mass. 24, the same court held that, as applied to a judicial trial for crime, the two phrases were synonymous and equivalent, and that each signified such proof as would satisfy the judgment and consciences of the jury that the crime charged had been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible. It was there also said that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt had often been held sufficient, without further explanation. In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule [441] may be and often is rendered obscure by attempts at definition, which serve to create doubts instead of removing them. But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail. If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion.

The instruction is not materially different from that given by *Lord* Tenterden, as repeated and adopted by *Chief Baron* Pollock, in *Rex* v. *Muller*. "I have heard," said the Chief Baron, addressing the jury, "the late *Lord* Tenterden frequently lay down a rule which I will pronounce to you in his own language: 'It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life.' No doubt the question before you to-day—involving as it does the life of the prisoner at the bar—must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect." 4 Fost. & Fin. 888-9, note. We are satisfied that the defendant was in no way prejudiced by the instructions of the court.

4. On the final argument to the jury, the [442] counsel for the prosecution alluded to the case as the most remarkable one ever tried in the Territory, and to "the many times it had been brought before the tribunals." To this latter remark exception was taken. Thereupon the remark was withdrawn by the counsel, and the court said to the jury that the case was to be tried on the evidence, and that they were not to consider it with respect to any previous trial, but only on the evidence given on this trial. The counsel for the defendant now contends that this allusion was in contravention of that section of the Act of the Territory regulating proceedings in criminal cases, which declares that "The granting of a new trial places the parties in the same position as if no trial had been had," and that "all the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument." Laws of Utah 1878, p. 126, § 817. The object of this law was to prevent the accused from being prejudiced by reference to any former conviction on the same indictment. There was, in fact, no reference to any verdict on a previous trial, but merely a mention of the times the case had been before the courts, so as to magnify its importance. If allusions to previous trials, such as were here made, were to vitiate a subsequent trial, a new element of uncertainty would be introduced into the administration of justice in criminal cases. We do not see that the defendant was in any way prejudiced by such reference. The fact that previous trials had proved unavailing may perhaps have induced greater care and caution on the part of the jury in the consideration of the case.

The judgment of the court below is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court U. S.

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[412]

GEORGE S. GRIER, *Appt.*

v.

JOHN F. WILT.

(See S. C. Reporter's ed. 412-430.)

Construction of clauses of letters patent—former patent as evidence.

1. Upon a bill for infringement, patents not set up in the answer may be introduced in evidence, to show the state of the art and to aid in the construction of the plaintiff's claim, although not to invalidate it for want of novelty.

2. The fourth claim of letters patent No. 190868, for an improvement in automatic fruit driers, must be limited to the mechanism described and shown. Said claim is not infringed by an apparatus without a suspending device, and in which each tray can be lifted and is supported independently.

[No. 148.]

Submitted Jan. 24, 1887. Decided March 7, 1887.

APPEAL from the Circuit Court of the United States for the District of Delaware. Reported below, 5 Fed. Rep. 450. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **F. O. McCleary**, for appellant:

Claims must be construed in view of the state of the art at the date of the invention.

Washing Machine Co. v. *Tool Co.* 87 U. S. 20 Wall. 342 (22: 303); *Pitts* v. *Wemple*, 1 Biss. 87.

A patentee's invention cannot be given a broad construction so as to cover later inventions, when it appears from the state of the art that there was no opportunity for a great original discovery; and the claim is properly limited to the specific improvement.

Root v. *Lamb*, 7 Fed. Rep. 222. See also *Jones* v. *Barker*, 11 Fed. Rep. 597; *Washburn & Moen Mfg. Co.* v. *Haish*, 10 Biss. 65.

An equivalent is such an element or ingredient as will perform the same function as one described in the patent, and which was well known at the date of the patent as a proper substitute for the one described in the patent.

Storrs v. *Howe*, 4 Cliff. 388; *Smith* v. *Downing*, 1 Fish. Pat. Cas. 64; *Welling* v. *Rubber Harness Trimming Co.* 7 O. G. 606; *Webster* v. *New Brunswick Carpet Co.* 5 O. G. 522; *Gill* v. *Wells*, 89 U. S. 22 Wall. 1 (22: 699); *Fuller* v. *Yentzer*, 94 U. S. 299 (24: 107); *Stimpson* v. *Baltimore & S. R. R. Co.* 51 U. S. 10 How. 329 (13: 441); *Schmidt* v. *Freese*, 12 Fed. Rep. 563.

The so-called "doctrine of equivalents" is based upon the equitable theory that a patentee should be guarded against mere colorable evasions of his claims and trifling mechanical variations in the details of his devices. It was never intended as a bar to the progress of invention; and the patentee of an improvement on a prior invention cannot invoke the doctrine of equivalents to suppress other inventions which are not mere colorable evasions of the first.

Burden v. *Corning*, 2 Fish. Pat. Cas. 477; *Seymour* v. *Osborne*, 3 Fish. Pat. Cas. 555.

Where a patentee is not a pioneer in his line, but simply an improver, he cannot broadly invoke the doctrine of equivalents to cover devices not specifically claimed by him.

Tobey Furniture Co. v. *Colby*, 34 O. G. 1276.

Messrs. **Samuel A. Duncan** and **Leonard E. Curtis**, for appellee.

[413] *Mr. Justice* **Blatchford** delivered the opinion of the court:

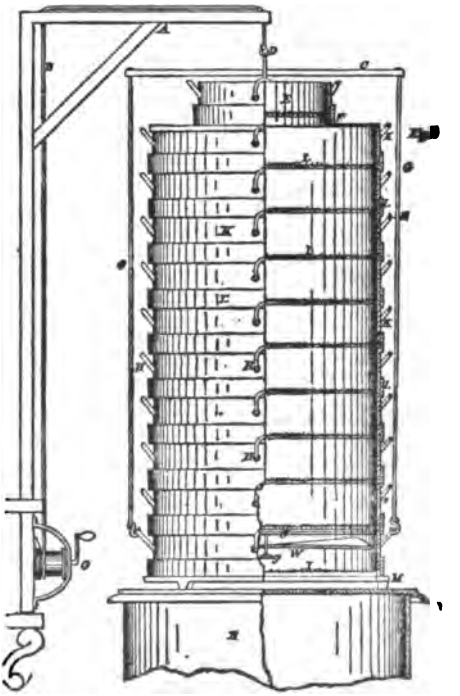
This is a suit in equity brought in the Circuit Court of the United States for the District of Delaware, by John F. Wilt against George S. Grier, for the infringement of letters patent No. 190368, granted to Asa Quincy Reynolds, May 1, 1877, for an "improvement in automatic fruit driers." The specification, drawings and claims of the patent are as follows:

"Figure 1 is a partial section and elevation of my improved fruit drier, showing the same as being located over an ordinary stove, and illustrating a simple means of elevating the machine. Fig. 2 is a similar view, showing the drier as located over a large furnace, as in the most extensive dry houses. Fig. 3 is a perspective view, illustrating the improved drier in a position removed from over an ordinary cooking stove. Fig. 4 is a perspective view of a fragment of a square tray or section, showing more plainly the metallic lining and the sockets and pins, which may be conveniently used in this form of tray. Fig. 5 is a similar view of a fragment of a round tray or section, showing also the tin or metallic lining. Like letters of reference in all the figures indicate corresponding parts.

The object of my invention is to simplify the construction of the fruit driers in common use, both for domestic and factory purposes, reducing the cost, increasing the efficiency, and rendering them easier to be manipulated, and at the same time fire proof, and capable of being enlarged or contracted at the pleasure of the operator; to accomplish all of which it (the invention) consists in certain details of construction and combination of parts, as will be hereinafter fully described, and then pointed out in the claims.

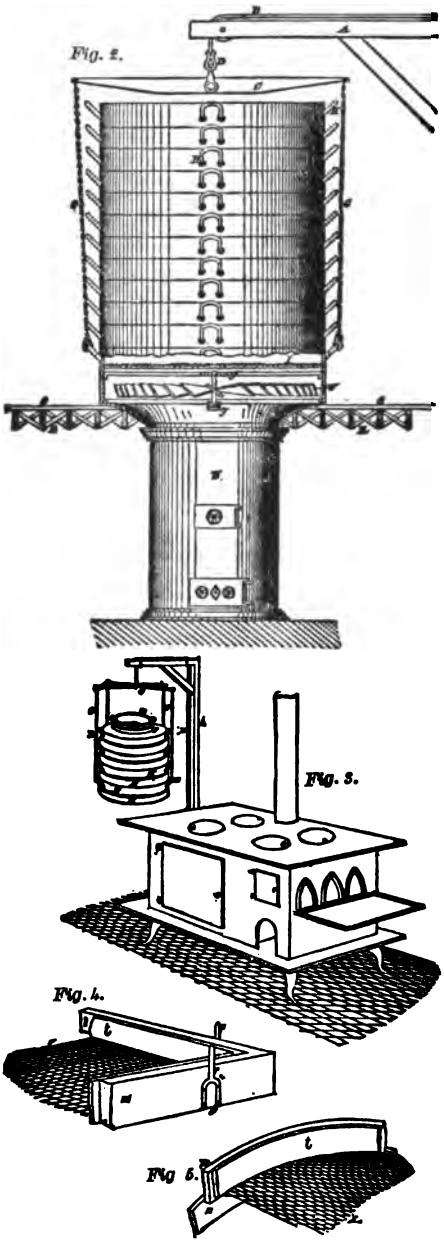
In Fig. 1 N is an ordinary stove or heating drum, over which is located the drier, consisting of a number of trays so constructed as that any one will receive a similar one above and also fit over a similar one below. For the lighter forms of driers I propose to make these trays of the ordinary sieves, or build them in the same manner, with perhaps two or more braces beneath the foraminated bottom, to give it sufficient [416] strength to support the weight of fruit. K is the main body of the tray, having a surrounding hoop, L. The several trays being of one size (save the uppermost, to be hereinafter described), it will be observed that each one will form a section of the wall of the drier, no matter what its position, and that this wall may be increased in height as much as desired or found necessary.

A is a crane and B a rope or chain running [417] over it and controlled by the windlass O. From the cross bars C the ropes or chains G depend, and these are made to suspend the drier through the medium of the handles H H, etc., upon each tray. In order to prevent the drier from tipping when elevated, three or more handles should be employed in connection with a corresponding number of chains or ropes, G [414]



At M is shown an iron ring, supported slightly above the top of the stove N, and upon which the lower tray rests. The drier is built up as follows: Fruit having been suitably disposed in a tray, the hooks upon the lower ends of the ropes G are placed under two or more of the handles H H, on the lowermost tray of the drier already over the stove, and the whole is elevated, by means of the windlass O, a trifle

[415]



more than the depth of one tray. The fresh tray is then placed upon the ring M, and those above lowered upon it, being so guided by the hands that the hoop of the one to which the ropes are attached will fit over the top of the one placed thereunder. In this way the drier may be built as high as desired by the successive introduction of trays below. The swinging crane and windlass combined is regarded as the simplest means likely to be employed for elevating the drier.

As the drying progresses and the trays are elevated, the fruit therein becomes more and more compact or shriveled up, leaving a comparatively free passage for the heated air through the body of the drier, in consequence of which very much of said air would pass off without accomplishing the work intended; and, the [418] partially cured fruit occupying considerably less space than the fresh, it is desirable that one or more smaller sized trays be provided for its reception. Upon the top of the uppermost of the main series of trays I place a flange, F, having a circular opening, with upwardly projecting collar, over which flange is located the the tray E, made in all respects similar to those below save as to its size. This flange serves to contract the flue formed by the series of trays below, and if the partially dried fruit be placed in the tray E, it will partially retard the flow of the air, and thus utilize so much thereof as would otherwise be wasted in the completion of the drying process. Above the flange F any number of small trays, E, may be placed; being matched one upon the other in a manner similar to those below.

Within each tray I propose to place a metallic lining, *t t* (preferably of bright tin), the object of which is to protect the wood of the trays from heat and prevent moisture from penetrating the same.

In Fig. 2 the series of trays forming the dry house is shown as located over a large furnace placed below the flooring Q. This form is intended for the larger sizes of dry houses, and is not different in principle or construction from that already described, except in that no hoops are illustrated as being placed upon the trays. These may be connected or matched with each other by any desirable and appropriate means.

It may be found advantageous to construct [419] the trays in other forms than circular, as indicated in Fig. 4, wherein the pin *p* and socket P are secured at suitable points upon the outside, and arranged to engage with similar sockets and pins upon the trays above and below, after the manner adopted in 'molders' flasks and the like.

With the swinging crane the drier may be removed from over the stove, as shown at Fig. 3, when the ordinary cooking operations may be performed and the drier returned at pleasure; or, if desirable, the drier may be elevated above the stove, leaving sufficient space between the two for the cooking utensils, and thus the drying and cooking processes be conducted simultaneously.

At D, Figs. 1 and 2, is a swivel connection by means of which the series of trays may be revolved, and thus the drying equalized throughout.

As fast as the fruit is thoroughly cured the trays are removed from the top, and may then be inserted at bottom, after having been charged with a fresh supply.

In all fruit driers it is observed that the material is liable to contract or shrivel in such a

manner as to open passages for the heated air, in consequence of which the fruit in the trays is unequally dried, the air passing off through these passages without coming in contact with the surrounding fruit. This difficulty has given rise to numerous inventions calculated to obviate it, among the most noticeable of which are revolving trays and revolving covers or shields for said trays. These are found in practice expensive to build, difficult to handle and move, and liable to get out of order; and it is a very important feature of the present invention to do away with all these objections. This I accomplish by the introduction of a fan wheel calculated to retard the ascending currents of heated air, and to distribute them uniformly across the whole area of the fruit-containing tray. In Fig. 1, the wheel W, composed of a series of inclined blades, is pivoted between the two bars *g g*, which are attached to the metallic lining *t*, before alluded to. It is sufficiently elevated above the foraminated bottom I as not to interfere with the placing of fruit upon said [420] bottom, if desired. The inclined blades cause the wheel to be rapidly revolved by the ascending currents of air, and these, meeting with a resistance, are compelled to pass by the blades in a uniform manner, said blades being so cut or separated as that they shall permit the passage of an equal quantity of air at every point below the bottom of the tray placed next above. Any number of these fans may be placed in the series of trays, as is apparent from the construction above described. They are automatically operated, not liable to get out of repair, and they are found to be very efficient for the purposes intended. If the currents of air be very rapid and strong the revolutions of the wheels are correspondingly rapid, and thus, under all circumstances, the currents are automatically regulated and always evenly distributed. For the larger sized driers the wheel W may advantageously be placed immediately over the funnel mouth S, conducting the heated air from the furnace below, as in Fig. 2. It may be pivoted in any desirable way, and other fans may be distributed throughout the series of trays. When the trays are made in square form one fan, occupying as much space therein as possible, will be found to work satisfactorily. If the trays be made oblong, then two fans might be introduced, the better to occupy the necessary space. They should, of course, be made to work upon the same level. These wheels have now come to be denominated 'flutter wheels,' and I desire to be understood as not limiting my invention to any particular number to be employed, to any specified location of said wheels in the drier, or to any particular method of suspending the same, so long as they are made to revolve independently of the trays, and to accomplish the results intended.

Having thus fully described my invention, what I claim as new and desire to secure by letters patent is:

1. In combination with a series of fruit-drying trays, located one above the other, a second or supplementary series smaller than the first, and adapted to operate as and for the purposes explained.

2. The plate F, adapted to cover the flue formed by the lower series of trays, and to receive and hold the upper series, the whole be- [421] ing arranged and combined substantially as set forth.

3. In combination with a fruit-drying tray, a fan wheel operated by the ascending currents of heated air, movable independently of said tray, and adapted to equalize the currents of air, in the manner set forth.

4. In combination with a fruit drier, the outer wall of which is made up of the frames of the several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the objects named.

5. In combination with a fruit drier adapted to be elevated, in the manner described, and suspended above a stove or furnace, a suspending device, substantially as shown, provided with a swivel connection, as and for the purposes set forth."

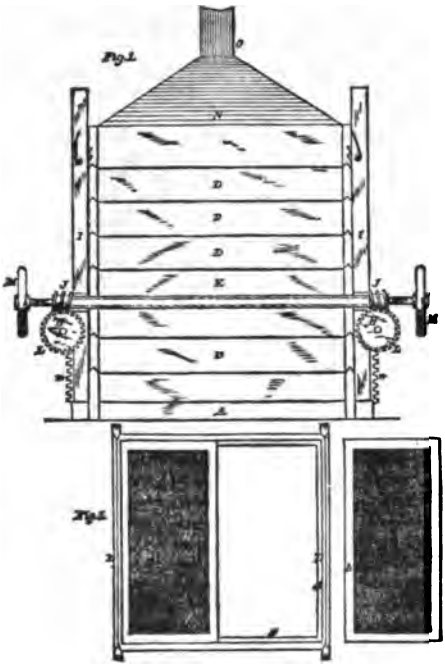
Infringement of the fourth claim only is alleged, the defendant's apparatus being that described in letters patent No. 221056, granted to him October 28, 1879, for an "improvement in fruit driers." The description and drawings of that apparatus, in the specification of that patent, are as follows:

"The nature of my invention consists in the construction and arrangement of a fruit evaporator, as will be hereinafter more fully set forth. In order to enable others skilled in the art to which my invention appertains to make and use the same, I will now proceed to describe its construction and operation, referring to the annexed drawings, in which Figure 1 is a side elevation of my improved fruit evaporator. Fig. 2 is a sectional view of the same. Fig. 3 shows the bottom of the drier. Fig. 4 is a vertical section of the roof. Fig. 5 shows one of the boxes with removable trays.

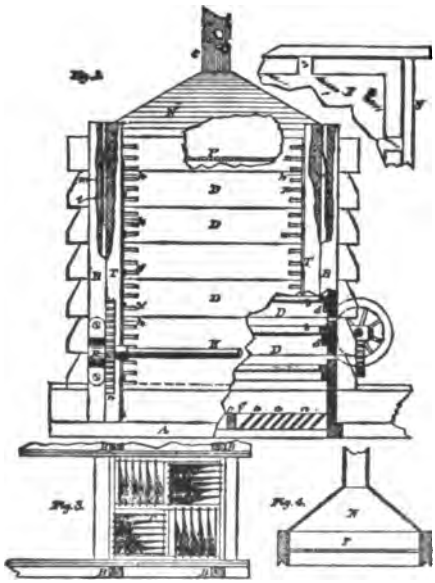
A represents a bed frame, of suitable dimensions, provided with four upright posts, B B, between which the boxes are placed for forming the walls of the evaporator and holding the trays. In the bottom frame, A, are two straight bars, C C, crossing each other at right angles, in the center, and dividing the bottom of the evaporator into four equal divisions. In each division is arranged a series of inclined slats, *a a*, and the four series of said slats are inclined outward in the four different directions, whereby, [424] when the evaporator is set over the furnace, the current of hot air, as it ascends, is directed to the sides of the machine. D D represent the boxes which go to form the walls of the evaporator, and which are open at the top and bottom. Each box contains one or more removable trays, *b*, which rest upon cleats *d* on the inside of the box. The upper edges of the side bars of each box D are made V shaped, while in their under edges are made corresponding grooves, so that the boxes will fit close together and can easily be moved back and forth. The outer sides of these side bars of the boxes have two or more horizontal notches, *x x*, at each end, into which take pivoted pawls *h h*. These pawls are pivoted to vertically movable posts or uprights I I, which are connected to the stationary corner posts B B by means of rods or bars, *m*, attached to each post I, and passing vertically through eyes *i* in a groove on the stationary post B. Each movable upright I is provided with a rack bar, *n*, and the two

rack bars on the same side of the evaporator are operated by pinions, *p*, on a horizontal shaft, H. The two shafts H H, on opposite sides of the evaporator, are operated by worms J J on a shaft, K, at one end of the evaporator, said

[422]



[423]



worms taking into gear wheels L L on the ends of the shafts H H. The shaft K is provided with hand wheels M M for turning the same.

In operation, the first box, having its tray or trays filled with fruit, is pushed in over the heater or furnace, and after being there, say about ten minutes, more or less, as desired, it is raised up by the gearing and the pawls *h*, attached to the movable uprights I, and another or second box similarly filled with fruit pushed in under the first, and the first lowered down on the second, and so on until twenty or more boxes with trays have been arranged to form the evaporator. It will be noticed that with my mechanism I lift each box independently of the others, so that I can lift a portion above, leaving the boxes of the lower part stationary, by disengaging the pawls below. This enables the operator to examine any one or more of the boxes by sliding them out while those above are suspended.

N represents the cover with central stack O. This cover is put on the first box to cause a draft, and it is raised by resting on the top or [425] first box, so that the evaporator is complete at all times, whether one or twenty, or more boxes are inserted.

In the cover N is a bottom, P, which does not extend to the outer edges of the cover, thereby causing the vapor and heated air to be drawn from the middle to the sides to dry evenly; and it also aids in carrying off the fumes of the sulphur, when such is used to bleach the fruit.

I am aware that a fruit evaporator has been made with upright sliding bars or posts provided with spring pawls, which pass under the trays to support the same, but in such case the pawls are inaccessible, and none of them can be thrown out of the way; whereas in my case the operator can easily disengage any one or more pawls on each post, so as to lift any one or more boxes, or all the boxes together, as may be desired."

The case was brought to a hearing on pleadings and proofs, the main issue raised by the answer, and contested, being that of infringement. The circuit court entered a decree in favor of the plaintiff, awarding a perpetual injunction and a reference as to profits and damages, in pursuance of which a final decree was rendered against the defendant for $1,918.97, with interest and costs, from which he has appealed.

The circuit court, in its decision, *Wilt* v. *Grier*, 5 Fed. Rep. 450, said: "This patent" (the plaintiff's) "is for an improvement in automatic fruit driers, and its peculiarity and novelty consist in mechanical arrangements and devices by which a stack of trays, fitting into each other, the outer edges of which constitute the outer side of the stack of trays or drying house, are moved upwards, and suspended by attachments to the lower tray, in order that a fresh tray of fruit can be inserted at the bottom, and the process repeated at pleasure, thus building up the drying house or stack from the bottom. It is not contended that the patentee is the inventor of the movable trays, the outer walls of which constitute the drying-house. It is admitted that the existence of such trays, for such purpose, is old in the art; but the complainant contends that the patentee is the originator of an idea, which is a novel and useful one, of raising the stack of trays from a point on the lowermost tray of the stack, thus making an opening for the insertion of a fresh [426] tray containing fruit, and in this manner building the stack up from the bottom instead of from the top; * * * the object and value of the patent consisting, not in the use of any special

machinery for elevating the stack for the purposes intended, but the elevation and opening of the said stack at the bottom, for those purposes, by any machinery best calculated to attain that end. * * * The court is therefore of the opinion that any attempt by defendant, or any other person, to elevate the stack of trays so constructed as aforesaid, and from a point at or on the lowermost tray thereof, so as to insert new trays at the bottom successively, by any mechanism whatever, adapted to accomplish that purpose, and which is a mechanical equivalent to the means employed by the complainant is an infringement of his patent. * * *

"The two machines, as will be manifest upon reference to the specifications and drawings in the respective patents, are alike in principle, having a stack in each case composed of sections of trays, fitting upon and into each other, the outer wall of which makes up and forms the exterior of said stack or drying house; and they are also alike in their purpose and capacity of being moved upward from a point in or on the lowermost tray, and of being suspended in that position, so as to admit the insertion of fresh trays in succession. They are unlike in their respective appliances and devices by which these objects are accomplished, and also in the facility by which intermediate trays between the top and bottom can be removed. The devices by which the trays in the complainant's patent are elevated in the manner described, for the purposes mentioned, are the cord and pulley passing over an upright crane, regulated by a windlass, or wheel and axle, with its ratchet and pawls, * * * the point of suspension * * * being directly over the center of the stack; and from the ends of the cross bars to which the rope passing through the pulley is attached, depend ropes or chains, which are attached by hooks to handles upon the lowermost tray to be removed, thus contributing both a lifting and suspending device. * * * [427] The machine embodying the defendant's invention * * * exhibits the following means for effecting the elevation of the stack of trays, and their suspension, for the purpose of allowing new trays to be inserted at the bottom; to wit, four movable uprights, each having a series of pivoted pawls, and arranged to slide in four stationary posts, secured in a frame, in combination with a series of boxes, or trays, having notches in their sides, whereby the boxes may be lifted independently of each other, or all together. The power is applied through the medium of two worms, situated at each end of a drum, or shaft, extending along the side of, and at least the width of the stack to be lifted. These worms engage into appropriate cog wheels, affixed to two other drums, or shafts, running at right angles to the first named shaft, on opposite sides of the stack, and extend horizontally the length of the same. Upon each of these last mentioned shafts are geared, at the ends of the same, small cog wheels, which, in turn, gear into vertical rack bars on the four sliding posts of the machine. The power is applied by means of a crank at the end of the first named drum or shaft.

"Now, here is undoubtedly a contrivance and device by which the novel and useful invention, first patented in the Reynolds patent, * * * of elevating the stack of trays from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom, is accomplished. It matters not whether this device has the capacity of lifting the upper trays in the series, so as to open the same for inspection or for any other purposes. So long as it accomplishes the purpose, or possesses the capacity, of moving up the whole series of trays from a point on the lowermost tray of the same, so as to permit the introduction of a fresh tray, it is, in that respect, an infringement of the complainant's patent; nor is this conclusion altered because of any supposed advantages gained by the greater facility afforded by the Grier patent in opening the stack at any point above the lowermost tray, for purposes of inspection, or otherwise. * * * The court, upon the best consideration it can give to this subject, has come to the conclusion that the defendant in this cause has used, in the ele- [428] vation and suspension of the stack of trays in this drier, mechanical appliances and contrivances which, while they differ somewhat in form from those used by the complainant, are mechanical substitutes and equivalents for the same; and in the use of the same for the accomplishment of the same results as those produced by the complainant's invention, the defendant has infringed upon the exclusive rights secured to the complainant."

The specification of the plaintiff's patent states that the invention "consists in certain details of construction and combinations of parts." The existence in a fruit drier of movable trays, the outer walls of which constitute the drying house, being old, the subject of the fourth claim is the arrangement, in a fruit drier with such trays, of a suspending device connected with the drier in or on the lowermost tray, so as to raise that tray, with all the trays above it, and allow the insertion, underneath all, of a fresh tray, and then lower the trays above it, and couple the suspending device again to the lowermost tray and so on. This is the effect or result of the mode of operation of the devices. The claim, however, is not for a process, but is only for mechanism. The decision of the circuit court seems to be based on the view, that the claim covers all methods of raising the lowermost tray with those above it, if opportunity is given to insert a fresh tray underneath; and that, while the appliances and devices of the plaintiff and defendant are unlike each other, the defendant infringes because he attains the same result, of inserting a fresh tray underneath, while the trays before inserted are moved up and held up by a force imparted to the lowermost one of them. The decision describes the invention as consisting in "elevating the stack of trays from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom;" and it, in effect, regards all mechanism for causing such elevation in such manner as a mechanical equivalent for the patented mechanism, because the result is to allow a fresh tray to be inserted underneath. [429] And this is the view urged here by the appellee.

The defendant introduced in evidence three United States patents—one to Adam Snyder, No. 48733, July 11, 1865, for a "fruit drier;" one to Joseph B. Okey and Ferdinand A. Lehr,

No. 108289, October 11, 1870, for an "improvement in fruit driers;" and one to Joel Orlando Button, No. 155286, September 22, 1874, for an "improvement in fruit driers." Their introduction was objected to by the plaintiff, because they were not set up in the answer. But they were receivable in evidence to show the state of the art, and to aid in the construction of the plaintiff's claim, though not to invalidate that claim on the ground of want of novelty, when properly construed. *Vance* v. *Campbell*, 66 U. S. 1 Black, 427, 430 [17: 168, 172]; *Railroad Co.* v. *Dubois*, 79 U. S. 12 Wall. 47, 65 [20: 265, 269]; *Brown* v. *Piper*, 91 U. S. 37, 41 [23: 200, 201]; *Eachus* v. *Broomall*, 115 U. S. 429, 434 [29: 419, 421].

The Snyder patent and the Okey and Lehr patent show, each of them, in a fruit drier, a series of trays, arranged one above another so that the frames of the trays form the wall of the drier. The Button patent shows a fruit drier, within which is a movable frame, which carries racks that rest upon each other. The racks are inserted through a door immediately above the frame, one by one, and each one is separately elevated on the frame by cam levers till it is held by spring catches, which move back while a rack is being elevated, and as soon as it passes spring out and support it, while the frame is being lowered for another rack. Each rack goes up with the frame, and, having been inserted at the extreme bottom, it carries up the racks above it, when it reaches them, and so on until they can be successively taken out at the top. The frames of the trays, which thus rest on each other, constitute, in a measure and to a degree, the walls of a chamber in which the drying takes place.

Movable trays, the outer walls of which constituted the drying chambers, being old, and apparatus having existed before to raise a tray or rack, and a column of racks above it and insert a fresh one at the bottom, and the two having been used in connection, the fourth claim of the plaintiff's patent must be limited to the mechanism described and shown. The circuit court made no reference to the Button patent.

[430] The plaintiff's patent describes and claims "a suspending device, operating substantially as described." The defendant has no such suspending device. The plaintiff has a crane, with suspended ropes, and his lowermost tray, while being raised, necessarily carries on it the weight of all the trays and fruit above it. In the defendant's apparatus each tray can be lifted independently of the others, and each tray is supported independently, so that the weight of the series of trays, and of the fruit on them, need not rest entirely on the lowermost tray. This result being different from that in the plaintiff's device, the mechanism is different and is not an equivalent of that of the plaintiff, any more than the plaintiff's is the equivalent of Button's. The fourth claim of the patent, if valid, cannot be construed so as to cover the defendant's apparatus.

The decree of the Circuit Court is reversed, and the case is remanded to that Court, with a direction to dismiss the bill of complaint, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[377]

H. C. SPEIDEL ET AL., EXRS. etc., of ELIAS SPEIDEL, Deceased, *Appts.*,
v.
JACOB HENRICI ET AL., Trustees of HARMONY SOCIETY OF BEAVER COUNTY, PENNSYLVANIA.

(See S. C. Reporter's ed. 377-390.)

Trusts—limitation of actions—bill by former member of Harmony Society—limitation of action in equity.

1. Length of time is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations; but time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust*.

2. In case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law.

3. A court of equity will refuse relief where a party has slept on his rights, and acquiesced for a great length of time.

4. A bill filed by a former member of the Harmony Society, an unincorporated association of individuals living together as a community, claiming a share in its property, is held to be too late, more than fifty years having elapsed since the complainant ceased to be a member of the Society.

[No. 92.]

Argued Dec. 14, 1886. Decided Mar. 7, 1887.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania. Reported below, 15 Fed. Rep. 753. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. Reinecke, George Hoadly,** *Edgar M. Johnson, Edward Colston, George Hoadly, Jr.*, for appellants:

The Harmony Society is not a charity. It is an association for mutual assistance and support, physical, moral, and spiritual.

Kain v. *Gibboney*, 101 U. S. 362 (25: 813); *Cocks* v. *Manners*, L. R. 12 Eq. 574; *Anon.* 3 Atk. 277; *Carne* v. *Long*, 2 De Gex. F. & J. 75; *Re Clark's Trusts*, L. R. 1 Ch. Div. 497; *Re Dutton*, L. R. 4 Exch. Div. 54.

The definition of a charity, given by *Mr. Justice* Gray, in *Jackson* v. *Phillips*, 14 Allen, 539, 556, has been generally accepted in this country. It is as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

As between trustee and *cestui que trust*, there is no such thing as an illegal trust. At least the fiduciary cannot set up illegality as against the beneficiary.

Walden v. *Bodley*, 39 U. S. 14 Pet. 156 (10: 398); *Benjamin* v. *Gill*, 45 Ga. 110; *Wheeler* v. *Black*, 25 W. Va. 266, 281; *Great Eastern R. R. Co.* v. *Turner*, L. R. 8 Ch. App. 149.

Whether, therefore, the trust in this case was in fact illegal or not, Speidel had the right and the circuit court was bound to treat it as legal, and the Statute of Limitations did not begin to run, nor was there anything to quicken his diligence to sue, growing out of its peculiar character. It was a continuing and subsisting trust, in which each trustee in succession to Rapp down to the present, is averred and (by the demurrer), admitted to have taken and held possession. Unless a trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the Statute of Limitations does not run.

Philippi v. *Philippe*, 115 U. S. 157 (29: 339); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177, 223 (9: 388, 404); *Seymour* v. *Freer*, 75 U. S. 8 Wall. 202 (19: 306).

Messrs. **George Shiras, Jr.,** and *O. S. Fetterman*, for appellees:

Both in England and the state and federal courts in the United States, it has been an established doctrine of courts in equity to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims, and this altogether independently of the existence of Statutes of Limitations.

Maxwell v. *Kennedy*, 49 U. S. 8 How. 210 (12: 1051); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Wood* v. *Carpenter*, 101 U. S. 135 (25: 807); *Landale* v. *Smith*, 106 U. S. 391 (27: 219).

This is not by any means the first or only case brought by recreant members against this venerable Society. In 1882, one Schreiber, who had left the Society, brought an action for an account in the Court of Common Pleas of Beaver County. That court refused to sustain the action, and its judgment was affirmed by the Supreme Court of Pennsylvania, in an opinion delivered by *Chief Justice* Gibson.

Schriber v. *Rapp*, 5 Watts, 362.

In 1853 a bill was filed against the Trustees of the Harmony Society by Joshua Nachtrieb, who claimed to have been unjustly and violently excluded from the Society, and asked for an account. This bill was sustained by the Circuit Court of the United States, but its decree was reversed by this court.

Baker v. *Nachtrieb*, 60 U. S. 19 How. 126 (15: 528).

The function of courts, under our system of jurisprudence, does not extend to passing judgment upon the orthodoxy of differing forms of belief, or upon the sincerity of learned and pious teachers. Courts can only interfere when public morals are outraged, or private rights infringed. The vague allegations of complainant's bill, assailing the religious belief in which his parents lived and died, and in which he himself was reared and continued until his twenty-fourth year, do not present issuable matter upon which the court can pass.

[385] *Mr. Justice* **Gray** delivered the opinion of the court:

This bill was filed against the Trustees of the Harmony Society, an unincorporated association of persons living together as a community, by a former member of the Society, claiming a share in property in the hands of the Trustees.

The bill is sought to be maintained on the ground that the trust was not a charity, in the legal sense, and the members of the Society were equitable tenants in common of the property held in trust. The learned counsel for the appellants differ in their views of the trust; the one insisting that it was unlawful because founded in fraud and against public policy, and should therefore be dissolved; and the other contending that it was a lawful and continuing trust. We have not found it necessary to consider which of these is the sound view, because we are of opinion that the plaintiff did not show himself to be entitled to invoke the interposition of a court of equity.

As a general rule, doubtless, length of time [386] is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. *Prevost* v. *Gratz*, 19 U. S. 6 Wheat. 481, 497 [5: 311, 315]; *Lewis* v. *Hawkins*, 90 U. S. 23 Wall. 119, 126 [23: 113, 114]; *R. R. Co.* v. *Durant*, 95 U. S. 576 [24: 391].

But this rule is in accordance with the reason on which it is founded, and, as has been clearly pointed out by *Chancellor* Kent and *Mr. Justice* Story, subject to this qualification: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust;* as when, for instance such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 124; *Robinson* v. *Hook*, 4 Mason, 139, 152; *Baker* v. *Whiting*, 3 Sumn. 475, 486; *Oliver* v. *Piatt*, 44 U. S. 3 How. 333, 411 [11: 622, 657]; This qualification has been often recognized in the opinions of this court, and distinctly affirmed by its latest judgment upon the subject. *Willison* v. *Watkins*, 28 U. S. 3 Pet. 43, 52 [7: 596, 600]; *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177, 223 [9: 388, 404]; *Seymour* v. *Freer*, 75 U. S. 8 Wall. 202, 218 [19: 306, 311]; *Bacon* v. *Rives*, 106 U. S. 99, 107 [27: 69, 71]; *Philippi* v. *Philippe*, 115 U. S. 151 [29: 336].

In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607, 634; *Beckford* v. *Wade*, 17 Ves. 87. In such a case, *Chief Justice* Marshall repeated and approved the statement of *Sir* Thomas Plumer, M. R., in a most important case in which his decision was affirmed by the House of Lords, that "Both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must within that period have made his claim in a court of law, had it [387] been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the Statute of Limitations, if, during all that period, the possession has been under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the

adverse possessor." *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152, 174 [6: 289, 296]; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1, 175, and 4 Bligh, 1.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. "A court of equity," said *Lord* Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' *Smith* v. *Clay*, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here. *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 405 [9: 173]; *McKnight* v. *Taylor*, 42 U. S. 1 How. 161 [11: 86]; *Bowman* v. *Wathen*, 42 U. S. 1 How. 189 [11: 97]; *Wagner* v. *Baird*, 48 U. S. 7 How. 234 [12: 681]; *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 [17: 836]; *Hume* v. *Beale*, 84 U. S. 17 Wall. 336 [21: 602]; *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 [22: 482]; *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806 [24: 324]; *Godden* v. *Kimmell*, 99 U. S. 201 [25: 431]. In *Hume* v. *Beale*, the court, in dismissing, because of unexplained delay in suing, a bill by *cestuis que trust* against a trustee under a deed, observed that it was not important to determine whether he was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further. 17 Wall. 348 [605]. See also *Bright* v. *Legerton*, 29 Beav. 60, and 2 De Gex, F. & J. 606.

When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Maxwell* v. *Kennedy*, 49 U. S. 8 How. 210 [12: 1051]; *National Bank* v. *Carpenter*, 101 U. S. 567 [25: 815]; *Landsdale* v. *Smith*, 106 U. S. 391 [27: 219].

The allegations of this bill, so far as they are material to the defense of laches, are in substance as follows:

[388] The Harmony Society is a voluntary association, formed in 1805 by the plaintiff's parents and other heads of families, who had emigrated from Germany under the leadership of one Rapp, and become subject to his control in both spiritual and temporal affairs. In that year Rapp, for the purpose of acquiring absolute dominion over their means and mode of living, falsely and fraudulently represented to them that they could not be saved from eternal damnation, except by renouncing the plan of a separate home for each family, yielding up all their possessions, as had been done by the early Christians, and laying them at the feet of Rapp as their apostle, to be put into a common fund of the Society, and thenceforth living as a community under his control, receiving in return only the necessaries of life; and they, induced by and relying on his false and fraudulent representations, immediately yielded up all their possessions to the common fund of the Society, and placed the fund in his keeping as their trustee, and thenceforth lived as a community or common household, submitted themselves and their families to do for the community such work as he directed, allowed the avails thereof to form part of the common fund, and relinquished to him and his successors in the leadership of the community the management of the trust fund and the control of their own persons and those of their wives and children, and received only the necessaries of life in return. Rapp received and accepted the trust fund, and all the accretions to it by the work of the inhabitants of the community or otherwise, not as his own, but in trust for the members of those families and the contributors to the fund, and for their common benefit; and always, up to his death in 1847, recognized and acknowledged said trust, and disclaimed any greater interest in the fund than that of any other contributor, and any other right to its management and control than by virtue of his leadership of the community. In 1807 Rapp obliged his followers to abjure matrimony, and thenceforth did not permit them to marry in the community, and compelled anyone about to marry to leave it. The plaintiff was born in the community in 1807, and was reared in and as a part of it, under Rapp's teachings and control, and faithfully worked for it from the [389] age of twelve to the age of twenty-four years, and allowed the avails of his work to become part of the common fund, and received in return nothing but the necessaries of life, which were of far less value than the avails of his work; and in 1831, being about to marry, had to leave and did leave the community. The trust fund so received and accepted by Rapp, with its profits, interest and accretions, now amounts to $8,000,000, and yields an annual income of $200,000, and is held by the defendants on the same trust on which Rapp held it in his lifetime; and neither Rapp nor the defendants ever rendered any account to the plaintiff or to the beneficiaries of the fund, although the plaintiff, before bringing this suit in May, 1882, demanded of the defendants an account and a settlement of his share.

The trust on which Rapp, and the defendants as his successors, held the common fund of the Harmony Society, is described in one place in the bill as "for the members of said families and the contributors of said fund, and for their common benefit," that is to say, as is clearly explained by what goes before, in trust for their common benefit as a community, living together in the community, working for the community, subject to the regulations of the community, and supported by the community. This was the "said trust" which, as the bill afterwards alleges, Rapp, up to his death, and his successors, until the bringing of this suit, "always recognized and acknowledged." The constant avowal of the Trustees, that they held the trust fund upon such a trust, is wholly inconsistent with and adverse to the claim of the plaintiff that they held the fund in trust for the benefit of the same persons as individuals, though withdrawn from the community, living by themselves, and taking no part in its work.

The plaintiff, upon his own showing, withdrew from the community in 1831, and never returned to it, and for more than fifty years took no step to demand an account of the Trustees, or to follow up the rights which he claimed in this bill.

If he ever had any rights, he could not assert
[390] them after such a delay; not on the ground of an express and lawful trust, because the express trust stated in the bill, and constantly avowed by the Trustees during this long period, was wholly inconsistent with any trust which would sustain his claim; not on the ground that the express trust stated in the bill was unlawful and void, and therefore the Trustees held the trust fund for the benefit of all the contributors in proportion to the amounts of their contributions, because that would be an implied or resulting trust, and barred by lapse of time. In any aspect of the case, therefore, if it was not strictly within the Statute of Limitations, yet the plaintiff showed so little vigilance and so great laches that the circuit court rightly held that he was not entitled to relief in equity.

It is proper to add that this decision does not rest in any degree upon the judgments of the Supreme Court of Pennsylvania and of this court, in the cases cited at the bar, in favor of the Trustees of the Harmony Society in suits brought against them by other members, because each of those cases differed in its facts, and especially in showing that the Society had written articles of association, which are not disclosed by this bill. *Schriber* v. *Rapp*, 5 Watts, 351; *Baker* v. *Nachtrieb*, 60 U. S. 19 How. 126 [15: 528].

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[390] ROSEWELL G. ROLSTON ET AL., Trustees, AND THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, *Appts.*,

v.

THOMAS T. CRITTENDEN, Governor; PHIL. E. CHAPPELL, Treasurer; JOHN WALKER, Auditor; AND THOMAS T. CRITTENDEN ET AL., Fund Commissioners of the STATE OF MISSOURI.

THOMAS T. CRITTENDEN, Governor; PHIL. E. CHAPPELL, Treasurer; JOHN WALKER, Auditor; AND THOMAS T. CRITTENDEN ET AL., Fund Commissioners of the STATE OF MISSOURI, *Appts.*,

v.

ROSEWELL G. ROLSTON ET AL., Trustees, AND THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

(See S. C. Reporter's ed. 390-412.)

Indebtedness of the Hannibal and St. Joseph Railroad Company to the State of Missouri—payment of—construction of statute—when suit against an officer is not against the State.

1. The State of Missouri, under certain Acts of 1851 and 1855, loaned its credit to the Hannibal and St. Joseph Railroad Company, and issued its bonds to the extent of $3,000,000 for that purpose, receiving statutory liens on the property of the Company to secure the payment of the amount required to meet both principal and interest so as to exonerate the State. By the Act of February 20, 1865, it was provided that the Company might issue bonds to secure the means with which to pay its indebtedness to the State, the liens of which were to be released and passed over to the holders of the new bonds to be issued under the Act. The Company having notified the Governor of its desire to exercise the authority conferred by said Act, the Act of March 26, 1881, was enacted, providing for the disposition of the money due the State when paid in. Subsequently, the Company paid to the State $3,000,000, being the principal and interest then due. As the bonds issued by the State were not due and could not be redeemed, the state officers claimed that the Company was still liable for the amount required to meet the interest on said bonds. Upon a bill filed to enjoin the enforcement of the liens of the State because of nonpayment of interest; and to secure from the Governor the assignment of said liens provided for by the Act of 1865, it is held that, under the Act of 1865, if payment was made in money, it should be of a sum, if any, in addition to the face of the bonds, which would enable the State to take up and cancel an equal amount of its other 6 per cent indebtedness then outstanding; and that the Act of 1881 was a direction to the state officers to accept the money when offered by the Company, and to use it as fast as needed in the payment of the general indebtedness of the State; such payment, when made, to operate as a discharge of the Company from all liability for the payment of either principal or interest of an equal amount of the bonds which had been issued for its benefit.

2. The Acts of 1865 and 1881 are not in conflict with the provisions of the Missouri Constitution which require the enforcement of the lien held by the State upon any railroad, and prohibit its release or alienation, or the release or extinguishment of any indebtedness to the State. The payment of the obligation in advance of its maturity, with a view to the use of the money so paid, in taking up other debts of the State at maturity, is the legal equivalent of a payment of the liability of the Company in accordance with the original terms on which it was created.

3. What occurred between the Company and the officers of the State in connection with said payment by the Company is immaterial, as said officers could only do what was authorized by the statutes.

4. A suit against a state officer to compel him to do what a statute requires of him is not a suit against the State, within the meaning of the Eleventh Amendment.

[Nos. 68, 213.]

Argued Dec. 1, 2, 1886. Decided March 7, 1887.

APPEALS from the Circuit Court of the United States for the Western District of Missouri. *Reversed in part, affirmed in part.*

Reported below, as *Ralston* v. *Crittenden*, 10 Fed. Rep. 254; 3 McCrary, 332.

The history and facts of the case appear in the opinion of the court.

Messrs. **John F. Dillon** and **Elihu Root**, for plaintiffs.

Messrs. **D. A. DeArmond** and **John B. Henderson**, for defendants.

Mr. Chief Justice **Waite** delivered the opinion of the court: [392]

This was a suit in equity brought by Rosewell G. Rolston, Heman Dowd, and Oren Root, Jr., Trustees in a mortgage made by the Hannibal and St. Joseph Railroad Company, a Missouri corporation, to restrain the executive officers of Missouri from selling the mortgaged property under prior statutory mortgages in favor of the State, on the ground that the liability for which the earlier liens were created had been satisfied, and that they, as Trustees, were entitled to an assignment of those liens. The material facts are these:

The Hannibal and St. Joseph Railroad Company was incorporated by the State of Missouri

under a statute for that purpose, approved February 16, 1847, to build and operate a railroad from Hannibal, on the Mississippi River, to St. Joseph, on the Missouri. To expedite the construction of the road the State passed an Act, which was approved February 22, 1851, to issue to the Company its own bonds as a loan of credit, redeemable at the pleasure of the Legislature at any time after the expiration of twenty years from the date of their issue, with interest, payable semi-annually, at the rate of 6 per cent per annum, in the City of New York, on the first days of January and July in each and every year. The acceptance of these bonds by the Company was to operate as a mortgage on its road "for securing the payment of the principal and interest of the sums of money for which such bonds shall * * * be issued and accepted, * * *." The Company also became bound to "make provision for punctual redemption of the said bonds so issued * * * to them, * * * and for the punctual payment of the interest which shall accrue thereon in such manner as to exonerate the [393] treasury of" the "State from any advances of money for that purpose." If default should be made by the Company in the payment of either the principal or the interest, the Governor was authorized to sell the road at auction, first giving a required notice.

Under the authority of this statute bonds were issued by the State to the Company at different times between December 28, 1853, and September 24, 1856, to the amount of $1,500,000, for which the Company and its railroad became bound in the manner specified.

On the 10th of December, 1855, the Company not having then completed its road, another Act was passed by the General Assembly, authorizing a further loan of the credit of the State, in bonds, to the amount of $1,500,000. These were to be thirty years' bonds. Section 2 of this Act was as follows:

"Sec. 2. The loan of the State's credit under this Act shall be, and it is hereby declared to be, upon the condition of a first lien or mortgage, as contained and reserved in the Act of February 22, 1851, hereinbefore recited, and the same shall in all respects be held to be an extension of the loan of state credit, under the said mortgage provisions, securing the State in this as in the former loan, upon the same equal and unrestricted bases, as to each and every bond of the State so issued, under said Acts or either of them."

Under this authority other state bonds were issued to the Company to the prescribed amount, maturing as follows:

November 10, 1886	$ 500,000
February 28, 1887	1,000,000

On the 20th of February, 1865, the following Act of the General Assembly of Missouri was approved:

"An Act to Provide for Reducing the Indebtedness of the State.

"Be it enacted by the General Assembly of the State of Missouri as follows:

"Section 1. The Hannibal and St. Joseph Railroad Company is hereby authorized to issue [394] its bonds, signed by the president and countersigned by the secretary of the Company, in sums of one thousand dollars each, with coupons attached, bearing interest, payable semi-annually, at the rate of 6 per cent per annum, and having not less than ten years to run, and to the amount of three millions of dollars, the payment of the same, with the accruing interest, to be secured by a mortgage or deed of trust conveying to three trustees, to be named therein, by and with appropriate forms of expression, and for the purpose of securing the payment of said bonds and interest, and for no other purpose, on the road of said Company, with all its franchises, rolling stock and appurtenances, subject, however, to all the liens and liabilities existing in favor of the State by virtue of any law of the State at the time said bonds may be issued and delivered.

"Sec. 1. Whenever the trustees provided for in the first section of this Act shall pay into the treasury of the State a sum of money equal in amount to all indebtedness due or owing by said Company to the State, and all liabilities incurred by the State by reason of having issued her bonds and loaned the same to said Company as a loan of the credit of the State, together with all interest that has and may at the time when such payment shall be made have accrued and remain unpaid by said Company, and such fact shall have been certified to the Governor of the State by the treasurer, who is hereby directed to make such certificate, then the Governor of the State is hereby authorized and required to make over, assign and convey to the trustees aforesaid all the first liens and mortgages now held by the State under the provisions of an Act of the Legislature of the State approved February 22, 1851, to secure the payment of a loan of the credit of the State to said Railroad Company in the sum of one million five hundred thousand dollars; and also of an Act of the Legislature approved December 10, 1855, to secure the payment of a like loan of the credit of the State in the sum of one million five hundred thousand dollars; and such conveyance shall, by appropriate expressions, convey to said trustees all and singular the rights, titles and interests held by the State under the several Acts of the Legislature, as aforesaid, in and to said railroad, its rolling stock, franchises, and appurtenances, to hold [395] the same as security for the payment of the bonds of the road authorized by the first section of this Act, and the interest thereon, with full power to sell and dispose of the same, in case of the failure of said Company to meet and pay, at maturity, the interest or principal of said bonds, or any of them, and to have and exercise all the rights and powers which belong to the people of the State of Missouri, and which, by the provisions of the Acts of the Legislature, as aforesaid, they might have exercised by and through the Governor of the State; *Provided*, That nothing in this Act shall be construed so as to render the State of Missouri liable in any case for the payment of the bonds or interest thereon, authorized to be issued by the first section of this Act.

"Sec. 3. The treasurer of the State is hereby authorized and directed to receive of the trustees aforesaid, in payment of three millions of dollars, and interest, as provided in the second section of this Act, any of the outstanding bonds of the State bearing no less than 6 per cent interest, or of the unpaid coupons thereof, at their par value.

"Sec. 4. The true intent and meaning of this Act is to place the persons and parties who may hold the bonds of the road authorized to be issued by the first section of this Act, through the trustees herein provided, in the same legal position which the people of the State of Missouri now hold, with full powers to act in the premises as the said State, by its Governor, might have done; and it shall be the duty of such trustees to proceed to advertise and sell the road with its appurtenances, as aforesaid, and in the manner provided for the sale of the same by the Governor of the State in the Acts of the Legislature aforesaid, whenever they shall receive a request so to do in writing, signed by persons and parties representing not less than one third of the bonds authorized to be issued by the first section of this Act, and which may be still outstanding; but only in case the said Railroad Company shall have made default in the payment of the principal or interest on said bonds when the same has become due; and all needed authority to do the same shall be maintained, and all needed decrees shall be issued by and in any court of competent jurisdiction [396] in this State, either in law or equity; and such sale, so made as herein provided, shall be deemed and held in all respects good and valid in law.

"Sec. 5. The provisions of this Act shall not be construed to modify, release, exonerate, discharge or relieve said Railroad Company from any duty, liability, obligation, penalty or forfeiture to which, under former laws, said Company may be liable to the people of the State of Missouri, on any account whatever, except from the payment of the several sums of money as is in this Act provided.

"Sec. 6. This Act to take effect from and after its passage."

When this Act was passed, it is said in the brief of the attorney-general, "The bonds of the State were worth in the market from 65 to 69 cents on the dollar, and there were outstanding on January 1, 1865, state aid bonds loaned to different railroad companies to the amount of many millions of dollars, beside $833,000 of other state bonds, and over $5,000,000 of past due coupons on state aid bonds loaned to the railroads." The testimony shows conclusively that no interest had been paid on any of the aid bonds except those of this Company since January 1, 1861.

On the 21st of March, 1874, an Act of the General Assembly of Missouri, "To authorize the issue of new state bonds in renewal of certain other bonds heretofore issued to the Hannibal and St. Joseph Railroad Company, and to maintain and perpetuate the first lien of the State to secure the payment thereof," was approved. Down to this time the Company had not availed itself of the privileges of the Act of February 20, 1865, but it had promptly met and provided for, at maturity, the interest on all its state bonds. By this new Act it was provided that whenever the owner or owners of any of the bonds issued to the Company under the authority of the Act of February 22, 1851, "shall present such bond or bonds for renewal to the Treasurer of the State, and shall satisfy such [397] treasurer that he or they are the real and *bona fide* holders and owners of such bond or bonds, and that the same have not been paid by the State, or by the said Company, and that they have not been taken up and placed in the hands of the Trustees to secure the payment of other bonds issued by said Company, as authorized by the Act entitled 'An Act to Provide for Reducing the Indebtedness of the State,' approved February 20, 1865, the treasurer shall certify the fact to the Governor of the State, and the Governor shall thereupon cause to be issued in renewal of such old bonds, and deliver to the holder or holders thereof, new bonds of the State of Missouri, in lieu thereof, said bonds to be signed by the Governor and countersigned by the Secretary of State, sealed with the seal of the State, and registered in the office of the State Auditor, and they shall be of the same denomination and tenor of the old bonds, for which they are to be exchanged; and they shall have the same rate of interest with like coupons, and be payable in the same time and manner as said old bonds."

Ample provision was then made for the preservation of the original security, and the Company was made liable for the payment of the renewal bonds to the same extent and in the same way it had been for the originals. The Company formally accepted the provisions of this Act, and under it renewal bonds were issued to the amount of $1,499,000, one of the original bonds for $1,000 having been paid. These renewal bonds mature as follows:

July 1, 1894	$500,000
July 1, 1895	203,000
January 1, 1896	165,000
July 1, 1896	614,000
July 1, 1897	17,000

The Company having at all times met the interest on these bonds as it matured, as well as that on the bonds issued under the Act of 1855, the board of directors, on the 19th of January, 1881, adopted a plan for refunding its debt, which contemplated a discharge of its obligations to the State in the way provided for in the Act of February 20, 1865. A few days previous to this time the officers of the State had been informally approached on the subject, but [398] on that day negotiations were regularly opened by the following letter from the President of the Company to the Governor of the State:

"Hon. THOS. T. CRITTENDEN,

"*Governor of the State of Missouri.*

"DEAR SIR: It is the desire of the directors of the Hannibal and St. Joseph Railroad Company to relieve the State of Missouri from the burden which the State assumed in pursuance of a wise and liberal policy to aid the construction of the road when the Company was in its infancy.

"The interest upon the three millions of state aid bonds has been regularly paid by us, including the coupons due January 1, 1881. We now wish to pay into the treasury of the State the entire sum of principal and the accrued interest since that date, in fulfillment of the obligation which rests upon the Company to provide for the payment of bonds. This course appears to have been contemplated in the Act of the Legislature of the State of Missouri, entitled 'An Act to Provide for Reducing the Indebtedness of the State,' approved February 20, 1865. So long a time has elapsed since the passage of that Act that we have considered it our duty to communicate with you upon the sub-

ject, in the first instance, in order that there may be a full understanding and co-operation in the action of the Railroad Company and the officers of the State.

"We should be very glad to receive any suggestion which may occur to you, affecting the convenience of the State or the duties of the officers of the State, depending upon our proposed action. It is our desire to complete the transaction as soon as possible after the period which must expire before a meeting of the Company can be had to approve the necessary arrangements

"I remain, with great respect, your obedient servant, WM. DOWD, *President.*"

After this letter was received by the Governor, Mr. Walker, the Auditor of State, went to [399] New York, where he had an interview with the officers of the Company. At this interview propositions were made on both sides, but no conclusion was reached. On the return of Mr. Walker from New York he made a report in writing to the Board of Fund Commissioners, under date of February 24, 1881, giving an account of what he had done and the suggestions he had made. This report was communicated by the Governor to the General Assembly the next day, accompanied by a message, of which the following is a copy:

"EXECUTIVE OFFICE,
"CITY OF JEFFERSON, *Feb.* 25, 1881.

"SIR: I have the honor to lay before you a communication from Hon. John Walker to the Board of Fund Commissioners of Missouri. Mr. Walker, as a member of that board, recently visited the City of New York for the purpose of conferring with the officers of the Hannibal and St. Joseph Railroad Company in regard to the proposition of that Company to discharge the full amount of what it claims is its present indebtedness to the State. The result of Mr. Walker's conference with those officials is fully set forth in the accompanying communication.

"I recommend that you adopt such legislation as will enable the Fund Commissioners to use or dispose of whatever sum, if any, may be accepted by the State from the Hannibal and St. Joseph Railroad Company.

"I do not mean to say that the State will accept the sum of $3,000,000 in complete satisfaction of the liability incurred by the State in aid of said Company. I think the liability extends to the maturity of the bonds; and as the Company has heretofore met its obligations to the State promptly, and has thereby secured the confidence of the people of the State, who were for many years in doubt as to the final result of our complications with that road, I trust that it will be equally as honorable in the future, and so act as to retain the confidence which its past conduct has inspired.

"In case the whole or any part of the money due from the Company is accepted, its receipt ought not to find us unprepared for its prompt [400] and profitable disposal.

"Very Respectfully,
"THOS T. CRITTENDEN.

"Hon. T. P. BASHAW,
Speaker of the House of Representatives."

Afterwards the General Assembly passed the following Act, which was approved March 26, 1881:

"An Act to Provide for the Transfer to the State Sinking Fund any Surplus Money That May Be in the State Treasury, Not Necessary to Defray the Current Expenses of the State Government, and to Meet the Appropriations Made by Law, and to Authorize the Fund Commissioners to Invest the Same in the Redemption or Purchase of the Bonds of the State and Bonds of the United States, Hannibal and St. Joseph Railroad Bonds Excepted.

"*Be it enacted* by the General Assembly of the State of Missouri, as follows:

"Section 1. Whenever there is any money in the state treasury not necessary to defray the current expenses of the State Government and to meet the appropriations made by law it shall be the duty of the State Auditor, and he is hereby authorized and required, to transfer the same to the credit of the State Sinking Fund for the purpose of paying the state debt, or any portion thereof, and the interest thereon as it becomes due.

"Sec. 2. Whenever there is sufficient money in the sinking fund to redeem or purchase one or more of the bonds of the State of Missouri, such sum is hereby appropriated for such purpose, and the Fund Commissioners shall immediately call in for payment a like amount of the option bonds of the State, known as 'five-twenty bonds.' *Provided*, That if there are no option bonds which can be called in for payment, they may invest such money in the purchase of any of the bonds of the State, or bonds of the United States, the Hannibal and St. Joseph Railroad bonds excepted."

On the 30th of April, 1881, the Company executed to Rolston, Dowd, and Root, trustees, [40 a mortgage such as was contemplated by the Act of February 20, 1865, and in which the provisions of that Act were recited, to secure an issue of bonds to the amount of $3,000,000. These bonds were negotiated by the Trustees, and with the money realized therefrom, and $90,000 furnished by the Company, they, on the 20th of June, 1881, paid to the Treasurer of State the full face of the bonds of the State for which the Company was liable, and the unpaid interest thereon, to fall due July 1 thereafter, the total amount of principal and interest being $3,090,000, and demanded from him the certificate provided for by the Act of February 20, 1865, to entitle them to an assignment from the Governor of the liens of the State, The Treasurer thereupon gave the Trustees a receipt, of which the following is a copy:

"TREASURER'S OFFICE, STATE OF MISSOURI,
"CITY OF JEFFERSON, *June* 20, 1881.

"Received of R. G. Rolston, Heman Dowd, and Oren Root, Jr., Trustees Hannibal & St. Joseph Railroad Company, three million and ninety thousand dollars $\frac{00}{100}$ on account of the statutory mortgage now held by the State of Missouri against said railroad.

"In testimony whereof I have hereunto set my hand and affixed my seal of office the day and year above. (Signed)
PHIL. E. CHAPPELL,
"$3,090,000. *Treasurer.*"

[The State Treasurer's Seal of office.]

At the same time he gave to them the following certificate:

"To Thomas T. Crittenden,
"*Governor of Missouri.*

"I, Phil. E. Chappell, Treasurer of the State of Missouri, do hereby certify that R. G. Rolston, Heman Dowd, and Oren Root, Jr., Trustees, have paid into the treasury of the State of Missouri three millions and ninety thousand dollars (3,090,000), under the Act entitled 'An Act to Provide for Reducing the Indebtedness of the State,' approved February 20, 1865, on account of the statutory mortgage the State holds against the Hannibal & St. Joseph Railroad Company. [402]

"Given under my hand this 20th day of June, 1881.

"(Signed) Phil. E. Chappell,
State Treasurer."

He refused to put the certificate in any other form, although requested to do so by the Company.

No special provision was made by the Company for the payment of the interest which fell due January 1, 1882, and on such failure the Governor threatened to take measures for the enforcement of the lien which the State held under its statutory mortgages as upon a default by the Company in the payment of interest. Thereupon the Trustees began this suit, on the 6th of January, 1882, which was at first against the Governor alone, to have him execute the assignment provided for by the Act of 1865, and also to enjoin him from selling the road under the statutory mortgage. On the filing of the bill a temporary restraining order was granted by the circuit judge. Afterwards, on the 10th of February, 1882, the court in session, being of opinion that the payment which had been made did not operate as a satisfaction of the obligation of the Company to the State under the Act of 1865, refused to grant a temporary injunction, but did not pass further on the rights of the parties. *Ralston* v. *Crittenden*, 10 Fed. Rep. 254; *S. C.* 3 McCrary, 332. The Company thereupon, to stop a sale by the Governor, paid to the State the interest which fell due January 1, 1882, and the cause proceeded without any injunction. Afterwards, on the 20th of March, an amended and supplemental bill was filed, on leave of the court, by which Chappell, the Treasurer of State, and Walker, the Auditor, were added as parties, and the Railroad Company also. The Governor and Auditor, with whom was united D. H. McIntyre, were also proceeded against as Fund Commissioners of the State, so that, if necessary, a decree might be had for a return of the money which had been paid. In other respects the prayer of the bill was not materially changed. Answers and replications were filed and testimony taken. After hearing upon bill, answers, replication and proofs, a decree was entered September 15, 1882, to the effect that the Trustees were entitled under the Act of 1865 to an assignment by the Governor of the liens of the State upon payment to the Treasurer of State of a sum of money which, together with that already paid, if it had been applied and invested within a reasonable time in accordance with the provisions of the Act of March 26, 1881, would have indemnified the State against loss by reason of its obligation to pay interest on the bonds to their maturity; and "that the complainants were and are entitled to have the said $3,000,000, paid as aforesaid to the said Treasurer of the State of Missouri, under the provisions of the aforesaid Act of February 20, 1865, applied and invested under and in accordance with the provisions of the said Act of March 26, 1881, to the payment of the option bonds of the State of Missouri known as 5-20 bonds, as rapidly as they were subject to call and payment; and in the meantime, and until such bonds became subject to call and payment or other portions of the state debt or interest thereon became due, to have the remaining and unapplied balance of the said moneys invested in bonds of the United States at the market rates, and when any portion of the said 5-20 bonds became or should become subject to call and payment, or any portion of the state debt or interest thereon became or should be subject to redemption or payment, to have the said moneys applied from time to time to the redemption or payment thereof." [403]

The case was then referred to a master to ascertain and report "what sum, including the said $3,000,000, was necessary to indemnify the State as aforesaid, if the same were applied and invested as hereinbefore provided within reasonable time in the exercise of due diligence by the officers of the State after the 20th of June, 1881." In this decree the Governor was enjoined from selling the road until a final judgment in the cause.

From the report of the master, it appears that after the order of the court referring the case, the state officers used $1,446,000 of the money that had been paid in by the Company, to take up and pay an equal amount of option and other bonds of the State which might have been called in at different times before, while the money was in the treasury to the credit of the sinking fund. The remainder of the money was then invested, as it might have been before, in state bonds and United States bonds, at rates which would yield an interest on the investment equal to 3 per cent per annum. [404]

The court below gave a decree finding the amount to be paid to the State before the Trustees could claim an assignment of the prior liens, calculated on the basis of applying the payment to taking up the bonds which had been issued to the Company as they matured, and crediting the fund with 6 per cent interest on the amount actually used to take up other bonds than those issued to the Company, at the rate of 6 per cent from the time it ought to have been so used, and on the remainder at the rate of 3 per cent per annum, which it was agreed was all that the investment that had been made in the purchase of state bonds and United States securities would produce. The amount thus found to be due was $476,049.27, and interest at the rate of 3 per cent per annum from May 11, 1883.

The officers of the State claimed that the amount due should have been ascertained by charging the Company with the face of the bonds and interest to the date of their maturity, and crediting it only with the amount invested and the interest thereon at the rate of 3 per

cent until actually used to take up the bonds for which the Company was liable.

Each of the parties appealed from this decree.

What the State did under the Acts of 1851 and 1855 was to loan its credit to the Railroad Company. For this purpose it issued its bonds, with coupons for semi-annual interest attached, redeemable, part at the end of twenty years and part at the end of thirty. These bonds were delivered to the Company to be disposed of to raise money to enable it to expedite and secure the completion of its railroad, and in this way the State incurred a liability for the Company, not only to pay the principal of the bonds to the holders thereof, but also to pay the interest semi-annually, at the rate of 6 per cent per annum, on some for at least twenty years, and [405] on others for thirty. The holder could not be required to take the principal and stop the interest until the State had the right by the terms of the bond to pay the principal. This was the liability of the State to the holders of the bonds for the benefit of the Company; and the corresponding liability of the Company to the State was to provide the State with the means for the punctual payment of the interest as it matured during the whole time the bonds had to run, and of the principal when it fell due. The Company could no more require the State to take the principal before it became due, and stop interest thereafter, than the State could require the bondholders to do the same thing. The liability of the Company to the State was identical with that of the State to the bondholders, for the duty of the Company was to make such provision for the payment of both interest and principal as would "exonerate the treasury of the State from any advances of money for that purpose."

This was the condition of the liability of the parties to and for each other under the original statutes when that of February 20, 1865, was enacted, during the late Civil War, while the State was largely in default for interest on its debt, and when of necessity its securities were much depreciated. The avowed purpose of the statute was, according to its title, to reduce the indebtedness of the State, and it related only to the Hannibal and St. Joseph Company, which was not in default for either the interest or the principal of the bonds it was bound to make provision for. That Company was authorized to raise money to get up the lien on its property in favor of the State, and pass it over to the holders of the new security upon the faith of which the money was to be got. Such a transfer could be obtained by paying "into the treasury of the State a sum of money equal in amount to all indebtedness due or owing by said Company to the State, and all liabilities incurred by the State by reason of having issued her bonds and loaned the same to said Company as a loan of the credit of the State, together with all interest that has and may, at the time when said payment shall be made, have accrued and remain unpaid by said Company" (§ 2), or by delivering to the Treasurer "any of the outstanding bonds of the State [406] bearing no less than 6 per cent interest, or * * * unpaid coupons thereof at their par value," amounting to "three millions of dollars and interest;" that is to say, to the amount of the bonds issued to the Company by the State and the accrued interest thereon, which had not already been paid by the Company. Sec. 3. This, as we construe the statute, means that if payment is made in money, and not in state bonds or coupons, it must be of an amount equal to the face value of the bonds issued to the Company and the accrued interest thereon to the time of payment, together with such further sum, if any, as would be necessary to enable the State to cancel then, or within a reasonable time thereafter, $3,000,000 of its outstanding liabilities, bearing interest at the rate of 6 per cent per annum.

This, we think, is shown in many ways. The avowed purpose of the Act was to reduce the debt of the State. This could not be done by a simple payment by the Company to the State of the amount of the bonds for which that Company was liable. To reduce the debt there must be a payment by the State to its own creditors and an actual cancellation of its own obligations. As by accepting the money the State discharged the Company from all further obligation to provide for the payment of the principal or the interest of the bonds for which it had become bound, it was necessary, in order to save the State from loss in the transaction, that the payment by the Company should be enough to enable the State to take up and cancel an equal amount of its other indebtedness bearing the same rate of interest. The apparent object of the statute was to relieve the State to some extent from its immediate embarrassments. There was then existing a past-due interest bearing debt in the shape of unpaid coupons, amounting to more than the face value of the bonds for which the Company was liable, and if the payment had been made at or about that time, the money could have been used at once in discharging an equal amount of debt then due and unpaid, without loss to the Company or the State. Looked at in the light of the surrounding circumstances, the statute appears like a plan by the State to get relief to some extent from its present embarrassments by an arrangement which would be equivalent to an issue of new bonds, payable at the times [407] when those which had been lent to the Company fell due. Apparently the State was in no condition to borrow at favorable rates upon its own credit, and so a scheme was devised by which the prior lien of the State upon the railroad of this Company might be used for that purpose, without any actual loss to the State and possibly with some advantage to the Company, for the Company was allowed to make its payment in any of the bonds or past-due coupons of the State bearing 6 per cent interest at their par value, and if these could be got at a discount the Company would be correspondingly a gainer.

Thus it appears that if the payment had been made at or near the time the statute was enacted, an equal amount of the interest-bearing debt of the State, which was immediately pressing for payment, could have been taken up, and a cancellation of the obligations of the Company secured. But no such payment was made, and the question now is whether, sixteen years afterwards, when the credit of the State had been re-established without any help from the Company, and when all its 6 per cent interest

bearing securities were commanding a high premium, the payment of the same amount would produce the same effect so far as the Company was concerned.

Under the Statute of 1865, as has already been seen, if payment was made in money, it must be of a sum, in addition to the face of the bonds, which would enable the State to take up and cancel an equal amount of its other 6 per cent indebtedness then outstanding. Accordingly, when the Company offered the amount of the face of the bonds only, and interest, the state officers insisted upon more, and, the parties failing to come to a satisfactory understanding on the subject, the whole matter was referred by the Governor to the General Assembly then in session. The Statute of March 26, 1881, was the result of this reference, and, construed in connection with the circumstances which surrounded its enactment, it may be looked upon as a direction to the state officers to take the money when offered by the Company and use it as fast as needed to pay the option bonds when they were called in, which must be done at the earliest possible moment, and in the redemption and payment of other state bonds as they fell due. Whatever amount was not so [408] used at once was to be invested and kept invested until it should afterwards be needed for that purpose. In this way the Act of 1865 was recognized as being still in force, with the effect we have already given it, and the use of the money paid into the treasury by the Company in taking up the 6 per cent bonds of the State, whether option bonds or others, was made to operate as a discharge of the Company from all liability for the payment of either the principal or interest of an equal amount of the bonds which had been issued for its benefit. The Fund Commissioners were also required to use the money as fast as it was needed for the payment of called or maturing bonds.

With this statute in force the Company paid and the state officers received the money in question. There is some conflict of testimony as to what took place between Mr. Walker, the Auditor of State, and the officers of the Company, in New York, in February, 1881, and also as to what occurred between the Company and the state officers when the payment was made in June of the same year; but we have not deemed it necessary to give either of these matters any considerable attention, because the officers of the State could only do what was authorized by the statutes which were enacted for the government of their conduct in the matter, and the rights of the parties depend alone upon the legal effect of those statutes.

By the Constitution of Missouri, which went into effect in 1875, article X, section 14, it is made the duty of the Legislature to levy and collect annually a tax sufficient to pay the accruing interest on the bonded debt of the State, and to reduce the principal thereof annually $250,000. This $250,000 is to be paid into and made a part of the sinking fund of the State. The tax thus provided for has been regularly levied and collected.

From the report of the master it now appears that $1,446,000 of the money paid in by the Company was actually used by the Fund Commissioners on or before the 23d of August, 1882, in taking up option and other bonds of the State, and that if this sum had been actually applied for that purpose at the times when the bonds so taken up became subject to call or pay- [409] ment, and the remainder of the fund had been applied to taking up other bonds of the State as they became due and payable, after making due allowance for the proper use of the $250,000 constitutional sinking fund each year, including the year 1881, it would require a further payment by the Company, on the third day of October, 1882, of $153,646.46, to entitle the Company to a discharge of its liability to the State on account of the bonds, and the Trustees to an assignment of the liens of the State. It is conceded that the calculation of the master is right. The only question is as to the correctness of the principles on which it rests, and of this we are satisfied. In passing the Act of March 26, 1881, the State substantially said to this Company that any money it paid into the treasury under the Act of 1865 should be put into the sinking fund and used as soon as it was needed to meet the maturing debt of the State, and that in order to use it at the earliest possible moment all option bonds should be called in and paid as soon as it could be done according to law. Inasmuch as, before the Act of 1881 was passed, the State had by its Constitution made it imperative that a certain amount should be raised each year by taxation and paid into the sinking fund to be applied to the liquidation of the state debt, it is but right that this should be exhausted as far as available before the money of the Company is used; but after that is exhausted the statute made it the duty of the commissioners to use any other money there might be in the fund to pay its bonds, whenever the right to make such payment should be complete. The State was not required to do this; but it did it, and the executive officers must govern themselves accordingly. It may be true that if no such provision had been made, money might have been got by the State to take up such of its maturing bonds as could not be met by the accumulations of the annual contributions to the sinking fund, out of the tax which the Constitution had provided for that purpose, at a less rate of interest than 6 per cent, and thus a saving made; but this was for the consideration of the Legislature when it passed the statute, not for the state officers afterwards. The State had the right to pass the law, and when passed it was binding on those whose duty it was to obey. [410]

It was said, however, in argument, that if the Acts of 1865 and 1881 are construed in this way they are invalid because in conflict with the following provisions of the Missouri Constitution, which went into effect November 30, 1875:

Article IV., sec. 50. "The General Assembly shall have no power to release or alienate the lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any Act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."

Sec. 51. "The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State, or to any county or other municipal corporation therein."

The Supreme Court of Missouri did say in *State* v. *Chappell*, 74 Mo. 835, a suit brought by these Trustees to compel the State Treasurer to give them a certificate of payment in the form required by the Act of 1865 to enable them to get from the Governor an assignment of the State's liens, that if the statutes required the acceptance of the $3,090,000 at the time it was paid in full satisfaction of the liability of the Company to the State they were unconstitutional and void. But here the question is whether the same result must follow when the statutes are construed so as to require the payment of a sum of money which will enable the State to take up an equal amount of its other indebtedness bearing an equal rate of interest, and we have no hesitation in saying it does not. Section 50 deals with the lien, and section 51 with the "indebtedness, liability, or obligation." The lien cannot be released or alienated until the debt is extinguished, and the debt cannot be released or extinguished except in the manner contemplated by the law under which it was created, or by something legally equivalent. Here there is a payment of the obligation in advance of its maturity, with a view to the use of the money so paid by the State in taking up other debts at their maturity for which no [411] other provision has been made. This is, in our opinion, the legal equivalent of a payment of the liability of the Company in accordance with the original terms on which it was created. By the Acts under which the payment was made the money was appropriated for use in this particular way. In the meantime it was to be kept invested until that use could be made, the Company indemnifying the State against its liability for interest in the meantime. A statute having such an effect violates neither the letter nor the spirit of the Constitution, which was no doubt intended, as was said by the Supreme Court of Missouri in the case just cited, to prevent the "frittering away" and "extinguishment" of "the liens held by the State on railroads" without payment in full. The payment in this case in the way which the statutes contemplate will be the complete legal equivalent of such a "payment in full."

It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel*, 107 U. S. 711 [27:448], is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the Trustees when they make a certain payment. The Trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the Trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the Trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for.

The decree of the circuit court is reversed, [412] so far as it fixed the amount to be paid to get an assignment of the lien, and the cause remanded with instructions to strike out the sum of $476,049.47, with interest from May 11, 1883, as the amount found due, and insert in lieu thereof $153,646.46, and interest at the rate of 8 per cent per annum from October 8, 1882. In all other respects the decree is affirmed, each party to pay its own costs in this court, the expenses of printing the record and the fees of the clerk for supervision to be taxed one half to each.

Mr. Justice **Blatchford** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plf.*, [479]
v.
RAMON ARJONA.

(See S. C. Reporter's ed. 479-489.)

Counterfeiting foreign securities—power and duty of United States to punish—statute need not declare offense to be against law of nations.

1. The United States has the power and it is its duty to prevent and punish the counterfeiting, within its jurisdiction, of the notes, bonds and other securities issued by foreign governments or under their authority.

2. In a statute enacted to define and punish an offense against the law of nations, such offense need not be declared to be "an offense against the law of nations."

[No. 1100.]

Submitted Jan. 3, 1887. Decided March 7, 1887.

ON a certificate of division of opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

The history and facts appear in the opinion of the court.

Mr. **A. H. Garland**, *Atty-Gen.*, for plaintiff.

Messrs. **George W. Wingate** and **Augustus A. Levey**, for defendant:

Within the scope of its powers as enumerated and defined within the Constitution, the Government of the United States is supreme, but beyond them it has no existence.

U. S. v. *Cruikshank*, 92 U. S. 542, 548 (23:588, 590).

"Every valid Act of Congress must find in the Constitution some warrant for its passage."

U. S. v. *Harris*, 106 U. S. 629 (27:290); *Martin* v. *Hunter's Lessee*, 14 U. S. 1 Wheat. 304 (4:97); *M'Culloch* v. *Md.* 17 U. S. 4 Wheat. 316 (4:579); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 (6:23); *U. S.* v. *Reese*, 92 U. S. 214 (23:563).

The counterfeiting, within the United States, of a note of a foreign corporation, cannot be constitutionally made by Congress an offense against the law of nations. The discretion given to Congress to define and punish offenses against the law of nations is limited to those

offenses which are legitimately included within that law.

Kent, Internat. Law, Dr. Abdy's notes, Lond. 1886, 445. See also *U. S.* v. *Palmer*, 16 U. S. 3 Wheat. 642 (4:480); *U. S.* v. *Pirates*, 18 U. S. 5 Wheat. 184, 185 (5:64).

The obligations of the law of nations do not include the offenses charged in this indictment. The offenses are the counterfeiting of a private obligation of a private institution.

The definition of "money" or "bills of credit," as used in the Federal Constitution, means a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.

Briscoe v. *Bank of Kentucky*, 36 U. S. 11 Pet. 257 (9:709); *Craig* v. *Missouri*, 29 U. S. 4 Pet. 410 (7:908).

A political division of a country like a federal State or a county cannot have, as to a foreign government, any element of sovereignty to be infringed. Still less can such be the case with respect to a private corporation created by such a political division.

The "law of nations" referred to in the Constitution is confined to those acts committed by one Nation, or its citizens, by which the rights of another Nation are injured.

Wheat. International Law, p. 14; Vattel, Droit des Gens, liv. 2, chap. 6, §§ 71, 72.

The definitions of the following writers, though differing materially in the language employed, all unite in limiting the function of international law to a violation of some principle of sovereignty:

Pinheiro Ferreira Cours, t II., pte. 1, § 2, art. 1, § 1; Felix, tit. *Prelim.* chap. 1, § 1; Ortolan, Regles, t. 1, p. 54; Halleck, chap. 2, § 1; Heffter, § 1; Hautefeuille Des Droits, t. 1, p. 3; Martens, Precis. § 2; Wolff, Jus. Gent. proleg. § 2; Manning, pp. 2, 3; Polson, sec. 1, § 1; Klüber Droit; Canchy, Int. § 1; Phillimore, Com. Vol. 1, § 9; Rigueline, Lib. 1, tit. 1, sec. 1, chap. 1; Grotius, Le Droit, proleg. § 1; Wildman, Vol. 1, p. 1; Fiore, Nouv. Droit Int. 55; Savigny, Systeme, liv. 1, chap. 2, § 6

[480] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is an indictment containing three counts against Ramon Arjona, for violations of sections 3 and 6 of the Act of May 16, 1884, chap. 52, 23 Stat. at L. 22, "To prevent and punish the counterfeiting within the United States of notes, bonds and other securities of foreign governments." The first and second counts were found under section 6 of the statute, and the third under section 3.

The statute makes the following things criminal:

1. Sec. 1. Forging or counterfeiting within the United States, with intent to defraud, "any bond, certificate, obligation, or other security of any foreign government, issued or put forth under the authority of such foreign government, or any treasury note, bill or promise to pay issued by such foreign government, and intended to circulate as money, either by law, order, or decree of such foreign government."

2. Sec. 2. Knowingly, and with intent to de-
[481] fraud, uttering, passing or putting off in payment or negotiation, within the United States, any forged or counterfeit bonds, etc., such as are described in section 1.

3. Sec. 3. Falsely making, forging or counterfeiting within the United States, with intent to defraud, or knowingly assisting therein, "any bank note or bill issued by a bank or other corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country."

4. Sec. 4. Knowingly uttering, passing, putting off or tendering in payment, within the United States, with intent to defraud, any such false or counterfeited bank note or bill as is mentioned in section 3, whether forged or counterfeited in the United States or not.

5. Sec. 5. Having in possession any forged or counterfeit instruments mentioned in the preceding sections, with intent to utter, pass, or put them off, or to deliver them to others, with the intent that they may be uttered or passed.

6. Sec. 6. Having in possession "any plate, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, except by lawful authority;" or using such plate, or knowingly permitting or suffering "the same to be used, in counterfeiting such foreign obligations, or any part thereof:" or engraving, or causing or procuring to be engraved, or assisting "in engraving, any plate in the likeness or similitude of any plate designed for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation;" or printing, photographing, or in any other manner making, executing, or selling, or causing "to be printed, photographed, made, executed, or sold," or aiding "in printing, photographing, making, executing, or selling any engraving, photograph, print or impression in the likeness of any genuine note, bond, obligation or other security, or any part thereof, of any foreign government, bank, or corporation;" or bringing "into the United States * * * any counterfeit plate, engrav-
[482] ing, photograph, print or other impressions of the notes, bonds, obligations or other securities of any foreign government, bank, or corporation."

The first count of the indictment charges Arjona with having "in his control and custody a certain metallic plate from which there might then and there be printed in part a counterfeit note in the likeness and similitude in part of the notes theretofore issued by a foreign bank; to wit, the bank known as El Banco del Estado de Bolivar, which said bank was then and there a bank authorized by the laws of a foreign State; to wit, the State of Bolivar; said State being then and there one of the States of the United States of Colombia."

In the second count, he is charged with having caused and procured "to be engraved a certain metallic plate in the likeness and similitude of a plate designated for the printing of the genuine issues of the obligations of a foreign bank, that is to say, of the bank notes of the bank known as El Banco de Estado de Bolivar the same being then and there a bank authorized by the laws of a foreign State; to wit the

State of Bolivar, said State being then and there one of the States of the United States of Columbia."

In the third count, the charge is that he, "unlawfully and with intent to defraud, did cause and procure to be falsely made a certain note in the similitude and resemblance of the notes theretofore issued by a bank of a foreign country; to wit, the bank known as El Banco del Estado de Bolivar, the same being then and there a bank authorized by the laws of one of the States of the United States of Colombia, that is to say, the State of Bolivar, and the notes issued by the said bank being then and by the usage of the said State of Bolivar intended to circulate as money."

To this indictment a demurrer was filed, and the judges holding the court have certified that at the hearing the following questions arose, upon which their opinions were opposed:

1. Whether the third section of the statute is constitutional.

2. Whether the sixth section is constitutional so far as it relates to "foreign banks and corporations."

3. Whether the counterfeiting within the United States of the notes of a foreign bank or corporation can be constitutionally made by Congress an offense against the law of nations.

[483] 4. Whether the obligations of the law of nations, as referred to in the Constitution of the United States, include the punishment of counterfeiting the notes of a foreign bank or corporation, or of having in possession a plate from which may be printed counterfeits of the notes of foreign banks or corporations, as mentioned in the third and sixth sections, "unless it appear or is alleged in the indictment that the notes of said foreign bank or corporation are the notes or money of issue of a foreign government, prince, potentate, state, or power."

5. Whether, if there is power to "so define the law of nations" as to include the offenses mentioned in the third and sixth sections, it is not necessary, in order "to define" the offense, that it be declared in the statute itself "to be an offense against the law of nations."

6. Whether the indictment is sufficient in law.

The fourth of the questions thus stated embraces the 4th, 5th, 6th, 7th and 8th of those certified, and the fifth embraces the 9th and 10th.

Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, article I, section 8, clause 18; and the Government of the United States has been vested exclusively with the power of representing the Nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign Nations," article I, section 8, clause 3; make treaties, and appoint ambassadors and other public ministers and consuls. Art. II, § 2, clause 2. A State is expressly prohibited from entering into any "treaty, alliance, or confederation." Art. I, § 10, clause 1. Thus all official intercourse between a State and foreign Nations is prevented, and exclusive authority for that purpose given to the United States. The National Government is in this way made responsible to foreign Nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized "to define and punish * * * offenses against the law of nations." Art. I, § 8, clause 10.

The law of nations requires every national [484] government to use "due diligence" to prevent a wrong being done within its own dominion to another Nation with which it is at peace, or to the people thereof; and because of this the obligation of one Nation to punish those who, within its own jurisdiction, counterfeit the money of another Nation has long been recognized. Vattel, in his Law of Nations, which was first printed at Neuchâtel in 1758, and was translated into English and published in England in 1760, uses this language: "From the principles thus laid down, it is easy to conclude that if one Nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that Nation an injury." When this was written money was the chief thing of this kind that needed protection, but still it was added: "There is another custom more modern, and of no less use to commerce than the establishment of coin; namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk. For the same reason that Sovereigns are obliged to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every Nation to have wise and equitable commercial laws established in the country." Vattel, Law of Nations, Phil. ed., 1876, book I, chap. 10, pp. 46, 47. In a note by Mr. Chitty in his London edition of 1834 it is said: "This is a sound principle, which ought to be extended so as to [48 deny effect to any fraud upon a foreign Nation or its subjects." *Id.* 47, note 50.

This rule was established for the protection of Nations in their intercourse with each other. If there were no such intercourse, it would be a matter of no special moment to one Nation that its money was counterfeited in another. Its own people could not be defrauded if the false coin did not come among them; and its own sovereignty would not be violated if the counterfeit could not under any circumstances be made to take the place of the true money. But national intercourse includes commercial intercourse between the people of different Nations. It is as much the duty of a Nation to protect such an intercourse as it is any other, and that is what Vattel meant when he said: "For the same reason that Sovereigns are obliged to protect commerce, they are obliged to support this custom;" "namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other," "by good laws, in which every merchant, whether citizen or foreigner, may find security."

In the time of Vattel certificates of the public debt of a Nation, government bonds, and other government securities, were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for them

selves or the public against forgers and counterfeiters elsewhere than at home; and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were almost unknown, and certainly they had not got to be extensive borrowers of money wherever it could be had, at home or abroad, on the faith of their *quasi* public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, is something enormous.

[486] Such being the case, it is easy to see that the same principles that developed, when it became necessary, the rule of national conduct which was intended to prevent, as far as might be, the counterfeiting of the money of one nation within the dominion of another, and which, in the opinion of so eminent a publicist as Vattel, could be applied to the foreign exchange of bankers, may with just propriety be extended to the protection of this more recent custom among bankers of dealing in foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, and sent abroad as the subjects of trade and commerce. And especially is this so of bank notes and bank bills issued under the authority of law, which, from their very nature, enter into and form part of the circulating medium of exchange—the money—of a country. Under such circumstances, every Nation has not only the right to require the protection, as far as possible, of its own credit abroad against fraud, but the banks and other great commercial corporations which have been created within its own jurisdiction for the advancement of the public good may call on it to see that their interests are not neglected by a foreign government to whose dominion they have, in the lawful prosecution of their business, become to some extent subjected.

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securities, and those of the States, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity; and against this, international
[487] comity requires that national protection shall, as far as possible, be afforded. If there is neglect in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offense, and thus secure the restraining influences of a fear of the consequences of wrongdoing. A refusal may not, perhaps, furnish sufficient cause for war, but it would certainly give just ground of complaint, and thus disturb that harmony between the governments which each is bound to cultivate and promote.

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations; and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another Nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a State from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a State as well as that of the United States.

Again, our own people may be dealers at home in the public or *quasi* public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign Nations, or sent here from abroad for sale in the money markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here with [488] impunity, our own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the Government of the United States.

It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offense against the law of nations, it is necessary, in order "to define" the offense, that it be declared in the statute itself to be "an offense against the law of nations." This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offense than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the Government of the United States. Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress. As has already been seen, it was incumbent on the United States as a Nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money, or its public or *quasi* public securities. This statute was en-

acted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations; and it was clearly appropriate legislation for that purpose. Upon its face, therefore, it defines an offense against the law of nations as clearly as if Congress had in express terms so declared. Criminal statutes passed for enforcing and preserving the neutral relations of the United States with other nations were passed by Congress at a very early date: June 5, 1794, chap. 50, 1 Stat. at L. 381; June 14, 1797, chap. 1, 1 Stat. at L. 520; March 3, 1817, chap. 58, 3 Stat. at L. 370; April 20, 1818, 3 Stat. at L. 447; and those now in force are found in title LXVII of the Revised Statutes. These all rest on the same power of Congress that is here invoked, and it has never been supposed they were invalid because they did not expressly declare that the offenses there defined were offenses against the law of nations.

If there is anything more in the eleventh [489] question certified than has been already disposed of in answering the others, it is too broad and indefinite for our consideration under the rules which have been long established regulating the practice on a certificate of division.

All the questions certified, except the eleventh, are answered in the affirmative, and as to that no special answer will be made.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[569] CHICAGO, BURLINGTON AND KANSAS CITY RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE OF MISSOURI, *ex rel.* JOHN F. GUFFEY, Collector of Revenue of PUTNAM COUNTY.

(See S. C. Reporter's ed. 569-575.)

Constitutional law—railroads—immunity from taxation must be clear—construction of statute.

1. An immunity from state taxation will not be recognized unless granted in terms too plain to be mistaken.

2. A branch railroad constructed under the Missouri Act of March 21, 1868, providing for the construction of branches, by the St. Joseph and Iowa Railroad Company, which should be for most purposes independent lines, is not entitled to immunity from state and county taxation under the charter of 1857, of said company.

[No. 1244.]

Argued Jan. 3, 1887. Decided March 7, 1887.

IN ERROR to the Supreme Court of the State of Missouri. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Jeff. Chandler** and *L. T. Hatfield*, for plaintiff in error.

Messrs. **John P. Butler**, *B. G. Boone, Atty-Gen. of Missouri*, and *S. P. Huston*, for defendant in error:

The immunity from taxation can only be conferred when clearly authorized by legislation. Unless so clearly authorized it is held to be an immunity personal to the company on which it is conferred and incapable of transfer. The language authorizing the mortgage only authorized a mortgage of the property and franchises. Immunity from taxation is not thereby described.

Morgan v. *La.* 93 U. S. 223 (23: 861); *Louisville & N. R. R. Co.* v. *Palmes*, 109 U. S. 244 (27: 922); *Memphis & L. R. R. Co.* v. *R. R. Comrs.* 112 U. S. 617 (28: 840); *Trask* v. *Maguire*, 85 U. S. 18 Wall. 391 (21: 938); *Wilson* v. *Gaines*, 103 U. S. 417 (26: 401); *Arkansas R. R. Co.* v. *Berry*, 41 Ark. 436; *State* v. *Sherman*, 23 Ohio St. 411.

When the Legislature cannot by law exempt a railroad from taxation, it cannot authorize a transfer by one company to another of the right of exemption.

Louisville & N. R. R. Co. v. *Palmes, supra.*

Elijah Smith could not purchase this immunity and then convey it to the plaintiff in error. That would be equivalent to creating a new corporation with an exemption then prohibited by the Constitution of the State.

Memphis & L. R. R. Co. v. *R. R. Comrs.* 112 U. S. 609 (28: 837); *Owen* v. *R. R. Co.* 83 Mo. 454; Const. Mo. 1865; *Campbell* v. *R. R. Co.* 23 Ohio St. 168.

Mr. Justice **Harlan** delivered the opinion of the court: [570]

The judgment which this writ of error brings up for review affirms the liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph and Iowa Railroad, more recently named the Linneus Branch of the Burlington and Southwestern Railway Company, and now owned by the Chicago, Burlington and Kansas City Railroad Company, a corporation organized under the laws of Missouri. The latter Company claims to have succeeded to all the rights, privileges and immunities granted to the St. Joseph and Iowa Railroad Company in its charter of 1857, among which was an exemption of its stock from taxation for "state and county" purposes. As the construction which the Supreme Court of Missouri places upon certain legislation, enacted after the charter of the St. Joseph and Iowa Railroad Company was granted, is inconsistent with the exemption claimed, the controlling question on this writ of error is whether the local statutes, as interpreted and applied by that court, impair the obligation of any contract which the company had with the State and thereby deprive its successor, the plaintiff in error, of any rights secured by the Constitution of the United States.

That question mainly depends upon the construction of an Act of the General Assembly of Missouri, entitled "An Act to Aid in the Building of Branch Railroads in the State of Missouri," approved March 21, 1868.

That Act took effect from its passage, and is [571] as follows:

"1. Any railroad company in this State authorized by law to build branches, and wishing to avail themselves of the provisions of this Act, shall, by its board of directors, pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line and general course, a certified copy of which res-

olution shall be filed with the Secretary of State; after which they shall be governed by the provisions of this Act.

"2. Whenever any such railroad company shall undertake the construction of a branch designated as provided in the first section of this Act, they shall receive donations or subscriptions to stock to aid its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line; they may borrow money and issue bonds secured by mortgage on such branch road to aid in its construction, and, in general, may operate, lease, sell or consolidate with any connecting road, distinct and separate from their main line, and in any other way, may manage or dispose of such branch, as by law they may be authorized with reference to their main line, and separate therefrom.

"3. Any branch road so constructed shall not be holden for any debt, lien or liability of the main line; nor shall the main line be holden for any debt, lien or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch; and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.

"4. The holders of stock in any railroad company which was subscribed in aid of the construction of a branch road, according to the provisions of this Act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specially affecting the interests of such branch road the stockholders in such branch [572] shall control, and, for such purpose, the directors, under their by-laws, may, or on the petition of parties representing one tenth of such stock shall, call a meeting of the stockholders in such branch, setting forth the object of such meeting; and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions, if not inconsistent with the laws of the State and the powers of such company." Laws Mo. 1868, p. 90.

The branch road in question was constructed under the provisions of that statute. That fact distinctly appears from the preamble and resolutions adopted by the board of directors of the St. Joseph and Iowa Railroad Company, March 25, 1871 (a certified copy thereof being filed April 19, 1871, in the office of the Secretary of State of Missouri), and expressly stating the purpose of the company to avail itself of the provisions of the Act of 1868 in building this branch road.

The statute, it will be observed, does not exempt from taxation stock subscribed in aid of the construction of the branch roads for which it makes provision. But as it applies to railroad companies "authorized by law to build branches," and as the St. Joseph and Iowa Railroad Company was authorized by its charter of 1857 to build such branch roads as it deemed proper (*State, ex rel., etc.* v. *County Court of Sullivan Co.* 51 Mo. 523, 581), it is contended that the exemption, by the company's original charter, of its stock from taxation for state and county purposes, extends to stock subscribed in the name and exclusively for the benefit of the branch road constructed under the Act of 1868.

When that statute was passed, the Constitution of Missouri of 1865 declared that "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." Art. 12, sec. 16.

As, perhaps, every railroad company, organized under the laws of the State prior to the adoption of the Constitution of 1865, had general authority to construct branch roads, it is clear that the construction of the Act of 1868, for which the appellant contends, cannot be [573] accepted, except upon the theory that the Legislature intended to evade the constitutional inhibition upon exemptions of property from taxation; for it is plain, from the provisions of the Act of 1868, that the roads which it authorized to be built, although called branch roads, are, for all purposes of separate ownership and management, independent lines, quite as distinct from the main lines as if constructed and operated by other and different corporations. Such provisions as are to be found in that statute are rarely ever found in legislative enactments. An analysis of them shows that any "branch" road constructed under it must be designated by the name under which it is built; donations and subscriptions in aid of it must be received in that name; the cost of construction and management must be kept separate and distinct from expenses incurred on the main line; money may be borrowed and bonds issued secured by mortgage on the branch only; the branch road may be sold, operated, leased or consolidated with any connecting road of another corporation, or disposed of separately from the main line; it is liable only for its own debts, and not for those of the main line; profits arising out of the business of such branch road can be divided only among its stockholders, and their interests are to be kept distinct from those of the stockholders of the main line; and the board of directors of the company owning the main line are required, in all matters relating especially to the interests of the stockholders of the branch road, to follow all instructions given by the latter, without regard to their effect upon the main line. In other words, the stockholders of a branch road constructed under the Act of 1868 constitute, in effect, a separate organization, having no connection whatever with the stockholders of the main line, except that the main line and the branch road are, for purposes of convenience, managed by the same board of directors. It may be conceded, for all the purposes of this case, that if the St. Joseph and Iowa Railroad Company, or the Company which succeeded to its rights, privileges and immunities, had built a branch road under the charter of 1857, it could, in respect to that branch, have stood upon the exemption con- [574] tained in its charter. Any stock issued by it and sold to aid in the construction of such a branch road would, in that case, have been on

the same footing in all respects as other stock it may have issued; and its main and branch lines would have been parts of the same system, controlled by the board of directors as they deemed proper. But the company elected not to adopt that course, for the reason, perhaps, that it could not, in that mode, have raised the money necessary to build a branch road. In the condition in which all the railroads of Missouri were left by the civil war, it would have been difficult to raise money to build branch roads, if their future was to be endangered by connection with main lines which needed repairs, and the corporations owning which were without credit. It was, doubtless, for that reason the St. Joseph and Iowa Railroad Company, instead of constructing a branch road under the charter of 1857, determined to avail itself of the provisions of the Statute of 1868, which permitted it to construct and maintain what is called a branch road, but what, in fact, would be a road having only nominal connection with the main line of the company.

The branch roads to which the charter of the St. Joseph and Iowa Railroad Company referred were, in our judgment, such as would be subject to the same control and management as its main line, and not roads that were branch roads only in name, but were distinct lines, operated solely with reference to the interests and pursuant to the directions of those holding stock therein, irrespective of the necessities of the main line.

To avoid the conclusion that there was a purpose to devise a plan whereby railroad property should be exempt from taxation, which the Constitution of 1865 intended should be taxed, we must assume that the Legislature intended to invite railroad corporations having general power under their charters to construct branch roads, to waive the exercise of such power, and construct roads under the provisions of the Act of 1868 which, although not granting an immunity from taxation, yet afforded peculiar protection to those whose money might be used in such construction.

To say the least, it is not clear that the Legislature intended that the exemption from taxation, given by such charters as that granted to the St. Joseph and Iowa Railroad Company, should be extended to branch roads constructed under the Act of 1868. As that statute does not grant immunity from taxation to roads constructed under its provisions, and as the system established by it is complete in itself without reference to other legislative enactments, the present claim to exemption must be denied; for it is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken. *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514 [7: 939]; *Philadelphia & W. R. R. Co.* v. *Maryland*, 51 U. S. 10 How. 376 [13: 461]; *Memphis & L. R. R. Co.* v. *Commissioners*, 112 U. S. 609, 617 [28: 837, 840]; *Southwestern R. R. Co.* v. *Wright*, 116 U. S. 231, 236 [29: 626, 628]; *Vicksburg, etc. R. R. Co.* v. *Dennis*, 116 U. S. 665, 667 [29: 770, 771].

[575]

As our conclusion upon this point accords with that of the state court, and is sufficient to dispose of the whole case, we omit any consideration of other questions presented in argument.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[586]

ROBERT GILMER, *Appt.*,

v.

WILLIAM W. STONE ET AL., EXRS. of ROBERT GILMER, Deceased, ET AL.

(See S. C. Reporter's ed. 586-595.)

Wills—latent ambiguity—extrinsic evidence, admissible—charitable bequest—Illinois Act of April 18, 1872.

1. Extrinsic evidence is admissible to remove a latent ambiguity in a will.

2. Extrinsic evidence of the uniform relations of the testator to the subject of foreign and home missions, and to certain societies engaged in that kind of work, and of his church relations, is admissible to explain a bequest to "The Board of Foreign and the Board of Home Missions," several different churches having such boards.

3. Neither the Board of Foreign Missions of the Presbyterian Church nor its Board of Home Missions is a church, congregation, or society formed for the purpose of religious worship, within the meaning of the Illinois Act of April 18, 1872, forbidding such societies from receiving by gift, devise or purchase more than ten acres of land.

[No. 1168.]

Submitted Dec. 20, 1886. Decided March 7, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **D. T. Littler, Bradley & Bradley, L. A. Whipp** and **R. E. Lewis**, for appellant:

The eleventh clause of the will which the court is now asked to construe is void and meaningless, and no estate can pass to the Board of Home and Foreign Missions, by reason of ambiguity, and the heir must take the estate.

Owens v. *Missionary Society*, 14 N. Y. 380; *Bridges* v. *Pleasants*, 4 Ired. Eq. 26; Perry, Trusts, § 713; 2 Story, Eq. §§ 1183, 979 a, 979 b; *Fontain* v. *Ravenel*, 58 U. S. 17 How. 369 (15:80); *Wheeler* v. *Smith*, 50 U. S. 9 How. 55 (13:44); see also *Taylor* v. *Keep*, 2 Ill. App. 368; *Wilkins* v. *Allen*, 59 U. S. 18 How. 385 (15:396).

A gift or devise of real estate to a corporation by name alone, where no use or purpose is expressed, is absolutely void and cannot be enforced by any aid to be derived from a court of equity.

The bequest being of real estate, the defendants, the Board of Home and Foreign Mission of the State of New York, being religious foreign corporations, cannot under the Statutes of Illinois take (if at all) more than ten acres each of lands by the devise.

Mr. **James McCartney**, for appellees:

When all the clauses of the will are properly considered, together with the evidence disclosed by the record showing that the testator was a member of the Presbyterian Church at Irish Grove, and had been since 1859; was an active, zealous and prompt supporter and contributor and attendant; was an elder and member of the session; was prompt and punctual in those relations; that the church to which he

sustained such relations was in the habit of taking up collections for the Board of Home Missions and Board of Foreign Missions of the Presbyterian Church of the United States; that the testator uniformly for a series of years, and only terminating with his death, appeared especially interested in these Boards, "and always desired his means should be contributed in that direction; it becomes clear that by the terms, "the Board of Foreign Missions and the Board of Home Missions," used in the connection in which these words were, the testator meant the Board of Foreign Missions of the Presbyterian Church of the United States and the Board of Home Missions of the Presbyterian Church of the United States. It can scarcely admit of well founded doubt that the circumstances under which the words were used by the testator in the will, together with his declarations before the making of the instrument, may be proven in order to determine what meaning is to be given to the words as used. This may well be considered the settled doctrine alike of the English and American courts.

2 Phil. Ev. 745-756; Wigram, Extraneous Ev. 118, 138; Pars. Wills, Common Law Library, 85; 1 Jarm. Wills, chap. 13, and notes.

"The American courts have very generally adhered to the rule that the charities for religious purposes shall go in the direction and for the propagation of the doctrine which the donor desired to advance; and for this purpose the particular tenets held by the donor will be inquired into, and when ascertained will be presumed to be the doctrines which it was the purpose of the trust to advance."

2 Redf. Wills, § 64, p. 810; *King* v. *Ackerman*, 67 U. S. 2 Black, 408 (17: 292); *Bernasconi* v. *Atkinson*, 17 Jur. 128; *Bradley* v. *Rees*, 113 Ill. 327; *Heuser* v. *Harris*, 42 Ill. 425; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Wilkins* v. *Allen*, 59 U. S. 18 How. 385 (15:396).

Where a corporation by the law of its creation is authorized, in some cases and for some purposes, or to a certain extent, to take and hold the title to real estate, it cannot be a question by any party except the State whether its real estate has been acquired for the authorized uses or not, or is in excess of the capacity of the corporation to take and hold. The State alone, in a direct proceeding, must assert her policy in that regard.

Hayward v. *Davidson*, 41 Ind. 214; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36; *Baker* v. *Neff*, 78 Ind. 68; *Alexander* v. *Tolleston Club*, 110 Ill. 65.

[588] *Mr. Justice* **Harlan** delivered the opinion of the court:

Robert Gilmer, late of Irish Grove, Menard County, Illinois, died December 31, 1883, having made a last will by which he disposed of his entire estate, consisting of about $4,000 in personal property, and from three to four hundred acres of land in that State. The eleventh clause of the will is in these words: "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the Board of Foreign and the Board of Home Missions." The object of the present suit is to obtain a decree declaring that clause to be void, and directing the estate of the testator, after meeting the debts and the bequests contained in other clauses, to be paid to the complainant, the uncle and only heir at law of the decedent.

The "Board of Foreign Missions of the Presbyterian Church in the United States of America" and the "Board of Home Missions of the Presbyterian Church in the United States of America"—corporations created under the laws of New York—severally appeared, were made defendants, and filed answers, each claiming the right to share in the devise in the eleventh clause of the will. The executors admit the justice of these claims, but ask the direction of the court in the premises. To these answers a general replication was filed; and, the cause having been heard upon the pleadings and proofs, the bill was dismissed with costs.

It is agreed in the case that the Baptist, Methodist, Episcopal, and other churches, like the Presbyterian Church in the United States of America, have boards of home and foreign missions; consequently, it is contended, the eleventh clause of the will is void for uncertainty as to the donee and the purposes of the gift. In this view we do not concur. It is undoubtedly the rule, in respect to the testamentary disposition of property, real and personal, that uncertainty either as to the subject or object of a devise will be fatal to its validity. But that rule has no application here; for, if there were no other fact in the case than that [589] there are numerous boards which may be generally described by the words, the "board of foreign missions," and "the board of home missions," the devise in the eleventh clause would not fail. With respect to charities, gifts may be good which, with respect to individuals, would be void; "and where there are two charities of the same name the legacy will be divided between them, if it cannot be ascertained which was the intended object." 1 Jarm. Wills, 376. Can it be ascertained by competent evidence which of these various boards were the objects of the testator's bounty?

In the fourth clause of the will, the testator bequeathed his library to the Presbyterian Church of Irish Grove; in the ninth, $500 toward the erection of a Presbyterian church in Greenview, Illinois, provided the same was built within two years from the date of the will; otherwise, the money should revert to his estate; and in the tenth, he bequeathed $50 to be paid on the minister's salary of the Presbyterian Church of Irish Grove for the year 1884.

And there was extrinsic evidence to the following effect: that the testator had been for many years a member and ruling elder of the Irish Grove Presbyterian Church, one of the local congregations of the Presbyterian Church in the United States of America; that collections were annually taken up in that congregation for the various boards of that church, including its Boards of Foreign and Home Missions; that while it was announced from the pulpit that collections would be taken for the Board of Foreign Missions or the Board of Home Missions, without, in words, naming the Presbyterian Church, all such collections, with the knowledge and assent of the church session, of which the testator was an active and zealous member, were, without exception, sent to the officers of the Presbyterian Boards of Foreign

and Home Missions in New York City, and regular reports thereof made to the session; that the testator took especial interest in the work of those particular Boards and uniformly contributed thereto; and that he did not, so far as his pastor or associates in the church session knew, make contributions to the societies of [590] any other church, except to the Bible Society which was sustained by several religious organizations.

Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as "the Board of Foreign and the Board of Home Missions;" and thus the court is enabled to avail itself of the light which the circumstances in which the testator was placed at the time he made the will would throw upon his intention. "The law is not so unreasonable," says Mr. Wigram, "as to deny to the reader of an instrument the same light which the writer enjoyed." Wigram, Wills, 2d Am. ed. 161. The proof made a case of latent ambiguity. Such an ambiguity may arise, "either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject." *Patch* v. *White*, 117 U. S. 217 [29: 864]. In the same case it was observed that "as a latent ambiguity is only disclosed by extrinsic evidence it may be removed by extrinsic evidence." See also *Allen's Exrs.* v. *Allen*, 59 U. S. 18 How. 385, 393 [15: 396, 399]; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Breckenridge* v. *Duncan*, 2 A. K. Marsh. 51, 12 Am. Dec. 359; *Morgan* v. *Burrows*, 45 Wis. 217; *Brewster* v. *McCall*, 15 Conn. 274; *Tilton* v. *Am. Bible Society*, 60 N. H. 382; 1 Jarm. Wills, 428, 431; 1 Greenl. Ev. § 290.

Construing, then, the will with reference to the extrinsic evidence of the uniform relations of the testator to the subject of foreign and home missions, and to certain societies engaged in that kind of work, it is not to be doubted that, in the eleventh clause, he had in mind the Boards of Foreign and Home Missions of the [591] general religious society or organization of which he was a member and officer. The words of the will very well apply to such an object, and, therefore, in so interpreting its provisions, no violence is done to the language employed by the testator.

It is also contended that the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America are foreign religious societies, or foreign societies organized for religious purposes, and, as such, cannot, under the laws of Illinois, take exceeding ten acres of land each, and that the devise in the eleventh clause, being of more than three hundred acres of land jointly, is void and must fail.

In the case of *Christian Union* v. *Yount*, 101 U. S. 360 [25: 891], decided in 1879, we considered the question whether a conveyance made in 1870, by a citizen of Illinois, of real estate there situated, of the value of $10,000, to the American and Foreign Christian Union, a New York corporation, was void under the laws of Illinois—the object of that corporation being, "by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists." The validity of the conveyance was sustained upon the ground that the law of Illinois, as it existed in 1870, did not preclude a benevolent or missionary corporation of another State, being thereunto authorized by its own charter, from taking title to real estate within her limits, by purchase, gift, devise or in any other manner.

It is however insisted that the force of that decision is weakened, if not destroyed, by the failure of the court to refer to section 44 of chapter 24 of the Revised Statutes of 1845, making it lawful for "the members of any society or congregation," theretofore formed or thereafter to be formed, "for purposes of religious worship," to "receive by gift, devise or purchase, a quantity of land not exceeding ten acres, and to erect or build thereon such houses and buildings as they may deem necessary for the purposes aforesaid, and to make such other use of the land and make such other improvements thereon as may be deemed necessary for the comfort and convenience of such society or [592] congregation." Rev. Stat. 1845, p. 120. Counsel overlook the fact that the court in *Christian Union* v. *Yount* referred incidentally, and as indicating the general course of legislation in Illinois, to the like provision in the Act of 1872. No comment was made upon that provision, for the reason that it had no application to the case; there being no claim, as there could not well have been, that the American and Foreign Christian Union was, within the meaning of the statute, a society or congregation "for purposes of religious worship."

In *St. Peter's R. C. Congregation* v. *Germain*, 104 Ill. 440, the Supreme Court of the State held that the foregoing section of the Act of 1845 was not repealed by the Act of March 8, 1869, providing "For the holding of Roman Catholic churches, cemeteries and other property," but was displaced by the 42d section of the Act of April 18, 1872 (chap. 32, Revision, 1874), which last section, however, the court said, was substantially the same as the 44th section of the Act of 1845, and to be regarded as, in effect, merely continuing the latter in force.

We have, therefore, to inquire whether the devise in question is void under the Act of April 18, 1872. That Act makes provision for the formation of corporations for any lawful purpose, except banking, insurance, real estate brokerage, the business of loaning money, and the operation of railroads other than horse and dummy railroads. It also makes provision for the incorporation of societies, corporations, and associations for any lawful purpose, not for pecuniary profit, "capable of taking, purchasing, holding and disposing of real and personal estate for purposes of their organization." Secs. 29, 31.

The Act proceeds:

"Sec. 35. The foregoing provisions shall not

apply to any religious corporation; but any church, congregation, or society, formed for the purpose of religious worship, may become incorporated in the manner following, to wit.* * *

"Sec. 41. Upon the incorporation of any congregation, church or society, all real and personal property held by any person or trustees for [593] the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise or donation that may be made to such person or trustee for the use of such congregation, church or society.

"Sec. 42. Any corporation that may be formed for religious purposes under this Act or under any law of this State for the incorporation of religious societies, may receive by gift, devise or purchase, land not exceeding in quantity (including that already held by such corporation) ten acres, and may erect or build thereon such houses, buildings or other improvements as it may deem necessary for the convenience and comfort of such congregation, church or society, and may lay out and maintain thereon a burying ground; but no such property shall be used except in the manner expressed in the gift, grant or devise, or, if no use or trust is so expressed, except for the benefit of the congregation, church or society for which it was intended."

The 45th section permits any congregation, church or society incorporated under the Act, to receive by grant, devise or bequest, real estate, not exceeding forty acres, for the purpose of holding camp meetings. Rev. Stat. 1874, p. 292-3.

Assuming, for the purposes of this case only, that a church, congregation or society formed under the laws of another State, for the purposes of religious worship in that State, could not lawfully receive by gift, devise or purchase, land, in Illinois, in excess of the quantity which may be received in either of those modes by a similar corporation formed under the laws of Illinois, we are satisfied that the sections last quoted from the Act of 1872 do not embrace corporations of the class to which these Boards of Foreign and Home Missions belong. The Board of Foreign Missions of the Presbyterian Church in the United States of America was formed "for the purpose of establishing and conducting Christian missions among the unevangelized or pagan nations, and the general diffusion of [594] Christianity." Its power to hold real or personal estate in New York is restricted to such quantity as will produce an annual income not exceeding $20,000. The object of the Board of Home Missions of that church is "to assist in sustaining the preaching of the Gospel in feeble churches and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of home missions in the behalf of such church as the General Assembly shall, from time to time, direct; and also to receive, take charge of, and disburse all property and funds which, at any time, and from time to time, may be intrusted to said church or said Board for home missionary purposes." It cannot take and hold real or personal property, the annual income of which shall exceed $200,000.

While these Boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the 35th section of the Act of 1872, a church, congregation, or society formed for the purpose of religious worship. The counsel for the plaintiff in error seem to lay stress upon the more general words, "formed for religious purposes," in the 42d section of the Act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the purpose of "religious worship," and not to organizations commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members.

This conclusion does not, in the slightest degree, conflict with the decision in *St. Peter's R. C. Congregation* v. *Germain* [*supra*]. That was the case of a conveyance of about eighty acres of land directly to a congregation or society [595] "formed for the purpose of religious worship," as distinguished from a benevolent or missionary organization. The court held that, under the legislation of Illinois, "A religious corporation is authorized to receive or acquire lands to the extent of ten acres, and no more. Any amount in excess of that is expressly forbidden by statute; and it follows that all conveyances, deeds, or other contracts made in violation of this prohibition are absolutely void."

As the eleventh clause was intended to pass, and was valid for the purpose of passing, to the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America, the estate thereby devised, *the decree must be affirmed. It is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM H. PLUMMER, Admr. of HIRAM TUCKER, Deceased, *Appt.* [442]

v.

SARGENT AND COMPANY.

(See S. C. Reporter's ed. 442-450.)

Reissued letters patent—validity—construction of—want of novelty.

Reissued letters patent Nos. 2355 and 2356, for an improved process of bronzing or coloring iron and for the product resulting therefrom, are either void for want of novelty, or they must be restricted exactly to what is described—a simultaneous and joint oxidation of the iron and the oil after the application of the oil to a cleansed surface of cast iron.

[No. 121.]

Argued Jan. 10, 11, 1887. Decided March 7, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. Reported below, 19 Blatchf. 538. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **James E. Maynadier** and **Elihu G. Loomis**, for appellant.

Messrs. **John K. Beach, Charles E. Mitchell** and *John S. Beach*, for appellee.

[443] *Mr. Justice* **Matthews** delivered the opinion of the court:

This is a bill in equity to restrain the alleged infringement of reissued letters patent Nos. 2355 and 2356, dated September 11, 1866, granted to the Tucker Manufacturing Company, as assignee of Hiram Tucker, and owned by the complainant; the former being for an improved process of bronzing or coloring iron, the latter for the product resulting from that process.

The specifications in the reissued patent No. 2355 are as follows:

"Metals have heretofore been lacquered or bronzed by the application of a solution of resin and metallic powders or salts, and dried by exposure to air or heat. Iron has been japanned by covering its surface with oily solutions of asphaltum and pigments and subsequent application of heat sufficient to produce hardness. These are well known operations.

"My invention consists in a process of covering iron with a very thin coating of oil, and then subjecting it to heat, the effect of which is to leave upon the iron a firm film, which is very durable, and gives the iron a highly ornamental appearance, like that of bronze.

"In practice I proceed as follows: The surface of the iron is cleansed from sand, scale, or [444] other foreign matter, and where fine effects are desired the surface is best made smooth or polished. Under given conditions of heating and oiling the finer the polish the lighter is the bronze tint produced. In cases where ornamentation is obtained by relief the salient parts should be the most highly polished or most smoothly surfaced in order that the color produced upon them shall not be so deep as it is on those parts which are in the rear, so as to imitate thereby more nearly the effects of genuine bronze, in which its natural oxidation is apt to be worn somewhat away from its salient parts, and therefore lighter in color.

"When the iron is thus prepared I cover it with a very thin coating of linseed oil, or any oil which is the equivalent therefor, for the purpose here specified (such a coating as I find best attained by applying the oil with a brush, and then rubbing off the oiled surface thoroughly with a rag, sponge, or other suitable implement), and then place it in an oven, where it is submitted to a degree of heat which may be measured by an intensity sufficient to change a brightened surface of clean, unoiled iron to a color varying from a light straw color to a deep blue, the lowest degree of heat producing the lightest colored changes and the lightest bronze, and the highest degree of heat producing the darkest colored changes and the darkest bronze. It is important that the coating of oil be made extremely thin, as a coating of any material thickness will leave a rough or varied surface after the heat is applied. As the oiled iron becomes heated the color obtained will be bronze, of an intensity corresponding to the degree of heat employed; but it should be observed that the heat may be made so intense and so long continued as to destroy the oil, in which case the iron will lose the bronze tint acquired and will assume the dark blue shade.

"The perfection of the results obtained under these instructions will of course depend, in a considerable degree, upon the dexterity and watchfulness of the operator in applying the oil and in regulating the heat.

"In practice I prefer to use boiled linseed oil. When the desired shade of bronzing is obtained the iron is removed from the oven or furnace, and, if desired, may again be treated with oil [445] as before, even if not cool, and then again submitted to the action of heat, as described, and the operation of oiling and heating may be repeated indefinitely, each repetition deepening the shade of the bronzing. I recommend that at each repetition the degree of heat should be less than the degree immediately before employed; and in oiling and heating more than once I recommend for the second and succeeding oilings the use of a dry hog-hair brush to take off the surplus oil. The process may be carried to such an extent by repetition of oiling and heating as to produce a very dark color; black even may be thus produced.

"I have specially described linseed oil as preferred by me for the practice of my invention because of its good drying quality and its capacity of giving a good, uniform, smooth film when spread thinly upon the iron, as before described.

"Slight variations from the degree of heat above mentioned may be allowed without departing from the principle of my invention.

"What I claim and desire to secure by letters patent is the process of ornamenting iron in imitation of bronze by the application of oil and heat, substantially as described."

Reissued patent No. 2356 is for a new article of manufacture, but the description of the method is the same as that contained in the specifications in the patent for the process; the claim, however, being as follows: "What I claim and desire to secure by letters patent is the new manufacture hereinabove described, consisting of iron ornamented in imitation of bronze by the application of oil and heat, substantially as described."

These two reissues were based upon the surrender of a prior original patent, dated December 15, 1863, covering both claims. These reissued patents were the subject of litigation before *Mr. Justice* Clifford in *Tucker* v. *Tucker Mfg. Co.* 4 Cliff. 397, and before *Judge* Lowell in *Tucker* v. *Burditt*, 5 Fed. Rep. 808, and *Tucker* v. *Dana*, 7 Fed. Rep. 213. The decree below was in favor of the defendants on the ground that there was no infringement. *Tucker* v. *Sargent & Co.* 19 Blatchf. 538. The infringement alleged was in the manufacture and sale [446] of cast iron butts, samples of which were produced and marked as exhibits. These are described in the opinion of the circuit court, from whose decree this appeal is prosecuted, as follows:

"These butts are colored in this way: The sunken parts are first covered with a black

japan, and this coat of blacking is baked in an oven at a temperature not exceeding 320 degrees Fahrenheit. This japanning of the sunken parts is immaterial. It is not really claimed to be a Tucker bronzing. The object probably is to make a marked contrast between the sunken and salient parts of the butt. All but the sunken parts are then ground and subjected to a heat of 480 degrees Fahrenheit, which colors the iron a dark straw color. The ground parts of one of the exhibits are nearly or quite blue. A coat of copal varnish of substantial thickness is then put on and baked in a heat of not over 300 degrees Fahrenheit. This produces a material coating of oxidized varnish upon the surface of the iron, which can be scraped up by a rapidly drawn knife blade as a shaving rolls up before the knife of a plane. It was not claimed by the defendant that the varnish was not oxidized by the heat. No proof was offered by the plaintiff in regard to the oxidation of the iron during the second heating, and I do not think it of importance. The plaintiff relies upon the uncontradicted fact that by successive applications of heat the iron and varnish were oxidized, and if an iron surface oxidized by heat with a coating of varnish oxidized by heat necessarily make Tucker bronze, then the defendant infringes the plaintiff's patents."

In order to determine the question of infringement it is necessary to consider the state of the art at the date of the patent. It appears from the evidence that one F. W. Brocksieper, in the employ of certain firms and companies, the predecessors of the defendant, between 1849 and 1859, as a foreman in the ornamental department of their work, in the year 1857, introduced into the business a mode of treating hat hooks, coat hooks, jamb hooks, sash fasteners, match boxes, looking-glass frames, and cast iron horses for saddlers' windows, in the following way:

[447] "We had the castings cast with a facing, so as to come out of the sand very nearly entirely free of sand, then those castings rolled, drilled and countersunk, the highest parts or the prominent parts of the ornaments brightened with sand paper or emery paper, brushed clean from dust, then sized and baked. In order to handle them easy, those hooks, we had them fastened on a block with a spring and sized them in quantities as they were ordered, let them stand long enough so that the size would not stick to the fingers, then we put them in pans, or on hooks, and put them in the kiln to bake. The size was a mixture of equal parts of turpentine, copal varnish and linseed oil, and was applied in a very thin coat, put on with a stiff, fine brush as lightly as he could. The kiln was heated to 420 degrees Fahrenheit. Several batches of hooks of from twelve dozen to twenty-four dozen each, between one hundred dozen and two hundred dozen sash fasteners, about one hundred looking-glass frames and horses in 'considerable quantities' were made and sold. The match boxes were probably made in larger quantities."

It was contended by the plaintiff that this process was not the same as that covered by his patents, for two reasons: 1, because, as he claimed, the iron was not oxidized by the heat; and 2, because the coating of size was too thick to make genuine Tucker bronze. The circuit court, in its opinion in this case, agreed upon this point with the plaintiff, that the process and article produced were different from those covered by the plaintiff's patents, on the ground that the coating of baked size over the iron was too thick, although it held that Brocksieper's method must have resulted in oxidizing the iron. The inference was that bright cast iron oxidized and covered with a coat of oxidized oil, varnish or size might be, but was not necessarily Tucker bronze. The latter product and process were defined by that court in its opinion as follows:

"Tucker bronze is a new surface of the iron produced by the joint oxidation or by the successive oxidations of the iron and a film of oil or varnish thereon, by means of high heat, and is not a new coating of oxidized oil or varnish upon the iron. The oil must be applied in such a way that after oxidation there is no substantial covering of baked oil upon the surface of the iron. The surface of the iron is a bronzed surface, because the film of the oil is [448] so thin and is so closely united with the pores of the iron as to be almost a part of it, and does not form a substantial covering like a coat of varnish over the surface of the iron.

"In Tucker bronze which has been subjected to one heat, the film of oil can with difficulty be scraped off with a knife. When the iron has had two or three successive applications of oil and has been heated two or three times, the oil comes off by scraping, in the form of little flakes or of powder.

"Tucker's discovery was that bright cast iron covered with a thin film of oil would take on, by the action of high heat, a new surface resembling bronze."

It was found from the evidence that the defendant covered the oxidized surface of iron with an oxidized coat of varnish, doing no more than what Brocksieper did in 1857, except that he did it in two successive stages instead of one, and for that reason there was no infringement. Although there are two patents, one for a process and the other for a product, there is in fact but one invention; and it may be assumed that the new article of manufacture called Tucker bronze is a product which results from the use of the process described in the patent, and not one which may be produced in any other way. So that, whatever likeness may appear between the product of the process described in the patent and the article made by the defendants, their identity is not established unless it is shown that they are made by the same process. The specimens exhibited in the case, as made by Brocksieper, have not the same external appearance as Tucker bronze; they are easily distinguished by inspection, and the process employed by Brocksieper seems to differ from that of the Tucker patents only in respect to the thickness of the sizing of oil or varnish applied upon the surface of the iron, unless the peculiarity of the Tucker bronze can be attributed to the fact that the thin film of oil or varnish was applied upon the surface of the iron before the application of the heat, and not after. For, although the patent contemplates and describes successive applications of heat, yet in each case it is to an oiled surface of iron. On the other hand, the method employed [449] by the defendants consists, first, in subjecting

the cleansed surface of the iron to a heat of 480 degrees Fahrenheit, sufficient to change its color by oxidizing, and then applying a coat of copal varnish and heating again to a point not in excess of 300 degrees Fahrenheit, which, while sufficient to harden and color the varnish by what is called the process of oxidation, yet is not sufficient to oxidize the iron itself. It is difficult, if not impossible, to distinguish by the eye the result of this process from Tucker bronze made according to the patents, but the two processes differ in the particulars pointed out; the effect in Tucker bronze appearing to be produced by the joint oxidation of the iron and the oil, while in the defendant's product the result is attained by successive heatings, first of the iron and then of the iron and oil, the heat, in the second step of the process, not being sufficient to cause a joint oxidation of the iron and the oil.

It seems necessarily to follow from this view either that the Tucker patents are void by reason of the anticipation practiced by Brocksieper, or that the patented process and product must be restricted to exactly what is described, that is, to a simultaneous and joint oxidation of the iron and the oil after the application of the oil to a cleansed surface of cast iron. To that extent the patents may be sustained, but upon that construction they do not include the process and product of the defendants; there is consequently no infringement.

In opposition to this conclusion it is contended on the part of the appellants that the witnesses who testify to the methods employed by Brocksieper in 1857 have confounded in their memory the actual facts in regard to that method as then practiced with processes subsequently employed, and which could have been learned only after the issue of the Tucker patent in 1863; and in corroboration of that criticism upon this evidence it is shown that reproductions of the Brocksieper method, made under the eye of the examiner by a competent expert, during the progress of the taking of the testimony, were not distinguishable in appearance from Tucker bronze made according to the patents. We are not, however, able to adopt that view of the evidence. The fact that [450] by careful workmanship the products are indistinguishable by mere inspection does not establish the identity of the processes; and as the patent for the product must be limited to an article made by the particular process, the inquiry must be determined by a comparison between the methods actually employed. As that used by the defendants differs from that described in the patent, just as that employed by Brocksieper does, the process of the defendants cannot be construed as an infringement without at the same time declaring that used by Brocksieper to be an anticipation.

The decree of the Circuit Court must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ACCIDENT INSURANCE COMPANY OF NORTH AMERICA, *Plff. in Err.*, [527]
v.
LORETTA M. CRANDAL.

(See S. C. Reporter's ed. 527-534.)

Accident insurance—death of assured by hanging himself while insane—company liable—practice—waiver of objection.

1. A policy of insurance against "bodily injuries, effected through external, accidental and violent means," and providing that "This insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self inflicted injuries," covers a death caused by the assured hanging himself while temporarily insane.

2. The refusal by the trial court to instruct the jury, at the close of the plaintiff's evidence, to find for the defendant, cannot be assigned for error where the defendant subsequently introduced evidence in his own behalf.

[No. 1126.]

Submitted Dec. 21, 1886. Decided March 7, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Opinion below, 27 Fed. Rep. 40. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action against an Accident Insurance Company upon a policy beginning thus:

"In consideration of the warranties made in the application for this insurance, and of the sum of fifty dollars, this Company hereby insures Edward M. Crandal, by occupation, profession or employment a president of the Crandal Manufacturing Company," in the sum of ten thousand dollars for twelve months, ending May 28, 1885, payable to his wife, the original plaintiff, "within thirty days after sufficient proof that the insured at any time within the continuance of this policy shall have sustained bodily injuries, effected through external, accidental and violent means within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and [528] prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time caused thereby in the sum of fifty dollars per week for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

Then followed certain conditions, the material part of which was as follows: "Provided, always, That this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign; nor to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment; and no claim shall be made under this policy when the death or injury may have been caused by dueling, fighting, wrestling, unnecessary lifting, or by over exertion, or by

suicide, or by freezing, or sunstroke, or self-inflicted injuries."

The application was signed by the assured, and began as follows:

"The undersigned hereby applies for a policy of insurance against bodily injuries effected through external and accidental violence, said policy to be based upon the following statement of facts, which I hereby warrant to be true."

The rest of the application consisted of fifteen numbered paragraphs, stating the name, age, residence and occupation of the applicant, the amount, term and payee of the policy applied for; affirming that he had never been "subject to fits, disorders of the brain or any bodily or mental infirmity;" that he had not "in contemplation any special journey or any hazardous undertaking," and that "his habits of life are correct and temperate;" and expressing his understanding of the effect of the insurance in several particulars; the last of which was as follows:

"15. I am aware that this insurance will not extend to hernia, nor to any bodily injury of [529] which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or by disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death."

The assured died July 7, 1884; and the plaintiff soon afterwards gave to the defendant written notice and proofs of the death, which stated that the assured, while temporarily insane, hanged himself with a pair of suspenders attached to a doorknob in his bedroom. At the trial, the plaintiff introduced evidence that the death of the assured was caused by strangulation from his so hanging himself; and, against the defendant's objection and exception, was permitted to introduce evidence tending to show that he was insane at the time. At the close of the plaintiff's evidence, the defendant moved the court to instruct the jury that under the law and the evidence in the case the plaintiff was not entitled to recover. The court overruled the motion, and the defendant excepted. The defendant then introduced evidence, and the case was argued to the jury.

The jury, under instructions to which no exception was taken, and in answer to specific questions from the court, returned a special verdict that Edward M. Crandal made the application; that the defendant issued the policy; that the premiums were fully paid, and the policy was in force at the time of his death; that he hanged himself on July 7, 1884, and thereof died on the same day; that he was insane at the time of his act of self-destruction; and that due notice and proof of death were given to the defendant; and, according to what, upon these facts, the opinion of the court in matter of law might be, found for the plaintiff in the full amount of the policy, or for the defendant.

The court overruled a motion for a new trial, and rendered judgment on the verdict for the plaintiff. 27 Fed. Rep. 40.

The defendant sued out this writ of error.

Messrs. **Thomas Bates, Thomas B. Brougham and Emerson B. Tuttle,** for plaintiff in error:

The court erred in its construction of the contract, and in its finding that the policy of accident insurance covered the case shown by this record.

Edward M. Crandal's death was in no manner accidental.

Mallory v. *Travelers Ins. Co.* 47 N.Y. 52; *Harris* v. *Travelers Ins. Co.* 7 Am. L. Rev. 589; *Prov. L. Ins. Co.* v. *Martin*, 32 Md. 310; *Ins. Co.* v. *Burroughs*, 69 Pa. 43; *Pollock* v. *Accident Assn.* 28 Alb. L. J. 518; *Bayless* v. *Travelers Ins Co.* 14 Blatchf. 144.

Insanity is a disease.

Web. Dic.; Ray, Medical Jurisprudence of Insanity, 152.

The court erred in finding that Edward M. Crandal's death was caused by accidental injuries alone, and to the exclusion of every other cause. Disease in a case like that at bar is the direct and proximate cause of death.

Life Ins. Co. v. *Terry*, 82 U. S. 15 Wall. 580 (21:236); *Fowler* v. *Germania Life Ins. Co.* Bliss, Life Ins. 2d ed. 415; *Gay* v. *Union Mut. Life Ins. Co.* 9 Blatchf. 146; *Breasted* v. *Farmers Loan & T. Co.* 8 N. Y. 299; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 97; *Nimick* v. *Mut. Ben. L. Ins. Co.* 1 Bigelow, 692.

"When death is the result of insanity it is equally the result of disease, for which the insane is in no respect responsible. It is a well settled, philosophical fact that disturbed intelligence has the same relation to the brain that distorted respiration has to the lungs and pleura. Death then by an insane suicide is as much death by disease as if it were death by fever or consumption."

Eastabrook v. *Union Mut. L. Ins. Co.* 54 Me. 224. See also *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268.

The court erred in finding that the death of Edward M. Crandal resulted from bodily injuries effected through external, accidental and violent means within the true intent and meaning of the policy in suit, and was not caused wholly or in part, either directly or indirectly, by bodily infirmities or disease.

The disease of insanity was the actual and proximate cause of Crandal's death.

North American L. & A. Ins. Co. v. *Burroughs*, 69 Pa. 43; *Peters* v. *Ins. Co.* 39 U. S. 14 Pet 99 (10:371); *Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 351 (14:452); *St. John* v. *Ins. Co.* 11 N.Y. 516; *Strong* v. *Ins. Co.* 31 N.Y. 103; *Lewis* v. *Ins. Co.* 10 Gray, 159; *McCarthy* v. *Travelers Ins. Co.* 8 Biss. 362; *Brady* v. *Ins. Co.* 11 Mich. 425; *Montoya* v. *Lond. Assur. Co.* 4 Eng. Law & Eq. Rep. 500; *Montoya* v. *Lond. Assur. Co.* 6 Exch. Rep. 450.

The court erred in finding that Edward M. Crandal was, at the time of his death, insane to such degree that he was unable to distinguish either the moral or the physical effect of his act.

Messrs. **George S. House, Geo. C. Fry** and **Thomas E. Babb,** for defendant in error:

The insured came to his death by external, accidental and violent means. This question

arises upon the facts found in the special verdict, which, so far as material, are that the insured hanged himself and died from the effects thereof; that at the time of such act of self destruction he was insane.

The question presented is whether self destruction by an involuntary, irrational act is a death effected by external, accidental and violent means. "Human acts or actions are internal or external. In other words, they are not perceptible by sense, or they are perceptible by sense. Internal acts are demonstrations of the will. External acts are such motions of the body as are consequent upon determinations of the will."

1 Austin, Jur. 376.

"That which is purely accidental or fortuitous, can no more be charged to the account of the person whose act happens to be the occasion of the accident, than to that of anyone else."

Lawrence v. *Mut. L. Ins. Co.* 5 Ill. App. 280; *Breasted* v. *Farmers L. & T. Co.* 4 Hill, 73, 75.

"Self destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose."

Manhattan L. Ins. Co. v. *Broughton*, 109 U. S. 131 (27: 882); *Karow* v. *Continental Ins. Co.* 57 Wis. 56.

The case does not come within the condition against death caused by suicide or self-inflicted injuries.

Life Ins. Co. v. *Terry*, 82 U. S. 15 Wall. 580 (21:236); *Life Ins. Co.* v. *Rodel*, 95 U. S. 232 (24: 433); *Manhattan L. Ins. Co.* v. *Broughton*, *supra*

The policy referring only to the warranties in the application, and containing no words to make the application or any part thereof, other than the warranties, a part of the policy, does not incorporate within itself the fifteenth clause of the application. which is not a warranty.

May, Ins. 2d ed. p. 183, 184, § 160; Bliss, Ins. 2d ed. p. 85; *Trench* v. *Chenango Co. Mut. Ins. Co.** 7 Hill, 122.

When a policy is issued with terms more favorable to the insured than his application, its language, wherein it differs from the application, controls, on its acceptance by the insured. This case shows an acceptance.

Myers v. *Keystone Mut. L Ins. Co.* 27 Pa. 268; Lawson, Presumptive Ev. rule 70, p. 303.

Granting that the fifteenth clause of the application is part of the contract, or, if not, that the condition against death caused by bodily disease extends to a death caused by mental disease, yet in the case at bar the proximate cause of death was not the disease but the immediate act of self destruction.

Scheffer v. *R. R. Co.* 105 U. S. 249 (26:1070); *Reynolds* v. *Accidental Ins. Co.* 22 L. T. (N. S.) 820; *Lawrence* v. *Accidental Ins. Co.* 7 L. R. Q. B. Div. 216; *Miller* v. *Mut. B. F. Ins. Co.* 31 Iowa, 236; *Carter* v. *Towne*, 103 Mass. 507; *State* v. *Jones*, 50 N. H. 398.

If there be a doubt whether the case is within the conditions of the policy, that doubt is to be resolved in favor of the defendant in error.

May, Ins. 2d ed. § 175; *Eastabrook* v. *Union Mut. F. Ins. Co.* 54 Me. 227.

[530] *Mr. Justice* **Gray**, after stating the case as above reported, delivered the opinion of the court:

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that she was not entitled to recover, cannot be assigned for error, because the defendant at the time of requesting such an instruction had not rested its case, but afterwards went on and introduced evidence in its own behalf. *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 [27: 266]; *Bradley* v. *Poole*, 98 Mass. 169. The subsequent instructions to the jury were not excepted to. No error is assigned in the previous rulings upon evidence, except in the admission, against the defendant's objection and exception, of evidence tending to prove the insanity of the assured. The only other matter open upon this record is whether the judgment for the plaintiff is supported by the special verdict, which finds that, while the policy was in force, the assured died by hanging himself, being at the time insane, and that due notice and proof of death were afterwards given. [531]

The single question to be decided therefore is whether a policy of insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business, and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries," covers a death by hanging oneself while insane.

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured "shall die by suicide," or "shall die by his own hand," go far towards determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect. *Life Ins. Co.* v. *Terry*, 82 U. S. 15 Wall. 580 [21: 236]; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284 [23:918]; *Insurance Co.* v. *Rodel*, 95 U. S. 232 [24:433]; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121 [27: 878]. In the last case, which was one in which the assured hanged himself while insane, the court, repeating the words used by *Mr. Justice* Nelson, when Chief Justice of New York, said that "Self destruction by a fellow being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force." 109 U. S. 132 [27: 882]; *Breasted* v. *Farmers Loan & T. Co.* 4 Hill, 73. In a like case, *Vice-Chancellor* Wood (since *Lord Chancellor* Hatherley) observed that the deceased was "subject to that which is really just as much an accident as if he had fallen from the top of a house." *Horn* v. *Anglo-Australian Ins. Co.* 30 L. J. (N. S.) Ch. 511; *S. C.* 7 Jur. [532]

*See note to this case, Lawyers' edition. [Ed.]

(N. S.) 673. And in another case, *Chief Justice* Appleton said that "The insane suicide no more dies by his own hand than the suicide by mistake or accident," and that, under such a policy, "death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule." *Eastabrook* v. *Union Ins. Co.* 54 Me. 224, 227, 229.

Many of the cases cited for the plaintiff in error are inconsistent with the settled law of this court as shown by the decisions above mentioned.

In this state of the law, there can be no doubt that the assured did not die "by suicide," within the meaning of this policy; and the same reasons are conclusive against holding that he died by "self-inflicted injuries." If "self-killing," "suicide," "dying by his own hand," cannot be predicated of an insane person, no more can "self-inflicted injuries;" for in either case it is not his act.

Nor does the case come within the clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease."

If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself could be held to be the cause of his death. *Scheffer* v. *R. R. Co.* 105 U. S. 249, 252 [26: 1070, 1071]; *Trew* v. *Railway Passengers Assur. Co.* 5 H. & N. 211, and 6 H. & N. 839, 845; *Reynolds* v. *Accidental Ins. Co.* 22 Law Times (N. S.) 820; *Winspear* v. *Accident Ins. Co.* 42 Law Times (N. S.) 900; affirmed, 6 Q. B. D. 42; *Lawrence* v. *Accidental Ins. Co.* 7 Q. B. D. 216, 221; *Scheiderer* v. *Travellers' Ins. Co.* 58 Wis. 13.

But the words "bodily infirmities or disease" do not include insanity. Although, as suggested by *Mr. Justice* Hunt, in *Life Ins. Co.* v. *Terry*, 82 U. S. 15 Wall. 589 [21: 241], insanity [533] or unsoundness of mind often, if not always, is accompanied by or results from disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase "bodily infirmities or disease," the word "bodily" grammatically applies to "disease," as well as to "infirmities;" and it cannot but be so applied, without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers who frame them. The prefix of "bodily" hardly affects the meaning of "infirmities," and it is difficult to conjecture any purpose in inserting it in this proviso, other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend.

In the argument for the plaintiff in error, some stress was laid on the fact that the concluding paragraph of the application differs in form of expression, so as to include mental as well as bodily diseases. It is by no means clear that this is so; but if it were, it would not affect the case. The whole application is not made part of the contract, and the only mention of it in the policy is in the opening words: "In consideration of the warranties made in the application for this insurance." This does not include all the statements in the application, but only those which are warranties. Some of them may be; others clearly are not. The statements as to the age, occupation, previous state of health and present habits of the assured, and as to his other insurance, may be warranties on his part. Those as to the amount, terms and payee of the policy applied for certainly are not. The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterwards issued and accepted.

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy, by which he is declared to be insured "against bodily injuries effected through external, accidental and violent means." This sentence does not, like the proviso, speak of what the injury is "caused [534] by;" but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning was held to be, in the cases of *Trew*, *Reynolds* and *Winspear*, above cited. And, according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.

The result is that the judgment of the Circuit Court in favor of the plaintiff was correct, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALBERT S. ROSENBAUM, *Plff. in Err.*, [450
v.
JOHN A. BAUER, Treasurer of the CITY AND COUNTY OF SAN FRANCISCO.

ALBERT S. ROSENBAUM, *Plff. in Err.*,
v.
BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

(See S. C. Reporter's ed. 450-464.)

Jurisdiction—original proceeding for mandamus, *not within jurisdiction of circuit courts—such a proceeding, not removable—Act of March 3, 1875—section 716, R. S.*

1. The circuit courts have no jurisdiction to award a *mandamus*, except as ancillary to some other proceeding establishing a demand, and reducing it to judgment, the *mandamus* being in the nature of process for executing the judgment.

2. An original proceeding for a *mandamus* is not a suit of a civil nature within the meaning of the Removal Act of March 3, 1875, and is not removable.

[Nos. 1200, 1199.]

Submitted Jan. 17, 1887. Decided Mar. 7. 1887.

IN ERROR to the Circuit Court of the United States for the District of California. Opinion below, 28 Fed. Rep. 223. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. L. Rhodes** and **A. H. Garland,** for plaintiff in error:

The action in each of these causes comes within the meaning of section 2 of the Act of 1875, and is a suit.

Weston v. *Charleston*, 27 U. S. 2 Pet. 464 (7: 486).

Mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ.

Commonwealth of Ky. v. *Dennison*, 65 U. S. 24 How. 97 (16: 725); *Kendall* v. *U. S.* 37 U. S. 12 Pet. 615 (9: 1217); *U. S.* v. *Schurz*, 102 U. S. 392 (26: 170); *Louis* v. *Brown Township*, 109 U. S. 166 (27: 893); *Kendall* v. *Stokes*, 44 U. S. 3 How. 100 (11: 512).

The jurisdiction of the circuit court, on the removal of a cause, is not dependent upon the original jurisdiction of the circuit court.

Lexington v. *Butler*, 81 U. S. 14 Wall. 292 (20: 811); *Gaines* v. *Fuentes*, 92 U. S. 17 (23: 527); *Boom Co.* v. *Patterson*, 98 U. S. 404 (25: 207); *Hess* v. *Reynolds*, 113 U. S. 73 (28: 927); *Claflin* v. *Commonwealth Ins. Co.* 110 U. S. 81 (28: 76); *Davies* v. *Corbin*, 112 U. S. 39 (28: 629).

The United States Courts afford to nonresidents remedies commensurate with the remedies given in and by the State where these courts are held.

Payne v. *Hook*, 74 U. S. 7 Wall. 425 (19: 260); *Whitton's Case*, 80 U. S. 13 Wall. 270 (20: 571); Thacher, Pr. 27-33.

Suits of a civil nature at common law are not restricted to the old settled forms of the common law, but include all remedies that are to be administered, not equitable, criminal, or of admiralty cognizance.

Thacher, Pr. 27.

Messrs. **Philip G. Galpin** and **Geo. Flournoy, Jr.,** for defendants in error.

[451] *Mr. Justice* **Blatchford** delivered the opinion of the court:

On the 13th of October, 1885, Albert S. Rosenbaum brought an action in the Superior Court of the City and County of San Francisco, in the State of California, against John A. Bauer, Treasurer of the City and County of San Francisco. The complaint set forth the issuing of certain bonds, called Montgomery Avenue bonds, by the board of public works of the City and County of San Francisco, under an Act of the Legislature of California, approved April 1, 1872 (Stat. 1871-2, chap. 626), entitled "An Act to Open and Establish a Public Street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to Take Private Lands Therefor." The Act provided for the creation by taxation of a fund for the payment of interest on the bonds, and of a sinking fund for their redemption; and enacted that whenever such Treasurer should have in his custody $10,000 or more belonging to the sinking fund, he should advertise for proposals for the surrender and redemption of the bonds. The complaint alleged that the plaintiff owned twenty-one of the bonds of $1,000 each; that the Treasurer had in his hands over $12,000 belonging to the sinking fund; that the plaintiff had exhibited his bonds to the Treasurer and demanded that he advertise for proposals for the surrender of bonds issued under the Act; that he refused so to do; and that no part of such bonds had been paid. The complaint prayed for a judgment that the defendant, "as Treasurer of the City and County of San Francisco, be commanded to advertise for the redemption of Montgomery Avenue bonds, as in section eleven of the Act hereinabove referred [452] to provided."

Three days afterwards the plaintiff filed a petition for the removal of the suit into the Circuit Court of the United States for the District of California on the ground that the plaintiff was a citizen of New York and the defendant a citizen of California. The state court made an order of removal. The record being filed in the federal court, the defendant demurred to the complaint, specifying as a ground of demurrer that the federal court had no jurisdiction of the subject of the action. The case being heard on the demurrer, the court made an order, on the 18th of January, 1886, that the cause be remanded to the state court, "this court having no jurisdiction of this cause in this form." The plaintiff has brought a writ of error to review that order.

The same Act provided that an annual tax should be levied on the property therein mentioned to raise money to pay the coupons annexed to the bonds, and another annual tax to create a sinking fund for the redemption of the bonds, the taxes to be levied in the manner in which other taxes are levied, that is by the Board of Supervisors. The same Rosenbaum, being the owner of twenty-one of the bonds, and of eight matured coupons, of $30 each, attached to each bond, each coupon being for six months interest, the first of them having matured January 1, 1882, brought an action on the 12th of December, 1885, in the said Superior Court of the City and County of San Francisco, against the Board of Supervisors of the City and County of San Francisco. The complaint set forth that there were no funds in the hands of the Treasurer applicable to the payment of any of the coupons; and that the plaintiff had demanded of the Board that it levy a tax sufficient to pay the coupons, but it had refused so to do. The complaint prayed for a judgment "against said Board of Supervisors, commanding them to levy the tax hereinabove mentioned, and to continue to levy said tax from year to year until all the interest upon said bonds, and said bonds themselves, are fully paid."

On the 21st of December, 1885, the plaintiff [453] filed a petition for the removal of this latter suit into the Circuit Court of the United States for the District of California, on the ground of diversity of citizenship in the parties. The state court made an order of removal. The defendant made a motion in the federal court to remand the case to the state court on the ground of want of jurisdiction by the federal court "of the subject matter contained in the complaint." On the 24th of May, 1886, the court made an order granting the motion, and the plaintiff has brought a writ of error to review that order.

The circuit court, in remanding the causes (28 Fed. Rep. 223), proceeded on these grounds: (1) That it had always been held by this court that the circuit courts had no jurisdiction to award a *mandamus* except as ancillary to some other proceeding establishing a demand, and

reducing it to judgment, the *mandamus* being in the nature of process for executing the judgment. (2) That a proceeding for a *mandamus* was not a suit of a civil nature, within the meaning of any provision of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, and was not removable under it.

Prior to the Act of 1875 it was well settled that the circuit courts had no jurisdiction to issue a writ of *mandamus* in a case like the present.

In *McIntire* v. *Wood*, in 1813, 11 U. S. 7 Cranch, 504 [3: 420], it was held that a circuit court had no power to issue a *mandamus* to the register of a land-office of the United States, commanding him to grant a final certificate of purchase to the plaintiff for lands to which he supposed himself entitled under the laws of the United States. In that case the plaintiff's alleged right to a certificate of purchase was claimed under the laws of the United States, but this court, speaking by *Mr. Justice* Johnson, said that the power of the circuit courts to issue the writ was confined by section 14 of the Judiciary Act of 1789, 1 Stat. at L. 81, to those cases in which it might be necessary to the exercise of their jurisdiction. This provision of section 14 appears now in section 716 of the Revised Statutes in these words: "Sec. 716. The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which [454] may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In *McClung* v. *Silliman*, in 1821, 19 U. S. 6 Wheat. 598 [5: 340], a *mandamus* was applied for in a Circuit Court of the United States to compel the register of a land-office of the United States to issue papers to show the preemptive interest of the plaintiff in certain land. The writ was refused. In this court, the case was sought to be distinguished from *McIntire* v. *Wood*, on the ground that the parties were citizens of different States. But the court, speaking again by *Mr. Justice* Johnson, said that no just inference was to be drawn from the decision in *McIntire* v. *Wood*, in favor of a case in which the circuit court was vested with jurisdiction by citizenship under section 11 of the Act of 1789. And then, in answer to the argument that, as the parties were citizens of different States, and competent to sue under section 11, the circuit court was, by section 14, vested with power to issue the writ as one "necessary for the exercise of its jurisdiction," the court said: "It cannot be denied that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue. The 14th section of the Act under consideration could only have been intended to vest the power now contended for in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out."

Consistently with the views in those cases, this court, in *Riggs* v. *Johnson County*, in 1867, 73 U. S. 6 Wall. 166 [18: 768], held that a circuit court had power to issue a *mandamus* to officers of a county, commanding them to levy a tax to pay a judgment rendered in that court against the county for interest on bonds issued by the county, where a statute of the State under which the bonds were issued had made such levy obligatory on the county. This ruling has been repeatedly followed since, and rests on the view that the issue of the *mandamus* is an award of execution on the judgment, and is a proceeding necessary to complete the jurisdiction exercised by rendering the judgment. [455]

In many cases adjudged in this court since *McIntire* v. *Wood*, that case has been referred to as settling the law on the point to which it relates; as in *The Secretary* v. *McGarrahan*, 76 U. S. 9 Wall. 298, 311 [19: 579, 583]; *Bath Co.* v. *Amy*, 80 U. S. 13 Wall. 244 [20: 539], and *Heine* v. *Levee Comrs.* 86 U. S. 19 Wall. 655 [22: 228].

In *Bath County* v. *Amy*, in 1871, *ubi supra*, the holder of bonds issued by a county in Kentucky applied to the Circuit Court of the United States for a *mandamus* to compel the county court to levy a tax to pay the interest on the bonds, on the ground that a statute of the State required the county court to do so. No judgment had been obtained for the interest. In Kentucky such a proceeding could have been maintained in a court of the State, without a prior judgment, and would have been there treated as a suit of a civil nature at common law, and not a mere incident to another suit. The circuit court awarded the *mandamus*, but this court reversed the judgment, holding that it was doubtful whether the writ of *mandamus* was intended to be embraced in the grant of power in the 11th section of the Judiciary Act of 1789 to the circuit courts, to take cognizance of suits of a civil nature, at common law, where the diversity of citizenship there specified existed; but that the special provision of the 14th section of the Act, while, no doubt, including *mandamus* under the term "other writs," indicated that the power to grant that writ generally was not understood to be covered by the 11th section. Citing the prior cases, the court said: "The writ cannot be used to confer a jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

The same doctrine was applied in *Graham* v. *Norton*, in 1872, 82 U. S. 15 Wall. 427 [21: 177], where a Circuit Court of the United States had affirmed the action of a district court in granting a *mandamus* to compel a state auditor to issue certificates as to the amount of illegal taxes paid by the applicant, the issuing of such certificates being provided for by a statute of the State. This court held that neither the circuit court nor the district court had jurisdiction to issue the writ.

The same principles have been asserted by this court in cases arising since the Act of March 3, [456] 1875; as in *County of Green* v. *Daniel*, 102 U. S. 187, 195 [26: 99, 101]; in *U. S.* v. *Schurz*, 102 U. S. 378, 393 [26: 167, 170]; in *Davenport* v. *County of Dodge*, 105 U. S. 237, 242, 243 [26: 1018, 1021]; and in *Louisana* v. *Jumel*, 107 U. S. 711, 727 [27: 448, 453].

But now it is contended for the plaintiff in

error that the circuit court can obtain jurisdiction of these cases by their removal under section 2 of the Act of 1875. It was evidently thought that the circuit court would have no original cognizance of them, if commenced in that court, for they were not brought in that court, although in the petition for removal in each proceeding the plaintiff states that he was a citizen of New York when it was commenced, and in the petition for removal in the first proceeding he states that Bauer was at its commencement a citizen of California, the defendant in the second proceeding being, when it was brought, a municipal corporation of California. The proceedings were evidently instituted with the purpose of removing them, for the petitions for removal were severally filed by the plaintiff three days and ten days after process was served on the defendant, and nothing was done in the state court but to file a complaint, and to serve a summons, and to take proceedings for a removal.

To maintain the jurisdiction by removal it is contended that that jurisdiction does not depend on the original jurisdiction of the circuit court; that the former may exist without the latter; and that in the present case it does exist.

The only possible ground of jurisdiction in the present cases is diversity of citzenship; for the right of action claimed does not arise under the Constitution, or a law or treaty of the United States. It exists, if at all, under a statute of the State. The State is not alleged to have passed any law impairing the obligation of any contract of which the plaintiff claims the benefit, or to have deprived him of any right secured to him by the Constitution of the United States. In respect to jurisdiction by citizenship, as applicable to this case, section 1 of the Act of 1875, in regard to original jurisdiction, and section 2, in regard to jurisdiction by removal, describe the subject matter of the suit in terms which are the same legally. In [457] section 1, the suit of which "original cognizance" is given is a suit "of a civil nature, *at common law* or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "in which there shall be a controversy between citizens of different States." In section 2 the language is identical except that the suit is to be a suit "of a civil nature, *at law* or in equity." In section 11 of the Act of 1879, the original cognizance given to the circuit courts was of "all suits of a civil nature, at common law or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "the suit is between a citizen of the State where the suit is brought and a citizen of another State." In section 12 of that Act, jurisdiction by removal was given to the circuit courts of a like suit. Now, if, as has always been held, "original cognizance," under section 11 of the Act of 1789, did not exist, of proceedings like those before us, founded on citizenship, it must necessarily follow that original cognizance cannot exist, under section 1 of the Act of 1875, of such a proceeding, founded on citizenship. If so, it is impossible to see how, with legally identical language in section 2 with that in section 1, jurisdiction by removal can exist, under section 2 of the Act of 1875, of proceedings like those before us, founded on citizenship. This view is entirely aside from the principle which has controlled in some cases, where a restriction as to original jurisdiction, contained in other provisions of section 11 of the Act of 1789, did not exist in section 12 of that Act, in regard to jurisdiction by removal, or in other removal statutes. Of that character was the restriction in section 11 on the right of an assignee of a chose in action to sue if the suit could not have been prosecuted in the court had the assignment not been made; as illustrated by the cases cited by the plaintiff in error, of *City of Lexington* v. *Butler*, 81 U. S. 14 Wall. 282 [20: 809]; and *Claflin* v. *Commonwealth Ins. Co.* 110 U. S. 81 [28: 76].

In *Gaines* v. *Fuentes*, 92 U. S. 10 [23: 524], an application for removal was sustained under the Local Prejudice Act of March 2, 1867, 14 Stat. at L. 558, of a suit to annul a will, on the ground that the Act, in authorizing the removal, invested the federal court by that fact with all needed jurisdiction to adjudicate the case. But that case was not one of a *mandamus*, to which the implied restriction of the [458] statute in respect to that writ was applicable. The same remark may be made as to *Boom Company* v. *Patterson*, 98 U. S. 403 [25: 206], where the removed proceeding was one to condemn lands for the use of a boom company; and as to *Hess* v. *Reynolds*, 113 U. S. 73 [28: 927], where the removal was of a proceeding in a probate court to obtain payment of a claim against the estate of a deceased person; and as to *Bliven* v. *New England Screw Co.* 3 Blatchf. 111, and *Barney* v. *Globe Bank*, 5 Blatchf. 107, where foreign corporations successfully maintained jurisdiction by removal, in ordinary suits, although they could not have been compulsorily brought into the circuit court by original process.

As this court, while sections 11 and 12 of the Act of 1789 were in force, and section 14 of that Act was also in force, always held, even where the requisite diversity of citizenship existed, that the restriction of section 14 operated to prevent original cognizance by a circuit court, under section 11, of a proceeding by *mandamus* not necessary for the exercise of a jurisdiction which had previously otherwise attached, so, with sections 1 and 2 of the Act of 1875 in force at the same time with section 716 of the Revised Statutes, the restriction of section 716 must operate to prevent cognizance by removal, by a circuit court, under section 2 of the Act of 1875, even where the requisite diversity of citizenship exists, of a like proceeding by *mandamus*. As was said by this court, speaking by *Mr. Justice* Miller, in *Hess* v. *Reynolds*, 113 U. S. 78, 79, 80 [28: 927, 929] the language of the repealing clause of the Act of 1875, is "that all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed," and the statute to be repealed must be in conflict with the Act of 1875, or that effect does not follow. There is nothing in section 2, or any other part of the Act of 1875, which is in conflict with, or has the effect to abolish, the restriction of section 716, just as there was nothing in section 11 or section 12, or any other part, of the Act of 1789, which was in conflict with, or had the effect to abolish, the restriction of section 14 of that Act.

These cases fall directly within the provision

[459] of section 5 of the Act of 1875, that if, in any suit removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly "within the jurisdiction" of said circuit court, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require. What is meant by the expression "within the jurisdiction?" It means within the judicial cognizance—within the capacity to determine the merits of the dispute or controversy, and to grant the relief asked for. The provision does not give countenance to the idea that the suit or proceeding is to be retained in the circuit court till brought to a formal adjudication on the merits, when, at that ultimate stage, the court must say that the case is not within its jurisdiction, after the party successfully challenging the jurisdiction has been harassed by expense and injured by delay. But it means what it says, that the dismissal or remanding "shall" be made whenever, "at any time" after the suit is brought or removed to the circuit court, it shall appear to the satisfaction of that court that there is, really and substantially, no dispute or controversy of which it has jurisdiction, in the sense above pointed out; the right to have a review by this court of the order dismissing or remanding the suit being given to the aggrieved party at once, instead of his being compelled to await the making of such an order at the end of a full and formal hearing or trial, on issues and proofs, on the merits alleged on either side.

Orders affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley**, dissenting:

Mr. Justice **Harlan** and *Mr. Justice* **Matthews** agree with me in dissenting from the judgment of the court in this case.

It is a constitutional right of the citizens of the several States having controversies with the citizens of other States, to have a national forum in which such controversies may be litigated. [460] It was one of the declared purposes of the Constitution, that the judicial power of the United States should extend to certain cases enumerated, one of which was, "to controversies between citizens of different States;" and it was declared that this power should be vested in one supreme court, and in such inferior courts as the Congress might from time to time ordain and establish; thus making it the duty of Congress to establish such tribunals. If Congress fails in this constitutional duty, the citizens have no redress but the ballot-box. But Congress has not failed. It has established the requisite tribunals, and has invested them with the powers necessary to give the citizens their constitutional rights. Or, if it has failed in any respect, either with regard to persons or causes, we think it has not failed in respect to the class of cases to which the present belong.

Congress, by the Act of March 3, 1875, passed to determine the jurisdiction of the circuit courts, has declared that they shall have original cognizance, concurrent with the courts of the several States, amongst other things, of all suits of a civil nature at common law or in equity, involving over five hundred dollars, in which there shall be a controversy between citizens of different States; and that any such suit brought in any state court may be removed by either party into the circuit court for the proper district. This jurisdiction should be liberally construed so as to give full effect, as far as may be, to the constitutional right, as presumably within the intent of Congress. The terms "suits at common law and in equity," or "suits at law and in equity," which is the same thing, are in themselves of the most general character and of the broadest signification; and this court ought not, by its decisions, to restrict their application. It is not meant by the expression "suits at common law" to confine the jurisdiction of the circuit courts to the old technical actions of trespass, trover, trespass on the case, debt, detinue, assumpsit, etc., but it extends to and includes any form of proceeding of a civil nature in which a legal right cognizable by the courts of common law is sought to be judicially enforced by whatever name, under the new-fangled nomenclature adopted by the different States, the proceeding may be called. [461] Suits at law and equity include every form of proceeding except those peculiar to admiralty, ecclesiastical or probate and military jurisdictions. And even in matters savoring of ecclesiastical process, after an issue has been formed between definite parties, we have held that the controversy came under the head of a suit at at law. *Gaines* v. *Fuentes*, 92 U. S. 17 [23:527]; *Hess* v. *Reynolds*, 113 U. S. 73 [28:927]. The broad terms used in the law were purposely employed, as it seems to us, to make the jurisdiction complete, to the full extent which the Constitution intended it should have. It is true that in one or two cases we have intimated a distinction between the extent of jurisdiction given in the first and that given in the second sections of the Act of 1875; but that distinction, if well founded, does not affect the present cases, since they arise under the second section, which has been supposed to be the broader of the two, and, in any event, the ground of distinction is not here involved.

Now, a *mandamus*, which was originally a prerogative writ only, has come to be in many cases, and in most States, a private suit, brought for the purpose of enforcing a private right. This is true in the two cases now before us. The appellant has a money demand against the City and County of San Francisco, and is seeking to collect it in the usual way in which such demands are collectible by the law of procedure of California. The *mandamus* which he seeks is the mere process for commencing his action, and is a proper process suited to his case. The City and County of San Francisco can set up any defenses to the action in this form which it could do in the ordinary action of debt or upon contract. It is essentially a civil suit at law, no matter by what name it is called,—certainly as much so as were the proceedings in *Gaines* v. *Fuentes*, *Hess* v. *Reynolds*, already cited, and in *Boom Co.* v. *Patterson*, 98 U. S. 404 [25:207], where there was an issue to ascertain the value of property taken by virtue of eminent domain. In *Davies* v. *Corbin*, 112 U. S. 36 [28:627], we sustained a writ of error

from this court to the circuit court on a judgment in a proceeding for *mandamus* to carry into effect a judgment for a debt. The Chief Justice there said: "While the writ of *mandamus*, in cases like this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be: first, a showing by the relator in support of his right to the writ; and second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defense, the showings of the parties make up the pleadings in the cause; and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce a judgment. Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court."

[462]

In the jurisprudence of California, it has frequently been held that a *mandamus* is a civil action. It is only necessary to refer to the cases to show that this is a point beyond all dispute. *Perry* v. *Ames*, 26 Cal. 372; *Cariaga* v. *Dryden*, 30 Cal. 246; *Courtwright* v. *Bear River Mining Co.* 30 Cal. 583; *Knowles* v. *Yeates*, 31 Cal. 90; *People* v. *Kern County*, 45 Cal. 679; *People* v. *Thompson*, 66 Cal. 398.

But it is urged that the power given to the Circuit Courts of the United States to issue writs of *mandamus* is limited by Act of Congress to certain special cases; namely, only where they may be necessary for the exercise of their ordinary jurisdiction (R. S. § 716), and that, according to the decisions of this court, in suits for the collection of money, the writ can only be used as ancillary to an execution after a judgment has been obtained in an ordinary suit. It is sufficient to say that all of these decisions, except two, relate to the law as it was before the passage of the Act of 1875. That Act, as we have seen, is expressed in general terms, without any qualification as to the writs or process which shall be employed, and repeals any restraining effect of section 716 of the Revised Statutes if in conflict with it. The two cases to which we have referred as decided since the Act are *County of Green* v. *Daniel*, 102 U. S. 187 [26: 99], and *Davenport* v. *County of Dodge*, 105 U. S. 237 [26: 1018]. But the point decided in these cases was that, although the state law gave the remedy of *mandamus* to compel the levy of taxes for the payment of bonds, an ordinary action might nevertheless be brought on the bonds for the purpose of obtaing a judgment. They do not decide, whatever *dicta* may appear to have been made, that *mandamus* might not have been brought originally.

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The inference drawn from section 716, R. S., is, that as it grants power to this court and the circuit courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," (which is rightly supposed to include the writ of *mandamus*) it must be construed as denying the power to issue that writ in any other case. This conclusion might be admissible if it is restrained to the instance of the particular writ of *mandamus* which alone was in contemplation; that is, the prerogative writ of *mandamus* as known to the practice of the King's Bench in England. The object of this section of the statute was to give the courts of the United States the power to issue such a writ when necessary in the exercise of a jurisdiction in which the use of such a writ was conformable to law. But the section had no reference to *mandamus* as a form of civil action, as it has become in modern times, having a definite purpose and scope, and as distinct in its use, for the purpose of enforcing private rights of a particular description, as are the forms of actions known to the common law, such as assumpsit, debt or trespass. Viewed as a civil action, authorized by the laws of the State in which the suit is brought, the jurisdiction of the circuit courts is established by section 1 of the Act of 1875, which embraces "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different States." If there be such a suit, in which, by the law of the State, the form of proceeding is required to be in *mandamus*, section 914, R. S applies, which requires that "The practice, pleadings and forms and modes of proceeding in civil cases, other than equity and admiralty cases, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." Effect may be given in the present case to this provision of the statute, without running counter to section 716. The fallacy of the argument against the jurisdiction of the circuit court, in such cases, is in construing section 716 as an exception out of the general grant of jurisdiction to that court over all suits in which the controversy is between citizens of different States; whereas, it is a general grant of power to issue all writs necessary to the exercise of their jurisdiction—a power which would probably have been implied without an express grant.

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In our judgment, the cases ought not to have been remanded, and the judgments of the circuit court remanding the same should be reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JANE HERRON ET AL., *Plffs. in Err.*, [464]
v.
PHILIP DATER ET AL.

(See S. C. Reporter's ed. 464–479.)

Ejectment—Pennsylvania titles by warrant and survey, valid—date of warrant—"John Keble's Purchase Blotter" as evidence—rejection of evidence.

1. In Pennsylvania an estate held by a warrant and survey attended with payment of the purchase money is considered in most respects the same in effect as the legal estate; and the State cannot

affect such title by a subsequent patent to a stranger.

2. Ejectment may be maintained upon a warrant and survey by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued.

3. Under a Pennsylvania Statute copies of entries from the old purchase blotter in the land-office of the State are *prima facie* evidence of the facts therein stated.

4. The orders, judgments and decrees of the Orphans' Court of Philadelphia County, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally.

5. A recital in a patent of a prior conveyance to the patentee is not evidence against third parties to affect rights previously vested in them.

6. In an action of ejectment evidence tending to show that certain payments of taxes might have been on other tracts is held to have been properly rejected.

[No. 142.]

Argued Jan. 19, 20, 1887. Decided March 7, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **R. P. Allen,** *A. H. Dill* and *John G. Reading, Jr.*, for plaintiffs in error:

"In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which show the right to be in another, these can only be considered on the equity side of the federal courts."

Foster v. *Mora*, 98 U. S. 425 (25: 191). See also *Gilmer* v. *Poindexter*, 51 U. S. 10 How. 257 (13: 411); *Sheirburn* v. *Cordova*, 65 U. S. 24 How 423 (16: 741); *Singleton* v. *Touchard*, 66 U. S. 1 Black, 342 (17: 50); *Hickey* (*Steel*) v. *Stewart*, 44 U. S. 3 How. 751 (11: 814).

A patent is a complete appropriation of the land it describes; and at law no defects in the preliminary steps can be tried.

Boardman v. *Lessors of Reed*, 31 U. S. 6 Pet. 328 (8. 415).

The orphans' court never confirmed the sale to Brobst. The petition of LeFavre's administrator to the orphans' court, upon which the order to sell was granted, upon its face showing that the debts of the decedent were all barred by the statute, such order was void for want of jurisdiction in the court to grant it, and the sale to Brobst was in like manner void. The validity of such sale may be contested in any case involving title to the land sold.

Stoolfos v. *Jenkins*, 8 Serg. & R. 173; *Dresher* v. *Allentown Water Co.* 52 Pa. 229; *Torrence* v. *Torrence*, 53 Pa. 510; *Thompson* v. *Stitt*, 56 Pa. 160; *Yorks' App.** 1 Cent. Rep. 354; *Shorman* v. *Farmers Bank*, 5 Watts & S. 373.

Messrs. **James Ryon, John W. Ryon** and *Samuel Linn*, for defendants in error:

The trust was a dry one; there was no control and no duty to perform by trustee, and under the Statute of 27 Henry VIII., commonly called the Statute of Uses, which is in force in Pennsylvania (see Robert's Digest of British Statutes, 412), the trust was immediately stricken down and the use executed, thereby making Dr. Ruston the complete owner of the lands as well at law as in equity.

2 Bl. Com. 333; *Sprague* v. *Woods*, 4 Watts & S. 192; *Kay* v. *Scates*, 1 Wright, 31; *Barnett's App.* 10 Wright, 393; *Moore* v. *Shultz*, 1 Harris, 101; Perry, Trusts, 521; *Duer* v. *Boyd*, 1 Serg. & R. 210; *Lauman* v *Thomas*, 4 Binn. 57; *Fox* v. *Lyon*, 3 Casey, 9; *Bunting* v. *Young*, 5 Watts & S. 188; *Chambers* v. *Mafflin*, 1 Pen. & W. 74; *Urket* v. *Coryell*, 5 Watts & S. 60; *Maclay* v. *Work*, 5 Binn. 158; *Gingrich* v. *Foltz*, 7 Harris, 40; *Burkhart* v. *Bucher*, 2 Binn. 455.

The Supreme Court of the United States has held a warrant survey with payment of the purchase money as vesting the owner with an estate strictly legal, upon which ejectment will be supported in the courts of the United States.

Sims v. *Irvine*, 3 U. S. 3 Dall. 425 (1: 665); *Evans* v. *Patterson*, 71 U. S. 4 Wall. 224 (18: 393).

The Circuit Courts of the United States in Pennsylvania have uniformly held a warrant, survey and return as a perfect legal title, and ejectment has always been sustained upon such titles. A warrant, survey, and payment of the purchase money are sufficient to give a legal right of entry, and is a sufficient legal title to support ejectment in United States Courts.

Willink v. *Miles*, Pet. (C. C.) 429.

A warrant and survey returned into the land-office and accepted vests a legal title of entry, and is such a legal title as will support ejectment in United States courts.

Griffiths v. *Tunckhouser*, Pet. (C. C.) 418.

A warrant, survey, and payment of the purchase money give a sufficient title in Pennsylvania to enable the plaintiff to maintain an ejectment in the Circuit Court of the United States.

Copley v. *Riddle*, 2 Wash. (C. C.) 354; *James* v. *Gordon*, 1 Wash. (C. C.) 338.

In a controversy respecting the title to lands in a State this court will administer the law of the State in all respects as if it were a court sitting there and reviewing the decree of an inferior court in that locality.

Olcott v. *Bynum*, 84 U. S. 17 Wall. 44 (21: 570); *Slaughter* v. *Glenn*, 98 U. S. 242 (25: 122).

A title to lands can only be acquired and lost according to the laws of the State in which they are situated.

Clark v. *Graham*, 19 U. S. 6 Wheat. 577 (5: 334); *Waring* v. *Jackson*, 26 U. S. 1 Pet. 571 (7: 267); *Davis* v. *Mason*, 26 U. S. 1 Pet. 503 (7: 239); *Gardner* v. *Collins*, 27 U. S. 2 Pet. 85 (7: 356); *Jackson* v. *Chew*, 25 U. S. 12 Wheat. 153 (6: 583).

Mr. Justice **Matthews** delivered the opinion of the court: [465]

This is an action of ejectment brought by the defendants in error in the Circuit Court of the United States for the Western District of Pennsylvania, to recover possession of a tract of land situated in Northumberland and Columbia Counties, containing about 230 acres. There was a verdict and judgment in favor of [466] the plaintiffs below, to reverse which this writ of error is brought.

Both parties claim title under the Commonwealth of Pennsylvania. It appears from the bills of exceptions taken during the progress of the trial that the plaintiffs put in evidence a certified copy of a document called an application, No. 12969, as follows:

"William Elliott applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, Northumberland County.

*See also note by the Editor.

"Joseph Tyson applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury adjoining Dr Thomas Ruston's other land, in Catawissa Township, in North'd County.

"William Shannon applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury, adjoining other lands of Dr. Thomas Ruston in Catawissa Township, North'd County.

"Lewis Walker applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other lands in Catawissa Township, North'd County.

"Nathaniel Brown applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, North'd County.

"Ebenezer Branham applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, North'd County."

Also a certified copy of old purchase voucher No. 12969, as follows:

"26 November, 1793. Certified copy of old purchase voucher No. 12969. Joseph Tyson, 400 a's lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other land, in Northumberland County.

"William Elliott—400 a's situate on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's other land, in Catawissa Township—said county.

"Lewis Walker—400 a's lying one mile north [467] of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other land, in said county.

"William Shannon—400 a's lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other lands, in said county.

"Ebenezer Branham—400 a's on a branch of Roaring Creek, joining Dr. Thomas Ruston, in said county.

"Nathaniel Brown—400 a's on a branch of Roaring Creek, joining land of Dr. Thomas Ruston, in said county.

"Amount, £60—interest from date thereof.

"[On the side]: A gen'l rec't wrote."

The plaintiffs also offered in evidence a copy of old purchase blotter No. 12969, as follows:

"1794, June 14. } 12969
Dr. Ruston. 6 W'r'ts of 400 a's Am't, 2400 a's, 50s p. c't p'd specie ch., £60—

Fees 60s p'd, rem'r Charge of 168 D's.

"Rec'd d'd."

To this the counsel for the defendants objected on two grounds: 1, that the warrant to Lewis Walker appearing to be dated November 26, 1793, it was not competent to prove payment of the purchase money by Ruston, on June 14, 1794; and 2, that if any title whatever accrued to Ruston, it would be but a resulting trust, as the plaintiffs did not propose to follow it with any evidence showing a conveyance of the legal title to Ruston or those claiming under him, or any possession of the land by him or them, or the bringing of any action of ejectment to recover it within twenty-one years from the date of the warrant. The objections were overruled, and an exception taken.

The plaintiffs also put in evidence a copy of the warrant to Lewis Walker, dated the 26th of November, 1796, for 400 acres adjoining Dr. Thomas Ruston's other lands; and a copy of a survey for Lewis Walker, dated the 22d of October, 1794, in pursuance of the warrant, containing 371¼ acres. The survey was followed by a certified copy of the return made by William Gray, deputy surveyor, into the land-office, showing that on February 23, 1795, he [468] returned to the land-office the Lewis Walker survey for 371¼ acres. Warrants and surveys of five other tracts were introduced in evidence in connection with the warrant and survey of the Lewis Walker tract, being the same tracts of land which are mentioned in the application and purchase voucher. The plaintiffs then traced title into Nicholas LeFavre by virtue of a judgment against Thomas Ruston in 1796, and levy on lands of the defendant Ruston, including the Lewis Walker tract, and a sale and conveyance of the same to LeFavre by a marshal's deed. Nicholas LeFavre having died, his will was admitted to probate on the 12th of August, 1815, on which day William R. Smith took out letters of administration with the will annexed. A schedule attached to the will of the testator, of his lands in Pennsylvania, included the Lewis Walker tract of 371¼ acres. In 1836, William R. Smith, the administrator with the will annexed of Nicholas LeFavre, petitioned the Orphans' Court of Philadelphia for an order to sell real estate to pay the debts of the decedent. By further proceedings upon said application in the Orphans' Court of Northumberland County, where a portion of the lands of LeFavre were located, a decree of sale was obtained; and the Lewis Walker tract, among others, was sold on the 9th of May, 1837, to Joseph Brobst, as the property of Nicholas LeFavre. A deed was made to Brobst for the land, and the sale confirmed in Northumberland County, where the lands were located. By sundry mesne conveyances the title of Brobst was vested in the plaintiffs below.

There was evidence tending to show that the lands in controversy were wild and unimproved until 1864, when the parties through whom the plaintiffs claim title took actual possession thereof, and improved the same by the erection of a house and sawmill, and put to work a corps of men for the purpose of proving the coal veins. These operations and expenditures were continued for a period of about eighteen months, at a cost of between $40,000 and $50,000, when the work was suspended as not being profitable, but possession was maintained through agents and tenants until 1875, when the defendants took forcible possession, claiming title. [469]

The defendants below objected to the admission in evidence of the records from the Orphans' Court of Philadelphia, showing the proceedings resulting in the sale of the lands of Nicholas LeFavre to Joseph Brobst, on the ground that the debts of the decedent, as set forth in the petition of the administrator, to pay which the order of sale issued, were barred by the Statute of Limitations and their lien extinguished, by reason of which it was claimed

that the orphans' court had no jurisdiction to grant the order. The objection was overruled, and an exception taken.

There was also evidence introduced by the plaintiffs, which was objected to, tending to show payment of taxes by those under whom the plaintiffs claim.

The defendants below offered in evidence on their part an application of Daniel Reese, Lewis Walker, and others, filed in the land-office November 26, 1793, indorsed "Ent'd by Wm. Lane for Daniel Rees;" also the warrant from the Commonwealth to Lewis Walker for 400 acres, dated November 26, 1793; also the survey to Lewis Walker made October 22 1794, in pursuance of the warrant of November 26, 1793, describing the tract in dispute; and then offered a certified copy of a patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 12, 1797, for the same tract, which patent contained a recital to the effect that Lewis Walker, by deed dated November 27, 1793, had conveyed the said tract with the appurtenances to Peter Grahl. Counsel for the plaintiffs below objected to the introduction in evidence of this patent, on the ground that Dr. Ruston held a prior title to the land from the Commonwealth. This objection was sustained, the court refusing to allow the patent to be read to the jury, to which the defendants excepted.

The defendants below then renewed the offer of the patent to Peter Grahl for the land in dispute, in connection with an offer to prove a connected chain of title from Peter Grahl to themselves, to be followed by proof that they took actual possession of the the land in dispute in 1875, paid taxes by redeeming the land from tax sales, made improvements, expended large sums of money in opening coal mines, [470] and have ever since held actual possession of the land; and also that Nicholas LeFavre, who purchased the alleged title of Dr. Ruston at marshal's sale on October 11, 1803, received notice in October, 1814, of the title of Peter Grahl under the patent to him, and that the plaintiffs below, when they purchased at sheriff's sale in 1872, received notice of the same facts. This offer was rejected, and an exception duly taken.

The court below also refused to allow the defendants to read in evidence certain parts of the return of William Gray, deputy surveyor, to the commissioners of Northumberland County, made in 1796, other parts of which had been read by the plaintiffs below, in order to show that the taxes paid by Dr. Ruston on the lands which he did in fact own in the same county, and paid into the same office during the same time, were paid to or by a different person than the taxes paid on the land in dispute; and to show that there was another tract surveyed by the Commonwealth in the same locality and in the same county in the name of Lewis Walker as warrantee, which was claimed by Dr. Ruston. These offers were also rejected by the court, to which ruling the defendants excepted.

The court below charged the jury, among other things, as follows:

"The plaintiffs put in evidence a certified copy of an ancient paper, dated November 26, 1793, on file in the land-office, designated as old purchase voucher No. 12969, and in connection therewith a certified copy of an entry, under date of June 14, 1794, from the old purchase blotter in the land-office. These documents were offered to show, and they are evidence tending to show, that Dr. Thomas Ruston was the owner of the Lewis Walker warrant, and paid to the Commonwealth the purchase money for said tract of land."

And also:

"The plaintiffs have shown that by sundry mesne conveyances the title which Nicholas LeFavre thus acquired became vested in them prior to the bringing of this action. In connection with their paper title the plaintiffs gave evidence tending to show that for many years they and those under whom they claim asserted title to the land and paid taxes thereon without any hostile claim being set up against them until the year 1875, when the defendants took possession. If the evidence on the part of the plaintiffs is believed by the jury, it makes out a *prima facie* case for the plaintiffs, and they are [471] entitled to your verdict upon this branch of their title."

To these charges the defendants excepted. These several rulings of the court are now assigned for error.

In the case of *Sims* v. *Irvine*, 8 U. S. 3 Dall. 425 [1:665], which was an ejectment for land lying in Pennsylvania, decided by this court in 1799, it was said that, in that State, "Payment, or, as in this case, consideration passed, and a survey, though unaccompanied by a patent, gave a legal right of entry which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself as such with property and tenures, it remains a legal right notwithstanding any new distribution of judicial powers, and must be regarded by the common-law courts of the United States in Pennsylvania as a rule of decision."

The case of *Evans* v. *Patterson*, 71 U. S. 4 Wall. 224 [18:393], decided in 1866, was similar. In that case *Mr. Justice* Grier, delivering the opinion of the court, said, p. 230 [394], "The case cannot be made intelligible without a brief notice of the very peculiar land law of Pennsylvania. The proprietors of the Province, in the beginning, allowed no one man to locate and survey more than three hundred acres. To evade this rule in after times, it was the custom for speculators in land to make application in the names of third persons, and, having obtained a warrant, to take from them what was called a 'deed-poll' or a brief conveyance of their inchoate equitable claim. Pennsylvania, until of late years, had no courts of equity. Hence, in an action of ejectment, the plaintiff might recover without showing a legal title. If he had a prior inchoate or equitable title, either as trustee or *cestui que trust*, he might recover. The courts treated the applicant or warrantee as trustee for the party who paid the purchase money, or paid even the surveying fees; for the purchase money, under the location or application system, was not paid at [472] the time, and sometimes never. When the State succeeded to the title of the proprietors, the application system was abandoned, and warrants were granted on payment of the pur-

chase money for the number of acres for which his warrant called. Hence, where the claimant of the warrant was unable to show his deed-poll, he might recover by showing that he paid the purchase money; that the warrantee whose name was used was, therefore, trustee for him. And an ejectment might also be maintained in the name of the warrantee, although he had no beneficial interest in the land, and no knowledge of the institution of the suit. See *Campbell* v. *Galbreath*, 1 Watts, 78, and also *Ross* v. *Barker*, 5 Watts, 391, which was decided on the title now in question."

It is equally well established that the action of ejectment may be maintained upon a warrant and survey by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued. *Brown* v. *Galloway*, Pet. (C. C.), 291; *Willink* v. *Miles*, Pet. (C. C.) 429. It was said by *Mr. Justice* Washington in *Huidekoper* v. *Burrus*, 1 Wash. (C. C.) 113, that "The person whose name appears on the warrant is considered as merely a nominal grantee, and a trustee for the person who pays for the warrant and has it executed;" stating, as a matter of fact in the history of the practice of the State, that "Whenever one person takes out many warrants he borrows the names of certain persons, no matter who they are." See also *Griffiths* v. *Tunckhouser*, Pet. (C. C.) 418; *James* v. *Gordon*, 1 Wash. (C. C.) 338; *Copley* v. *Riddle*, 2 Wash. (C. C.) 354. This doctrine is established as the law of Pennsylvania by many decisions of the Supreme Court of that State. In *Duer* v. *Boyd*, 1 Serg. & R. 210, that court said: "For above fifty years past lands held by warrant and survey, without patents, have been considered as the legal estate in England, subject to the liens of judgment, curtesy, dower, and other incidents of real property."

[473] In *McClay* v. *Work*, 5 Binn. 158, it is said: "An estate held by warrant or survey, or other imperfect title, without patent, is of a singular nature. In many, and indeed in most respects, it is considered as a legal estate against all persons but the Commonwealth. It is subject to the same laws of descent, devise, and conveyance as the legal estate. Tenancy by the curtesy and in dower are attached to it. An ejectment may be supported on it." And in *Gingrich* v. *Foltz*, 7 Harris, 40, it is said: "In Pennsylvania a warrant and survey, attended with payment of the purchase money, is to be considered, as against all but the Commonwealth, in the same light as the *legal* estate in England, and is not to be distinguished, as to the mode of conveying, entailing, and barring entails, from estates *strictly legal*. * * * If the warrant, survey, and payment of the purchase money constitute a *legal title*, it is impossible to comprehend how the Commonwealth can, by any act whatever, after she has parted with that title, prejudice, much less extinguish, it."

Upon this view of the law, it appears from the record that the plaintiffs below proved a legal title to the Lewis Walker tract in controversy in Dr. Thomas Ruston. The old purchase voucher No. 12969, offered in evidence, shows that the purchase money for the six tracts described was paid by one person; and the receipt, being a copy from the old purchase blotter, also No. 12969 to correspond, shows that the owner of the warrants, by virtue of the payment of the purchase money, was Dr. Ruston.

Counsel for the plaintiffs in error seek to read the abbreviations in that extract from the old purchase blotter as showing that the purchase money had not been paid in full; but we think it otherwise sufficiently appears, not only on the face of the receipt itself, but also from the statement on the margin of the old purchase voucher, that a general receipt had been given, corroborated by the fact that the warrants were actually issued.

A point is made on behalf of the plaintiffs in error that the issue of the warrant cannot be considered as evidence of the payment of the purchase money, because it is dated prior to the date of the receipt taken from the old purchase blotter, the warrant being dated the 26th of November, 1793, and the receipt the 14th of [474] June, 1794. This, however, is explained by the practice, known to have existed, that while a warrant was never issued except after the payment of the purchase money, yet it was dated as of the date of the entry in the old purchase voucher, which was the authority given to the surveyor to locate the land, the warrant being subsequently issued so as to relate back to that date.

In *Brown* v. *Galloway*, Pet. (C. C.) 291, *Mr. Justice* Washington said: "A warrant for land is, according to long and uniform practice, dated on the day the application is made for the land, although it is retained in the office until the purchase money is paid, when, and not before, it issues to the party." To the same effect is *Lewis* v. *Meredith*, 3 Wash. (C. C.) 81.

The competency and value of the two documents from the old purchase voucher and the old purchase blotter, to prove the fact of the payment of the purchase money, and by whom it was paid, are stated by the Supreme Court of Pennsylvania, in the case of *Oliphant* v. *Ferren*, 1 Watts, 57. It is there said that these entries were made by John Keble, who was chief clerk in the Receiver-General's Office. Prior to 1823 proof of the payment of the purchase money was made by the production of the original receipt, or the testimony of Keble during his lifetime, and, after his death, proof of his handwriting and entry in these books. In 1823, however, by a statute passed during that year, the books themselves, and copies from them, were made *prima facie* evidence.

The matter is thus explained by *Judge* Huston in his essay on the History and Nature of Original Titles to Land in the Province and State of Pennsylvania, Charles Huston, p. 335:

"Even on warrants where money was paid, there was sometimes difficulty as to who was the owner. The warrant, being in a name different from that of the claimant on its face, proved nothing. Where the owner, when he took out his warrant, took a receipt for his purchase money and preserved it, this often decided the question of ownership, and it became usual for a plaintiff to recover on such a receipt, without producing any conveyance from the person whose name was used in the warrant. [475] But where the owner either took no receipt, or it was lost or mislaid, the ownership must be proved by other means. The common books

of the land-office charged the warrantee with the land and credited him with the payment of the money. When it became necessary to pay the money before you got the warrant, and while John Keble was chief clerk in the Receiver-General's Office, he kept an account of who paid the money on every warrant sealed in that office. The entry, however, is not easily understood, except by those acquainted with the office. Every application was numbered successively, as they were handed in, from one up to near twenty thousand. Some of these applications were for a single tract, and many for more than one hundred, the last written on a single sheet of paper, or several sheets attached together. On each of these was marked the date when filed, and the name of the man who paid the money always appeared. When you applied for a warrant, there were marks by which you could refer to and find the application, and from the application and its number and date, you could find the entry in John Keble's blotter, and there see who paid the purchase money. The right to many tracts has been ascertained by searching as here mentioned; and a copy of that blotter under seal of office, is now evidence in a court of justice, by a particular Act of Assembly. So careful was John Keble that if the person who paid the money told him by whom it was sent, that also appeared in the blotter." *Vide* also *Campbell* v. *Galbreath*, 1 Watts, 70.

There is nothing in the case of *Strimpfler* v. *Roberts*, 18 Pa. 283, cited and relied upon by the plaintiffs in error, inconsistent with the foregoing. In that case the plaintiffs in the ejectment were permitted to prove that Benson, under whom they claimed, had paid the purchase money, and they did so by the blotters, vouchers, etc., as in the present instance; and it was admitted and decided in that case that such proof established a *prima facie* title in them, but one, however, which might be overcome by proof of the fact that Benson, who appeared to have paid the purchase money, had done so, not on his own behalf, but as agent [476] for others; and that fact being made to appear, it was held that a patent issued to the assignee of the warrantee conveyed a superior legal title. The conclusion is summed up by *Chief Justice* Black, in the opinion of the court, as follows, p. 302: "That where a warrant is issued to one person and the purchase money is paid by another, and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase money is gone, unless he takes possession of the land or brings ejectment to recover it within twenty-one years from the date of the warrant; and after that lapse of time he cannot recover, no matter how clearly he may be able to prove that the legal owner was in the beginning a trustee for him. * * * When I say that the suit must be brought within twenty-one years from the date of the warrant, I speak of a case like the present one in which the alleged trust is proved by the naked and solitary fact of the payment of purchase money. Where the *cestui que trust* has superintended the survey, and paid the officer's fees, or exercised other acts of ownership over the land, the presumption in favor of the trustee would perhaps not begin to arise until he did some act of hostility, such as selling his title, or taking out a patent to himself."

In the present case the evidence admitted was held to establish a *prima facie* legal title in Dr. Thomas Ruston. It was sufficient to establish that he paid the purchase money, and the other proof in the case showed that he and those who claimed under him exercised acts of ownership over the property until their possession was disturbed violently by the defendants below in the year 1875. The defendants were able to offer nothing in opposition to this, except the patent under which there had been no claim of title for more than seventy-five years, and which was not connected by any proof, other than its own recitals, with the warrant and survey.

In *Glass* v. *Gilbert*, 8 P.F. Smith, 266, it was decided that the doctrine of *Strimpfler* v. *Roberts*, 18 Pa. 283, and *McBarron* v. *Glass*, 6 Casey, 183, that a trust will not be sustained between the warrantee and one who has paid the purchase money after twenty-one years, without possession taken by the claimant, etc., does not apply to a stranger to the title of the war- [477] rantee. If twenty-one years elapse before interference by a junior survey, the presumption in favor of the first, although a chamber survey, becomes absolute. It follows from the foregoing that the evidence introduced by the plaintiffs below was competent and sufficient to establish in Dr. Ruston a legal title to the lands in question.

The next assignment of error is founded upon the objection made to the admission of the record and proceedings in the Orphans' Court of Philadelphia County, resulting in the sale of the title of Nicholas LeFavre to the Lewis Walker tract to Joseph Brobst, by the deed of May 9, 1837. This objection was that it appeared from the face of the petition for the sale of the real estate of the decedent that the debts, to pay which it was alleged that the sale was necessary, were barred by the Statute of Limitations, and that, as a consequence, the orphans' court had no jurisdiction to make the order of sale. The course of proceeding taken in the present case, as shown by the transcript, was: 1, a petition to the Orphans' Court of Philadelphia for authority to sell, that being the court which had jurisdiction of the accounts of the executor; 2, a petition to the Orphans' Court of Northumberland County, in which the land was situated, an order of sale granted thereon, and sale made, and, as required by the express provisions of the Statute of 1832, then in force, the return of the sale made to and confirmed by the same court sitting in the county where the land is situated. It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the orphans' court, in a case where it had jurisdiction of the subject matter, cannot be impeached collaterally; much less is it so in the present case, because the Statute of Pennsylvania of March 29, 1832 (2 Brightly's Purd. Dig. p. 1279, pl. 3), provides as follows: "The orphans' court is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law; its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided

collaterally in any other court; but they shall be liable to reversal or modification or alteration on appeal to the supreme court, as hereinafter directed." *Iddings* v. *Cairns*, 2 Grant, 88; [478] *Riland* v. *Eckert*, 11 Harris, 215. In *Dresher* v. *Allentown Water Co.* 52 Pa. 229, *Mr. Justice* Strong said: "Orphans' Court decrees are doubtless conclusive; they cannot be impeached collaterally."

The next assignment of error is founded upon the refusal of the court to admit as evidence the certified copy of the patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 12, 1797, with a recital therein of the fact that Lewis Walker, by deed dated November 27, 1793, had conveyed the tract in question to Peter Grahl. The legal title of Thomas Ruston to the premises in dispute, established by the warrant and survey and payment of the purchase money, was perfected by the return made by the deputy surveyor into the land-office on February 23, 1795. According to the doctrine established by the authorities already cited, it was not competent for the Commonwealth of Pennsylvania to affect that title by a subsequent patent to a stranger. Peter Grahl, the patentee, was not connected with the title under the warrant and survey, otherwise than by the recital contained in the patent itself, that the tract had been previously conveyed to him by Lewis Walker. Clearly, that recital was not evidence against the plaintiffs, for, if the patent could not take effect against them without it, it could not give any effect to that recital. Their right had already vested prior to the existence of the patent, and the grant to them could not be affected by a subsequent grant to a stranger. That such is the uniform course of decisions in Pennsylvania appears by numerous cases. *Penrose* v. *Griffiths*, 4 Binn. 231; *Maclay* v. *Work*, 5 Binn. 154; *Woods* v. *Wilson*, 37 Pa. 379; *Delaware & Hudson Canal Co.* v. *Dimmock*, 47 Pa. 393; *Urket* v. *Coryell*, 5 Watts & S. 60; *Balliot* v. *Bauman*, 5 Watts & S. 155; *Smith* v. *Vasbinder*, 77 Pa. 130.

It is next assigned for error that the court below erred in rejecting that portion of the return of William Gray, deputy surveyor, offered to be read in evidence by the defendants below. That portion of the return related to other surveys in the same township, returned as belonging to Dr. Ruston, and was offered for the [479] ostensible purpose of explaining that part of the return of William Gray, the deputy surveyor, and the assessment for taxes received in evidence on the part of the plaintiff below, and in order to show that the taxes alleged to have been paid by Dr. Thomas Ruston might have been paid upon other tracts than the Lewis Walker tract in controversy. It seems to us, however, very clear that the offer was rightly rejected; that the part of the return offered related to other lands than the tract in question, was wholly irrelevant to the issue in the case, and did not tend to prove any material fact.

Neither was there any error in the other rulings of the court excepted to, in reference to other offers of evidence by the defendants below, made with the view of showing that Thomas Ruston paid taxes and made claims to other surveys in the name of Lewis Walker than that of the tract in dispute. None of them tended to show that Ruston was not the owner of the Lewis Walker tract in controversy, whatever they may have shown with reference to his claims to other tracts for which warrants and surveys had been made in the same name.

This disposes of all the questions raised by the assignments of error.

We find no error in the record, and the judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PEOPLE'S SAVINGS BANK AND LEOPOLD FREUD, *Plfs. in Err.*, [556]

v.

LEVI M. BATES ET AL.

(See S. C. Reporter's ed. 556–569.)

Chattel mortgages — Michigan Statutes — construction of — good faith of mortgage a question for jury — rights of second mortgagee — consideration — parties — review of Michigan authorities.

1. Under the Statutes of Michigan, relating to chattel mortgages, the good faith of a chattel mortgage on a stock of goods, where the mortgagor remains in possession and prosecutes his business as usual, is a question for the jury.

2. A creditor at large cannot attack a chattel mortgage as fraudulent until he has obtained a judgment and execution, or some legal process against the mortgaged property. It seems that this rule applies to a second mortgagee in possession seeking to attack a prior mortgage.

3. The words "mortgagee in good faith," as used in said statutes, mean the same thing as "mortgagee for a valuable consideration without notice."

4. Where a second mortgage, although first recorded, was given merely as collateral security for a pre-existing indebtedness, the prior mortgage confers the superior right.

[No. 52.]

Argued Nov. 15, 16, 1886. Decided Mar. 7, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John Atkinson**, *James T. Keena*, *Ashley Pond*, and *George V. N. Lothrop*, for plaintiffs in error:

The Bank was in a position to attack these mortgages, as a subsequent creditor, although it had neither attached, nor levied an execution. Under the decisions in Michigan, a mortgagee is a creditor secured by a lien on the thing mortgaged.

Lucking v. *Wesson*, 25 Mich. 443; *Gardner* v. *Matteson*, 38 Mich. 200.

A person does not cease to be a creditor by becoming a mortgagee. The statute has been frequently construed by the Supreme Court of the State, to protect all persons who become creditors after a mortgage is given, and before it is put on file or possession taken under it.

Kohl v. *Lynn*, 34 Mich. 360.

The second and third of these mortgages must be treated as renewals merely of the first. They gave to Bates, Reed and Cooley no rights which the first did not confer.

Gill v. *Griffith*, 2 Md. Ch. 270.

The People's Savings Bank must be treated as a subsequent creditor within the meaning of the statute, as to the first and second mortgage,

and prior in time as to third, if it is to be treated as anything but a renewal.

It was not necessary that it should have an attachment or an execution levied upon the property to put it in a position to attack the mortgages of Bates, Reed and Cooley.

In the case of *Putnam* v. *Reynolds*, 44 Mich. 118, the defendant obtained possession by an assignment for the benefit of creditors. Putnam held a mortgage which had been withheld from the records, which he sought to foreclose. Reynolds defended on the ground that he represented creditors, as to whom the mortgage was void, because so withheld. He was met by the assertion that he was neither an attachment or judgment creditor, nor a purchaser for value. The supreme court had frequently held the general rule as above stated as to creditors, and had also held that an assignee for the benefit of creditors was not to be considered a *bona fide* purchaser.

Farrington v. *Sexton*, 48 Mich. 454.

It has been held, however, that the defendant represented creditors, and having, as such, obtained possession of the property by voluntary action of the debtor had a right to keep it.

See also *Lee* v. *Brown*, 7 Ga. 275.

It is not necessary in this case to uphold the right of a subsequent purchaser or mortgagee to attack a previous conveyance, on the ground of fraud in the party making it. The attack here is really made on the ground that Bates, Reed and Cooley were guilty of a fraud in leaving Freedman Bros. & Co. in possession as ostensible owners and withholding their mortgages from the record.

Putnam v. *Reynolds*, 44 Mich. 118; *Shaw* v. *Levy*, 17 Serg. & R. 99; *Winslow* v. *Leonard*, 12 Harris, 14; *Lanfear* v. *Sumner*, 17 Mass. 110; *Frank* v. *Miner*, 50 Ill. 444.

When the second mortgagee is also a creditor against whom the previous mortgage is void, possession puts him in a position to assert its invalidity as to him as creditor.

The charge of the court that the pre-existing indebtedness is not a sufficient consideration to constitute one a mortgagee in good faith is not the law of this court.

This is not a case where we are bound by state decisions. It is not in any sense one calling for the construction of a state statute; but one where the meaning of "a valuable consideration" is to be settled as a question of commercial law.

If decisions affecting commercial paper are applicable to the question now under discussion, it is useless to cite more than the decisions of this court. In *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 (10: 865), the question involved was whether one taking a note in payment of an antecedent debt was a holder for value. The decision went further and held that even where it was received as security, the party receiving it was a holder for value.

See also *R. R. Co.* v. *Nat. Bank*, 102 U. S. 14 (26: 61); *Bank of the Metropolis* v. *New Eng. Bank*, 42 U. S. 1 How. 234 (11: 115); *S. C.* 47 U. S. 6 How. 212 (12: 409).

As between successive vendees the first to obtain possession must prevail.

Shaw v. *Levy*, *Winslow* v. *Leonard*, *Lanfear* v. *Sumner*, and *Frank* v. *Miner*, *supra*; *Judson* v. *Corcoran*, 58 U. S. 17 How. 612 (15: 231); *Lamb* v. *Durant*, 12 Mass. 54.

In nearly all these cases the consideration for the sale which was held to take the property was a past indebtedness.

Mr. **Don M. Dickinson**, for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action of replevin involving conflicting claims under certain chattel mortgages executed by Freedman Bros. & Co., formerly merchants in the City of Detroit. The firm was composed of Herman Freedman, who managed its business in Detroit; Benjamin Freedman, who resided in New York and had entire charge of the buying and of the firm's financial affairs in that city; and Rosa Freedman. At the beginning of the action the mortgaged property was in the custody of Leopold Freud as agent of the People's Savings Bank, plaintiff in error.

Bates, Reed and Cooley, the defendants in error, who were the plaintiffs below, claim priority under a mortgage given by Freedman Bros. & Co. February 7, 1881, to secure both the past indebtedness of the latter, amounting to $45,000 and upwards, for goods, wares and merchandise sold and money loaned to them, and any future liabilities which might be incurred by the mortgagors for other goods purchased or other moneys borrowed from the mortgagees; the mortgage, covering not only the goods, wares, merchandise and other personal property then in the mortgagors' stores in Detroit, but also their notes, book accounts and securities, and all future additions to or substitutions for such goods and merchandise. No part of said indebtedness was created at the time of the execution of the mortgage. [557]

The People's Savings Bank claims under a mortgage made by Freedman Bros. & Co. on the 11th of February, 1881, to secure certain demand notes aggregating $49,000, which were executed by that firm on the 7th day of February, 1881, and also "all other paper indorsed" by it and held by the Bank; that mortgage covering all the goods and merchandise then in the mortgagors' stores and all thereafter put into them. This last mortgage provided that Leopold Freud, the Bank's agent, should take immediate possession and sell the goods in the ordinary course of business, applying the proceeds to said indebtedness until the same was paid. The said demand notes represented past indebtedness; for they were given in place of other paper of the mortgagors' then outstanding, and which had not then matured. Each demand note was accompanied by a cognovit or "confession of judgment," under which, however, no action was taken. The mortgage to the Bank was the first one filed in the proper office in Detroit, though it was not lodged until after the Bank had notice, through its agent, that Bates, Reed and Cooley claimed to be in possession of or to have rights in the mortgaged property. Whether the Bank, before the mortgage to it was given, had actual notice of the prior mortgage to Bates, Reed and Cooley does not clearly appear.

By the Statutes of Michigan relating to chat-

[558] tel mortgages it is provided that "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk of the township or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a nonresident of the State, when the mortgage or a true copy thereof shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the property is." 2 Howell, Annotated Stat. p. 1609, § 6193.

The mortgagees respectively insist that there was, within the meaning of the statute, an immediate delivery to them followed by an actual and continued change of possession of the things mortgaged; the Bank claiming to have taken possession under its mortgage on the 11th of February, 1881, while Bates, Reed and Cooley, denying that the Bank ever had such possession as the law requires, contend that they took possession on the 15th of February, 1881. But the claim of neither party in that respect is satisfactorily sustained by the proof. The evidence does not show such open, visible and substantial change of possession as the law required in order to give notice to the public of a change of ownership. *Doyle* v. *Stevens*, 4 Mich. 93. In a sense, both parties were in possession by agents early on the morning of the 15th of February, each claiming the exclusive right to manage and control the property under the terms of the respective mortgages. As the contest for such management and control was likely to result in an unseemly display of force, the parties on that day entered into an agreement which recited their respective claims of priority both of possession and of right, and [561] provided—"neither party waiving or surrendering any right or advantage"—that the possession of each should remain as it then was and that the business should continue as it was then being conducted, all the proceeds of sale being deposited in bank and remaining there intact until these conflicting claims should be settled by judicial decision or by agreement. The claims were not settled by agreement; and the defendants in error, having insisted that this arrangement was not being carried out in good faith, and having been refused exclusive possession, brought this action—as they might do consistently with the agreement—to obtain a judicial determination of their rights. In adopting that course they surrendered no right they had in the premises.

In behalf of the Bank it is contended that the mortgage to Bates, Reed and Cooley was fraudulent as against subsequent creditors and mortgagees in good faith, in that the mortgagees contemplated that the mortgagors should remain in possession and prosecute the business in the ordinary mode. The mortgage of February 7, 1881, certainly contains no provision of that kind. But if the extrinsic evidence establishes that such a course upon the part of Freedman Bros. & Co. was in fact contemplated by Bates, Reed and Cooley, it would only show that the mortgagees were willing to give the mortgagors an opportunity to avoid a suspension of their business and bankruptcy—the additions to the stock in trade being bought under the mortgage, so as to compensate the mortgagees for any diminution in value by reason of goods disposed of in the usual course of business. If the mortgage had in terms made provision for such a course upon the part of the mortgagors as the Bank contends was in the contemplation of the mortgagees, it would not be held, as matter of law, to be absolutely void or fraudulent as to other creditors. *Oliver* v. *Eaton*, 7 Mich. 108, 112; *Gay* v. *Bidwell*, 7 Mich. 519, 523; *People* v. *Bristol*, 35 Mich. 28, 32; *Wingler* v. *Sibley*, 35 Mich. 281; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 523 [22: 762]. The good faith of such transactions, where they are not void upon their face, is, under the Statutes of Michigan, a question of fact for the determination of the jury. *Oliver* v. *Eaton* and *Gay* v. *Bidwell*. That rule does not however restrict [562] the power of the court to give to the jury a peremptory instruction covering such an issue when the evidence is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is. In this case there is an entire absence of any evidence impeaching the good faith of Bates, Reed and Cooley in procuring the mortgage of February 7, 1881. There is nothing whatever to show that they had any purpose to commit a fraud or to put their mortgagors in such a position that the latter could more readily deceive or defraud other creditors.

Besides, as the court below held, upon this branch of the case, the Bank, in its capacity as a creditor at large, is not entitled to attack the prior mortgage as fraudulent upon the grounds just stated. This general proposition is conceded by counsel, the usual way, he admits, being for the creditor, who has no particular claim in the property, to acquire a specific interest therein through the levy of an attachment or execution. Hence, he says that while it is often stated that conveyances of this sort are void as to creditors generally, they must put their claims in the form of a judgment or attachment before they are in a position to attack them—the object of the attachment or execution being to bring the attacking party into privity with the property. And such seems to be the rule recognized by the Supreme Court of Michigan. In *Fearey* v. *Cummings*, 41 Mich. 376, 388, the court, construing a somewhat similiar statute, said: "If the mortgage was made with intent to hinder, delay, or defraud creditors (Comp. L. sec. 4718), or, inasmuch as the possession was not altered, if it was not put on file prior to plaintiff becoming creditor, it was invalid as against them; the law being that those who became creditors whilst the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still no one, as creditor at large, can question the mortgage. He can only do that by means of some process or proceeding against the property. Sec. 4706." In that case the court cites *Thompson* v. *Van Vechten*, 27 N.Y. 568, 582, in which it was held

[563] in reference to a somewhat similar statute, that "The mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process."

But it is argued that this rule does not apply in the case of a creditor who is a second mortgagee in possession. Such possession, it is claimed, gives him the right by way of defense, and without resorting to attachment and before obtaining judgment, to assert the invalidity of the prior mortgage. There is some apparent support to this position in *Putnam* v. *Reynolds*, 44 Mich. 115. That was a suit in equity brought to foreclose a chattel mortgage not filed until after the mortgagor had become insolvent, and while his estate was being disposed of by an assignee for the benefit of creditors. The court said that there was reason to believe that the mortgagor acted in bad faith; that the mortgage was left off the record for the purpose of giving the mortgagor a credit to which he was not entitled in which case the mortgage was void in fact, irrespective of the statute. Upon this ground alone the court declined to give the relief asked, remitting the mortgagee to his remedy, if any he had at law. It expressly declined to decide whether the rule that creditors cannot attack a mortgage, except indirectly, through a seizure of the property by attachment or other suitable process, applies where the mortgage was originally valid, but is made void by the subsequent neglect of the mortgagee. The case in hand cannot be brought within the principle announced in *Putnam* v. *Reynolds*, for the reason if there were no other, that there was no fraud in fact upon the part of Bates, Reed and Cooley, nor any unreasonable delay in filing the mortgage of February 7, 1881. It was filed shortly after the mortgage to the Bank was lodged for record.

This disposes of all the material questions in the case preliminary to the main inquiry whether the Bank—the mortgage to it having been really given to secure past indebtedness of the mortgagors—is, in the meaning of the statute, a subsequent "mortgagee in good faith," If not, the mere filing of the mortgage of February 11, 1881 before that of February 7, 1881, [564] did not give it priority of right over Bates, Reed and Cooley; and the mortgage that was in fact first executed and delivered must be held to give priority of right.

In *Kohl* v. *Lynn*, 34 Mich. 360, the Supreme Court of Michigan said that "The statute which makes a mortgage of chattels, which has not been recorded, void against subsequent purchasers or mortgagees in good faith, uses those terms in the sense which has always been attached to them by judicial decisions." Guided by this rule, which we deem a sound one, we concur with the court below in holding that the words "mortgagee in good faith" mean the same thing as "mortgagee for a valuable consideration without notice."

It is insisted that the principles announced in *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 [10:865] and *R. R. Co.* v. *Nat. Bank*, 102 U. S. 14 [26:61], sustain the proposition that the Bank was a mortgagee in good faith, although the mortgage to it may be held to have been given merely as security for past indebtedness. The general doctrine announced in *Swift* v. *Tyson* was that one who becomes the holder of negotiable paper, before its maturity, in the usual course of business and in payment of an existing debt, is to be deemed to have received it for a valuable consideration, and is, therefore, unaffected by any equities existing between antecedent parties. In that case *Mr. Justice* Story said that the rule was applicable as well when the negotiable instrument was received as security for, as when received in payment of a pre-existing debt. In *Railroad Company* v. *National Bank* it was held conformably to the recognized usages of the commercial world, that "The transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice."

Do these principles apply to the case of a chattel mortgage given merely as security for [565] a pre-existing debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance nor come under a binding agreement to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative.

The rules established in the interests of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed in the adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a *bona fide* holder for value before their maturity. Such a result, if desirable, must be attained by legislation, rather than by judicial decisions.

One of the earliest cases in the federal courts upon this subject is that of *Morse* v. *Godfrey*, 3 Story, 364, 369. It there appeared that one Reed mortgaged to Godfrey all stock in trade and nearly all his real estate. The latter subsequently mortgaged the same property to a bank. In a contest between the bank and the assignee in bankruptcy of Reed, the former claimed to be a *bona fide* purchaser for value without notice of the invalidity, under the bankrupt law, of the mortgages to Godfrey. *Mr. Justice* Story said:

"This leads me to remark that the bank does not stand within the predicament of being a *bona fide* purchaser for a valuable consideration, without notice, in the sense of the rule upon this subject. The bank did not pay any consideration therefor, nor did it surrender any securities or release any debt due, either from Reed or Godfrey, to it. The transfer from

Godfrey was a simple collateral security, taken as additional security for the old indebtment and liability of the parties to the notes described in the instrument of transfer. It is true that, as between Godfrey and Reed and the bank, the latter was a debtor for value, and the transfer was valid. But the protection is not given by the rules of law to a party in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities.

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"But here the bank has merely possessed itself of the property transferred as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is, therefore, in truth, no purchaser for value in the sense of the rule." * * *

After referring to *Dickerson* v. *Tillinghast*, 4 Paige, 215, in which it was held by *Chancellor* Walworth that the transfer of an estate upon which there was a prior unrecorded mortgage, in payment of a pre-existing debt, without the transferee giving up any security or devesting himself of any right, or placing himself in a worse situation than he was in before, did not make the latter, who was without notice of the prior mortgage, a grantee or purchaser for a valuable consideration, *Mr. Justice* Story proceeded: "I do not say that I am prepared to go quite to that length, seeing that by securing the estate as payment the pre-existing debt is surrendered and extinguished thereby. But here there was no such surrender or extinguishment or payment; and the general principle adopted by the learned Chancellor is certainly correct: that there must be some new consideration moving between the parties, and not merely a new security given for the old debts or liabilities without any surrender or extinguishment of the old debts and liabilities or the old securities therefor; so that upon this ground alone the title of the bank would fail. The case of *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 [10: 865] does not apply. In the first place there the bill was taken in payment or discharge of a pre-existing debt. In the next place it was a case arising upon negotiable paper, and who was to be deemed a *bona fide* holder thereof, to whom equities between other parties should not apply. And such a case is not necessarily governed by the same considerations as those applicable to purchasers of real or personal property under the rule adopted by courts of equity for their protection." See also *Rison* v. *Knapp*, 1 Dill. 186, 200-1.

[567]

In *Johnson* v. *Peck*, 1 Woodb. & Min. 336, which was a case of a mortgage given to secure a pre-existing debt due from a mortgagor who had previously purchased the goods under such representations as entitled his vendor to sue to recover them back, *Mr. Justice* Woodbury said: "When rights of third persons intervene in this class of cases they are to be upheld, if those persons purchased the property absolutely and parted with a new and valuable consideration for it without notice of any fraud. * * * But if they have notice of the fraud or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as holding the goods open to the same equities and exceptions as to title as they were open to in the hands of the mortgagor, pawner, or assignor."

And so in American Leading Cases, 5th Am. ed. p. 233, it is stated, and we think properly, as the doctrine established by a preponderance of authority, that "Whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value or defeat existing equities." See 2 Lead. Cas. Eq. 104, 3d Am. ed.; *Id.* 83, 4th Am. ed. Vol. 2, pt. 1.

Such, we think, is also the doctrine of the Supreme Court of Michigan. In *Kohl* v. *Lynn*, 34 Mich. 360, the court, after observing that the object of the statute is to protect those who have acquired rights under the circumstances which would render them liable to be defrauded unless protected against instruments of which they knew nothing when acquiring their rights, said: "It has always been held that a purchaser who had paid nothing could not be thus defrauded, and that no one could be protected as a *bona fide* purchaser, except to the extent of his payments made before he received such notice as should have prevented him from making further payments. This doctrine has been too uniformly recognized to require discussion or citation of authorities. As Kohl had made no payments at all before the property was replevied from him, he was not a *bona fide* purchaser, and his rights are subject to the mortgage."

[568]

In *Stone* v. *Welling*, 14 Mich. 514, 525, where the issue was between the holder of an unrecorded mortgage and a subsequent grantee, who agreed to surrender indebtedness of the grantor to him and others, and put the deed on record without notice of the mortgage, the court said:

"Welling claims that the agreement which was given for the deed was amply sufficient to support it, and to entitle him to the rights of a *bona fide* purchaser under the recording laws. It was satisfactory, it is said, to Hart; and as to the indebtedness held by Welling and Root against him, it would have the effect of a present discharge. That it was satisfactory to Hart can be of no consequence on this question, since, to constitute Welling a *bona fide* purchaser he must have parted with something of value, and not merely given a contract which he could avoid, if his title under the deed proved defective. *Thomas* v. *Stone*, Walker, Ch. 117; *Dixon* v. *Hill*, 5 Mich. 404; *Warner* v. *Whittaker*, 6 Mich. 133; *Blanchard* v. *Tyler*, 13 Mich. 339. Nor do we think the agreement had the effect to discharge any indebtedness. It was executory in its character, covering not only the claims of Welling and Root, but also other claims to be procured by them, and upon which it cannot be claimed that the agreement itself would have any effect whatever."

In *Boxheimer* v. *Gunn*, 24 Mich. 373, 379, the defendant in a suit brought to foreclose a recorded mortgage relied upon a subsequent deed of the mortgagor, which he was induced to take under the representation of the latter that the mortgage debt had been paid. After sustaining the claim of the plaintiff upon certain grounds, the court said that the defendant must fail in the suit upon the further ground that,

although he acted with good faith, he was not [569] a *bona fide* purchaser or incumbrancer for value, with equities superior to those of the plaintiff, because it appeared that the conveyance to him was "merely as a security for a precedent debt," without his paying or agreeing to pay any other consideration or relinquishing any remedy or right he may have had.

Without further discussion of the authorities cited by counsel, all of which have been carefully examined, we are of opinion that the claim of the Bank to be a subsequent mortgagee in good faith cannot be sustained, because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered, or agreed to surrender, or to postpone the exercise of any substantial right it had against the mortgagors, but merely as collateral security for past indebtedness. Under such circumstances, the mortgage which was prior in time confers a superior right.

Other questions of a minor character are discussed by counsel; but it is not deemed necessary to consider them.

We perceive no error in the record, *and the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[534] LUCY W. FLETCHER ET AL., *Plfs. in Err.*,
v.
NATHAN FULLER, in His Own Right, and as Trustee for TRUMAN B. FULLER ET AL.

(See S. C. Reporter's ed. 534–555.)

Real property—long continued possession and use raise a presumption of grant—nature of this presumption—belief of actual existence, not necessary—rebuttal—erroneous instruction.

1. When the possession and use of real property have been long continued, they create a presumption of lawful origin; and this presumption does not always proceed on a belief that the thing presumed has actually taken place.

2. The presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given to him or those under whom he holds, but have been lost, or which he or they were entitled to have, but neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect.

3. Though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

4. In the case presented it is held that the claim to the lands in controversy by the defendants and their ancestors in title for over a century, with the payment of taxes thereon, and acts of ownership suited to the condition of the property, and its actual use for thirty-six or twenty-eight years would justify a presumption of a deed to the original ancestor to quiet the title of the defendants claiming under him; and that an instruction to the effect that in order to presume a lost deed the jury must be satisfied it had actually existed, was error.

[No. 138.]

Argued Jan. 18, 19, 1887. Decided Mar. 7, 1887.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. H. Greene, James Tillinghast** and *Charles Hart*, for plaintiffs in error.

Messrs. **Livingston Scott, Elisha C. Mowry** and *James O. Collins*, for defendant in error.

Mr. Justice **Field** delivered the opinion of [537] the court:

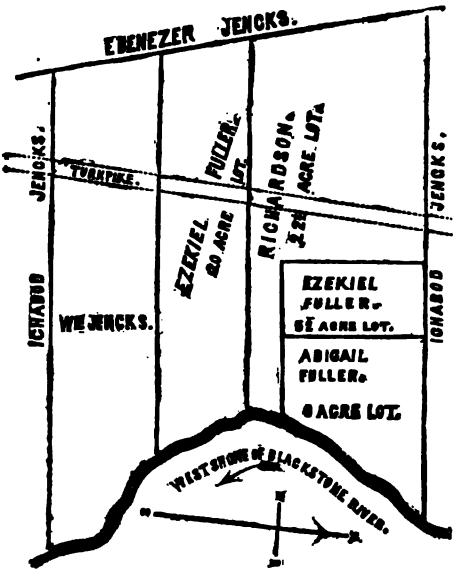
This is an action of ejectment to recover possession of twenty-seven twenty-eighths undivided parts of a tract of land, containing about 14 acres, situated in the Town of Lincoln, formerly Smithfield, in the State of Rhode Island. The plaintiff, a citizen of Connecticut, sues the defendants, citizens of Rhode Island, in his own right and as trustee for others.

The declaration contains several counts, all of which except two are withdrawn. In these the plaintiff alleges that on the 25th of October, 1874, he was "seised and possessed in his demesne as of fee in his own right and as Trustee" of twenty-seven twenty-eighths undivided parts of the tract of land which he has described, and that the defendants on that day and year, with force and arms, entered thereon and ejected him therefrom, and have ever since withheld the possession, to his damage of $1,000. The two counts differ merely in the description of some of the boundary lines of the tract. The defendants pleaded the general issue and twenty years' possession under the Statute of Possessions. Upon these pleas issues were joined and the case was tried, the parties stipulating that the plea of the statute should be held to apply to any period or periods of twenty years that could be covered by any other like plea that might have been filed, and that either party might offer any evidence and rely upon any matters that would be admissible under such plea or pleas, and any proper replications or other proceedings thereon. The case was tried three times, resulting the first time in a verdict for the defendants, and at the other times in a verdict for the plaintiff. The judgment on the last verdict is brought before us for review by the defendants on a writ of error. Numerous exceptions were taken in the progress of the trial to the rulings of the court in the admission and rejection of evidence, and to the instructions given and refused to the jury. But the conclusions we have reached with respect to the instructions given and refused, as to the presumption of a deed to the ancestors in title of the defendants, render it unnecessary to consider the others.

It appears from the evidence at the trial that the land in controversy was the westerly part [538] of a tract of 38¼ acres, belonging, in 1750, to one James Reed, and which, by early conveyances, became divided into three parcels, one containing 22¼ acres, one 5¼ acres, and the third 6 acres, as shown by a diagram submitted by consent of parties, to the jury, of which the following is a reduced copy:

A turnpike, running through the tract north- [539] erly and southerly, was opened in 1816. The 22¼ acre parcel was conveyed to Francis Rich-

ardson, of Attleboro, Massachusetts, by deed dated April 10, 1750. The land in controversy is a portion of this parcel lying west of the turnpike. The 5¼ acre parcel was conveyed to Ezekiel Fuller by deed dated November 17, 1750. The 6 acre parcel was conveyed to Abigail Fuller, wife of Ezekiel, and daughter of Francis Richardson, by deed dated January 21, 1756.



The plaintiff claims to derive title under the will of Francis Richardson, dated May 26, 1749, and the codicil thereof dated August 10, 1750, which were admitted to probate in Massachusetts, January 19, 1756. A copy of the will and codicil, and of the Massachusetts probate, was produced and given in evidence, together with a certificate of their having been filed and recorded in the probate office in Lincoln on the 27th of August, 1881.

It does not appear that there was any direct evidence that Francis Richardson was seized of the 22¼ acre parcel at the time of his death. The presumption, in the absence of any opposing circumstances, is undoubtedly that, being the owner at the date of the codicil, August 10, 1750, he continued such owner up to the time of his death, which occurred some years afterwards. Whether sufficient opposing circumstances to rebut this presumption are found in the absence of all claim to the land for three quarters of a century by the devisee or her husband, or her heirs, and the continued claim of ownership by the ancestors in title of the defendants during that period, is a question to be hereafter considered.

It is stated in the record that there was evidence tending to show that Abigail Fuller, the devisee, and her husband entered into possession of the property devised under the will and codicil, but what that evidence was does not appear. Abigail died prior to 1766, leaving her husband surviving her. He left Smithfield some time in 1761 "for parts unknown." It appears also that in a deed executed by him on the 11th of April, 1761, of the 20 acre lot designated on the diagram, he recited that such lot was bounded on the north by "his former land."

With the exception of the evidence tending to show that the devisee and her husband entered into possession of the property devised, and the reference by the husband in his deed to the tract as his former land, there was nothing to show that any claim of right or title to the land had been made by them, or by their heirs, for nearly three quarters of a century, either by the exercise of acts of ownership over it, such as its occupation or the use of its products, or by leasing or selling it, or by the payment of taxes, or in any other way. And for over forty years after the lapse of the three quarters of a century, the only claim of title made by the heirs of the devisee to any portion of the 22¼ acre lot consisted in the fact that in 1835 they brought an action against certain persons with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼ acre parcel, which action was discontinued in 1838 on account of the poverty and pecuniary inability of the heirs to carry it on; and in the fact that, at varying intervals between 1826 and 1857 (not 1858, as stated in one part of the record) they had been in the habit, under such claim, of cutting wood thereon openly for family use, and the manufacture of baskets, in which business some of them were engaged, and carrying it to their homes; and that on three occasions, once in 1840, once in 1845, and once in 1852, some of them, in contemplation of taking legal proceedings to establish their title, had gone around and upon the land and pointed out its boundaries. [540]

When Ezekiel Fuller departed from Smithfield in 1761, he left two children, Francis and Abigail, without means of support; and at a meeting of the town council in September following, proceedings were taken to provide for them. In a resolution reciting that "Ezekiel is gone, we know not where;" that his children were then and likely to be chargeable to the town; that little or nothing of Ezekiel's estate was to be found to support them, but that it was assumed there was some estate belonging to him, a person was appointed to make proper inquiry and search for it, "to know what land there is belonging to the family of said Ezekiel and secure the same for the support of the children." It would seem that the person thus appointed reported that there was a piece of land—a six acre parcel—which was possessed by Ezekiel in right of his wife; for the town council, at a meeting in March, 1776 [1766], after reciting that there was nothing of said Fuller's estate left behind to maintain his children but a small piece of land, and that no provision for their support could be had without the favor and authority of the General Assembly to sell and give a deed of it, appointed one Edward Mowry to lay the matter before the Assembly and request that it would pass an Act to enable some proper person to dispose of the parcel, and clothe him with authority to give a deed thereof. Mowry presented a proper petition to the Assembly, which granted the prayer and empowered the town treasurer, with the consent and advice of the town council to sell the land and apply the money received for the purpose stated; that is, the support of the children. A [541]

sale of the six acre lot for £30 was accordingly made by the town treasurer under the authority thus conferred.

Abigail, the wife of Ezekiel, left five children surviving her, all of whom died before their father except Abigail, Jr., who was one of the two supported by the town. The father, who disappeared from Smithfield in 1761, died in the poor house in Attleboro, Massachusetts, in 1800. Abigail, the daughter, was born December 29, 1757, became of age December 29, 1778, and was married to Benjamin Fuller December 1, 1779. He died in 1832, and she died in 1835 intestate. The plaintiff is the grandson of this Abigail, and the parties for whom he is Trustee are her other descendants. They all derive whatever title they have from her.

On the 24th of May, 1874, a century and eighteen years after the probate of the will of Francis Richardson, all the heirs of Abigail Fuller, except one, executed a power of attorney to Theodore C. Fuller, also one of said heirs, authorizing him to sell to Nathan Fuller, the plaintiff in this action, all their title and interest in the tract conveyed by James Reed to Francis Richardson by deed dated April 10, 1750, and devised to Elizabeth [Abigail] Fuller, wife of Ezekiel, by his last will and testament probated [542] January 19, 1756, to hold the same upon trust to prosecute to final conclusion legal proceedings necessary to recover possession of the premises, to employ counsel for that purpose, to conduct the proceedings, and to make such compromises of the grantors' claims as to him and his counsel might seem best.

The same grantors, by their attorney, on the same day, executed a deed of the same tract of land to Nathan Fuller, reciting a consideration of $10, upon trusts similar to those contained in the power of attorney. Both documents were duly acknowledged by the grantors. The delivery of the deed was made by the attorney in this way; he and the grantee went upon the land with three other persons, and whilst upon it he delivered the deed to the grantee. He also took up some earth in his hands and passed it to the grantee. This he had been instructed to do by his counsel as the form of delivering possession. The parties were about fifteen minutes on the land. There was no evidence of any notice to or knowledge by the defendants of these acts, and they testified that they had neither. This is the case of the plaintiff, briefly stated.

The defendants trace their title to the land in question by continuous claim of title from a deed of the 22¼ acre parcel, made by one Jeremiah Richardson, a grandson of the testator, Francis Richardson, to Stephen Jenks, dated April 8, 1768, containing full covenants of title and warranty, and recorded in the records of Smithfield on July 10 following. Jeremiah Richardson was the son of Francis Richardson, who was a son of the testator, and is named in the will as having died. Jeremiah had a brother also called Francis Richardson, who died prior to March, 1766. Stephen Jenks, by deed dated August 12, 1796, containing full covenants of warranty, to secure several notes, amounting to $3,000, mortgaged the land in controversy, with adjoining lands to which he had acquired title, making in all 50 acres; of which the 20 acre lot, designated on the diagram, was one parcel, which he had purchased in 1763 for £640, and the 6 acre lot, also designated on the diagram, was another parcel, which he had purchased in 1768 for £45. He died in 1800, leaving a will, by which he devised his real estate in Smithfield and elsewhere to his children. Stephen Jenks, Jr., his son, acquired the in- [543] terests of the other heirs, and by deed dated May 18, 1804, conveyed the whole, including by specific description the land in controversy, to his brother, Jerahmael Jenks, who was the grandfather and ancestor in title of the defendants. Other portions of the 22¼ acre parcel were conveyed by ancestors in title of the defendants, by deeds to different parties, containing full covenants of title and warranty, dated respectively April 12, 1841, December 3, 1845, and May 21, 1860, and they entered into possession of the respective parcels, and enclosed and improved them. In May, 1864, the father of the defendants, from whom they derive their title, surveyed and plotted into town lots the remaining portion of that parcel, being the land in controversy. In the partition of the estate of the grandfather, Jerahmael Jenks, between his heirs at law, in 1824, this land had been taken by him as part of his estate, and plotted as such in the partition plot. He died in 1866.

The land was not inclosed on the line of the turnpike. In 1838 a fence was put up on the westerly side by an adjoining owner. On the southerly side there was at one time a fence running from the turnpike westerly to the other side of the ledge hereafter mentioned, but it disappeared in 1835. On the northerly line there was only a brush fence until 1867, when a purchaser of adjoining land erected one. The land has never been put under cultivation. Prior to 1858 it was covered with wood; and every year from 1829 to 1857 the ancestors of the defendants cut wood upon it for family use. In 1857 the father of the defendants cut and applied to his use all the wood of value then remaining. The land had an extensive ledge of rock running across its center from north to south, which was opened by defendants' ancestors as early as 1835. In 1845 or 1846 large quantities of stone were quarried and sold by them to railroad companies; and from that time down to the trial, with longer or shorter intervals, never of more than a year or two, the ledge was worked more or less extensively by the defendants or their ancestors in title, or their lessees and tenants, and the stone removed. There is no evidence that any other person had ever worked the ledge or taken stone off the land, or attempted to do so. [544] The father of the defendants put up a sign on the land, stating that all persons were forbidden from taking wood or stone from it. In 1860 or 1861 his lessee built a barn and tool shed on the land near the ledge for his use in quarrying, these structures being in full view from Broad Street, formerly the turnpike. He also dug a well, from which he obtained water for his business. The barn, with lofts for hay, was of sufficient capacity "to accommodate and did accommodate six or eight horses, or more." It remained on the land, with some additions, until some time in 1869, when it was removed by the lessee. The land was assessed for taxes to the ancestors in title of the defend-

ants, and paid by them, for twenty years, between 1770 and 1805. The tax lists for the other years up to 1805 could not be found. From 1805 to the time of the trial, a period of seventy-seven years, the land was assessed to them, and the taxes were paid by them. The Statute of Rhode Island respecting the assessment of taxes, in force between 1798 and 1825, required the assessors to assess taxes on real estate to persons who held and occupied it, and the one in force between 1825 and 1855 required them to assess the taxes to those who held and occupied it or to the owners thereof, and the one in force after 1855, to the owners thereof. No taxes were ever assessed to the Fullers or paid by them. Neither plaintiff nor defendants, nor their ancestors, ever resided on the premises, and the land was occupied and possessed by the ancestors in title of the defendants only in the way mentioned.

Upon the case thus presented, and we have not omitted, we think, any material circumstance in the statement, the defendants asked an instruction to the jury as to the presumption they might make of a lost grant to their ancestor in title, which the court refused. Its charge was thus:

"Of course, gentlemen, if you find that you can presume a grant, if you find from the testimony that there was a lost deed which passed from Abigail Fuller to Jeremiah Richardson, or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jenks, that makes the title of the defendants here complete. * * * But, gentlemen, you are to look [545] into the evidence upon this question of a grant; and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."

The defendants requested the court to instruct the jury "that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor."

This instruction the court refused to give, or to modify its charge in conformity with it. The defendants now contend that the court thus erred, its charge being in effect that in order to presume a lost deed the jury must be satisfied that such a deed had in fact actually existed. Such seems to us to be the purport of the charge, and therein there was error.

In such cases "presumptions" as said by *Sir* William Grant, "do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as *Lord* Mansfield says, merely from a principle and for the purpose of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must often be imperfect, and in many cases unavailable when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is already vested." *Hillary* v. *Waller*, 12 Ves. 239, 252; *Eldridge* v. *Knott*, Cowp. 215.

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance [546] executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements, and a conviction that they can be readily obtained at any time.

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled, and of course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in and by reasonable presumptions, that acts to protect one's rights, which might have been done, and in the ordinary course of things generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions; and thus gives peace and quiet to long and uninterrupted possessions.

The rule of presumption, in such cases, as has been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society. "Where one uses an easement whenever he sees fit, without asking leave and without objection," says the Supreme Court of Pennsylvania, "his adverse and uninterrupted enjoyment for twenty-one years is a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain [547] how it began, is presumed to have been in pursuance of a full and unqualified grant." *Garrett* v. *Jackson*, 20 Pa. 335. The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. As said by this court in *Ricard* v. *Williams*, 20 U. S. 7 Wheat. 109 [5: 410], speaking by *Mr. Justice* Story: "A grant of land may as well be presumed as a grant of a fishery, or of a common, or of a way. Presumptions of this nature are adopted, from the general infirmity of human

nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."

It is not necessary therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its nonexecution. In *Edson* v. *Munsell*, 10 Allen, 557, which was an action for obstructing the enjoyment of an easement, the doctrine of acquiring such rights by prescription or adverse possession is elaborately considered; and it is there said that "The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century, to avoid the absurdity of their rule of legal memory, and was derived by analogy from the limitation prescribed by the Statute of 21 Jac. 1, c. 21, for actions of ejectment. It is not founded on a belief that the grant has actually been made in a particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions."

In *Casey's Lessees* v. *Inloes*, 1 Gill, 503, which was an action of ejectment, the Court of Appeals of Maryland held that where there had [548] been a continuous possession of land for twenty years or upwards by a party or persons claiming under him, the court was authorized to instruct the jury, in the absence of a deed to such party, to presume that one had been executed to him. It also approved the refusal of the court below to instruct the jury that before they could find a title in the defendants, or any one of them, by presumption of a grant by the plaintiff or those under whom he claims, they must believe on their consciences and find as a fact that such grant was actually made. "The granting of such a prayer," said the court, "would have a tendency to mislead the jury, by inducing them to believe that a presumption of a grant could not be made, unless the jury in point of fact believed in the execution of the grant; whereas, it is frequently the duty of the jury to find such presumption as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant."

In *Williams* v. *Dowell*, 2 Head, 695, 698, which was also an action of ejectment, the Supreme Court of Tennessee, speaking on the same point, said: "It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that by legal possibility a grant might have issued; and this appearing, it may be assumed, in the absence of circumstances repelling such conclusions, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

In accordance with the doctrine thus explicitly declared, there can be no doubt that the court below should have instructed the jury as requested. It would seem from the instruction given that the deed which the defendants insisted might be presumed was one from Ezekiel and Abigail Fuller, or from Abigail Fuller, to Jeremiah Richardson. We think, however, that the facts point with equal directness to a conveyance from his grandfather. The codicil to his will, by which he devised the property to his married daughter, was dated several years before his death; and there was no evidence that he was seised of it at that time, except the presumption arising from his having once possessed it. It does not appear that either the [549] devisee or her husband ever exercised any acts of ownership in any way, or ever claimed to own it. After he left Smithfield, two of his children were supported by the town, and the agent of the town, appointed to search for any property belonging to the father, from the sale of which the children might be supported, reported that there was only the 6 acre parcel, which was held by him in the right of his wife. He afterwards went to the poor house, where he died in 1800. During the thirty-nine years after he left Smithfield, and notwithstanding his having been part of that time in the poor house, no word appears to have come from him asserting that he had any interest in the property. It is difficult to reconcile his conduct or that of his wife, the devisee, if in truth the testator continued the owner of the property until his death, and it passed under the codicil to his will. While Ezekiel Fuller was still living, and for several years after he had left Smithfield, Jeremiah Richardson, the testator's grandson, asserted ownership of the tract by its sale to Stephen Jenks by a deed, with covenants of title and warranty, which was recorded in the town records. No word of opposition to this sale or to the subsequent mortgage of the property by the grantee was ever made, so far as the record discloses. The fact that Jeremiah Richardson was a minor when his grandfather died does not militate against the presumption of a deed to him. Nothing would be more natural than a deed of gift from the grandfather to the grandson. It would also seem from the charge of the court, that in the deed of Jeremiah to Jencks he recited that the property had come from his honored grandfather, or words to that effect.

If, however, the evidence which, as the record says, tended to show that the devisee and her husband entered into the possession of the property devised, and the recital in his deed of April 11, 1761, of the 20 acre parcel, that it was bounded on the north by his *former* land, can be considered as rebutting the presumption of such a deed by the testator, then the defendants may fall back on the presumption of a deed to Jeremiah Richardson by Ezekiel and Abigail Fuller, the devisee, and her husband. [550] There is nothing in the conduct or language of either of these parties which in any way repels such a presumption. Their silence and nonclaim of the property would rather indicate that they had parted with their interest. The minority of Jeremiah at the time only shows

his inability to purchase the property, but those under whose charge he was could have purchased it for him, and had the deed executed to him. His orphanage may have induced such a proceeding. We do not, therefore, think that his minority at the time can be urged against the presumption of a deed to him.

For the refusal of the court below to give the instruction requested, the case must go back for a new trial. We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

How long a period must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination. "In general," said this court, speaking by *Mr. Justice* Story, "it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the Statute of Limitations in cases where the statute does not apply. But where the statute applies, it constitutes ordinarily a sufficient title or defense independently of any presumption of a grant, and, therefore, it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the Statute of Limitations." *Ricard* v. *Williams*, 20 U. S. 7 Wheat. 59, 110 [5: 398, 410].

The general statement of the doctrine, as we have seen from the authorities cited, is that the [551] presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. And hence, as a general rule, it is only where the possession has been actual, open and exclusive for the period prescribed by the Statute of Limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked. But the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership. But, as *Mr. Justice* Story observes, in delivering the opinion of this court in *Green* v. *Liter*, 12 U. S. 8 Cranch, 249 [3: 552]. "In the simplicity of ancient times there were no means of ascertaining titles but by the visible seisin; and indeed, there was no other mode between subjects of passing title but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seised he had a perfect investiture, and if ousted could maintain his action for the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety; to prevent frauds upon the land and upon the other tenants." There may be acts equally notorious, and therefore equally evincive of ownership, which, taken in connection with a long possession, even if that possession has been subject to occasional intrusion, are as fully suggestive of rightful origin as an uninterrupted possession. Where any proprietary right is exercised for a long period, which, if not founded upon a lawful origin, would in the usual course of things be resisted by parties interested, and no such resistance is made, a presumption may be indulged that the proprietary right had a lawful origin. The principle is thus stated by *Mr. Justice* Stephen [552] of the High Court of Justice of England, in his Digest of the Law of Evidence, using the term "grant" in a general sense, as indicating a conveyance of real property, whether corporeal or incorporeal: "When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost." Art. 100.

This presumption may therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which, under proper instructions, may be left to the jury.

In the present case, acts of ownership over the property in controversy by the ancestors in title of the defendants, so far as they could be manifested by written transfers of it, either as conveyances of title or by way of security, were exercised from 1768 for more than a century. The first conveyance, from which the defendants traced their title, was duly recorded in the land records of the town soon after its execution in that year. The assessment of taxes on the property to those ancestors, and their payment of the taxes for twenty years between 1770 and 1805, and the assessment of taxes to them or to the defendants for seventy-seven years after 1805, and the payment of taxes by them, such assessment being required to be made, under the laws of the State, to occupants or owners of the land, are circumstances [553] of great significance, taken in connection

with their constantly asserted ownership. In *Ewing* v. *Burnet*, this court speaks of the uninterrupted payment of taxes on a lot for twenty-four consecutive years as "powerful evidence of claim of right to the whole lot." 36 U. S. 11 Pet. 54 [9: 630]. Here, as seen, the taxes were uninterruptedly paid by the defendants or their ancestors in title for a much longer period.

In *St. Louis Public Schools* v. *Risley's Heirs*, the Supreme Court of Missouri said: "Payment of taxes has been admitted in questions of adverse possession and may have an important bearing, as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the Statute of Limitations, or for one to pay taxes, having no claim or color of title." 40 Mo. 370. In *Davis* v. *Easley*, which was an action of ejectment, the Supreme Court of Illinois held that receipts for taxes paid by the plaintiff were admissible, and said: "The payment of taxes indicated that the plaintiff claimed title to the whole tract. It likewise tended to explain the character and extent of his possession." 13 Ill. 201.

In this case, the ancestors of the defendants entered upon the land under claim of title, and opened and worked the ledge of rock running through it, as early as 1835, and from 1846 they or their tenants or lessees continued, with occasional intervals, to work that ledge to the time of trial in 1882, a period of thirty-six years, and it does not appear that during that time anyone ever interfered with their work or complained of it. To constitute an adverse possession it was not necessary that they should have actually occupied or inclosed the land. It was sufficient that they subjected it to such uses as it was susceptible of to the exclusion of others. *Ellicott* v. *Pearl*, 35 U. S. 10 Pet. 442 [9: 487]. That subjection might be shown by the quarrying of the ledge and the removal of the stone, without disturbance or complaint from any quarter. The exclusive working of the quarry, under claim of title to the whole tract by virtue of conveyances in which it was described, might operate in law to carry the possession over the whole; and the payment of taxes thereon might authorize the jury to infer a continuous possession of the whole, notwithstanding any temporary and occasional intrusion by others upon a different part of the tract, which did not interfere with the work. [554]

The entry of the plaintiff with the attorney of his coheirs in 1874, and the delivery of the deed to him with a handful of earth, if weight and consideration are to be given to that proceeding under the circumstances in which it was made, would only reduce the period of undisturbed possession to twenty-eight years. The cutting of wood on a different portion of the land by the Fullers for family use, or the manufacture of baskets, at occasional intervals during a portion of this period, though competent for the consideration of the jury, was not necessarily an interruption to the peaceable occupation of the land, so far as quarrying of the ledge and the removal of the stone were concerned, to which uses the defendants and their ancestors in title subjected it, and which appear to have constituted its principal value. Nor did it necessarily change the legal effect of the possession for quarrying the ledge with the attendant claim to the whole tract.

In *Webb* v. *Richardson*, the Supreme Court of Vermont, in speaking of interruptions in the actual occupancy of real property as effecting the claim of continuous possession said: "To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy necessary to constitute a continuous possession depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterwards be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken." 42 Vt. 465–473. That was an action of trespass for cutting timber on the land of the plaintiff, who was in possession at the time, and offered testimony to prove that his possession was earlier than the defendant's, and also that he had acquired the land by fifteen years' adverse possession. The defendant did not show a chain of title back to the original proprietor of the land, but showed that his grantors entered into possession in 1835, and cut timber and claimed to own the land, and it was held that the question whether this entry interrupted the plaintiff's possession should have been submitted to the jury under proper instructions, in connection with the plaintiff's evidence of continuous possession under those through whom he claimed, and that it was error to refuse to submit it. [555]

Our conclusion is that the claim to the land in controversy by the defendants and their ancestors in title for over a century, with the payment of taxes thereon, and acts of ownership suited to the condition of the property, and its actual use for thirty-six or twenty-eight years, it matters not which, would justify a presumption of a deed to the original ancestor, Jeremiah Richardson, to quiet the possession of the defendants claiming under him, and the jury should have been permitted to presume such a deed without finding from the testimony that there was in point of fact a deed which was lost. If the execution of a deed was established, nothing further would be required than proof of its contents; there would be no occasion for the exercise of any presumption on the subject. It is only where there is uncertainty on this point that the presumption is indulged to quiet the possession.

The judgment of the court below must be reversed, and the cause remanded for a new trial.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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THOMAS BALDWIN, *Plff. in Err.*,
v.
J. C. FRANKS, Marshal of the UNITED STATES OF AMERICA FOR THE DISTRICT OF CALIFORNIA.

(See S. C. Reporter's ed. 678-707.)

Criminal law—conspiracy to drive Chinese subjects from their homes not within sections 5508, 5336, R. S.—section 5519 R. S., invalid in its operation within the States—construction of statutes—civil rights.

1. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable, so that each may be read alone.

2. Section 5519, R. S., cannot be sustained in whole or in part in its operation within a State, neither as to a conspiracy to deprive a person of protection under state laws nor a conspiracy to deprive him of rights secured to him by the Constitution, laws or treaties of the United States.

3. A conspiracy to deprive Chinese subjects, residing within a State, of rights secured to them by treaty, by forcibly expelling them from their homes and the town in which they reside, is not an offense within section 5508, R. S., which is held to apply only to conspiracies affecting citizens in their enjoyment of the elective franchise and their civil rights as citizens.

4. A conspiracy to deprive Chinese subjects of their rights under the laws and treaties of the United States is not within section 5336, R. S. An offense within that section means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution.

5. Penal statutes must be strictly construed.

[No. 884.]

Submitted Apr. 26, 1886. Decided Mar. 7, 1887.

IN ERROR to the Circuit Court of the United States for the District of California. Opinion below published, 27 Fed. Rep. 187. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **A. L. Hart**, for plaintiff in error.

Mr. **Hall McAllister**, for defendant in error:

Any attempt to compel or constrain any Chinese resident of this country to remove from or to any particular place, or to refrain from following any lawful occupation, or doing any lawful work that he may find to do, is not only morally wrong, but contrary to the law of the land.

The words "privileges and immunities," used in the Constitution in relation to rights of citizens of the different States, have been fully considered by this court and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the Treaty with China.

Ward v. *Md.* 79 U. S. 12 Wall. 430 (20: 452); *Slaughter House Cases*, 83 U. S. 16 Wall. 76 (21: 408); *Corfield* v. *Coryell*, 4 Wash. (C. C.) 380, 384. See also *Holden* v. *Joy*, 84 U. S. 17 Wall. 242 (21: 533); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 196, 198 (23: 847).

This case is not obnoxious to the several cases in which this court has decided that certain provisions of the United States Statutes were merely intended to prohibit state action, and had no reference to the conduct of individuals.

Neither is this case within the operation of those decisions of this court which hold that the complaint is insufficient in failing to show that the crime charged is violative of some federal right possessed by the injured party. Here the allegations of the complaint are clear and distinct, that the whole object of the conspiracy charged, and of all the overt acts committed in pursuance thereof, was to drive and expel the Chinese aliens in question from their homes, from the County of Sutter, from their rights of residence in the Town of Nicolaus, from their right of labor in said town where they then lived, and from their right to there earn a livelihood at their respective lawful vocations as theretofore.

The distinction which runs through the cases decided by this court is that the complaint (to bring the offense within federal jurisdiction) must clearly show, not merely that the offenders have committed a crime, but that the crime has been committed with the manifest intent of defeating a federal right possessed by the injured party; that where the State interferes with rights of individuals, guaranteed to them by the Constitution or laws or treaties of the United States, then such state action comes within the prohibition of the Acts of Congress, provided Congress has taken appropriate action in the premises. And so, also, where Congress has made it an offense to violate certain rights of individuals, that where such individual rights are violated, and such rights are federal in their character, that is, rights guaranteed to the injured individuals by the Constitution, or laws, or treaties of the United States, that then they constitute federal offenses within the appropriate action of Congress, and within the jurisdiction of the federal tribunals.

U. S. v. *Reese*, 92 U. S. 217 (23: 564); *U. S.* v. *Cruikshank*, 92 U. S. 548 (23: 590); *U. S.* v. *Harris*, 106 U. S. 636-640 (27: 292-294); *Ex parte Yarbrough*, 110 U. S. 657-666 (28: 275-279); *U. S.* v. *Waddell*, 112 U. S. 79 (28: 673).

The circumstance that the offense named was committed within the territory of the State of California does not deprive the federal court of jurisdiction nor Congress of the power "to define and punish" the offense.

U. S. v. *Holliday*, 70 U. S. 3 Wall. 407 (18: 182); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 188 (23: 846); *Ex parte Yarbrough*, and *U. S.* *Waddell*, *supra*.

As to the scope of the treaty-making power, see:

Holmes v. *Jennison*, 39 U. S. 14 Pet. 561 (10: 589); *Hauenstein* v. *Lynham*, 100 U. S. 483 (25: 628).

The Government of the United States, and not the State of California, is responsible for the damages sustained by the Chinese aliens in question.

Chy Lung v. *Freeman*, 92 U. S. 275 (23: 550).

The question in this case could not have been involved in *U. S.* v. *Harris*, 106 U. S. 641 (27: 294). In that case the law alleged to have been violated was a law of the State; but here the law alleged to have been violated is a law of the United States, a treaty—which is the supreme law of the land.

A statute may be regarded as constitutional for one purpose and not for another.

Tiernan v. *Rinker*, 102 U. S. 123 (26: 103); *People* v. *Hill*, 7 Cal. 104; *Oregon* v. *Wiley*, 4

Oreg. 187; *Mundy* v. *Monroe*, 1 Mich. 68; *Cargill* v. *Power*, 1 Mich. 369; *Baker* v. *Braman*, 6 Hill, 47.

[680] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a writ of error brought by Thomas Baldwin, the plaintiff in error, for the review of a judgment of the Circuit Court of the United States for the District of California, refusing his discharge on a writ of *habeas corpus*, from the custody of the Marshal of the district; and the questions presented for consideration arise on a certificate of the judges holding the court, of a division of opinion between them in the progress of the trial. The record shows that Baldwin was held in custody by the Marshal, under a warrrant issued by a commissioner of the circuit court, on a charge of conspiracy with Bird Wilson, William Hays and others, to deprive Sing Lee and others, belonging to "a class of Chinese aliens, being * * * subjects of the Emperor of China, of the equal protection of the laws and of equal privileges and immunities under the laws, [681] for that said * * * persons so belonging to the class of Chinese aliens did then * * * reside at the Town of Nicolaus, in said County of Sutter, in said State of California, and were engaged in legitimate business and labor to earn a living, as they had a right to do, and they at that time had a right to reside at said Town of Nicolaus, * * * and engage in legitimate business and labor to earn a living, under and by virtue of the Treaties existing, and which did then exist, between the Government of the United States and the Emperor of China, and the Constitution and laws of the United States; but, nevertheless, while said * * * persons were * * * so residing and pursuing their legitimate business and labor for the purpose aforesaid, said conspirators * * * did, * * * having conspired together for that purpose, unlawfully and with force and arms, violently and with intimidation, drive and expel said persons, * * * belonging to said class of Chinese, * * * from their residence at said Town of Nicolaus, * * * and did * * * deprive them * * * of the privilege of conducting their legitimate business and of the privilege of laboring to earn a living, and, without any legal process, * * * placed said Chinese aliens * * * under unlawful restraint and arrest, and so detained them for several hours, and * * * by force and arms, and with violence and intimidation, placed them * * * upon a steamboat barge, then plying on the Feather River, and drove them from their residence and labor and from said county."

The questions certified relate only to the sufficiency of this charge for the detention of the prisoner. There are nine questions in all, the first six having reference to section 5519 of the Revised Statutes, and the others to sections 5508 and 5336, as the authority for the prosecution. The fourth fairly presents the whole case as it arises under section 5519, and that is as follows:

"4. Whether a conspiracy of two or more persons in the State of California, for the purpose of depriving Chinese residents, lawfully residing in California, in pursuance of the provisions of the several treaties between the United States and the Emperor of China, of the right to live and pursue their lawful vocations at the Town of Nicolaus in said State, and in pursuance of such conspiracy actually forcibly expelling such Chinese from said town, in [682] the manner shown by the record, is: 1. A violation of and an offense within the meaning of section 5519 of the Revised Statutes of the United States; 2. Whether said section, so far as it applies to said state of facts and such Chinese residents, and makes the acts stated an offense against the United States, is constitutional and valid."

The seventh presents all the points for consideration under sections 5508 and 5336, as follows:

"7. Where two or more persons, with or without disguise, go upon the premises of Chinese subjects, lawfully residing in the State of California, with intent to prevent and hinder their free exercise or enjoyment of any right secured to them by the several Treaties between the United States and the Emperor of China, and in pursuance of such conspiracy, forcibly prevent their exercise and enjoyment of such rights, and expel such Chinese subjects from the town in which they reside:

"Whether (1) such acts so performed constitute an offense within the meaning of the provisions of section 5508 of the Revised Statutes of the United States; and,

"(2) If so, whether the provisions of said section, so making said acts an offense, are constitutional and valid;

"(3) Whether such acts so performed constitute an offense within the meaning of that clause of section 5336 of the Revised Statutes of the United States, which makes it an offense for two or more persons in any State to conspire, 'by force, to prevent, hinder or delay the execution of any law of the United States,' or within the meaning of any other clause of said section; and,

"(4) Whether said section, so far as applicable to the facts stated, is a constitutional and valid law of the United States."

The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offense as that with which Baldwin is charged, but whether it has so done.

That the treaty-making power has been surrendered by the States and given to the United States is unquestionable. It is true, also, that the treaties made by the United States and in [683] force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.

Articles II and III of a Treaty between the United States and the Emperor of China, concluded November 17, 1880, and proclaimed by the President of the United States October 5, 1881, are as follows:

Article II. "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored Nation."

Article III. "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored Nation, and to which they are entitled by treaty." 22 Stat. at L. 827.

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities or exemptions guaranteed to them by this Treaty, we do not doubt. What we have to decide, under the questions certified here from the court below, is whether this has been done by the sections of the Revised Statutes specially referred to. These sections are as follows:

Sec. 5519. "If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering [684] the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

Sec. 5508. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Sec. 5336. "If two or more persons in any State or Territory conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, for a period not less than six months, nor more than six years, or by both such fine and imprisonment."

As the charge on which Baldwin is held in custody was evidently made under section 5519, and that is the section which was most considered in the court below, we will answer the questions based on that first. It provides for the punishment of those who "in any State or Territory conspire * * * for the purpose of de- [685] priving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."

In *United States* v. *Harris*, 106 U. S. 629 [27: 290], it was decided that this section was unconstitutional, as a provision for the punishment of conspiracies of the character therein mentioned, within a State. It is now said, however, that in that case the conspiracy charged was by persons in a State against a citizen of the United States, and of the State, to deprive him of the protection he was entitled to under the laws of that State, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be invalid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a State by the Treaties of the United States. In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The lim- [686] itation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.

Thus, in *United States* v. *Reese*, 92 U. S. 214 [23: 563], the indictment was against two of the inspectors of a municipal election in Kentucky, under sections 3 and 4 of the Act of May 31, 1870, chap. 114, 16 Stat. at L. 140, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election. There was nothing in

either of the sections to limit their operation to a refusal or hindrance "on account of the race, color, or previous condition of servitude" of the voter, and it was held that they were unconstitutional because, on their face, they were broad enough to cover wrongful acts without as well as within the constitutional power of Congress. An attempt was made there as here to limit the statute by construction so as to make it operate only on that which Congress might rightfully prohibit and punish, but to this the court said, p. 221 [565]: "For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only." This was answered in the negative, the court remarking: "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

[687] Following this were the *Trade-Mark Cases*, 100 U. S. 82 [25: 550], in which there were indictments under sections 4 and 5 of the Act of August 14, 1876, chap. 274, 19 Stat. at L. 141, "to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods." Of this Act the court said, speaking through *Mr. Justice* Miller, p. 98 [553], that its broad purpose "was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here." A statute so broad and sweeping was then held not to be within the constitutional grant of legislative power to Congress, but, p. 95 [552], "whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control," was properly left undecided. The indictment, however, presented a case in which the defendant was charged with having in his possession counterfeits and colorable imitations of the trade-marks of foreign manufacturers, and it was suggested that if Congress had power to regulate trade-marks used in commerce with foreign Nations and among the several States, this statute might be held valid in that class of cases, if no further; but the court decided otherwise, and in so doing said, p. 98 [553]: "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, when they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." And again, further on, after citing *United States* v. *Reese*, and quoting from the opinion in that case, it was said, p. 99 [553]: "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, to make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under a state law." [688]

The same question was also considered and the former decisions approved in *United States* v. *Harris*, *supra*, and in the *Virginia Coupon Cases*, 114 U. S. 305 [29: 197], it was said that "To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

It is suggested, however, that *Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377] and *Presser* v. *Illinois*, 116 U. S. 252 [29: 615] are inconsistent with *United States* v. *Reese* and the *Trade-Mark Cases*, but we do not so understand them. In *Packet Co.* v. *Keokuk* the question arose upon an ordinance of the City of Keokuk establishing a wharf on the Mississippi River and the rates of wharfage to be paid for its use. In its general scope the ordinance was broad enough to include a part of the shore of the river declared to be a wharf, which was in its natural condition and unimproved. The city had, however, actually built, paved and improved a wharf at a large expense within the limits of the ordinance, and the charges then in question were for the use of the facilities thus provided for receiving and discharging cargoes. An objection was made to the validity of the ordinance because it provided for charges to be paid for the use of the unimproved bank as well as for the improved wharves, but the court said, p. 89 [381]: "The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case It may be conceded that the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented." That was not a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature. The only question was whether the packet company was bound to pay for the use of improved wharves when the ordinance, taken in its breadth, fixed the charges and required payment for the use of that part of the established wharf which was unimproved as well as that which was improved. The precise point to be determined was whether, under those circumstances, the vessel owners were [689]

excused from paying for the use of that which was improved.

In *Presser* v. *Illinois*, the indictment was for a violation of the provisions of one of the sections of the Military Code of Illinois, and it was claimed that the whole Code was invalid, because in its general scope and effect it was in conflict with title XVI of the Revised Statutes of the United States upon the subject of "The Militia." But the court held that, even if the first two sections of the Code, on which the objection rested, were invalid, they were easily separable from the rest which could be maintained. The objectionable sections related to the enrolment of the militia in the State generally, and the rest to the organization of eight thousand men as a "volunteer active militia." This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, "where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible, even though the other part should fail." *Virginia Coupon Cases*, [*supra*]. As was said in *Allen* v. *Louisiana*, 103 U. S. 84 [26: 319], "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if these were stricken out, to give effect to what appears to have been the intent of the Legislature."

Applying this rule to the present case, it is clear that section 5519 cannot be sustained in whole or in part in its operation within a State, unless *United States* v. *Harris* is overruled, and [690] this we see no occasion for doing. That case was carefully considered at the time, and subsequent reflection has not changed our opinion as then expressed. For this reason we answer the second branch of the fourth question which has been certified in the negative. This disposes of all the other points included in the first six questions, and no further answer to them is necessary.

We come now to the questions certified which arise under section 5508. That this section is constitutional was decided in *Ex parte Yarbrough*, 110 U. S. 651 [28: 274], and *United States* v. *Waddell*, 112 U. S. 76 [28: 673]. The real question to be determined, therefore, is whether what is charged to have been done by Baldwin constitutes an offense within the meaning of its provisions.

The section is found in title LXX, chapter 7, of the Revised Statutes embracing "Crimes against the Elective Franchise and Civil Rights of Citizens;" and it provides for the punishment of those "who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same;" and of those who go in companies of two or more "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured." The person on whom the wrong to be punishable must be inflicted is described as a *citizen*. In the Constitution and laws of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a State or of the United States. It is so used in section 1 of article XIV of the Amendments of the Constitution, which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside;" and that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But it is also sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in section 5508 in the Revised Statutes is quite clear, if we revert to the original statute from which this section was taken. [691] That statute was the Act of May 31, 1870, chap. 114, 16 Stat. at L. 140, "To enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." It is the statute which was under consideration as to some of its sections in *United States* v. *Reese*, *supra*, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several States. Under these circumstances there cannot be a doubt that originally the word citizen was used in its political sense, and as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

This particular section is a substantial reenactment of section 6 of the original Act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account "of race, color, or previous condition of servitude." Sometimes, as in sections 3 and 4, the language is broader than this, and, therefore, as decided in *United States* v. *Reese*, those sections are inoperative; but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents, or inhabitants.

This section is highly penal in its character, much more so than any others, for it not only provides as a punishment for the offense a fine of not more than $5,000 and an imprisonment of not more than ten years, but it declares that any person convicted shall "be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is therefore to be construed strictly; not so strictly as to defeat the legislative will, but doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a [692] person only or an inhabitant. And, besides, the crime has been classified in the revision among those which relate to the elective franchise and the civil rights of citizens. For these reasons we are satisfied that the word citizen, as used in this statute, must be given the same

meaning it has in the Fourteenth Amendment of the Constitution, and that to constitute the offense which is there provided for, the wrong must be done to one who is a citizen in that sense.

It is true that the word "citizen" only occurs in the first clause of the section, but in the second clause there is nothing to indicate that any other than a citizen was meant, and the section of the original statute from which this was taken has nothing from which any different inference can be drawn. That clearly deals with citizens alone, and the revision differs from it only in a re-arrangement of the original sentences and the exclusion of some superfluous words. Sections 5506 and 5507, which immediately precede this in the revision, clearly refer to political rights only, for they both relate to the privilege of voting, section 5506 being for the protection of citizens in terms, and section 5507 being for the protection of those to whom the right of suffrage is guaranteed by the Fifteenth Amendment of the Constitution. It may be that by this construction of the statute some are excluded from the protection it affords who are as much entitled to it as those who are included; but that is a defect, if it exists, which can be cured by Congress, but not by the courts.

We, therefore, answer the first subdivision of the seventh question certified in the negative. The second subdivision need not be answered otherwise than it has been elsewhere in this opinion.

It remains only to consider that part of the questions certified which relates to section 5336. That section provides for the punishment of those who conspire: 1, "to overthrow, put down, or destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof;" or 2, "by force to prevent, hinder or delay the execution of any law of the United States;" or 3, "by force to seize, take, or possess any property of the United States contrary to the authority thereof." This is a re-enactment of similar provisions in the Act of July 31, 1861, chap. 33, 12 Stat. at L. 284, "To define and punish certain conspiracies," and in that of [693] April 20, 1871, chap. 22, § 2, 17 Stat. at L. 13, "To enforce the provisions of the Fourteenth Amendment of the Constitution of the United States, and for other purposes."

It cannot be claimed that Baldwin has been charged with a conspiracy to overthrow the government, or to levy war within the meaning of this section. Nor is he charged with any attempt to seize the property of the United States. All, therefore, depends on that part of the section which provides a punishment for "opposing" by force the authority of the United States, or for preventing, hindering, or delaying the "execution" of any law of the United States.

This evidently implies force against the government as a government. To constitute an offense under the first clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority. That is not pretended in this case. The force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection.

So, too, as to the second clause; the offense consists in preventing, hindering, or delaying the Government of the United States in the execution of its laws. This, as well as the other, means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. The United States are bound by their Treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment; and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen. But that is not what Bald- [694] win has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it. His force was exerted against the Chinese people, and not against the government in its effort to protect them. We are compelled, therefore, to answer the third subdivision of the seventh question in the negative, and that covers the fourth subdivision.

This disposes of the whole case, and, without answering the questions certified more in detail, *we reverse the judgment of the Circuit Court, and remand the case for further proceedings not inconsistent with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** dissenting:

I agree with the majority of the court in its construction of the different sections of the Revised Statutes which have been under consideration in this case, except the third clause of section 5336, and the last clause of section 5508.

The third clause of section 5336 declares that if two or more persons in any State or Territory conspire "by force to prevent, hinder or delay the execution of any law of the United States," each of them shall be punished by a [702] fine of not less than $500 or more than $5,000, or by imprisonment, with or without hard labor, for a period of not less than six months or more than six years; or by both such fine and imprisonment.

By the Treaty with China, of 1868, the United States recognize the right of Chinese to emigrate to this country, and declare that in the United States the subjects of that empire shall enjoy the same privileges and immunities in respect to residence which are enjoyed by citizens or subjects of the most favored nation.

The complaint against the plaintiff in error is that he conspired with others to expel by force from the town of Nicolaus, and the County of Sutter, in the State of California, the subjects of the Emperor of China, who were residing and doing business there, and in furtherance of the conspiracy entered the homes of certain persons of that class, seized them, and forcibly placed them upon a barge

on Feather River, on the bank of which the Town of Nicolaus is situated, and drove them from the county, and thus deprived them of privileges and immunities conferred by the treaty.

For this alleged offense the plaintiff in error, with others, was arrested. On application for a *habeas corpus* for his discharge, the judges of the circuit court were divided in opinion. This court holds that a conspiracy thus violently to expel the Chinese from the county and town where they resided and did business, and thus defeat the provisions of the Treaty, was not a conspiracy to prevent or hinder by force the execution of a law of the United States, although a treaty is declared by the Constitution to be the supreme law of the land.

Under the Constitution, a treaty between the United States and a foreign Nation is to be considered in two aspects—as a compact between the two Nations, and as a law of our country. As a compact, it depends for its enforcement on the good faith of the contracting parties, and to carry into effect some of its provisions may require legislation. For any infraction of its stipulations importing a contract, the courts can afford no redress except as provided by such legislation. The matter is one to be settled by negotiation between the [703] executive departments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable. *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253, 314 [7: 415, 435]; *Head Money Cases*, 112 U. S. 580, 598 [28: 798, 803]; *Taylor* v. *Morton*, 2 Curtis (C. C.) 454, 459; *Re Ah Lung*, 9 Sawy. 306.

But in many instances a treaty operates by its own force, that is, without the aid of any legislative enactment; and such is generally the case when it declares the rights and privileges which the citizens or subjects of each Nation may enjoy in the country of the other. This was so with the clause in some of our early treaties with European Nations, declaring that their subjects might dispose of lands held by them in the United States, and that their heirs might inherit such property, or the proceeds thereof, notwithstanding their alienage. Thus the Treaty with Great Britain of 1794 provided that British subjects then holding lands in the United States, and American citizens holding lands in the dominions of Great Britain, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to whom they pleased, in like manner as if they were natives, and that neither they nor their heirs nor assigns should, as far as might respect the said lands, and the legal remedies incident thereto, be regarded as aliens. Art. 14. A clause to the same purport, and embracing also movable property, was in the Treaty with France in 1778, article 9, and also in that of 1800, article 7. It required no legislation to give force to this provision. It was the law of the land by virtue of the Constitution, and congressional legislation could not add to its efficacy. Whenever invoked by the alien heirs, the rights it conferred were enforced by the federal courts. *Chirac* v. *Chirac*, 15 U. S. 2 Wheat. 259 [4: 234]; *Carneal* v. *Banks*, 23 U. S. 10 Wheat. 181 [6: 297]; *Hughes* v. *Edwards*, 22 U. S. 9 Wheat. 489, 496 [6: 142, 144]. See also the Treaty with the Swiss Confederation of 1850, art. 5; *Hauenstein* v. *Lynham*, 100 U. S. 483 [25: 628].

This is so also with clauses found in some treaties with foreign Nations, stipulating that the subjects or citizens of those Nations may trade with the United States, and for that purpose freely enter our ports with their ships and cargoes, and reside and do business here. [704] Thus the Treaty of Commerce with Italy, of February 26, 1871, provides that "Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter, with their ships and cargoes, all the ports of the United States and of Italy respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories." Article 1. These stipulations operate by their own force; that is, they require no legislative action for their enforcement. Treaty of Commerce with Great Britain of 1815, art. 1; renewed and continued for ten years by art. 4 of the Treaty of 1818, and continued indefinitely by art. 1 of the Treaty of 1827; Treaty with Bolivia of May 13, 1858, art. 3; Treaty with Costa Rica of July 10, 1851, art. 2; Treaty with Greece of December, 1837, art. 1; Treaty with Sweden and Norway of July 4, 1827, art. 1.

The right or privilege being conferred by the treaty, parties seeking to enjoy it take whatever steps are necessary to carry the provisions into effect. Those who wish to engage in commerce enter our ports with their ships and cargoes; those who wish to reside here select their places of residence, no congressional legislation being required to provide that they shall enjoy the rights and privileges stipulated. All that they can ask, and all that is needed, is such legislation as may be necessary to protect them in such enjoyment. That they have, I think, to some extent, in the clause punishing any conspiracy to prevent or hinder by force the execution of a law of the United States. The section in which this clause appears is a re-enactment in part of the Act of July 31, 1861, and declares, among other things, a conspiracy of two or more persons to overthrow by force the Government of the United States, or to oppose by force its authority, or "by force to prevent, hinder, or delay the execution of *any* law of the United States," or by force to seize and possess any of their property against their authority, to be a high crime, and prescribes for it severe punishment. As thus seen, the section is not in- [705] tended as a protection against isolated or occasional acts of individual personal violence. For such offenses the laws of the States make ample provision. It is intended to reach *conspiracies* against the supremacy and authority of the Government of the United States, and against the enforcement of its laws. It is directed not only against those who conspire to overthrow the government, but those also who conspire to defeat the execution of its laws, including under the latter treaties as well as statutes, and thus permanently deprive others of the rights, benefits and protection intended to be conferred by such laws. In the case before

as, the purpose of the alleged conspirators was to permanently deprive the Chinese residing in Nicolaus—not any particular Chinese, but all of that class of persons—of the right of residence conferred by the Treaty. That right is not limited to any particular place; it may be exercised wherever it is lawful for anyone to reside without encroachment upon the equal right of others. The conspirators well knew, as everyone in California knows, the provision of the Treaty and its meaning; and their purpose was to nullify and defeat it.

A treaty, in conferring a right of residence, requires no congressional legislation for the enforcement of that right; the treaty in that particular is executed by the intended beneficiaries. They select their residence. They are not required, as said above, to reside in any particular place, or do business there. A conspiracy to prevent by force a residence in the town or county selected by them appears to me, therefore, to be a conspiracy to prevent the operation—that is, the execution—of a law of the United States, and to be within the letter and spirit of the third clause of section 5336. If the conspirators can expel the Chinese from their residence in the town and county of their selection without being amenable to any law of the United States, they can, with like exemption from legal liability, expel the Chinese from the entire State, and thus utterly defeat the stipulations of the Treaty.

So, also, a conspiracy to prevent by force ships belonging to subjects of a foreign Nation —not any particular ship, but ships generally belonging to them—from entering our ports with their cargoes would, in my judgment, be a conspiracy to prevent by force the operation [706] of the Treaty with that Nation, which stipulates that its subjects shall have that privilege. And in all other cases where a clause of a treaty conferring rights or privileges operates by its own terms and does not require congressional legislation to give it effect, a conspiracy to prevent by force their enjoyment is a conspiracy to prevent by force the execution of a law of the United States; that is, to prevent its having, with respect to the rights and privileges stipulated, any effectual operation. I do not see how Congress could improve the matter, or do more than it has already done, by declaring that those who thus conspire by force to deprive parties of the rights or privileges conferred by a treaty should be punished. Its declaration to that effect would be no more than what the present law provides.

The last clause of section 5508 declares that "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder the free exercise or enjoyment of any right or privilege so secured [by the Constitution or laws of the United States], they shall be fined not more than five thousand dollars, and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

I do not agree with the majority of the court that this clause is limited in its application only to offenses against citizens. The first clause of the section is thus limited, but, in my judgment, the last is more extensive, and reaches an invasion of the premises of anyone, whether citizen or alien, by two or more persons for the unlawful purposes mentioned. But I am not clear that the qualification of going "in disguise" on the highway does not also extend to the going on the premises of another—and thus render the clause inapplicable to the case before the court; though there is much force in the view of *Mr. Justice* Harlan, that the clause should be read as though its words were: "If two or more persons go on the highway in disguise, or on the premises of another, with the intent," etc., thus making the words "in disguise" apply only to the offense on the highway. If his view be correct, the last provision of the clause would describe the exact offense charged against the plaintiff in error and [707] his co-conspirators—that they went on the premises of the Chinese with the intent to deprive them of rights and privileges conferred by the Treaty—the law of the land—an intent which they carried out by forcibly expelling the Chinese from the town and county of their residence and business. But without adopting or rejecting his view, I prefer to place my dissent upon what I deem the erroneous construction by the court of the third clause of section 5336, in holding that it does not cover this case, but applies only to cases where there has been a forcible resistance to measures adopted by Congress for the execution of a law, or a treaty of the United States.

The result of the decision is that there is no national law which can be invoked for the protection of the subjects of China, in their right to reside and do business in this country, notwithstanding the language of the Treaty with that Empire. And the same result must follow with reference to similar rights and privileges of the subjects or citizens resident in this country of any other Nation with which we have a treaty with like stipulations. Their only protection against any forcible resistance to the execution of these stipulations in their favor is to be found in the laws of the different States. Such a result is one to be deplored.

Mr. Justice **Harlan**, dissenting:

By the Treaty of 1880-1 with China, the Government of the United States agreed to exert all its power to devise measures for the protection, against ill treatment at the hands of other persons, of Chinese laborers or Chinese of any other class, permanently or temporarily residing, at that time, in this country, and to secure to them the same rights, privileges, immunities and exemptions to which the citizens or subjects of the most favored Nation are entitled, by treaty, to enjoy here. It would seem from the decision in this case, that if Chinamen, having a right, under the Treaty, to remain in our country, are forcibly driven from their places of business, the Government of the United States is without power in its own courts to protect them against such violence, or to punish those who, in this way subject them to ill treatment. If this be so, as to Chinamen lawfully in the United States, it must be equally true as to the citizens or subjects of every other foreign Nation, residing or doing business here under the sanction of treaties with their respective governments.

I do not think that such is the present state

of the law, and must dissent from the opinion and judgment of the court.

It is conceded in the opinion of the court to be within the constitutional power of Congress [695] to provide—as by section 5508 of the Revised Statutes it has done—that "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined," etc. It is also conceded that, in the meaning of that section, a treaty between this Government and a foreign Nation is a "law" of the United States; and that the wrongs done by Baldwin and others to the subjects of the Emperor of China, named in the warrant, prevented the free exercise and enjoyment of rights and privileges secured to those aliens by the Treaty between the United States and China. I concur in these views, but am unable to assent to the proposition that the offense charged is not embraced by the foregoing section or by any other valid enactment of Congress.

My brethren hold that section 5508 describes only wrongs done to a "citizen;" in other words, that Congress did not intend, by that section, to protect the free exercise or enjoyment of rights secured by the Constitution or laws of the United States, except where citizens are concerned. This, it seems to me, is an interpretation of the statute which its language neither demands nor justifies. Observe that the subject with which Congress was dealing was the protection of "*any* right or privilege" secured by the Constitution or laws of the United States. There is, perhaps, plausible ground for holding that the first clause of section 5508 embraces only a *conspiracy* directed against a "citizen." But the succeeding clause describes two other and distinct offenses; namely, the going of two or more persons "in disguise on the highway," and the going of two or more persons "on the *premises* of another"—that is, upon the premises of another *person*—with intent, in either case, to prevent or hinder the free exercise or enjoyment by such person of any right or privilege secured to him by the Constitution or laws of the United States. The use of the word "another," instead of "citizen," in the [696] latter clause, shows that, in respect of rights and privileges so secured, Congress had in mind the protection of persons, whether citizens or not. In this view, the statute is not unlike the Fourteenth Amendment, the first section of which recognizes as well rights appertaining to citizenship as rights belonging to persons. Baldwin, and others, according to the statements in the warrant, certainly did go "on the premises of another," with the intent to interfere with rights which the court concede are secured by treaty, and, therefore, by the supreme law of the land. *Chew Heong* v. *U. S.* 112 U. S. 540 [28: 771]; *Head Money Cases*, 112 U. S. 580 [28: 798]. In my judgment the case is within both the letter and spirit of the statute. It is, however, excepted by the court from its operation, by imputing to Congress the purpose of withholding national protection from those who do not happen to enjoy the privileges of American citizenship,—a purpose inconsistent with the obligations which the Nation has assumed by treaties with other countries. I cannot think it possible that Congress, while providing for the punishment of two or more persons, who go on the *premises* of a citizen, with intent to prevent his free exercise or enjoyment of rights secured by the Constitution or laws of the United States, purposely refrained from providing for the punishment of the same persons going on the premises of one, not a citizen, with intent to prevent the enjoyment by the latter of rights secured by the same Constitution and laws.

The rule of interpretation which the court lays down, if applied in other cases, will lead to strange results. We have statutes which give "to every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws," etc. (§§ 2289, 2290, 2291), the right, for purposes of a homestead, and under certain conditions, to enter unappropriated public lands. The party making the entry, or, if he be dead, his widow, etc., will be entitled ultimately to receive a patent, provided he resides upon and cultivates the land for a certain length of time, and provided, in the case of the [697] foreigner, he shall have become a citizen of the United States prior to his application for a patent. Now, suppose that an entry is made under the homestead statute, by a citizen, and a similar entry is made at the same time, in the same locality, by one who has only filed his declaration of intention to become a citizen. During the period of residence upon and cultivation of the lands both of the parties so making entries are, we will suppose, forcibly driven from the land by a lawless band of persons, with the intent to prevent them from perfecting their respective rights to a patent. In the case of the citizen thus wronged, we held in *United States* v. *Waddell*, 112 U. S. 76 [28: 673], that he may invoke the protection given by section 5508, and in that way have the wrong doers punished in a court of the United States as therein prescribed. But in the case of the person who has only declared his intention to become a citizen, the wrong doers cannot be reached by indictment in a court of the United States, because, under the decision in this case, that section only furnishes protection to *citizens*.

It is said—though I believe no such suggestion is made by the court—that the words "if two or more persons go in disguise on the highway, or on the premises of another," apply only when the offenders are "in disguise." I cannot suppose that Congress intended to make a distinction between wrong doers going in disguise "on the premises of another," for the purpose of interfering with rights secured by the Constitution or laws of the United States, and wrong doers who openly and without masks enter upon the same premises with a like unlawful purpose. It intended, rather, to guard the homes of all persons against invasion by combinations of lawless men, who seek, by entering those homes, to prevent the free exercise of

rights secured by the Constitution or laws of the United States. If the clause had read, "if two or more persons go on the highway in disguise, or on the premises of another," it would never occur to anyone that the words "on the premises of another" were qualified by the words "in disguise." The free exercise of personal rights secured by the United States should not be made to depend upon the trifling circumstance that the words "in disguise" precede, rather than follow, the words "on the highway."

[698]

In my judgment the going of two or more persons, whether openly or in disguise, on the premises of another, whether the latter be a citizen or not, with intent to prevent his free exercise or enjoyment of a right secured by the Constitution or laws of the United States, was made by section 5508 an offense against the United States.

I feel obliged also to express my nonconcurrence in so much of the opinion of the court as holds that Congress is without power under the Constitution to make it—as by section 5519 of the Revised Statutes it is made—an offense against the United States for two or more persons, in any State, "to conspire, or go in disguise on the the highway, or on the premises of another, for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws."

It is not necessary in this case to inquire what is the full scope of that clause of the Fourteenth Article of Amendment, which provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." It is sufficient to say, that that provision does something more than describe the duty and limit the power of the States. Taken in connection with the fifth section, conferring upon Congress power to enforce the Amendment by appropriate legislation, that provision is equivalent to a declaration, in affirmative language, that every *person* within the jurisdiction of a State has a right to the equal protection of the laws; just as the prohibition in the Thirteenth Amendment, against the existence of slavery, operated not only to annul state laws upholding that institution, but to establish "universal civil and political freedom throughout the United States," and to invest every individual person within their jurisdiction with the right of freedom; *Civil Rights Cases*, 109 U. S. 20 [27: 842]; and just as the prohibition in the Fifteenth Amendment, against the denial or abridgment of the right of citizens of the United States to vote, on account of their race, color, or previous condition of servitude, operated to invest such citizens with "a new constitutional right," which "comes from the United States;" namely, "exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude." *U. S.* v. *Cruikshank*, 92 U. S. 542 [23: 588]; *U. S.* v. *Reese*, 92 U. S. 214, [23: 563].

[699]

In the *Civil Rights Cases*, p. 23 [843] it was held that Congress, under its express power to enforce, by appropriate legislation, the provisions of the Thirteenth Amendment, could, so far as necessary or proper, enact legislation, "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not," for the purpose of eradicating "all forms and incidents of slavery and involuntary servitude." And since, in the matter of voting, the exemption of citizens from discrimination on account of race, color, or previous condition of servitude is a right which "comes from the United States," and is "granted or secured by the United States" (*U. S.* v. *Cruikshank*), can it be doubted that Congress, under its express power to enforce the Fifteenth Amendment, by appropriate legislation, could make it an offense against the United States for two or more persons to conspire to deny or abridge the citizen's right to vote, on account of his race or color? Is there any recognized exception to the general rule that Congress may, by appropriate legislation, secure and protect rights derived from or guaranteed by the Constitution or laws of the United States? Believing that these questions must be answered in the negative, I am unable to perceive any constitutional objection to section 5519; certainly, none of such a serious character as to justify this court in holding that Congress by enacting it, has transcended its powers. If the United States is powerless to secure the equal protection of the laws to persons within the jurisdiction of a State, until the State, by hostile legislation or by the action of her judicial authorities, shall have denied such protection, and can even then interfere only through the courts of the Union in suits involving either the validity of such state legislation, or the action of the state authorities, it is difficult to understand why Congress was invested with power, by appropriate legislation, to enforce the provisions of the Fourteenth Amendment; for, without such power of legislation, the courts of the Union are competent to annul any state laws or reverse any action of state judicial officers which deny the equal protection of the laws to any particular person or class of persons. Indeed, since the organization of the government, there has existed a remedy in the courts of the Union for any denial in a state court of rights, privileges, or immunities derived from the United States. It seems to me that the main purpose of giving Congress power to enforce, by *legislation*, the provisions of the Amendment was, that the rights therein granted or guaranteed might be guarded and protected against lawless combinations of individuals, acting without the direct sanction of the State. The denial by the State of the equal protection of the laws to persons within its jurisdiction may arise as well from the failure or inability of the state authorities to give that protection, as from unfriendly enactments. If Congress, upon looking over the whole ground, determined that an effectual and appropriate mode to secure such protection was to proceed directly against combinations of individuals, who sought, by conspiracy or by violent means, to defeat the enjoyment of the right given by the Constitution, I do not see upon what ground the courts can question the validity of legislation to that end.

[700]

There is another view of this question which seems to be important. In *United States* v. *Wad-*

dell [*supra*], and again in this case, the court has sustained the power of Congress to enact section 5508, which, among other things, makes it an offense against the United States for two or more persons to "go in disguise on the highway, or on the premises of another," with intent to prevent or hinder his free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States. Now, it is difficult to understand why, if Congress can do this, it may not make it an offense for the same persons (§ 5519) to "go in disguise on the highway, or on the premises of another, [701] for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws." The only possible answer to this suggestion is to say that "the equal protection of the laws" is not a right or privilege secured by the Constitution of the United States. But that, it seems to me, cannot be said without doing violence to the language of that instrument, and defeating the intention with which the people adopted it.

It was long since announced by this court that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conductive to the exercise of a power granted by the Constitution." *U. S.* v. *Fisher*, 6 U. S. 2 Cranch, 358 [2: 304]. And in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 421 [4: 605], *Chief Justice* Marshall, speaking for the court, said: "'The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.' In view of these settled doctrines of constitutional law, I am unwilling to say that it is not appropriate legislation for the enforcement of the right, given by the Constitution, to the equal protection of the laws, for Congress to make it an offense against the United States, punishable by fine and imprisonment for two or more persons in any State to conspire, or go in disguise on the highway, or go on the premises of another, for the purpose of depriving him of the equal protection of the laws.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[707] RICHARD VITERBO, *Appt.*,
v.
J. FRIEDLANDER, ET. AL., EXRS. of SAMUEL FRIEDLANDER, Deceased.

(See S. C. Reporter's ed. 707-737.)

Landlord and tenant—nature of relation between, under Civil Code of Louisiana—distinction between civil and common law—annulment of lease—injuries by overflow through the opening of a crevasse in levee of Mississippi River—"fortuitous or unforeseen event"—review of authorities.

1. The general purpose and common rule of the civil law, as expressed in the Civil Code of Louisiana, are that the lessor shall secure to the lessee the possession, use and enjoyment of the thing leased, against everything but the fault of the lessee; and that any loss of the thing, or deprivation of its use and enjoyment, by accidents or fortuitous events, shall be borne by the lessor and not by the lessee.

2. The opening of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must be considered as a "fortuitous or unforeseen event," within the meaning and scope of articles 2697 (2667) and 2699 (2669) of the Code, entitling the lessee, if thereby the plantation is wholly or partly destroyed, or is rendered unfit for the purpose for which it was leased, to have the lease annulled.

3. In the case presented, this court is of opinion that the lease being of a sugar plantation to be used to cultivate sugar cane, the injuries proved to the plantation, and to its capacity for producing cane and sugar, amounted to a partial destruction of the plantation, or, what is the same thing in legal effect, to making it cease to be fit for the purpose for which it was leased; that those injuries were caused by a fortuitous or unforeseen event; and that under articles 2697 (2667) and 2699 (2669) of the Civil Code, construed in the light of other articles, and of the principles of the civil law, as established in Louisiana, the plaintiff is entitled to have the lease annulled.

4. The ordinary rules of interpretation of statutes are applicable to the Louisiana Code.

5. In construing those parts of the Code which reenact provisions originally enacted in both the English and French languages, both texts may be taken into consideration; but if the two cannot be reconciled, the English must prevail.

[No. 703.]

Submitted Jan. 4, 1887. Decided March 7, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. Opinion below, 24 Fed. Rep. 320. *Reversed.*

Statement of the case by *Mr. Justice* **Gray:** [708]

This was a petition, filed October 2, 1884, by a citizen of France against a citizen of Louisiana, to annul a lease of a sugar plantation from the defendant to the petitioner for five years; and alleging that by an extraordinary rise of the Mississippi River, which could not have been foreseen, and without any fault of the lessee, a crevasse was made in the levees of a neighboring plantation, the leased plantation overflowed, all the cane destroyed, and the plantation rendered wholly unfit for the purpose for which it had been leased; and that the petitioner requested the defendant, as soon as the water from the crevasse should have withdrawn, to put back the plantation in the same condition as when leased, and to replace the plant cane and stubble, and the defendant refused to do so. By direction of the circuit court, the case was transferred to the chancery side, and the petitioner filed a bill in equity, containing similar allegations, and praying for like relief.

The lease in question was dated October 27, 1883, and was of "a sugar plantation, situated [709] in the parish of St. Charles in this State, known as Friedlander's plantation," and "all the buildings, outhouses, fences, sugar houses, and other appurtenances thereof" (particularly described), from September 27, 1883, to December 15, 1888, at an annual rent of $5,000, which the lessee agreed to pay; and contained the following provisions:

"And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field, which the said lessee expressly binds himself to plant as seed cane on said plantation; and to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation for the sole use and benefit of said lessor, at the termination of this lease, December 15,

1883, eighty-five acres of full-standed seed cane (such as is usually called first year's stubble) which has been thoroughly cultivated, cut at the proper time for saving seed, and carefully windrowed, especially for seed; and in addition thereto, said lessee shall also leave on said plantation for said lessor not less than two hundred acres of stubble from what is called plant cane, which shall be properly protected in the ground."

"And said lessee binds himself to deliver said plantation at the expiration of this lease, with the ditches in a good draining condition, sufficiently so for the proper cultivation of as much land as may have been under cultivation by said lessee during his fourth year's occupancy of said plantation; and the foregoing clause means that said lessee shall not neglect nor allow the filling up of said ditches during the last year of this lease, any more than ditches usually fill up in one year on a well managed sugar plantation in good cultivation."

"And the said lessor further declared that he leaves with said lessee, to be used in the culture of sugar cane on said plantation, thirty-four mules," valued at $3,700, and implements of husbandry and sugar culture (particularly enumerated), valued at $500; all of which the lessee agrees to return in kind or value at the expiration of the lease.

The answer admitted the execution of the lease; and that in March, 1884, when the waters of the Mississippi River were at their usual spring rise or flood, the levees along its banks near the leased property gave way, and inundated the country to some extent; and the demand and refusal to restore the plantation to its original condition and to replace the cane; but denied the other allegations of the bill. [710]

After the filing of a general replication, the case was referred to a master, who reported the facts as follows:

"The lessee on entering upon the lease, according to the evidence, found the ditches in a bad condition, and no canal into which to drain the fields, except one on the lower side of the plantation In order to prepare the ground for cultivation of sugar cane, he decided that a more perfect system of drainage was necessary, and he caused a canal to be dug through the center of the plantation from the front to the swamp, and enlarged and deepened the ditches, securing thereby a better system of drainage."

"In March, 1884, a crevasse occurred upon what is known as the Davis plantation, the back waters from which crevasse overflowed a large portion of the Friedlander plantation, especially that portion used for cultivation, and it was under water for several months.

"The damage caused by this overflow I find from the evidence to be as follows: The lessee lost, by reason of said overflow, the entire crop of sugar cane of 1884; that is, the 200 acres of stubble cane and the 85 acres of plant cane were destroyed; the ditches were partially, and in some places entirely, filled; the canals, especially the one dug by the lessee, were partially filled, and the bridges generally swept away; the water remained over the land until July, 1884; a deposit was left over the land of from three inches to six inches. To cultivate the land as a sugar plantation the following year (1885) it would require ditches to be redug, the canals to be opened or cleaned out, the bridges replaced, and seed cane to be obtained and planted, all at considerable expense, to put the plantation in the condition it was at date of the crevasse."

The plaintiff admits the plantation would grow a crop of cane. But it would require a considerable sum of money and labor to put it in good condition for the growing of cane; that is, it would require seed cane, the canals and ditches to be dug out, and bridges rebuilt. [711] This work is an incident to the growing of a crop of sugar cane annually. Some years it may require more seed cane, more labor to put the canals and ditches in order than in others. The land therefore has not ceased to be fit for the purposes for which it was leased; on the contrary, some of the witnesses suggest that the deposit has enriched and greatly benefited the land.

The master, after discussing at length the law of the case, concluded and reported that the property leased was not destroyed, and had not ceased to be fit for the purpose for which it was leased; that the loss of the growing crop, the partial filling of the canals and ditches, and the washing away of the bridges, were not caused by an "unforeseen event;" that equity could give no relief to the plaintiff, and that his bill should be dismissed.

Exceptions taken by the plaintiff to the master's report, in regard both to his findings of fact and to his conclusions of law, were overruled by the circuit court, and a decree entered for the defendant, dismissing the bill. 24 Fed. Rep. 320.

The plaintiff appealed to this court, and filed the following assignment of errors:

"1. That when property leased has been rendered unfit for the purpose for which it was leased, by the act of God, the lease is dissolved.

"2. That the facts show that the plantation leased as a sugar plantation has been destroyed, and the lease is at an end.

"3. That sugar cane, which is in the form of plant and rattoon or stubbles, is a part and portion of the land, and when destroyed the destruction annuls the lease.

"4. That the draining ditches and canals, dug by the lessee in fulfillment of his obligation under his lease, become the property of the lessor, and when destroyed by a crevasse it becomes the duty of the lessor to put them back in the condition they were before the crevasse.

"5. That when a lessor is duly put in default to fulfill a part of his obligations as landlord, and refuses, the lease is dissolved."

Messrs. **Charles Louque and Albert Voorhies,** for appellant. [712]

Messrs. **George H. Braughn and Charles F. Buck,** for appellees.

Mr. Justice **Gray,** after stating the case as above reported, delivered the opinion of the court:

In considering this case, it is important to keep in mind that the view of the common law of England and of most of the United States, as to the nature of a lease for years, is not that which is taken by the civil law of Rome, Spain and France, upon which the Civil Code of Louisiana is based.

The common law and the civil law concur in holding that in the case of an executed sale a subsequent destruction of the property by any cause is the loss of the buyer. *Res perit domino.* They also concur in holding that performance of an executory obligation to convey a specific thing is excused by the accidental destruction of the thing, without the fault of the obligor, before the conveyance is made. *Taylor* v. *Caldwell*, 3 B. & S. 826; *Wells* v. *Calnan*, 107 Mass. 514; Pothier, Obligations, nos. 657, 668; Contrat de Louage, no. 65; Civ. Code La. art. 2219 (2216).

But as to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood, fire or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction; and by that law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased. *Fowler* v. *Bott*, 6 Mass. 63; 3 Kent, Com. 465, 466; Broom, Legal Maxims, 3d ed. 213, 214; *Doupe* v. *Génin*, 45 N. Y. 119; *Kingsbury* v. *Westfall*, 61 N.Y. 356. *Naumberg* v. *Young*, 15 Vroom, 331; *Bowe* v. *Hunking*, 135 Mass. 380; *Manchester Warehouse Co.* v. *Carr*, L. R. 5 C. P. D. 507.

[713] The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property; and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident; and if he does not do so, the tenant may have the lease annulled, or the rent abated. Dig. 19, 2, 9, 2; 19, 2, 15, 1, 2; 19, 2, 25, 2; 19, 2, 39; 2 Gomez, Variae Resolutiones, c. 3, §§ 1-8, 18, 19; Gregorio Lopez, in 5 Partidas, tit. 8, ll. 8, 22; Domat, Droit Civil, pt. 1, lib. 1, tit. 4, sec. 1, no. 1; sec. 3, nos. 1, 3, 6; Pothier, Contrat de Louage, nos. 3, 6, 11, 22, 53, 103, 106, 139-155.

It is accordingly laid down in the Pandects, on the authority of Julian, "If anyone has let an estate, that, even if anything happens by *vis major*, he must make it good, he must stand by his contract," *si quis fundum locaverit, ut, etiamsi quid vi majore accidisset, hoc ei praestaretur, pacto standum esse;* Dig. 19, 2, 9, 2; and on the authority of Ulpian, that "A lease does not change the ownership," *non solet locatio dominium mutare;* Dig. 19, 2, 39; and that the lessee has a right of action, if he cannot enjoy the thing which he has hired, *si re quam conduxit frui non liceat*, whether because his possession, either of the whole or of part of the field, is not made good, or a house, or stable or sheepfold, is not repaired; and the landlord ought to warrant the tenant, *dominum colono praestare debere*, against every irresistible force, *omnim vim cui resisti non potest*, such as floods, flocks of birds, or any like cause, or invasion of enemies; and if the whole crop should be destroyed by a heavy rainfall, or the olives should be spoiled by blight, or by extraordinary heat of the sun, *solis fervore non assueto*, it would be the loss of the landlord, *damnum domini futurum;* and so if the field falls in by an earthquake, for there must be made good to the tenant a field that he can enjoy, *oportere enim agrum praestari conductori, ut frui possit;* but if any loss arises from defects in the thing itself, *si qua tamen vitia ex ipsa re oriantur*, as if wine turns sour, [714] or standing corn is spoiled by worms or weeds, or if nothing extraordinary happens, *si vero nihil extra consuetudinem acciderit*, it is the loss of the tenant, *damnum colono esse.* Dig. 19, 2; 15, 1, 2.

So Domat says: "If the tenant is expelled by the act of the sovereign, by *vis major*, or by some other accident, or if the property is destroyed by an inundation, by an earthquake, or other event, the lessor, who was bound to give the property, cannot demand the rent, and will be bound to restore so much of it as he has received, but without any other damages; for no one ought to answer for accidents." Droit Civil, pt. 1, lib. 1, tit. 4, sec. 3, no. 3.[1]

Pothier brings out the same principles more fully, as applicable to cases resembling the case at bar, saying: "When the thing leased, which the lessor offers to deliver to the lessee, is found not to be entire, the lessor having lost a part of it since the contract, or when it is not in the same condition in which it was at the time of the contract; when what is wanting in the thing, or when the change that has happened in the thing, is such that the lessee would not have been willing to hire this thing, if it had been such as it has since become; in that case, the lessee has the right to refuse to receive the thing, and to demand the annulment of the contract. This takes place, even if it is by a *vis major* occurring since the contract, that the thing is no longer entire, or is destroyed; as, for example, if, since the contract, lightning has burned a considerable part of the house that you have leased to me, and the rest is not sufficient for me to dwell in with my family; or, if a field, that you have leased to me, has been inundated by an overflow of a river, which has left a hurtful deposit that has spoiled the grass; but in this case I can only demand the annulment of the bargain, without being able to claim any damages for its nonexecution."[2] Contrat de Louage, no. 74.

Again; after laying down the general principles that "the tenant, lessee or farmer ought [715] to have an abatement of the whole rent, when the lessor has not been able to procure him the enjoyment or the use of the thing leased;" and that "when the tenant has not been absolutely deprived of the enjoyment of the thing, but by an unforeseen accident his enjoyment has suffered a change and a very considerable diminu-

[1] "3. Si le preneur est expulsé par le fait du prince, par une force majeure, ou par quelque autre cas fortuit, ou si l'héritage périt par un débordement, par un tremblement de terre, ou autre événement, le bailleur, qui était tenu de donner le fonds, ne pourra prétendre le prix du bail, et sera tenu de rendre ce qu'il en avait reçu, mais sans aucun autre dédommagement; car personne ne doit répondre des cas fortuits."

[2] "74. Lorsque la chose louée, que le locateur offre de délivrer au conducteur, ne se trouve pas entière, le locateur en ayant perdu une partie depuis le contrat, ou lorsqu'elle ne se trouve pas au même état qu'elle était lors du contrat; quand ce qui manque de la chose, ou quand le changement, qui est arrivé dans la chose, est tel que le conducteur n'eût pas voulu prendre cette chose à loyer, si elle se fût

tion, he can demand a proportionate diminution in the rent, during the time that his enjoyment has suffered that diminution;" he says that, according to these principles, "when by *vis major* a farmer has been deprived of the power of gathering the fruits of one of the years of his lease; as if an enemy has ravaged all the standing corn on the land leased, or all the fruits yet ungathered have been destroyed by an overflow of a river, or by a swarm of locusts, or by any like accident: in all these cases, the farmer ought to have an abatement of the year's rent;" but that "the accident, which has caused a considerable loss of the fruits, must be an extraordinary accident, and not one of those ordinary and frequent accidents which a farmer ought to expect. For example, the tenant of a vineyard cannot demand an abatement of his rent for the loss caused by frost, blight or hail, unless it was an extraordinary frost or hail storm that caused the total loss of the fruits."[1] Contrat de Louage, nos. 139-163. See also nos. 309, 477; Introduction aux Coutumes d'Orléans, tit. 19, nos. 17-22. [716]

The Civil Code of Louisiana affirms the same general principles. A lease is defined to be a contract by which "one party gives to the other the enjoyment of a thing" at a fixed price. Art. 2669 (2639). "He who grants a lease is called the *owner* or *lessor*. He to whom the lease is made is called the *lessee* or *tenant*." Art. 2677 (2647). "The lessor is bound, from the very nature of the contract, and without any clause to that effect: 1. To deliver the thing leased to the lessee. 2. To maintain the thing in a condition such as to serve for the use for which it is hired. 3. To cause the lessee to be in peaceable possession of the thing during the continuance of the lease." Art. 2692 (2662). "The lessor is bound to deliver the thing in good condition and free from any repairs. He ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary, except those which the tenant is bound to make, as hereafter directed." Art. 2693 (2663). "The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used," even if unknown to the lessor at the time of making the lease, or arising since, if they do not arise from the fault of the lessee; and to indemnify him for any loss resulting from them. Art. 2695 (2665). "The lessee is bound: 1. To enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease. 2. To pay the rent at the terms agreed on." Art. 2710 (2680). [717] The repairs which the tenant is bound to make are mere petty repairs inside a house, and repairs of windows, including "replacing window glass, when broken accidentally, but not when broken, either in whole or in their greatest part, by a hail storm or by any other inevitable accident." Art. 2716 (2686). "The expenses of the repairs which unforeseen events or decay may render necessary must be supported by the lessor, though such repairs be of the nature of those which are usually done by the lessee." Art. 2717 (2687). "The lessee is only liable for the injuries and losses sustained through his own fault." Art. 2721 (2691). And the lease "is dissolved by the loss of the thing leased." Art. 2728 (2699).

The above articles of the Codes of 1825 and 1870, with only verbal differences, and in the same order, are all to be found in the Louisiana Code of 1808,[1] and all of them (except that which designates the parties, and the two last above quoted, which are but repetitions or corollaries of the others), in the Code Napoleon;[2] and the books, titles and chapters, under which the various matters are arranged in the Code of 1808, correspond for the most part to those of the Code Napoleon of 1807, or Code Civil des Français of 1804, and still more closely to those of the *projet* or commissioners' report of that Code, which had been published in 1801. 2 Discussions du Code Civil, 536, note. *Chief Justice* Martin states that in 1807, when the first Civil Code of Louisiana was reported to the territorial Legislature by Moreau Lislet and Brown, no copy of the French Code had as yet reached New Orleans; "and the gentlemen availed themselves of the project of that work, the arrangement of which they adopted, and *mutatis mutandis* literally transcribed a considerable portion of it." 2 Martin, Hist. La. 291. The provisions of the laws of Spain, as they formerly existed in Louisiana, upon the subject before us, were quite different in their details. [718] Asso and Manuel's Institutes, lib. 2, tit. 14; 1 White, Land Laws, 201-204; 5 Partidas, tit. 8, ll. 1, 4-7, 18-24; Schmidt, Law of Spain and Mexico, 168-170. It is manifest, therefore, that the language of these provisions of the

trouvée telle qu'elle est devenue depuis; en ce cas, le conducteur est bien fondé à refuser de recevoir la chose, et à demander la résolution du contrat. Cela a lieu, quand même ce serait par une force majeure survenue depuis le contrat, que la chose ne se trouverait plus entière, ou se trouverait détruite; comme, par exemple, si, depuis le contrat, le feu du ciel avait brûlé une partie considérable de la maison que vous m'aviez louée, et que ce qui en reste ne fût pas suffisant pour m'y loger avec ma famille; ou si une prairie, que vous m'aviez louée, avait été inondée par un débordement de rivière, lequel y a laissé un mauvais limon qui en a gâté l'herbe; mais, dans ce cas, je ne pourrais demander que la résolution du marché sans pouvoir prétendre aucuns dommages et intérêts pour son inexécution."

[1] "PREMIER PRINCIPE. Le conducteur, locataire ou fermier, doit avoir la remise du loyer pour le tout, lorsque le locateur n'a pu lui procurer la jouissance ou l'usage de la chose louée."

"SIXIÈME PRINCIPE. Lorsque le conducteur n'a pas été privé absolument de la jouissance de la chose, mais que, par un accident imprévu, sa jouissance a souffert une altération et une diminution très considérable, il peut demander une diminution proportionnée dans le loyer, depuis le temps que sa jouissance a souffert cette diminution."

"153. Suivant les principes proposés au paragraphe premier, lorsqu'un fermier a été, par une force majeure, privé de pouvoir recueillir les fruits de quelqu'une des années de son bail; *puta*, si un parti ennemi a fourragé tout les blés encore en herbe de la terre qu'il tient à ferme, ou si tous les fruits, que étaient encore sur pied, ont péri par une inondation de rivière, par un essaim de sauterelles, ou par quelque accident semblable; en tous ces cas, le fermier doit avoir remise de l'année de ferme."

"163. Il faut que l'accident, qui a causé une perte considérable des fruits, soit un accident extraordinaire, et non pas de ces accidents ordinaires et fréquens auxquels un fermier doit s'attendre. Par exemple, le fermier d'une vigne ne doit pas demander une remise de sa ferme pour la perte qu'a causée la gelée, la coulure ou la grêle, à moins que ce ne fût une gelée ou une grêle extraordinaire qui eût causé la perte totale des fruits."

[1] Louisiana Code of 1808, lib. 3, tit. 8, arts. 2, 6, 17-19, 26, 30, 31, 35, 40.

[2] Code Napoleon. arts. 1709, 1719-1721, 1728, 1754, 1755.

Louisiana Code was taken from the French Code.

The Codes of 1825 and 1870 also contain the following article:

"Art. 2697 (2667). If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease. In neither case has he any claim for damages."[1]

This article was in a more condensed form in the Code of 1808, lib. 3, tit. 8, art. 20, namely: "If by any accident, the thing leased should be either totally or partly destroyed, the lessee may, according to the nature of the case, either claim a diminution of the rent or the cancelling of the lease, but he cannot claim to be indemnified."[2]

As it now stands, it has been restored to the very words of the corresponding article 1722 of the Code Napoleon, except in omitting the words "according to circumstances," *suivant les circonstances*, as affecting the claim of the lessee in the case of partial destruction, which were in that article, as well as in the Code of 1808; and in inserting the words "or if it be taken for a purpose of public utility," which were not expressed in the Code Napoleon, but would doubtless be implied, for a taking of property for the public use was always deemed a species of destruction by *vis major*. Pothier, [719] Contrat de Louage, no. 65; 3 Duvergier, Droit Civil, no. 332.

The following article, not to be found in so many words in the Code Napoleon, or in the Louisiana Code of 1808, first appears in the Code of 1825:

"Art. 2699 (2669). If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls, shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."[3]

But this article, too, only affirms a reasonable, if not necessary, construction of article 2697 (2667); for the lessor being held to warrant that the lessee shall enjoy the property for the use for which it was leased, any cause which makes his enjoyment impossible has the same effect as if it destroyed the property. This is clearly shown by Ulpian and by Pothier, in the various passages above referred to. So Troplong says that if the *vis major* lets the thing exist in whole and in all its parts, but prevents the lessee from taking or keeping the enjoyment, this case does not come exactly within the letter of article 1722 of the Code Napoleon; but the spirit should give life to the text, *mais l'esprit doit venir vivifier le texte;* and it is certain that this case of *vis major* would give an opening for an annulment of the lease or an abatement of the rent. Troplong, Droit Civil, no. 225. See also 6 Marcadé, 450; *Bowditch* v. *Heaton*, 22 La. Ann. 356. From the earliest times, also, the building up by a neighbor so as to darken the lights of a house leased was held to entitle the tenant to relief. Dig. 19, 2, 25, 2; Domat, pt. 1, lib. 1. tit. 4, sec. 3, no. 6; Pothier, Contrat de Louage, no. 325.

Under articles 2697 (2667) and 2699 (2669) of the Louisana Code, as under article 1722 of the Code Napoleon, it is not, of course, every destruction of part of the thing leased, or injury to its fitness for the use for which it was leased by an unforeseen event or *cas fortuit*, [720] that entitles the lessee to have the lease annulled; and it is for the court to decide whether the destruction or the injury is grave enough. But if by such an event an important part of the property is destroyed, or the property is made unfit for its destined use, the lessee has the right to elect the annulment of the lease and is not obliged to be satisfied with an abatement of the rent. Troplong, nos. 202, 213; 30 Dalloz, Louage, nos. 200-202; 6 Marcadé, 448; 25 Laurent, Droit Civil, arts. 402-404.

The learned counsel for the defendant much relied on some *dicta* of Louisiana judges to the effect that the law of the State does not favor the abrogation of a lease when the loss or inconvenience is not caused by the fault of the lessor. *Dussnau* v. *Generis*, 6 La. Ann. 279; *Denman* v. *Lopez*, 12 La. Ann. 823; *Foucher* v. *Choppin*, 17 La. Ann. 321; *Penn* v. *Kearny*, 21 La. Ann. 21, 23. But such *dicta* cannot be understood as laying down a general rule, in opposition to the express words of articles 2697 (2667) and 2699 (2669) of the Civil Code. The circumstances of each of the cases in which they were uttered were quite different from those before us; in two of them the injury or inconvenience was comparatively unimportant; and in the other two the tenant had not surrendered the lease, but remained in possession. In a later case than any of these, which was one of partial destruction by fire of a building in a city, the court held that under article 2697 (2667) the lessee, although he might, if he pleased, have the rent abated, had a perfect right to elect to have the whole lease annulled. *Higgins* v. *Wilner*, 26 La. Ann. 544.

All the articles, already cited, except perhaps those regarding tenant's repairs, clearly apply to farms and plantations as well as to houses; for one of the first articles of the Louisiana Code on the subject of leases declares, "The letting out of things is of two kinds; to wit, 1. The letting out houses and movables. 2. The letting out predial or country estates." Art. 2676 (2646); Code of 1808, lib 3, tit. 8, art 4. And the corresponding articles in the Code Napoleon, excepting the introductory definitions, [721] are placed under the heading "Of the rules common to leases of houses and of rural property;"

[1] Also in French, in the Code of 1825: "Si, pendant la durée du bail, la chose louée est détruite en totalité par cas fortuit, ou est prise pour un objet d'utilité publique, le bail est résilié de plein droit. Si elle n'est détruite qu'en partie, le preneur a le choix de demander une diminution de prix, ou la résiliation du bail. Dans l'un et l'autre cas, il n'y a lieu à aucun dédommagement."

[2] And in French: "Si, pendant la durée du bail, la chose louée est détruite, en tout ou en partie, par cas fortuit, le preneur peut, suivant les circonstances, demander, ou une diminution du prix, ou la résiliation du bail; mais sans aucun autre dédommagement."

[3] And in French, in the Code of 1825: "Si la chose cesse, sans le fait du bailleur, d'être propre à l'usage pour lequel elle était louée, ou si l'usage en est devenu très incommode, comme si un voisin, en élevant ses murs, intercepte les jours de la maison louée, le preneur peut, suivant le cas, obtenir la résiliation du bail; mais il ne lui est dû aucune indemnité."

those as to tenant's repairs being placed under the heading "Of the rules peculiar to leases for hire," that is to say, of houses and furniture.

The Louisiana Code of 1808, lib. 3, tit. 8, art. 54, as well as each of the subsequent Codes, contains the following article relating to rural or predial estates only:

"Art. 2743 (2714). The tenant of a predial estate cannot claim an abatement of the rent under the plea that, during the lease, either the whole or a part of his crop has been destroyed by accidents unless those accidents be of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made, such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion, or the like.

"But even in these cases, the loss suffered must have been equal to the value of one half of the crop at least, to entitle the tenant to an abatement of the rent.

"The tenant has no right to an abatement, if it is stipulated in the contract that the tenant shall run all the chances of all foreseen and unforeseen accidents."[1]

To this the following article was added in the Code of 1825:

"Art. 2744 (2715). The tenant cannot obtain an abatement, when the loss of the fruit takes place after its separation from the earth, unless the lease give to the proprietor a portion of the crop in kind; in which case the proprietor ought [722] to bear his share of the loss; provided the tenant has committed no unreasonable delay in delivering his portion of the crop."[2]

These articles take the place of several articles contained in the Code Napoleon, under the heading "Of the rules peculiar to leases of rural property," of which the following is a translation:[3]

"1769. If the lease is made for several years, and if, during the continuance of the lease, the whole or at least the half of the crop is destroyed by accidents, the tenant may demand an abatement of the rent, unless he is indemnified by the preceding harvests. If he is not indemnified, the estimate of the abatement can only take place at the end of the lease, at which time an account is taken of all the years of enjoyment; and nevertheless the judge may provisionally relieve the tenant from paying a part of the rent, by reason of the loss suffered.

"1770. If the lease is only for one year, and the loss is of the whole of the fruits, or at least of the half, the tenant shall be discharged from [723] a proportional part of the rent. He cannot claim any abatement, if the loss is less than half.

"1771. The tenant cannot obtain an abatement, when the loss of the fruits takes place after they are severed from the land, unless the lease gives to the landlord a portion of the crop in kind; in which case the landlord ought to bear his part of the loss, provided the tenant has not been guilty of unreasonable delay in delivering to him his portion of crop. Likewise, the tenant cannot demand an abatement, when the cause of the damage was in existence and known at the time when the lease was made.

"1772. The tenant may be charged with accidents by an express stipulation.

"1773. That stipulation is understood of ordinary accidents only, such as hail, lightning, frost or blight. It is not understood of extraordinary accidents, such as the ravages of war, or an inundation, to which the country is not ordinarily subject, unless the lessee has been charged with all accidents, foreseen or not foreseen."

The last clause of article 2743 (2714) of the Louisiana Code was evidently taken from articles 1772 and 1773 of the Code Napoleon. The rest of the article was apparently derived from the view expressed by Pothier in his Contrat de Louage, no. 163, above quoted, which, as has been pointed out by the commentators on the Code Napoleon, was rejected by the framers of the Code. Troplong, no. 710; 4 Duvergier, no. 188; 9 Duranton, 261. And article 2744 (2715) is copied word for word from so much of article 1771 of the Code Napoleon.

The decision of the present case mainly depends upon the true construction of articles 2697 (2667) and 2699 (2669) taken in connection [724]

[1] And in French, in the Codes of 1808 and 1825:

"Le fermier d'un bien rural ou de campagne ne peut obtenir aucune remise sur le prix du bail sous prétexte que, pendant la durée de son bail, la totalité, ou partie de sa récolte, lui aurait été enlevée par des cas fortuits, si ce n'est que ces cas fortuits fussent d'une nature extraordinaire, et dont l'événement n'a pu raisonablement être prévu, ou supposé par les parties, lors du contrat, tels que les ravages de la guerre au milieu d'un pays qui était en paix, et où l'on devait se croire naturellement à la bri de tout invasion, et autres cas semblables.

"Encore, pour obtenir cette remise, faut il que la perte éprouvé soit au moins de la moitié de la récolte, et que le preneur ne soit pas chargé par le bail de tous les cas prévus ou imprévus."

[2] And in French: "Le fermier ne peut obtenir de remise, lorsque la perte des fruits arrive après qu'ils sont séparés de la terre, à moins que le bail ne donne au propriétaire une quotité de la récolte en nature; auquel cas le propriétaire doit supporter sa part de la perte, pourvu que le preneur ne fût pas en demeure de lui délivrer sa portion de récolte."

[3] The original text is as follows:

"1769. Si le bail est fait pour plusieurs années, et que, pendant la durée du bail, la totalité ou la moitié d'une récolte au moins soit enlevée par des cas fortuits, le fermier peut demander une remise du prix de sa location, à moins qu'il ne soit indemnisé par les récoltes précédentes. S'il n'est pas indemnisé, l'estimation de la remise ne peut avoir lieu qu'à la fin du bail, auquel temps il se fait une compensation de toutes les années de jouissance; et cependant le juge peut provisoirement dispenser le preneur de payer une partie du prix, en raison de la perte soufferte.

"1770. Si le bail n'est que d'une année, et que la perte soit de la totalité des fruits, ou au moins de la moitié, le preneur sera déchargé d'une partie proportionnelle du prix de la location. Il ne pourra prétendre aucune remise, si la perte est moindre de moitié.

"1771. La fermier ne peut obtenir de remise, lorsque la perte des fruits arrive aprés qu'ils sont séparés de la terre, à moins que le bail ne donne au propriétaire une quotité de la récolte en nature; auquel cas le propriétaire doit supporter sa part de la perte, pourvu que le preneur ne fût pas en demeure de lui délivrer sa portion de récolte. Le fermier ne peut également demander une remise, lorsque la cause du dommage était existante et connue à l'époque où le bail a été passé.

"1772. Le preneur peut être chargé des cas fortuits par une stipulation expresse.

"1773. Cette stipulation ne s'entend que des cas fortuits ordinaires, tels que grêle, feu du ciel, gelée ou coulure. Elle ne s'entend pas des cas fortuits extraordinaires, tels que les ravages de la guerre, ou une inondation, auxquels le pays n'est pas ordinairement sujet, à moins que le preneur n'ait été chargé de tous les cas fortuits, prévus ou imprévus."

with article 2743 (2714) of the Civil Code of Louisiana. But before proceeding to the particular examination of these articles, some other general considerations should be adverted to.

The ordinary rules of interpretation of statutes are applicable to the Louisiana Code.

The Code itself lays down as rules for "the application and construction of laws," that "Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning;" that "laws *in pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another;" and that "the most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." Arts. 16-18 (16-18); Code of 1808, prel. tit. arts. 16-18.

In the same spirit *Chief Justice* Eustis said: "A statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the Legislature resulting from the whole." *Commercial Bank* v. *Foster*, 5 La. Ann. 516, 517. And in *Childers* v. *Johnson*, 6 La. Ann. 634, 638, the court said: "It is a sound rule of interpretation, in construing an article of the Code with reference to a subject matter, to take into view the general system of legislation upon the subject matter contained in the same work; and where a provision of the Code is invoked in derogation of the common rule regulating the subject matter, the intention so to derogate should be clear and beyond reasonable doubt. If an interpretation can be given to the particular article, which, without doing violence to its terms, will make it harmonize with the general rules and the other provisions of the Code regulating the subject matter, such interpretation should be adopted."

[725] It is to be remembered that the Louisiana Code, as it was originally enacted in 1808, and as it was again promulgated in 1825, and remained in force until 1870, was in French as well as in English. The Code of 1808, enacted before the admission of the State of Louisiana into the Union, was entitled "A Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government;" and the Act of March 31, 1808, chap. 29, declaring and proclaiming it to be in force in that territory, was published in both languages, and provided that "If, in any of the dispositions contained in the said digest, there should be found any obscurity or ambiguity, fault or omission, both the English and French texts shall be consulted, and shall mutually serve to the interpretation of [the] one and the other."[1] 2 Mart. Dig. 98, 99.

The Constitution of the State of Louisiana, ever since its admission into the Union, has provided that all laws should be promulgated in the language in which the Constitution of the United States is written. Constitutions of 1812, art. 6, § 15; 1845, art. 108; 1852, art. 100; 1864, art. 103; 1868, art. 103. The Constitutions of 1845 and 1852 also contained provisions that "The secretary of the senate and clerk of the House of Representatives shall be conversant with the French and English languages, and members may address either House in the French or English language;" that "The Constitution and laws of this State shall be promulgated in the English and French languages;" and that any amendment of the Constitution, proposed by the Legislature, should be published in French and English, before being submitted to the vote of the people. Const. 1845, arts. 104, 132, 140; 1852, arts. 101, 129, 141. These provisions were omitted in the Constitutions of 1864 and 1868; and the Code of 1870 was promulgated in English only.

But it is a familiar canon of interpretation, that all former statutes on the same subject, [726] whether repealed or unrepealed, may be considered in construing the provisions that remain in force. *Bank for Savings* v. *Collector*, 70 U. S. 3 Wall. 495 [18: 207]; *Ex parte Crow Dog*, 109 U. S. 556, 561 [27: 1030, 1032]. The reasons are no less strong for referring to former statutes, embodied in a code of laws, to aid in the interpretation of that Code. *Bank of La.* v. *Farrar*, 1 La. Ann. 49, 54; *U. S.* v. *Bowen*, 100 U. S. 508, 513 [25: 631, 632]; *Myer* v. *Car Co.* 102 U. S. 1, 11 [26: 59, 60]; *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642 [29: 755]; *Baldwin* v. *Franks*, 120 U. S. 678 [*ante*, 766]. And the Supreme Court of Louisiana has always held that in construing those parts of the Code which re-enact provisions originally enacted in both languages, both texts may be taken into consideration to aid in ascertaining their meaning as parts of one law; and obscurities or ambiguities in the English text have often been cleared up by referring to the greater precision of the French text; although, if the two texts cannot be reconciled, the English must prevail. *Hudson* v. *Grieve*, 1 Mart. (La.), 143; *State* v. *Dupuy*, 2 Mart. (La.) 177; *Breedlove* v. *Turner*, 9 Mart. (La.) 353; *Chretien* v. *Theard*, 2 Mart. N. S. 582; *Borel* v. *Borel*, 3 La. 30; *Durnford* v. *Clark*, 3 La. 199, 202; *State* v. *Moore*, 8 Rob. (La.) 518; *State* v. *Mix*, 8 Rob. (La.) 549; *State* v. *Ellis*, 12 La. Ann. 390; *State* v. *Judge of Eighth District Court*, 22 La. Ann. 581; *Lafourche* v. *Terrebonne*, 34 La. Ann. 1230, 1233.

This accords with the judgment of this court in a case arising under the Treaty of 1819, by which Spain ceded Florida to the United States, which was drawn up in Spanish as well as in English; the English part declaring that grants of lands previously made by the King of Spain "shall be ratified and confirmed to the persons in possession;" and the corresponding clause of the Spanish part declaring that such grants "shall remain ratified and confirmed" to the persons in possession. 8 Stat. at L. 258, 259. *Chief Justice* Marshall said: "The Treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical." "If the English and the Spanish parts can, without violence, be made to

[1] In French: "Si, dans quelqu' une des dispositions contenue dans ledit digeste, il se trouve quelque obscurité ou ambiguité, ou quelque faute ou omission, les deux textes Anglais et Français seront consultés pour s'interpréter mutuellement."

agree, that construction which establishes this conformity ought to prevail. If, as we [727] think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of the government in order to give validity to the titles which, according to the usages of the civilized world, were already valid. No violence is done to the language of the Treaty by a construction which conforms the English and Spanish to each other. Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative Act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by the force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable." *U. S.* v. *Percheman*, 32 U. S. 7 Pet. 51, 88, 89 [8: 604, 618].

Upon a comparison of the English text with the French, of so much of the Louisiana Code as bears upon this case, the greater uniformity and precision of the French text, and its striking resemblance to the Code Napoleon, make it quite clear that the French is the original and the English the translation. Moreover, in the concluding article 3556 (3522) of verbal definitions, the French words in the Code of 1825 are arranged alphabetically, with the English equivalent opposite each one, regardless of its own alphabetical order. In the French column, "*Cas fortuits*" are defined as "*Événemens occasionés par une force à laquelle on ne peut pas résister*," or events caused by a force that one cannot resist; opposite to which in the English column is, "Fortuitous event is that which happens by a cause which we cannot resist." But on turning back to the other articles, we find the French "*cas fortuit*" rendered in English in various ways; as "unforeseen event,"[1] as "unforeseen accident,"[2] as "fortuitous event,"[3] as "fortuitous accident,"[4] as "accident,"[5] and as "chance."[6] In one place, "*cas fortuit ou force majeure*" is rendered "fortuitous event or irresistible force,"[7] and [728] in another, "accidental and uncontrollable events;"[8] thus treating the two alternative expressions as synonymous. In the concluding article, also, "*Force*" is defined, both in French and in English, as "the effect of a power which cannot be resisted;" and "*Force majeure*," *vis major*, as "*un fait un accident que la prudence humaine ne peut ni prévoir ni empêcher*," or a fact or accident which human prudence can neither foresee nor prevent—with a corresponding definition of the English equivalent, "Superior force." "*Force majeure*" is also rendered in different places "unforeseen events,"[9] "overpowering force,"[10] and "force,"[11] only; "*événement de force majeure*" as "accident;"[12] and "*accidens de force majeure*" as "inevitable accident."[13] It cannot be doubted, therefore, that the words "unforeseen event" and "accident," as used in the articles now under consideration, have the meaning of "fortuitous event" or "irresistible force."

The Louisiana Code, following the French law and the Code Napoleon, recognizes two kinds or degrees of what, under various but equivalent names, has been called *vis major*, *cas fortuit*, irresistible force, inevitable accident, or unforeseen event; the one, ordinary, which might have been foreseen by any man of common prudence as not unlikely to happen at some time; the other, extraordinary, which could not have been foreseen, or expected to occur at any time. The distinction is clearly stated by Domat, and more fully brought out by the commentators on the Code Napoleon; and, as those commentators have clearly shown, the words, "*prévus ou imprévus*," as used in speaking of express stipulations by the tenant, literally, "foreseen or unforeseen," respectively mean in this connection those which could have been foreseen as likely to happen, and those which could not have been so foreseen. Domat, pt. 1, lib. 1, tit. 4, sec. 4, no. 6; Troplong, nos. 204, 211, 756; 4 Duvergier, no. 182; 6 Marcadé, 508. The concurrent opinions of the French jurists upon the meaning of the French Code are of the greatest weight in the interpretation of similar provisions in the Code of Louisiana. [729] *Johnson* v. *Bloodworth*, 12 La. Ann. 699, 701.

The general purpose and the common rule of the civil law, as expressed in the Code of Louisiana, are that the lessor shall secure to the lessee the possession, use and enjoyment of the thing leased, against everything but the fault of the latter; and that any loss of the thing, or deprivation of its use or enjoyment, by accidents or fortuitous events, shall be borne by the lessor and not by the lessee. This appears from the general provisions in the articles above quoted, by which the lessor is bound, from the very nature of the contract of lease, and without any clause to that effect, not only to deliver the thing leased to the lessee, but also to maintain it in such a condition as to serve the purpose for which it is leased, to cause the lessee to be in peaceable possession of the thing during the continuance of the lease, to make, during its continuance, all repairs, except some petty internal ones, and to make even those when rendered necessary by unforeseen events; as well as by articles 2697 (2667) and 2699 (2669), which apply both to country estates and to town houses, and entitle the lessee, whenever by a fortuitous event, and without his fault, the thing is either destroyed, or ceases to be fit for the purpose for which it has been leased, or its use is much impeded, to demand the annulment of the lease, and if it is only destroyed in part, to demand either a revocation of the lease or a diminution of the rent.

Article 2743 (2714) is in derogation of this general purpose and common rule, and is therefore to be strictly construed.

A comparison of the language of articles 2697 (2667) and 2699 (2669) with that of article 2743 (2714) discloses substantial differences between the former and the latter, in the cause of injury, in the thing injured, and in the form of relief, of which they speak. It will be convenient to consider these three points of difference in the inverse order.

[1] Art. (2667).
[2] Art. (2756).
[3] Arts. (2290) (2445) (2511).
[4] Art. (2216).
[5] Arts. (2714) (563).
[6] Arts. (571) (2870) (2871) (2872).
[7] Art. (1927).
[8] Art. (2725).
[9] Art. (2667).
[10] Art. (2910).
[11] Art. (2917).
[12] Art. (783).
[13] Art. (2686).

First. As to the form of relief: Articles 2697 (2667) and 2699 (2669) deal wholly with the ending, revocation or annulment of the lease, except that in the case of a partial destruction of the thing leased the alternative of a diminution of rent is permitted. But article [730] 2743 (2714) relates to the abatement of rent only, and does not affect the right of the lessee to have the lease annulled.

The case of a tenant demanding an abatement of rent, while retaining his lease, and thereby reserving the opportunity of reaping profits during the rest of the term, stands on quite different ground from the case of a tenant seeking to annul the lease, and thus to give up all prospective benefits at the same time that he is relieved from all burdens.

Second. The injuries spoken of in articles 2697 (2667) and 2699 (2669) are the total or partial destruction of the thing leased, or its ceasing to be fit for the purpose for which it was leased. But article 2743 (2714) is limited to a destruction of the crop only.

There is no doubt that by the civil law, as by the common law, crops so long as they are standing and ungathered are part of the land to which they are attached. Louisiana Code, art. 465 (456); Code of 1808, lib. 2, tit. 1, art. 17; Code Napoleon, art. 520; Pothier, de la Communauté, no. 45. In strictness of principle, the title of the standing crops, as of the land on which they stand, would be in the landlord, and a destruction of the crops might have been considered as a partial destruction of the land itself, within article 2697 (2667) of the Louisiana Code, and article 1722 of the Code Napoleon, if no special provision as to the crops had been added; and such was the opinion of Troplong. Troplong, nos. 695-697. On the other hand, it might be considered that as the lessor only warranted to the tenant the enjoyment of the thing leased, that is to say, the possibility of enjoying it, and did not warrant to him the fruits of the enjoyment, a destruction of the crops only, not injuring the capacity of the land to produce other crops, ought not to be considered as a destruction or injury of the thing leased. 25 Laurent, no. 455. The framers of either Code have solved the difficulty by making special provisions with relation to the loss of a crop by fortuitous events, without otherwise modifying the previous articles which establish the rules applicable to a destruction, by such events, of the property itself, or of its capacity for the use [731] for which it was leased. One of the principal commentators on the Code Napoleon, after stating the well established construction, above mentioned, that a general stipulation by the tenant against accidents is to be understood of ordinary, and not of extraordinary accidents, says that for the same reason the tenant assumes the risk, either of ordinary accidents, or of all accidents whatsoever even if extraordinary, he must be understood (unless a different intention is clearly manifested) to stipulate against accidents causing a loss of the crops only, and not against those which deprive him of the use and enjoyment of the property itself. 6 Marcadé, 508.

Third. The contingencies guarded against in articles 2697 (2667) and 2699 (2669) include any unforeseen event (meaning thereby, as we have seen, any fortuitous event or irresistible force), whether ordinary or extraordinary, one that might have been foreseen, as well as one that could not have been foreseen. But in article 2743 (2714) the only accidents relieved against are those "of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made."

Under this article, the Supreme Court of Louisiana in 1861 refused to allow to the tenant of a predial estate an abatement of the stipulated rent, on account of the destruction of his crop by an overflow of the Mississippi River, and gave the following reasons for the decision: "The overflow of the Mississippi River is of such frequent occurrence that it cannot be regarded as belonging to that class of extraordinary and unforeseen accidents which entitle the tenant of a predial estate to an abatement of rent. Indeed, the overflows of this river are so frequent that a system of levees has been constructed under the authority of the State, for the purpose of preventing, we may say, the annual inundation of its banks; and so frequently have the waters of this river made breaches in the levees, that even a crevasse itself cannot be considered as an extraordinary accident in the sense of article 2714 of the Code, and as such entitle the tenant of a predial estate to a reduction of the stipulated rent, although such crevasse should be the means of overflowing the land leased by the tenant, and thereby destroying a part or the whole of his crop. The periodical over- [732] flow of the waters of a river is not an extraordinary accident; and if a party seeks to give to an inundation that character, he must show that it was unusual, unforeseen, and one to which the country was not ordinarily subjected. See Troplong, du Louage, nos. 207, 211. The frequency of overflows and crevasses on the Mississippi River is not disputed in this case, but is, on the other hand, sufficiently established by the evidence." *Vinson* v. *Graves*, 16 La. Ann. 162. That decision has since been followed, without further discussion. *Masson* v. *Murray*, 21 La. Ann. 535; *Jackson* v. *Michie*, 33 La. Ann. 723.

But the utmost extent of those decisions is that neither an overflow of the Mississippi River, nor even a crevasse, is an "extraordinary and unforeseen accident," for a destruction of a crop caused by which the tenant can have an abatement of rent under article 2743 (2714). That the court did not intend to imply that such an overflow or crevasse was not an unforeseen accident at all clearly appears by the carefully guarded language of the opinion in *Vinson* v. *Graves*, as well as by the reference in that opinion to the passages of Troplong in which the violence of a river leaving its bed is classed, with earthquakes and extraordinary snows or rains, as a *cas fortuit*, and is distinguished from the usual rains and snows, and risings of rivers, which necessarily occur in the order of the seasons: and the view of earlier jurists is approved, which divides accidents into accustomed and unaccustomed, ordinary and extraordinary. Troplong, nos. 206, 207, 211. The civilians generally class an inundation under *vis major* or *cas fortuit*. Ulpian and Domat, *ubi supra;* 5 Partidas, tit. 8,

l. 22; 4 Duvergier, no. 183; 9 Duranton, 261. And Pothier, in a passage already quoted, states the case of the overflow of a field by a river, leaving a deposit that spoils the grass, as one of those in which the tenant is entitled to have the lease annulled. Contrat de Louage, no. 74.

The annual rise and overflow of a river may doubtless in some countries and places be considered as one of the things that necessarily occur in the order of the seasons. But the [733] bursting of a river through its natural banks or through artificial dikes must generally be regarded as an accident or *cas fortuit*, ordinary or extraordinary, according to the frequency or infrequency with which it takes place in the tract of country in question. In France, "an inundation, to which the country is not ordinarily subject," is expressly ranged, in article 1773 of the Code Napoleon, before quoted, with the ravages of war, under extraordinary accidents, *cas fortuits extraordinaires*. In Louisiana, the breaking of the Mississippi through the levees occurs so often that it is held not to be an extraordinary accident; but that does not take it out of the general class of accidents or unforeseen events, *cas fortuits*.

The breaking of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must therefore be considered as a *cas fortuit*, a fortuitous or unforeseen event, within the meaning and scope of articles 2697 (2667) and 2699 (2669), entitling the lessee, if thereby the plantation is wholly or partly destroyed, or is rendered unfit for the purpose for which it was leased, to have the lease annulled; although it is not a *cas fortuit extraordinaire*, an extraordinary as well as an unforeseen accident, within the meaning of article 2743 (2714), so as to justify an abatement of rent if the crop only is destroyed.

In the case at bar, the thing leased is a sugar plantation, with the buildings, mules and implements necessary for the cultivation and making of sugar, and the growing crop of sugar cane. This crop is not sold to the lessee absolutely, with the right to use and consume it as he pleases; but it is leased to him as part of the plantation, and to be replanted on the plantation as seed cane; and he expressly binds himself to do this, as well as, by way of reimbursing the lessor for this cane, to leave a certain amount of growing cane on the plantation at the end of the lease. These stipulations as to the growing cane leased with the plantation, and the growing cane to be left on the plantation at the end of the lease, do not constitute a separate contract of exchange of one thing for another, under article 2660 (2630) of the Louisiana Code; or a letting of movables, or of things which cannot be used without be- [734] ing destroyed by the use, within the meaning of article 2678 (2648); or a payment of rent in a portion of the crop, under article 2671 (2641). But they are parts and incidents of the principal contract of lease into which the parties have entered; and that contract is the lease of one entire thing, a sugar plantation, with growing cane upon it, and otherwise fit for the cultivation of sugar, to be used and enjoyed as such by the lessee until the end of the lease, and then to be returned by him to the lessor in like condition, barring such accidents as may excuse the lessee from the performance of the contract on his part.

The material facts regarding the cultivation of sugar cane, as appearing by the evidence returned with the master's report, are these: Sugar cane is propagated by cutting standing cane and planting it as seed cane. The cane so cut from one acre will plant not more than three acres. The plants that spring up from the seed cane are called plant cane; the roots from which cane has been cut are called stubble; and the shoots which spring up in the following years from those roots are called rattoons (*rejetons*), and are cut for sugar in the two years succeeding the first cutting, after which it is usual to plant the ground anew.

It also appears that the plaintiff at once performed the obligation, expressly assumed by him in the lease, of cutting the standing cane leased to him with the plantation, and planting it as seed cane; and that, when this cane was a little above the ground, the inundation took place, the facts concerning which, as stated in the master's report, were as follows:

The lessee, upon entering into possession under the lease, in the autumn of 1883, found the plantation in bad condition for want of proper drainage, and, in order to prepare the ground for the cultivation of sugar, dug a new canal and enlarged and deepened the ditches. Early in the spring of 1884, the Mississippi River made a crevasse in the levees opposite a neighboring plantation, and the waters coming through the crevasse overflowed the plantation leased. By reason of the overflow, the lessee lost the entire crop of sugar cane of 1884, the 200 acres of stubble cane and 85 acres of plant cane were destroyed, the canals and ditches were partially, and in some places wholly, filled up, [735] and the bridges generally swept away. The whole plantation remained under water for three months; and when the waters went down they left a deposit of from three to six inches in depth. To put the plantation in the condition in which it was at the time of the crevasse, and to fit it for cultivation as a sugar plantation in 1885, would require the canals to be opened or cleaned out, ditches to be redug, the bridges replaced, and seed cane to be obtained, all at considerable expense.

Upon comparing the master's report with the evidence taken in the case, the above appears to be a fair statement of the material facts, except that the master would seem to have overstated the number of acres of stubble cane, and understated the number of acres of plant cane; but that is immaterial, since there is no question of the whole amount of cane destroyed, or of its having been all the cane on the plantation.

But we cannot concur in the conclusions of the master and of the circuit court, that the property was neither destroyed, nor rendered unfit for the purpose for which it was leased; that the loss of the growing crop and the injuries to the plantation were not caused by an "unforeseen event;" and that the plaintiff was not entitled to relief. As the case is on the equity side of the court, it is not important to consider how far those conclusions involved inferences of fact, and how far they consisted of matter of law.

The object of this suit is not to obtain an abatement of rent, under article 2743(2714) of the Civil Code of Louisiana, on account of the destruction of the crop, but it is to have the lease annulled, under articles 2697 (2667) and 2699 (2669), because the plantation has been destroyed or rendered unfit for the purpose for which it was leased.

That the breaking in and overflow of the waters of the Mississippi River was a fortuitous and unforeseen event, within the meaning of these articles, necessarily results from the reasons already stated, which need not be recapitulated. The remaining question is whether that event destroyed the thing leased, or rendered it unfit for the purpose for which it was leased. This question lies in smaller compass.

[736] The plaintiff had hardly put the plantation in a condition suitable for the cultivation of sugar cane, which was the sole purpose of the lease, and planted one crop, when the inundation came, putting the plantation under water for three months, filling up the canals and ditches necessary for its drainage, sweeping away the bridges, and leaving a deposit from three to six inches deep over the whole land, and making it necessary, in order to cultivate the thing leased as a sugar plantation the following year, to spend large sums of money to open and dig out canals and ditches and replace bridges; and also destroying all the stubble cane as well as all the plant cane, and leaving the plantation without any cane upon it, either to make sugar of, or to cut seed cane from for planting in succeeding years.

In short, the inundation left the thing leased in such a condition, that it was unfit for the purpose of a sugar plantation, for which it had been leased, and could not be made fit for that purpose without spending large sums of money to restore it to a condition fit for the cultivation of sugar cane, and to obtain seed cane elsewhere to start it afresh. It not only destroyed the whole crop for the year 1884, but it destroyed the plants which would otherwise have produced, both in that year and afterwards, cane for making sugar, as well as what was needed for seed cane, and destroyed the entire capacity of the plantation to grow cane and make sugar, until it should be restored to a condition fit for cultivation and planted anew. This was not a mere destruction of a crop for one year, like the destruction of a crop of wheat, or of grapes, or of apples; but it was more like the destruction of the vines, or of the apple trees, from which present and future crops are to be gathered.

Upon the whole case, we are of opinion that the lease being of a sugar plantation for the purpose of being used to cultivate sugar cane, the injuries proved to the plantation, and to its capacity for producing cane and sugar, amounted to a partial destruction of the plantation, or, what is the same thing in legal effect, to making it cease to be fit for the purpose for which it was leased; that those injuries were [737] caused by a fortuitous or unforeseen event; and that under articles 2697 (2667) and 2699 (2669) of the Civil Code, construed in the light of the other articles that we have cited, and of the principles of the civil law, as established in Louisiana, the plaintiff was entitled to have the lease annulled. The decree of the court below dismissing the bill must therefore be reversed; and any equities of the parties which should affect the form of the decree may more conveniently be dealt with in that court.

Decree reversed, and case remanded to the Circuit Court, with directions to take such further proceedings therein as may be in conformity with law, and not inconsistent with the opinion of this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MATTHEW BOLLES ET AL., *Plffs. in Err.*, [759
v.
TOWN OF BRIMFIELD.

(See S. C. Reporter's ed. 759-765.)

Municipal bonds—ratification by retroactive statute—federal courts—how far bound by construction of state statutes, by state courts.

1. Where the liability of a municipal corporation on negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.
2. It is the settled doctrine of this court that rights accruing under one construction will not be lost merely by a change of opinion in the local court.
3. Where such rights have accrued before the state court has announced its construction, this court will not surrender its independent judgment in deference to subsequent decisions of the state court.
4. In the absence of any constitutional restriction, the Legislature of a State may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies where it might have previously authorized such acts and proceedings.
5. The Illinois Act of March 31, 1869, legalizing a prior unauthorized vote for the issue of railroad bonds by the Town of Brimfield, Peoria County, was valid.
6. The subsequent ratification by the Legislature of what had been done by a majority of the voters of the Municipality cannot be regarded as imposing a debt upon it, for local corporate purposes, against the will of its corporate authorities.

[No. 279.]

Submitted Jan. 6, 1887. Decided March 7, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George A. Sanders** and **Thomas S. McClelland**, for plaintiffs in error:

It lies in the power of the Legislature to pass curative Acts validating bonds issued by a vote of the people of a municipality, notwithstanding at the time the vote was taken there was no legislative authority for such vote.

Cooley, Const. Lim. 371, and cases cited; *St. Joseph Township* v. *Rogers*, 83 U. S. 16 Wall. 666 (21: 339); *Keithsburg* v. *Frick*, 34 Ill. 405; *Cowgill* v. *Long*, 15 Ill. 202; *Schofield* v. *Watkins*, 22 Ill. 66; *McMillan* v. *Lee County*, 3 Iowa, 317; *Anderson* v. *Santa Anna*, 116 U. S. 356 (29: 633); *Jonesboro City* v. *Cairo & St. L. R. R. Co.* 110 U. S. 192 (28: 116); *Read* v. *Plattsmouth*, 107 U. S. 568 (27: 414); *Mahomet* v. *Quackenbush*, 117 U. S. 513 (29: 984); *Grenada Co.* v. *Brogden*, 112 U. S. 262 (28: 704); *Hayes* v. *Holly Springs*, 114 U. S. 125 (29: 82); Dill. Mun. Corp. § 79; *Thompson* v. *Lee Co.* 70 U. S.

3 Wall. 327 (18: 177); *People* v. *Clark*, 53 Barb. 171; *Campbell* v. *Kenosha*, 72 U. S. 5 Wall. 194 (18: 610); *Commissioners* v. *Thayer*, 94 U. S. 631 (24: 133); *New Orleans* v. *Clark*, 95 U. S. 653 (24: 522); *City of Kenosha* v. *Lamson*, 76 U. S. 9 Wall. 478, 485 (19: 725, 729); *Ritchie* v. *Franklin Co.* 89 U. S. 22 Wall. 68 (22: 825); *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 623 (19: 206); Cooley, Const. Lim. 379, 380.

The Legislature may treat an unauthorized or illegal prior popular vote as an expression of the wishes of the municipality in reference to the issuing of such bonds, the same as though the vote had been legal at the time it was taken.

County of Leavenworth v. *Barnes*, 94 U. S. 70 (24: 63); *R. R. Co.* v. *County of Otoe*, 83 U. S. 16 Wall. 667 (21: 375).

On commercial questions this court is not governed by state decisions.

Roberts v. *Bolles*, 101 U. S. 119 (25: 880); *Oates* v. *National Bank*, 100 U. S. 246 (25: 583); *Warren Co.* v. *Marcy*, 97 U. S. 96 (24: 977); *Venice* v. *Murdock*, 92 U. S. 494 (23: 583); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 (17: 525); *Pine Grove* v. *Talcott*, 86 U. S. 19 Wall. 666 (22: 227); *Douglass* v. *Pike Co.* 101 U. S. 677 (25: 968).

Messrs. **Henry B. Hopkins** and **William W. Hammond**, for defendant in error:

The bonds in question were voted and issued, not only without legislative authority, but contrary to both legislative and constitutional prohibition.

The limit of the grant in the Act of March 5, 1867, to the amount of $35,000, is a direct legislative prohibition against subscribing more than that amount.

Gaddis v. *Richland Co.* 92 Ill. 119; *Sammis* v. *Clark*, 13 Ill. 546; Dwarr. Stat. 713; *King* v. *Cunningham*, 5 East, 478; *Warden of St. Paul* v. *The Dean*, 4 Price, 78.

The curative Act, attempting to validate the bonds, is unconstitutional and void; and upon this point there is no departure from absolute uniformity in the decisions of the Supreme Court of Illinois.

Marshall v. *Silliman*, 61 Ill. 218; *Wiley* v. *Silliman*, 62 Ill. 170; *Barnes* v. *Lacon*, 84 Ill. 461; *Williams* v. *Town of Roberts*, 88 Ill. 11; *Gaddis* v. *Richland Co.* 92 Ill. 119.

This court is governed by the decisions of the state tribunals in the construction of their Constitutions and local laws.

Elmwood v. *Marcy*, 92 U. S. 289 (23: 710); *South Ottawa* v. *Perkins*, 94 U.S. 260 (24: 154); *Post* v. *Supervisors*, and *Amoskeag Bank* v. *Ottawa*, 105 U. S. 667 (26: 1204); *Pana* v. *Bowler*, 107 U. S. 529 (27: 424); *Quincy* v. *Cooke*, 107 U. S. 549 (27: 549); *Burgess* v. *Seligman*, 107 U. S. 37 (27: 366); *Taylor* v. *Ypsilanti*, 105 U. S. 60 (26: 1008).

[760] *Mr. Justice* **Harlan** delivered the opinion of the court:

In *Anderson* v. *Santa Anna*, 116 U. S. 356, 364 [29: 633,635], we had occasion to consider the validity of so much of the Act of the Legislature of Illinois of February 28, 1867, in reference to municipal subscriptions to the stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, as declared that where elections had been held, and a majority of the legal voters of any township or incorporated town declared in favor of a subscription to the stock of that company, "then and in that case no other election need be held, and the amount so voted for shall be subscribed" as in that Act provided; further, "that such elections are hereby declared to be legal and valid," as though that Act had been in force at the time thereof, and all its provisions had been complied with. An election was held in the Township of Santa Anna July 21, 1866, but there was no authority of law for its being held. It was, however, conducted in the customary mode, and the proposition for a subscription was sustained by a majority of the legal voters of the township. The subscription was made October 1, 1867, in pursuance of that vote, and of the curative Act of February 28, 1867. The validity of bonds issued in payment of the subscription was disputed upon the ground that the last named Act was in violation of the Constitution of Illinois. We held, in accordance with numerous decisions of this court cited in the opinion, that subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under legislative sanction in the first instance, was equivalent to original authority. We referred, in that case, to *U. S. Mortgage Co.* v. *Gross*, 93 Ill. 483, 494, where [761] the Supreme Court of Illinois said that, "Unless there be a constitutional inhibition, a Legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance."

As a municipal corporation, organized for public purposes, has, as a general rule and as between it and the State, no privileges or powers which are not subject at all times, under the Constitution, to legislative control, and as the Legislature might legally have authorized a subscription by the Township of Santa Anna, with the assent of a majority of its legal voters, we adjudged the Act of February 28, 1867, to be within the constitutional power of the Legislature to pass.

Does the present case come within these principles?

By the sixth section of an Act of the General Assembly of Illinois, approved March 5, 1867, incorporating the Dixon, Peoria and Hannibal Railroad Company, it is provided that "The several counties in which any part of said road may hereafter be located, and the several townships in said counties which have adopted or may hereafter adopt township organizations, and the cities and incorporated towns in said counties, are hereby authorized to subscribe and take stock in said Dixon, Peoria and Hannibal Railroad Company." Private Laws, Ill. 1867, p. 604. The Act restricted a subscription by a county to $100,000, and a subscription by a township, city, or town to $35,000.

It is admitted that at an election duly notified and held, on the 3d day of August, 1868, the Town of Brimfield, by a vote of one hundred and fifty as against fifty-six, lawfully voted to subscribe $35,000 to the stock of the railroad company, and to issue its bonds therefor. At the same time and place, but without authority of law, an election was held to take the sense of the voters of the Town as to an additional subscription by it of $15,000 to the stock of the same

company, for which coupon bonds should be issued, payable in ten, fifteen, and twenty years. This last proposition was sustained by a vote of one hundred and fifty-three as against fifty-five.

[762] On the 31st of March, 1869, the General Assembly of Illinois passed an Act declaring "that a certain election, held in the Township of Brimfield, in Peoria County, on the 3d day of August, 1868, at which *a majority of the legal voters in said Township*, at special town meeting, voted to subscribe for and take $15,000 of the capital stock of the Dixon, Peoria and Hannibal Railroad Company over and above the amount authorized to be taken by the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said Township in the same manner as if said subscription had been made under the provisions of said charter." Private Laws, Ill. Vol. 3, p. 372.

Subsequently, May 5, 1869, the Township, by its proper officers, issued to the company its coupon bonds for $35,000, in pursuance of the vote at the first-named election, and also its coupon bonds for $15,000, pursuant to the above vote at the same time and place, payable in ten, fifteen and twenty years as aforesaid.

The present suit is upon bonds and coupons of the latter issue. A demurrer to a special plea setting forth these facts was overruled, and, the plaintiff electing to stand by the demurrer, the action was dismissed.

From this statement of the case it is apparent that the judgment below is inconsistent with the decision in *Anderson* v. *Santa Anna*. It is not disputed that the bonds in suit would be valid obligations of the Town of Brimfield if the election of August 3, 1868, at which they were voted, had been previously authorized by statute. In other words, according to the settled doctrines of the Supreme Court of Illinois, it would have been competent for the legal voters of the Town, under legislative authority for that purpose previously given—such voters being its "corporate authorities" in the meaning of the State Constitution as interpreted by the highest court of Illinois—to have required the subscription to be made, and the bonds to be issued which were in fact made and issued pursuant to the unauthorized election of August 3, 1868. The question then is, could the [763] Legislature, by subsequent ratification, make that legal which was originally without legal sanction, but which it might, in the first instance, have authorized? A negative answer to this question would be in conflict with numerous decisions of this court upon the general question as to the power of a Legislature to enact curative statutes, when not restrained by constitutional provisions—the last of those decisions being *Anderson* v. *Santa Anna*. We adhere to what has been heretofore said by this court upon that subject; and, in doing so, we do not infringe upon the rule that, in respect to rights arising under, and depending upon the interpretation of, the Constitution and laws of a State, this and other courts of the United States will accept as controlling the established doctrines of the highest court of the State, as announced before such rights accrued. *Burgess* v. *Seligman*, 107 U. S. 33 [27: 365]; *Carroll County* v. *Smith*, 111 U. S. 568 [28: 519]. Previous to the issuing of the bonds in suit, May 5, 1869, there had been no decision of the Supreme Court of Illinois to the effect that it was beyond the power of the Legislature to enact such a statute as that of March 31, 1869, or that the Legislature could not ratify and confirm such acts of a municipal corporation as would have been lawful if done under previous legislative authority. On the contrary, its decisions prior to that time, as we endeavored to show in *Anderson* v. *Santa Anna*, tended to sustain the validity, in such cases, of retroactive legislation. The first direct decision of the state court, so far as we are aware, adverse to the validity of such legislation, was *Marshall* v. *Silliman*, 61 Ill. 226, determined in 1871, after the bonds in the suit were issued. The cases of *People* v. *Mayor of Chicago*, 51 Ill. 17, *People* v. *Salomon*, *Id.* 37, *People* v. *Chicago*, *Id.* 58, *Harward* v. *St. Clair, etc. Drainage Co.* *Id.* 130, and other cases of that class cited by counsel, do not touch the question before us; for they decide, in effect, nothing more than that the power to levy taxes for local purposes could be conferred only upon the corporate authorities of the municipal body to be affected thereby—the object of the constitutional provision that "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes," being to define as well [764] the class of municipal officers upon whom the power of taxation for local purposes might be conferred, as the purposes for which such power could be constitutionally exercised. *Town of Quincy* v. *Cooke*, 107 U. S. 554 [27: 551].

So that substantially the same question is presented here that arose in *Anderson* v. *Santa Anna*. Having a clear conviction that the Legislature did not transcend its power in enacting the Statute of March 31, 1869, and there being, to say the least, at the time the bonds in suit were issued, no adjudication to the contrary in the Supreme Court of Illinois, we cannot surrender our judgment upon that question and overrule the settled doctrines of this court, in deference to decisions by the state court, made long after the rights of the plaintiff accrued. *Burgess* v. *Seligman*, *Carroll County* v. *Smith*, and *Anderson* v. *Santa Anna*. In holding that the Legislature did not violate the Constitution of the State in passing the Act of March 31, 1869, we do not disregard those decisions of the state court which hold that the Legislature cannot impose a debt, for local corporate purposes, upon a municipal body, against the will of its corporate authorities. For, as often held by the state court, the corporate authorities of a town like Brimfield are its legal voters, and they, at the election of August 3, 1868, gave their consent to the subscription and bonds in question. The same voters who approved the subscription of $35,000, at the same time, and by means of the same election machinery, approved an additional subscription for $15,000. There is no suggestion in the record that the votes cast for the latter subscription did not constitute a majority of all the legal voters of the Town. We must presume upon this record that the Legislature ascertained, as stated in the Act in question, that such a majority had, at the election of August 3, 1868, voted for the additional subscription of $15,000; and we do not see that the subsequent ratification by the

Legislature of what had been done by the voters can be regarded as imposing a debt upon them against their will. The Legislature simply gave effect to the wishes of the people, as expressed in the customary mode for ascertaining the popular will. *Grenada County Supervisors* v. *Brogden*, 112 U. S. 262 [28: 704]; *Anderson* v. *Santa Anna* [*supra*]. [765]

The judgment must be reversed and the case remanded for further proceedings consistent with this opinion. It is so ordered.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[575] BRADLEY G. SCHLEY, *Plff. in Err.*,
v.
PULLMAN'S PALACE CAR COMPANY.

(See S. C. Reporter's ed. 575-586.)

Conveyance by feme covert—*Illinois Statutes and decisions—joinder with husband—sufficiency of acknowledgment—counsel censured.*

1. Under the Illinois Act of February 22, 1874, relating to the conveyance by nonresident married women of their lands in that State, and in accordance with the tendency of the decisions of its supreme court, it is held that the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, the deed being signed and acknowledged by both and certified as required by law.

2. A statement in a certificate of acknowledgment to the effect that "personally came" the grantors, "known to me to be the persons who executed the foregoing instrument," is a substantial compliance with the Illinois Statute, which requires the certificate to show that the person making the acknowledgment was personally known to the officer.

3. In the case presented, an objection that the certificate does not state that the wife was not informed of the contents of the deed is held not to be well taken.

4. Counsel for the defendant in error censured for introducing into his printed argument facts not found in the record, and in violation of a stipulation between the parties.

[No. 1113.]

Submitted Jan. 6, 1887. Motion submitted Jan. 18, 1887. Decided March 7, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Opinion below published, 25 Fed. Rep. 890. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **S. Corning Judd, Albert Ritchie, William Ritchie, Edward B. Esher and Edward S. Judd,** for plaintiff in error:

The fact that William Lynn signed, sealed and acknowledged this deed is not sufficient to make him a party to it. He should have been named or otherwise expressly designated in the body of the deed as a party grantor.

Agricultural Bank v. *Rice*, 45 U. S. 4 How. 228 (11: 951); *Batchelor* v. *Brereton*, 112 U. S. 396 (28: 748); *Lithgow* v. *Kavenagh*, 9 Mass. 172; *Lufkin* v. *Curtis*, 13 Mass. 223; *Melvin* v. *Proprietors, etc.* 16 Pick. 139.

"A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound."

Catlin v. *Ware*, 9 Mass. 218; *Fowler* v. *Shearer*, 7 Mass. 14.

This is just as true of William Lynn, though he was a person *sui juris*, as it would have been of his wife.

Peabody v. *Hewett*, 52 Me. 33, 50; *Chapman* v. *Crooks*, 41 Mich. 595; *Harrison* v. *Simons*, 55 Ala. 514. See also *McFarland* v. *Febiger*, 7 Ohio, 194; *Purcell* v. *Goshorn*, 17 Ohio, 105; *Cincinnati* v. *Newell*, 7 Ohio St. 41; *Carter* v. *Goodin*, 8 Ohio St. 78; *Payne* v. *Parker*, 10 Me. 178; *Cox* v. *Wells*, 7 Blackf. 410; *Whiteley* v. *Stewart*, 63 Mo. 360; *Powell* v. *Monson & B. Mfg. Co.* 3 Mason, 348; *Davis* v. *Bartholomew*, 8 Ind. 491; *Gray* v. *Mathis*, 7 Jones, L. (N. C.) 502; *Warner* v. *Peck*, 11 R. I. 481; *Hammond* v. *Thompson*, 56 Ala. 590.

The remaining objection to this deed is that the certificate of acknowledgment does not comply with the statutory requirements.

Tully v. *Davis*, 30 Ill. 103; *Lindley* v. *Smith*, 46 Ill. 523; *Murphy* v. *Williamson*, 85 Ill. 152; *Lane* v. *Dolick*, 6 McLean, 204.

The omissions or defects in the certificate cannot be supplied by parol.

Elliott v. *Peirsol*, 26 U. S. 1 Pet. 328 (7: 164); *Lindley* v. *Smith*, 46 Ill. 523.

It is true that if Mrs. Lynn was "known" to the officer, as the certificate states, she must have been either "personally" known, or proven by credible witnesses, but this leaves it uncertain which, and it was the purpose of the statute not to leave this point uncertain.

Shephard v. *Carriel*, 19 Ill. 319.

Mr. **Alfred Ennis,** for defendant in error: [576]

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action of ejectment, in which the plaintiff in error claims title to certain real estate in Cook County, Illinois, of which Pullman's Palace Car Company is in possession. A jury having been waived, the case was tried by the court, pursuant to a stipulation between the parties, that judgment should be entered for the defendant if the court was of opinion that a certain deed was valid and binding as a conveyance by husband and wife of the real estate therein described.

The deed and the certificate of acknowledgment annexed thereto, referred to in the stipulation, are as follows:

"*This Indenture*, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six, *witnesseth*: That I, Christina Lynn, sister and heir at law of Henry Millspaugh, deceased, who was a recruit of Lieutenant T. W. Denton, of Thirteenth Regiment, United States Infantry, War of 1812, with Great Britain, of the County of St. Clair, and State of Michigan, party of the first part, in consideration of the sum of forty-three dollars in hand paid by Milton & Thomas C. McEwen, of the County of Orange and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quitclaim unto the said party of the second part, their heirs and assigns, forever, all her right, title, claim and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn, the brother and sister and only heirs at law of Henry Millspaugh, deceased, as follows, to wit: [Here follows a description of the land] * * *; to have and to [577]

hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to their only proper use, benefit and behoof of said parties of the second part, their heirs and assigns, forever.

"In witness whereof the said grantor- have hereunto set our hands and seals the day and year first above written.

"CHRISTINA LYNN. [SEAL.]
"WILLIAM LYNN. [SEAL.]

"Signed, sealed and acknowledged in the presence of—

"MARY A. LYNN,
"OBED SMITH.

"STATE OF MICHIGAN, }
COUNTY OF ST. CLAIR, } ss.

"On this twenty-seventh day of May, A. D. 1856, before me, a justice of the peace in and for said County of St. Clair, personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed; and the said Christina Lynn, having been by me privately examined separate and apart from the said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely and without any force or compulsion from her said husband or from any one.

"OBED SMITH,
Justice of the Peace."

The court being of opinion that the deed was valid to pass to the grantees all the right, title [578] and interest of Christina Lynn and William Lynn, her husband, in the real estate therein described, entered judgment for the defendant on its plea of not guilty.

Before entering upon the consideration of the case it is proper to notice the motion made in behalf of the plaintiff in error, to strike out certain parts of the printed argument filed by the counsel for the defendant in error. Notwithstanding the agreement that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things, which he declares to be "incontrovertible facts," and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The motion to strike out relates to those matters. The excuse given for this breach of professional propriety is "the extreme brevity of the record." But it is the same record upon which counsel for the Company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation; much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which he must have known could not be taken into consideration. It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case.

The plaintiff insists that the deed was void under the laws of Illinois, upon two grounds: 1. That the husband is not a party to the deed; 2. That the acknowledgment is defective.

In *Lane* v. *Soulard*, 15 Ill. 123, it was held that the Revised Statutes of Illinois of 1845 repealed all former laws on the subject of conveyances of real estate, and authorized married women within that State to convey land by joining with their husbands and acknowledging the deeds in a specified way; but that no provision was made for the conveyance by non-resident married women of their lands in Illinois until the passage of the Act of February 22, 1847. See also *Higgins* v. *Crosby*, 40 Ill. 260; *Rogers* v. *Higgins*, 48 Ill. 211.

This case depends mainly upon the construc- [579] tion to be placed upon the second section of the latter Act, which was in force when the deed of May 26, 1856, was executed. That section is as follows:

"When any *feme covert*, not residing in this State, being above the age of eighteen years, shall join with her husband in the execution of any deed, mortgage, conveyance, or other writing of, or relating to, any lands or real estate, situate within this State, she should thereby be barred of and from all estate, right, title, interest, and claims of dower therein, in like manner as if she was sole and of full age. And any such *feme covert* joining with her husband in the execution of a power of attorney or other writing, authorizing the sale, conveyance, or other disposition of lands or real estate as aforesaid, shall be bound and concluded by the same, in respect to the right, title, claim or interest in such estate, as if she were sole and of full age as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing may be the same as if she were sole, and shall entitle such deed, mortgage, conveyance, power of attorney, or other writing to be recorded as is authorized by this Act; and the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings heretofore, as well as those which may hereafter be executed." Scates, Treat & Blackwell, Stat. Ill. Vol. 2, p. 965; 1 Gross, Stat. Ill. chap. 24, § 24; 1 Adams & Durham, Real Estate Stat. & Decisions of Ill. p. 175.

Did Christina Lynn, within the meaning of that statute, "join with her husband in the execution" of the deed of 1856? The plaintiff contends that she did not, because the name of the husband is not expressly designated in the body of the deed as a grantor. It is argued that as William Lynn, the husband, had during coverture a freehold interest, jointly with his wife, in her estate of inheritance, with absolute ownership of the rents and profits of the wife, the requirement in the Act of 1847, that she should join him in the execution of any deed for real estate, was a recognition of his supremacy and right of control, and necessarily implied that he, as grantor, so named in the granting or operating [580] clause, must pass whatever interest he had, and thereby, also, express his willingness that the wife should convey her title or estate. While this position is sustained by some adjudications, it is necessary to inquire as to the state of the local law; for the rights of the parties must be governed by the requirements of that law in respect to the mode in which real property sit-

uated within the limits of that State may be conveyed or transferred. *U. S.* v. *Crosby*, 11 U. S. 7 Cranch, 115 [3:287]; *Clark* v. *Graham*, 19 U. S. 6 Wheat. 579 [5:335]; *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 202 [6:308]; *Suydam* v. *Williamson*, 65 U. S. 24 How. 433 [16:745]; *Brine* v. *Ins. Co.* 96 U. S. 627 [24: 858].

In *Johnson* v. *Montgomery*, 51 Ill. 185, the question was whether dower was barred by a deed executed in 1853, in Ohio, conveying lands in Illinois belonging to the husband, the wife signing the deed and duly acknowledging it before a proper officer. But the wife was not named in the body of the deed, nor was her right of dower referred to therein in any way. It is true, as suggested by counsel for the plaintiff in error, that an inchoate right of dower is not a present estate in lands, and that the court in that case expressly waived any decision of the question whether the deed then before it would have been good under the Act of 1847, and placed its decision entirely upon the 21st section of the Statute of Conveyances of 1845. That section provides that it shall be lawful "for any married woman to release her right of dower of, in, and to any lands, tenements whereof her husband may be possessed or seised, by any legal or equitable title during her coverture, by joining such husband in the deed or conveyance for the conveying of such lands and tenements, and appearing and acknowledging the same, etc., * * * which [certificate of privy examination] being recorded together with the deed, duly executed and acknowledged by the husband according to law, shall be sufficient to discharge and bar the claim of such woman to dower in the lands and tenements conveyed by such deed or conveyance." 1 Adams & Durham, 133; Rev. Stat. Ill. 1845, p. 107. The court, after observing that the deed merely extinguished the wife's contingent right of dower, [581] and did not pass any estate she had in the land. said: "This precise question has not hitherto been presented, but we entertain no doubt it has always been supposed by both the people and the profession in this State that a married woman, signing her husband's deed and being properly examined before an officer and causing his certificate of that fact to be placed upon the deed, would bar her dower in the premises conveyed, although her name nowhere appeared in the body of the deed. By signing the deed she 'joins' in it, and having done this, her dower is barred if she takes the other steps pointed out by the statute." This decision bears somewhat on the question as to what the local statutes mean when they require the wife to join with the husband in a conveyance of real estate.

In *Miller* v. *Shaw*, 108 Ill. 290, one of the questions was whether a certain conveyance by a married woman, living in Illinois with her husband, passed the title to her separate real property situated in that State, the husband not joining with her in the granting clause of the deed. The statute in force when the deed was made prescribed the mode in which the husband and wife, residing in Illinois, could convey the real estate of the wife. Act of 1845, § 17, p. 106; 1 Adams & Durham, 127-8. It made it lawful for the husband and wife to "execute" any grant, lease, deed, or conveyance of such estate. The court said: "That which this statute requires to be done, to enable the wife to convey her separate property, is that she and her husband shall execute the deed, and after that she shall appear before a proper officer and acknowledge the same in the mode pointed out in the statute; and such deed being acknowledged or proved according to law by the husband, it will be as effectual to pass the title to the wife's separate property as the deed of an unmarried woman would be to convey her property. All this was done in this case. Both Mrs. Sheldon and her husband executed the deed to Ward, and afterwards she appeared before a proper officer and acknowledged it in conformity with the statute; and the acknowledgment of her husband to the deed being according to law, that seems to be all the law requires to be done to make the deed effectual to [582] pass the title to the wife's separate estate."

The latest case to which our attention has been called is *Yocum* v. *Lovell*, 111 Ill. 212. By a Statute of Illinois every householder is declared to be entitled "to an estate of homestead," to a specified amount, in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and acquired by him or her as a residence; such homestead and all right and title therein being exempted from attachment, judgment, levy, execution or sale for the payment of his debts or other purposes and from the laws of conveyance, descent and devise as provided in that statute. The exemption continues after the death of the householder for the benefit of the surviving husband or wife, so long as he or she occupies such homestead, and of the children until the youngest child become twenty-one years of age. The statute also provides that "No release, waiver or conveyance of the estate so exempted shall be valid, unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance; or, if the exemption is continued to child or children, without the order of the court directing a release thereof." Rev. Stat. 1874, p. 497. In the case last cited, the question was whether a trust deed expressly relinquishing the homestead right was effectual for that purpose, the name of the wife not appearing in the granting clause of the deed, although it was signed and duly acknowledged by herself and husband in conformity with the statute. The court held the deed to be sufficient to pass the interest of both husband and wife in the estate of homestead,—observing that the statute did not require the name of the husband or wife to appear in the body of the deed. Referring to *Miller* v. *Shaw*, as presenting an analogous question, the court said: "In the case now being considered the wife joins with her husband in the release of the homestead in precisely the same manner as the husband did with the wife in the case cited."

While those cases do not cover the precise [583] question under consideration, we are of opinion that under the principles announced in them, the deed of May 26, 1856, must be upheld as a valid transfer under the law of Illinois of the interest of Christina Lynn and her husband. If, as adjudged by the Supreme

Court of the State, the wife, whose name did not appear in the operative clause of the husband's conveyance of his lands, is to be held as having joined him therein and surrendered her right of dower, by simply signing the deed and acknowledging it in conformity with the statute, and upon privy examination duly certified; if, under a statute making it lawful for husband and wife "to execute" a conveyance of her real estate, they will both be held to have executed a conveyance of her separate property where her name appears, but that of the husband does not appear, in the granting clause of the deed, but they both sign and acknowledge it in the mode required by law; and if the wife's "estate of homestead" can be conveyed by a deed, signed and duly acknowleged by herself and husband, her name, however, not appearing in the body of the deed; it would seem to follow that, within the meaning of the Act of 1847, and according to the tendency of the decisions of the Supreme Court of the State, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed by both herself and husband, is acknowledged by both, and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife as if his name had also appeared in the granting clause.

[584] If, as suggested, the purpose of the Act of 1847 in requiring the wife to join the husband in the execution of conveyances of her real estate was to protect her against strangers and secure his co-operation and counsel, that object was as fully accomplished by his signing and acknowledging the deed with her as it would have been by designating him in the body of the deed, as co-grantor with the wife.

It is proper to say that the question under consideration is not free from difficulty, and we should have been glad to be guided in our determination of it by an express decision of the highest court of the State. The conclusion reached by us is more in harmony with what that court has held in cases somewhat analogous than would be a decision adjudging the deed of 1856 to be void.

One other question remains to be considered. It is contended that the certificate of acknowledgment is fatally defective for two reasons: 1. It does not appear that Mrs. Lynn was personally known to the magistrate, or that she was proved by a credible witness to be the same person as the one who subscribed to the deed; 2. It does not appear that she was informed of the contents of the deed.

In support of these objections, the counsel for the plaintiff in error relies upon the 20th section of the chapter on "Conveyances" in the Revised Statutes of 1845, p. 107. That section provides: "No judge or other officer shall take the acknowledgment of any person to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who, and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness; and the judge or officer taking such acknowledgment shall, in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, or having executed the same, or that he was proved to be such by a credible witness (naming him)," etc. That chapter was amended by the Act of February 11, 1853, the first section of which provides, "That no deed, mortgage, or other instrument of writing, heretofore executed, or hereafter to be executed, by husband and wife, in good faith, for the purpose of conveying or incumbering the estate of the husband, or the estate of the wife, or the right of dower in any lands situate in this State, and acknowledged by them before any officer authorized by the laws of this State to take acknowledgments, shall be deemed, held, or adjudged invalid, or defective or insufficient in law, by reason of any informality or omission in setting forth the particulars of the acknowledgment, before such officer as aforesaid, in the certificate thereof: *Provided, however*, That it appears in substance, from such certificate, that the parties executing said [585] deed, mortgage, or other instrument of writing, executed the same freely and voluntarily; and that in case of married women executing the same, it appears, in substance, that they knew the contents of said deeds, mortgages or other instruments of writing, and that they were examined by the officer aforesaid, separate and apart from their husbands." 1 Adams & Durham, 185.

It was said in *Lindley* v. *Smith*, 46 Ill. 527, that the requirement that the certificate should show that the person acknowledging it was personally known to the officer to be the person whose name is subscribed to the deed, or was proved to be such, by a credible witness, was one of substance and salutary in its operation, and was not dispensed with by the Act of 1853; and that "It is the acknowledgment of the *feme covert* which is the operative act to pass her title." See also *Murphy* v. *Williamson*, 85 Ill. 152. Assuming this to have been the settled law of Illinois when the deed in question was executed, and that the case, on this point, is governed by the Revised Statutes of 1845, the result claimed by the plaintiff in error does not follow. The cases cited do not sustain the objection to the certificate of acknowledgment. In *Lindley* v. *Smith*—one of the cases relied upon by the plaintiff in error—there was no language in the certificate of the wife's acknowledgment from which it could be inferred that she was either personally known to him or was proved by a witness to be the person who had, as wife, signed the deed. To the same class belong the cases of *Heinrich* v. *Simpson*, 66 Ill. 57, and *Coburn* v. *Herrington*, 114 Ill. 107. The officer's certificate in this case states that "personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed." This is, in substance, a statement that they came before the officer and were personally known to him to be the real persons who in fact subscribed and acknowledged the deed.

The objection that the officer's certificate [586] does not state that she was informed of the

contents of the deed—if it have any force whatever under the Act of 1847, permitting the nonresident *feme covert* to acknowledge her deeds as if she were unmarried—is not well taken. The certificate shows that she executed the deed freely and without force or compulsion from the husband or from anyone else, "fully understanding the contents" thereof. Besides, this defect, if it be one, is of the kind that was cured by the Act of 1853, which only required it to appear, in substance, as it does here, that the deed was executed freely and voluntarily, and, in the case of a married woman, that she knew its contents and was examined separately and apart from her husband. She must have known, if, as certified, she fully understood the contents of the deed.

The judgment below was right, and is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

LEPINE C. RICE, Assignee of ROBERT ERWIN ET AL., Trading as ERWIN & HARDER, *Appt.*,

v.

UNITED STATES.

122 US 611

Captured and Abandoned Property Act—special Act for relief of Robert Erwin—action by assignee in bankruptcy—Statute of Limitations.

The judgment of the court below holding that an action brought February 17, 1886, under the provisions of the special Act of February 5, 1877, authorizing that court to take jurisdiction of the claims of Robert Erwin against the United States, is barred under the Statute of Limitations, is affirmed by a divided court.

[No. 1269.]

Submitted Jan. 3, 1887. Affirmed March 7, 1887. Petition for rehearing denied March 21, 1887.

APPEAL from the Court of Claims. Reported below, 21 Ct. Cl. 413.

This action was brought February 17, 1886, by the assignee in bankruptcy of Robert Erwin, under the provisions of the special Act of February 5, 1877, authorizing the court below to take jurisdiction, under the provisions of the Captured and Abandoned Property Act of March 12, 1863, of his claims against the United States for property alleged to have been taken from him by persons duly authorized and acting in behalf of the United States.

At the hearing upon general demurrer, and of a motion to dismiss for want of jurisdiction, the questions whether the assignee can maintain an action on said claims, said special Act having been "for the benefit of Robert Erwin" and not for his creditors, and whether an assignee in bankruptcy can keep the estate open and bring an action nine years after his appointment, were raised but not decided. The court held, *Mr. Justice* Nott dissenting, that the cause of action arose on the passage of the Act of 1877, and that the action, having been commenced more than six years thereafter, is barred by section 1069, R. S. Claimant appeals to this court.

Messrs. **Charles Marshall, Albert Small, Samuel Shellabarger, J. M. Wilson and Charles N. West,** for appellant:

The action is under the special statute reviving *pro hac vice* the Captured and Abandoned Property Act, and extends to this claimant all the benefits of that Act.

The right of action under the original Act expired by its own limitation two years after the close of the war, August 20, 1868.

The effect of revival, such as this, as expressed by this court, is: "We are of opinion that by reviving an Act, the Legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired."

The Aurora, 11 U. S. 7 Cranch, 382 (3: 378).

The form and effect of the Captured and Abandoned Property Act, in behalf of these claims, is therefore in nowise changed. The effect of the special statute is to extend to the claims the remedy provided by that Act, notwithstanding the limitation it prescribes.

Erwin v. *U. S.* 97 U. S. 394 (24: 1066); *Ford* v. *U. S.* 116 U. S. 216 (29: 609).

By the Captured and Abandoned Property Act Congress created an express trust, the Government being the trustee; the trust estate, the fund created by it in the Treasury; the *cestuis que trust*, all who could bring themselves within the terms of the Act; and for the right thus created, a remedy by suit in the court of claims. For reasons of public policy the jurisdiction of the court was limited as to its duration; no other limitation was imposed.

As the Act affects the question of jurisdiction here raised, it was very fully considered in *Haycraft* v. *U. S.* 89 U. S. 22 Wall. 81 (22: 788).

That the fund in the Treasury created by the operation of the Act is a trust fund has been uniformly held by the court of claims and by this court, and is expressly declared in the following cases:

Anderson's, 76 U. S. 9 Wall. 65 (19: 617); *Padelford's*, 76 U. S. 9 Wall. 538 (19: 790); *Klein's*, 80 U. S. 13 Wall. 128 (20: 519); *Haycraft's, supra; The Elgee Cotton Cases*, 89 U. S. 22 Wall. 180 (22: 863); *Hall's*, 92 U. S. 28 (23: 598); *Lamar* v. *Browne*, 92 U. S. 195 (23: 653); *Ross's*, 92 U. S. 281 (23: 707); *Intermingled Cotton Cases*, 92 U. S. 651 (23: 756); *Young's*, 97 U. S. 61 (24: 997).

There is no doubt of the right of a Government to create a trust by legislation.

1 Perry, Tr. § 30; *Alexander* v. *Duke of Wellington*, 2 Russ. & M. 35; *Stevens* v. *Bagwell*, 15 Ves. 140.

The Act did not devest the title of the owner.

Klein's Case, supra; Pugh's, 99 U. S. 269 (25: 323); *Winchester's*, 99 U. S. 372 (25: 479).

The subject matter of the trust is fixed and certain; the beneficiaries are specifically determined; a jurisdiction is erected, and a remedy is provided for the enforcement of the rights created by the Act.

Haycraft's Case, supra; 2 Story, Eq. Jur. § 964; 1 Spence, Eq. 499.

Limitations do not run against an express trust.

U. S. v. *Taylor*, 104 U. S. 216 (26: 721); *U. S.* v. *Lawton*, 110 U. S. 149 (28: 101); *Philippi* v. *Philippe*, 115 U. S. 156 (29: 338;) *Fripp's Exr.* v. *U. S.* 19 Ct. Cl. 667.

The intention of Congress to create an ex

press trust, although, for the reasons assigned by this court at page 95 of *Haycraft's Case*, the time within which the remedy, under the Act, could be availed of was limited, is thus very forcibly stated by the court of claims in *Ford* v. *U. S.* 19 Ct. Cl. 519:

"Had that Act granted that privilege, without specifying a time within which a loyal man should prefer his claim here, there is no reason why he might not come here now, though more than twenty-one years had elapsed, as in the present case, since his property was captured and sold."

If the court of claims has jurisdiction, it is of the claims of Robert Erwin, which by operation of the Bankrupt Act passed to the appellant, as assignee, carrying with the title to the claims every right of action which the owner, Erwin, had.

Erwin v. *U. S.* 97 U. S. 397 (24: 1067); *Phelps* v. *McDonald*, 99 U. S. 304 (25: 475); *Sanger* v. *Upton*, 91 U. S. 62 (23: 222); *Clark* v. *Clark*, 58 U. S. 17 How. 315 (15: 77); *Milnor* v. *Metz*, 41 U. S. 16 Pet. 227 (10: 945); *Minot* v. *Tappan*, 127 Mass. 383; *Berry* v. *Sawyer*, 19 Fed. Rep. 286.

Messrs. **A. H. Garland**, *Atty-Gen.* and **Heber J. May**, *Assist. Atty.* for appellee:

The claims in this case have no other foundation than a law of Congress which brought them within the general jurisdiction, and, consequently, within the general limitation statutes.

To hold because the special Act itself contains no limitation, no limitation whatever applies, would be to overrule a well established line of decisions.

Zellner's Case, 76 U. S. 9 Wall. 244 (19:665); 7 Ct. Cl. 208; *Erwin's Case*, 97 U. S. 392 (24: 1065); 18 Ct. Cl. 49; *Clark's Case*, 99 U. S. 493 (25: 481); 11 Ct. Cl. 702.

It is disputed that Congress intended to put Erwin's claim on a better footing than other claims. Congress has not expressed any such intention in the Act in regard to the claim, and the same cannot be presumed or implied. The object of the Act was to legislate as to previous and not future limitation. It is a simple grant of jurisdiction to the court of claims to hear and determine *Erwin's Case* under the law, without other or further expressed privileges.

Mr. Chief Justice **Waite** announced an *affirmance by a divided court.*

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[595] ELON A. MARSH ET AL., *Appts.*,
v.
NICHOLS, SHEPARD & COMPANY.

(See S. C. Reporter's ed. 595-597.)

Practice—motion by one of several appellants to dismiss appeal.

This court will not dismiss an appeal on motion of one of several appellants against the opposition of the others.

[No. 641.]

Submitted March 7, 1887. Decided March 14, 1887.

ON motion by one appellant to dismiss an appeal from the Circuit Court of the United States for the Eastern District of Michigan. *Overruled.*

This was a motion, upon an appearance entered for that purpose by James Scott, one of the appellants, who had not authorized the appeal nor an entry of his appearance, to dismiss the appeal, which was from a decree dismissing on the hearing a bill in equity for an accounting, and for a perpetual injunction to restrain the defendant from unlawfully infringing letters patent for a certain invention of which the complainants were the owners. The motion was founded upon the following affidavit, entry of appearance and transcript of the record in a suit commenced in the Circuit Court of Calhoun County by the appellee, against the appellants, to restrain them from asserting that the appellee has not the complete right to make, use, vend or put in practice or operation and use on any engine made, sold, used or operated by them, a certain device; that appellants may be ordered to specifically carry out a certain contract by which appellees were to be permitted to use said device; and praying that if a patent should hereafter be granted to appellants they should be restrained from interfering with complainant's use of said device; which relief was granted by a decree of the circuit court, and upon appeal to the Supreme Court of Michigan was affirmed after this pending appeal was taken.

There is also a copy of a writ of error to this court by appellants Marsh and Le Fever, taken on the ground that it appears in the record and proceedings that there was drawn in question before said supreme court an authority exercised by defendants under the Constitution and laws of the United States; and also it appears that such authority so exercised by defendants was denied in this:

1. That it appears therein that the exclusive jurisdiction of the Supreme Court of the United States, on the appeal by these defendants upon the same question, and between the same parties, was drawn in question, and was denied.

2. That full faith and credit, at the request of these defendants, was not given to the proceedings, record and appeal appearing in the Circuit Court of the United States for the Eastern District of Michigan, concerning the same issues and between the same parties. [597]

3. That the right and authority under the Constitution and laws of the United States of the said defendants to prosecute their said appeal from the said Circuit Court of the United States was drawn in question and denied.

4. That the right and authority under the Constitution and laws of the United States, authorizing the issue of letters patent to inventors, and especially the right and authority exercised by said defendants under letters patent No. 236052, issued in pursuance of said laws, was drawn in question and denied.

The motion was as follows:

"And now comes James Scott, one of the parties named as appellant in the above-entitled case, by Edward J. Hill, his attorney, who appears herein for the purpose of his motion only, and shows unto this honorable court that the said appellants are all citizens of the State of Michigan, resident at the City of Battle Creek in the County of Calhoun, therein, and that the appellee is a private corporation organized and doing business at said city, by the name of 'Nichols, Shepard & Co.,' under the

laws of said State of Michigan; and that the claim of said appellants against the said appellee in this cause is for an alleged infringement by the appellee of those certain letters patent numbered 236052, dated December 28, A. D. 1880, issued to said appellants Elon A. Marsh and his assignee, the said Minard LeFever, out of and under the seal of the patent office of the United States, for an invention therein described, of the said Elon Marsh; to wit, a new and useful improvement in steam engine valve gear; and that since the appeal herein was taken they, the said Elon A. Marsh, Minard LeFever and James Scott, have, by the orders and decrees of the Circuit Court of Calhoun County aforesaid, as affirmed, amended and approved, on appeal, by the Supreme Court of the State of Michigan, been perpetually enjoined and restrained from further making any claim against the said Corporation for the manufacture, sale and use of said invention; and the said appellants have been required to execute a release, among other things, of all the claims and demands which they have been prosecuting in this cause, to the said Corporation, as will more fully and at large appear in and by duly certified copies of the said orders and decrees, as the same are of record in the clerk's office of the said Circuit Court of Calhoun County, in that certain cause therein wherein the said Nichols, Shepard & Co. was the plaintiff and the said Elon A. Marsh, Minard LeFever and James Scott were the defendants, herewith filed herein; and further that he, the said James Scott, is informed by counsel learned in the law that, by virtue of the said orders and decrees of the Circuit Court of Calhoun County, the cause of action of the said appellants against the said Corporation appellee has been extinguished, so that the further prosecution of this appeal would not only be nugatory, but in direct violation of the orders and decrees of a court of equity of competent and exclusive jurisdiction over both the parties and the subject matter involved in said orders and decrees.

Wherefore, the said James Scott now produces and exhibits the said orders and decrees and the pleadings in the said cause in the said Circuit Court of Calhoun County, by duly certified copies thereof, together with the opinions of the circuit court judge who heard the same, and the Supreme Court of Michigan approving, affirming, modifying and amending the said orders and decrees, and asks that this appeal be dismissed, or for such other or further order or direction herein as the exigencies of the case may require, according to the custom and practice of this honorable court, and as to equity and good conscience may appertain. Dated February 28, A. D. 1887.

James Scott.
By Edward J. Hill, his attorney.
Edward J. Hill, of counsel."

The affidavit was in these words:

"State of Michigan, } ss.
Calhoun County. }

[596] James Scott, being first duly sworn, doth on oath depose and say: I am one of the appellants named in the above entitled case; that said appeal was taken without my knowledge and consent, and that I gave no authority to R. A. Parker, Esq., of Detroit, Michigan, to enter my appearance in this case in this court, but that I have authorized and directed Mr. Edward J. Hill, of Chicago, Illinois, one of the attorneys of this court, to appear for me and move to dismiss this appeal.

James Scott.

Subscribed and sworn to before me this 10th day of February, A. D. 1887.

[Seal.] Frank W. Dunning,
Notary Public."

Mr. **Edward J. Hill,** for James Scott, appellant, in support of the motion:

The license and the injunction established by the decree of the state court end all controversy as to any infringement, and the further prosecution of any suits therefor covering the improved steam engine valve gear described in letters patent No. 236052, dated December 28, A. D. 1880.

Hartell v. *Tilghman*, 99 U. S. 547 (25: 857).

The release of all the claims and demands involved in this suit required by the amendment ordered by the Supreme Court of Michigan, on appeal, extinguishes the cause of action in this cause.

Dakota Co. v. *Glidden*, 113 U. S. 222 (28: 981), and cases there cited.

We insist that, instead of suing out a writ of error where, on the face of the decree, it is plain and palpable that no jurisdiction can possibly exist in this court to review the question of license, it was their duty to bow (as this appellant does here now) in deference to the decree of the Michigan Supreme Court, which is the final arbiter in such cases, and promptly cause this appeal to be dismissed.

Semple v. *Hagar*, 71 U. S. 4 Wall. 431 (18: 402).

Besides, the writ of error is fatally defective, as it does not include one of the defendants; namely, James Scott aforesaid; it cannot therefore affect him.

Simpson v. *Greeley*, 87 U. S. 20 Wall. 152 (22: 338); *Feibelman* v. *Packard*, 108 U. S. 14 (27: 634).

Messrs. **R. A. Parker** and **Don M. Dickinson,** for appellants Marsh and Le Fever:

The motion admits that the final decree of the Supreme Court of the State of Michigan conflicts with the prosecution of the appeal in this cause, and this is supported in the brief of Mr. Hill. It also appears from the motion that the action resulting in such decree forbidding the prosecution of the appeal was taken subsequently to the obtainment of the jurisdiction of the United States Circuit Court below and of this court; hence, this court is asked to dismiss an appeal because the state court has, in an action subsequently commenced, undertaken to restrain its prosecution. As a general principle this cannot be done, and the state court is without jurisdiction to do so.

Embry v. *Palmer*, 107 U. S. 3 (27: 346); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Peck* v. *Jenness*, 48 U. S. 7 How. 624 (12: 846).

In case it should attempt to do this, a writ of error to the Supreme Court of the United States would lie.

Freeman v. *Howe* and *Embry* v. *Palmer*, *supra*.

In reply to the position taken in the motion and brief, we say:

First. That the order and decrees of the state court have been superseded by a writ of error taken to this court, as will appear by certified copies filed herewith.

Second. That said writ of error has been taken because, among other things, of the conflict of jurisdiction between the state and federal courts; hence, we submit that appellants are not bound by the decrees of the state court pending the disposition of the same in this court, either to comply with those decrees or to bow thereto, or to refrain from prosecuting their appeal in this court.

But it is urged that such writ of error is fatally defective because Scott is not a party thereto.

The pleadings, orders and decrees filed with the motion show:

First. That while Scott was made a defendant with Marsh and Le Fever in the bill filed in the state court by the defendant herein, he answered severally from Marsh and Le Fever, and to the effect that he disclaimed all interest whatsoever in the letters patent in question, or the device or invention mentioned therein, or any interest as a partner, joint owner or otherwise with Marsh and Le Fever.

Second. That he acquiesced in the decision of the Circuit Court of Calhoun Co., from which Marsh and Le Fever alone appealed to the Supreme Court of the State of Michigan and were the only parties subject to its decree on appeal, whereby a proceeding equivalent to a severance was had, as Marsh and Le Fever, on the affirmance of the supreme court, were the only parties capable of taking a writ of error to this court, as such writ of error could only be taken from a final decision of a court of last resort; hence, the cases cited by Mr. Hill do not apply.

Mr. **Edward J. Hill**, in reply:

The gentlemen who oppose this motion are wrong as to the chancery practice of their own State. True, "Any complainant or defendant who may think himself aggrieved * * * by the decree or final order of a circuit court in chancery in any case may appeal therefrom to the supreme court."

Howell, Stat. § 6737.

But the appeal brings up the entire record as a whole, with all matters, as well those of discretion as otherwise, open for consideration and review in the appellate court, precisely as they were in the court below. The hearing will be the same as if the cause had never been heard before. The court will affirm, modify or reverse, as equity may require, or make such order or decree as should have been made by the court below.

Detroit F. & M. Ins. Co. v. *Renz*, 33 Mich. 298; *Haines* v. *Haines*, 35 Mich. 143; Howell, Stat. § 6741.

The gentlemen say "We have no objection, however, to James Scott being made a party by amendment to the writ of error, if this court should think it necessary." This may be done by consent.

See *Deneale* v. *Stump*, 33 U. S. 8 Pet. 526, 528 (8: 1032, 1033).

The disclaimer did not shield Scott from the decree. He has a suit pending to rescind his contract of purchase, but he alone could not rescind. The decree is against him, and he is a party named in the record from the bill of complaint to the final decree. Is he then a stranger to this record? This record is final, unless this court has jurisdiction.

We do not understand that, even if the question of license had been raised and were pending as a defense to an infringement suit, the pendency of the infringement suit would preclude the jurisdiction of a court of equity in settling the terms, effect and scope of the license. Had a decree been rendered at Detroit finding Nichols, Shepard & Co. an infringer, then the prior adjudication might have precluded that corporation from avoiding the same by any subsequent action to establish a license. But the decree there was against the plaintiffs. The cause had been dismissed for the reasons stated in the published opinion of the learned district judge.

See *Marsh* v. *Nichols*, 24 Off. Gaz. 901, August Term 28 (1883).

The license was not set up and, if it had been set up as a defense, could not have been passed upon by the Circuit Court for the Eastern District of Michigan.

24 Off. Gaz. 901, August 28 (1883).

The injunction does not reach this court, nor this appeal in No. 641; it reaches the parties. And by means of this motion and the filing of the record here, the estoppel of record involved in the decision of the state courts and the release there ordered are made known to this court. This court, seeing that the cause of action no longer exists, it seems to us, must dismiss the appeal, even if Scott were a stranger.

Lord v. *Veazie*, 49 U. S. 8 How. 251 (12: 1067).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The sole ground of the application is that since the appeal the Supreme Court of Michigan has, in a suit between the same parties, enjoined these appellants from making any claim against the appellee for the use of the patented invention which is the subject matter of the suit, and has required them to release all the claims and demands which they have been prosecuting.

Marsh and Le Fever oppose this motion, and Scott has no right to dismiss for them.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ELON A. MARSH ET AL., *Plffs. in Err.*, [598
v.
NICHOLS, SHEPARD & COMPANY

(See S. C. Reporter's ed. 598-600.)

Practice—parties to writ of error.

A party defendant, against whom a decree was taken *pro confesso*, cannot make himself a party to a writ of error which was sued out by other defendants, so as to control the case in this court.

[No. 671.]

Submitted March 7, 1887. Decided March 14, 1887.

IN ERROR to the Supreme Court of the State of Michigan. *Motion denied.*

On motion of James Scott for leave to file the transcript and docket cause, with which is united a motion to amend the writ by making himself a party plaintiff in error, and then to dismiss for want of jurisdiction.

This bill was filed in the Calhoun Circuit Court to compel defendants to convey to complainants, who are a Corporation engaged in engine building at Battle Creek, the right to use a certain improvement consisting of a reversing apparatus, for which defendants claim to own a patent, and for the principal part of which it is admitted they are entitled to have one.

The answer of James Scott disclaimed any interest whatever in the matter in controversy, and a decree *pro confesso* was taken against him. Defendants Marsh and LeFever answered, denying any arrangement under which complainants have a right to use the improvements, and they also rely on the fact that they, subsequent to the allowance of the patent, filed a bill against complainants in the Circuit Court of the United States for the Eastern District of Michigan, charging an infringement, and complainants set up in defense the validity of the patent, and put the invention in issue, but did not set up license. This suit was defeated, on the ground that the patent had never been issued and signed and sealed by the proper officer. An appeal was taken by the defendants and also by complainants to the United States Supreme Court, where it is now pending. These appeals are Nos. 641, and 671, October Term, 1886. The present suit was begun before that case was appealed. The state court held that the present suit, not being brought to determine any question arising under the patent laws, but merely to enforce a contract to transfer an inventor's right, is not one in which the courts of the United States have particular jurisdiction, and that as all parties are citizens of Michigan there is nothing to prevent the maintenance of this suit, as complainants are not estopped by the litigation in the United States courts. As defendants had not then obtained a good patent, complainants were not called on to put in any defense which admitted one. And they cannot be deprived of the right to vindicate in another suit such rights as could not have been adequately enforced in that litigation. On the final hearing the state circuit court decreed that defendants should give complainants' written evidence of the right which they had bought and paid for. Scott did not appeal from this decree. Marsh and LeFever appealed. The supreme court affirmed the decree, modifying it so as to require the execution of a release instead of a license by the defendants. This writ of error to the Supreme Court of Michigan was taken by Marsh and LeFever. Scott's name was left out of the writ. Scott claims that the main object of this writ of error is to delay him in his suit with Marsh and LeFever over this question, which he claims to be forever settled by this decree. His position is plainly antagonistic to that of Marsh and LeFever. In his suit against Marsh and LeFever to rescind he desires the license, established according to the decree of the Supreme Court of Michigan, upheld. In this respect he occupies ground almost the same as Nichols, Shepard & Co The decrees are, however, against him; until properly rescinded by a court of competent jurisdiction his interest is subsisting; his election to rescind and his disclaimer therein did not annul his contract of purchase, so as to release him from a decree, but he insists it warrants him in severing himself from Marsh and LeFever in No. 641, and in coming in here to look after his interest, and to show these facts by an attorney of this court other than Mr. Parker, who has up to the time of Scott's election to rescind acted for Scott as well as for Marsh and LeFever. Since that election Mr. Parker could not, therefore, consistently represent Scott as his attorney, either in this litigation or in No. 641, in which Scott has submitted a motion to dismiss.

See opinion in preceding case.

The motion and affidavit are as follows:

And now comes James Scott, by Edward J. Hill, his attorney, and brings here a transcript of the record to which the said plaintiffs in error above named have caused the writ of error issued from this court herein to be directed, together with a copy of the writ; and thereby shows that he is a material and necessary party of record to this cause, and therefore asks that he have leave to file said transcript of record, and be made a party plaintiff in error herein; and that said cause be docketed, and that his appearance may be entered herein; and that the said writ of error be dismissed for want of jurisdiction apparent on the face of the record, or for such other or further order in the premises as may be just and proper.

Dated February 28, 1887.

James Scott,
By Edward J. Hill, his attorney.

Mr. **Edward J. Hill**, for James Scott:

The decrees of the Circuit Court of Calhoun County, as affirmed, amended, and approved by the Supreme Court of Michigan, are against three defendants; viz., Elon A. Marsh, Minard LeFever, and James Scott; all three, therefore, are necessary parties plaintiff in error.

Simpson v. *Greeley*, 87 U. S. 20 Wall. 152 (22: 338).

The writ may be amended.

Pearson v. *Yewdall*, 95 U. S. 294 (24: 436); § 1005, R. S.

A glance at the decree of the Circuit Court of Calhoun County, Michigan, of date October 31, 1885, and to the subsequent orders and decrees in this record, is sufficient to show that no federal question was decided. The contract established by these proceedings made by Marsh with Nichols, Shepard & Co., was for an irrevocable license to make, use and vend his device—a right to place it upon all engines of their manufacture, without royalty. This contract was made before any patent was obtained, and is entirely outside the patent laws, therefore, all rights flowing from it, and all remedies relating to it are exclusively within the purview of the jurisdiction of the state tribunals, as the parties to it are citizens of the same State.

Wilson v. *Sandford*, 51 U. S. 10 How. 99 (13: 344); *Bloomer* v. *McQuewan*, 55 U. S. 14 How. 549, 550 (14: 537); *Hartell* v. *Tilghman*, 99 U. S. 547 (25: 357); *Hill* v. *Whitcomb*, 1 Holmes, 317; *Burr* v. *Gregory*, 2 Paine, 426; *Perry* v. *Littlefield*, 17 Blatch. 272; *Florence S. Machine*

Amy & Co. was for interest on these issues of bonds, and the principal of one bond which had become due. The controversy in this proceeding is as to the amount of tax the council is authorized to levy for the payment of this judgment. The three mills tax provided for in the charter has been regularly levied and collected, and the City claims this to be the extent of its corporate power in that behalf. The court, however, was of opinion that, for all bonded indebtedness incurred after the Constitution of 1870 went into effect, it was the duty of the City to levy and collect a direct annual tax sufficient to pay both the interest and the principal as it fell due; and as this had not been done, an order was made requiring the levy and collection of "a special tax upon all taxable property of said City for the year 1886 sufficient in amount to pay" the judgment in full. To reverse that order this writ of error was brought.

The points presented for decision are: 1, whether the Constitution of 1870 abrogated that part of the charter which limited the power of the City to tax for the payment of its bonded debt incurred after that Constitution went into effect; and 2, if it did, whether the court could "compel a levy *en masse* to pay the whole debt and interest, when the Constitution only required the council to provide for the collection of an *annual* tax to pay the interest as it falls due and the principal within twenty years."

In our opinion the Constitution removed from the charter the limitation upon the power of the council to tax for the payment of any bonded indebtedness which might thereafter be incurred, and gave authority to levy and collect enough to meet the interest as it fell due, and the principal within twenty years. It gave no new power to incur a debt. That had been given by the charter itself, to the extent of $100,000. There is here no question as to a limitation of this power by the provision that [603] the bonded debt shall not exceed in the aggregate 5 per centum on the value of the taxable property, for no excess of issue has been suggested.

The principle on which this decision rests is the same as that acted on in *Neal* v. *Delaware*, 103 U. S. 370 [26: 567], where this court held that the Fifteenth Amendment of the Constitution of the United States, of itself, and without any action by the State, rendered inoperative a provision of the Constitution of Delaware, which limited the right of suffrage to the white race, and this accorded with the opinion of the Supreme Court of the State in the same case.

Undoubtedly a State Constitution is in a sense a limitation on the powers of the State Government. It is the act of the people establishing the fundamental law for their own government as members of a political community, known as a State of the United States, and it fixes the powers of that government. But this does not imply that the people cannot in such a fundamental law regulate as they please the powers of the political subdivisions or municipal corporations of the State. Such a regulation, if made, would operate as a limitation on the legislative power of the State Government over the subject, but it would form part of the fundamental law of the locality to which it applied.

In this case the Constitution limited the power of the Legislature of Illinois in respect to the grant of authority to municipal corporations to incur debts, but it declared in express terms that if a debt was incurred under such authority the corporation should provide for its payment by the levy and collection of a direct annual tax sufficient for that purpose. Under this provision of the Constitution, no municipal corporation could incur a debt without legislative authority, express or implied; but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured and the principal within twenty years. This provision for the tax was written by the Constitution into every law passed thereafter by the Legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It [604] was made by the people a part of the fundamental law of the State that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment.

It only remains to consider the objection that a tax cannot now be levied sufficient in amount to pay the entire judgment at once. The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually sufficient to pay all interest as it accrued and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment which was all for past due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division.

The constitutional obligation of the City was not fully met by providing, when the debt was incurred, for the levy and collection of the necessary tax. It required as well the actual levy and collection when needed to pay the debt. This is an obligation that can be enforced by *mandamus* after judgment caused by a neglect to meet its requirements.

We see nothing in *Weber* v. *Traubel*, 95 Ill. 427, to the contrary of what is here decided. In that case there was no question of power to levy a tax beyond the one per cent allowed by the charter to pay debts incurred under the authority of law after the Constitution of 1870, and for the payment of which by means of taxation provision had been made as specially required by that Constitution. The precise [605] point there determined was that the three mills

tax provided by the charter for the payment of the bonded debt, and the one mill tax for the "Library Fund," under the Act of 1874, were parts of the one per cent allowed by the charter, and not additions to it. Here, however, the tax is in accordance with the special provision made to pay a new debt lawfully incurred, and to meet the requirements of the Constitution in its regulation of the conduct of municipal corporations in such matters. This is a tax which the Corporation under the operation of the Constitution contracted with the bondholders to levy and collect to meet its liabilities on the bonds, and it is not necessarily limited to the three mills or the 1 per cent of the charter.

Neither does the claim of the City find support in the case of *East St. Louis* v. *Zebley*, 110 U. S. 321 [28: 162]. There the question was whether the court could compel the City to set apart any more than three out of the ten mills charter tax to pay the bonded debt, and we held that it could not. No point was made as to the power of the City to levy more than a ten mills tax, and it did not appear that the debt then in question was incurred after the Constitution of 1870.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[605] DOLORES DEL MORAL Y GONZALES, AUGUSTIN GONZALES, JUAN MANUAL GONZALES, ET AL., *Plfs. in Err.*,

v.

EDWARD ROSS AND INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 605-630.)

Mexican grants—action of trespass to try title to land—testimonio *extending title to Juan Gonzales, admissible in evidence—numerous objections considered and held insufficient—regularity of official acts, presumed—waiver of forfeiture.*

In an action brought by plaintiffs in error to try the title to a large tract of land situate in Kinney County, Texas, it is *held*:

1. That the Act of the Congress of Coahuila and Texas, of April 28, 1832, under which the grant to plaintiffs' ancestor was made, although repealed and supplied by the Act of March 26, 1834, applied to the grant in question; the presumption being, under the circumstances disclosed, that the latter Act had not been promulgated at the Village of Dolores on April 18, 1834, when the *testimonio* extending title to said Gonzales was there executed.
2. That the commissioner of the Beales and Grant Colony, who executed said *testimonio*, was the one intended by the grant.
3. That the official acts of said commissioner, having been accepted and acquiesced in by the government, must be considered as valid, even if done by him only as commissioner *de facto*.
4. That in 1834 the State of Coahuila and the department of Monclova extended eastwardly as far as the River Nueces, at least, and included the premises in question.
5. That the mere date of the *testimonio* is not sufficient under the circumstances to make it invalid, on the ground that the period of eighteen months, limited by the Act of 1832 for reducing the grant to possession, had expired two days prior to said date, especially as the law makes the delivery of possession after the eighteen months only a ground of forfeiture which the government might waive by accepting and acquiescing in the commissioner's acts.
6. That the *testimonio* sufficiently connects itself with the original concession.
7. That no petition or order was necessary to have the grant extended in possession, power and authority being given to the commissioner to extend it by the grant itself.
8. That an objection to the *testimonio* because not written on stamped paper does not go to its validity, and that its execution was sufficiently proved.
9. That the *testimonio* was sufficient in form; that it contained all the requisites necessary to invest Gonzales with title in the land delivered to him; and that the description of the land was sufficient.
10. That objections based on the alleged nonfulfillment of the conditions of the grant, the absence of a protocol, or matrix, of the concession or *testimonio* from the archives of the land-office, and the failure to record the *testimonio* in the proper county within the proper time, can only be set up by way of defense, and not as objections to the admission of the plaintiffs' evidence.
11. That if a forfeiture for nonpayment, or other condition subsequent, can be availed of by a private person, it can only be after he has shown some right to the land in himself derived from the sovereignty of the soil.
12. That the laws of Texas, prior to the adoption of the Constitution of 1876, did not require that a title should be registered in the county, or deposited among the archives of the land-office, to give it validity.
13. That it cannot be assumed either that the plaintiffs' muniments of title were not on file among the archives of the land-office, or that the taxes on the lands have not been paid, or that Gonzales and those claiming under him did not continue in possession of the land after possession was delivered to him by the commissioner in 1834.
14. That all favorable presumptions will be made against the forfeiture of the grant.
15. That the acts of a public officer in the discharge of a public duty are presumed regular.
16. That on the whole this court is of opinion that the commissioner had authority to extend the title in question, or, at least, that his official acts were acquiesced in by the government, and are to be considered as valid.

[No. 28.]

Submitted Nov. 2, 1886. Decided March 14, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Texas. *Reversed.*

The history, facts and case appear in the opinion of the court.

Mr. **H. E. Barnard**, for plaintiffs in error:

The *testimonio* of possession tendered was complete evidence of the final title; and when issued gave to the grantee, Juan Gonzales, the ancestor of plaintiffs, a perfect title; and it must be presumed that the officer extending the title acted within his authority, and that all acts done prior to his were regularly and legally done.

Hunnicutt v. *Peyton*, 102 U. S. 359 (26: 117); *U. S.* v. *Arredondo*, 6 Pet. 31 U. S. 729, 730 (8: 561); *U. S.* v. *Peralta*, 60 U. S. 19 How. 343 (15: 678); *U. S.* v. *Clarke*, 33 U. S. 8 Pet. 486 (8: 1001); *Hancock* v. *McKinney*, 7 Tex. 442; *Nicholson* v. *Horton*, 23 Tex. 47; *Jenkins* v. *Chambers*, 9 Tex. 167; *Hanrick* v. *Jackson*, 55 Tex. 17.

Testimonios of public acts done under the former government are receivable as evidence in all respects as originals.

Herndon v. *Casiano*, 7 Tex. 322.

The petition and concession received in evidence upon the trial without objection, taken with the *testimonio*, showed a perfect legal title to the land and completely segregated the land described therein from the public domain.

Graham v. *U. S.* 71 U. S. 4 Wall. 261 (18: 333); *Hunnicut* v. *Peyton, supra; Malarin* v. *U. S.* 68 U. S. 1 Wall. 289 (17: 595); *Hancock* v. *McKinney, supra.*

The juridicial possession, evidenced by the *testimonio* offered, when delivered to the grantee, Juan Gonzales, was an ascertainment of the boundaries of the land granted. It was executed by the proper officer of the government specially designated for that purpose, and had all the force and efficacy of a judicial determination or judgment.

U. S. v. *Pico*, 72 U. S. 5 Wall. 536 (18: 695).

The ancestor having been put in actual possession, it is presumed that he remained in possession during his life, and that his heirs assumed and continued his possession until the contrary is shown. Constructive possession, which follows every formal legal title, is all that is necessary; and one's title to land in law draws to it the possession which remains with the owner of the fee, until some hostile act amounting in law to an act of ouster destroys the character of his and their possession.

Murphy v. *Welder*, 58 Tex. 236.

The reasons stated in the third objection are all matters of defense. The officer having acted, it will be presumed that he acted within his authority. This has been the presumption always indulged in, in Texas concerning the validity of the acts of the officers of the former government. Besides, the authority of Fortunato Soto was proven upon the trial.

Hanrick v. *Jackson*, 55 Tex. 17, 27; *Hancock* v. *McKinney*, 7 Tex. 384; *Ruis* v. *Chambers*, 15 Tex. 590; *Hatch* v. *Dunn*, 11 Tex. 717, 718; *Holliman* v. *Peebles*, 1 Tex. 709.

The constitutional article in objection fifteenth is prematurely invoked, from the fact that the law, at the stage of the trial when this *testimonio* was offered, presumed due and legal archiving of the title, and that the protocol or matrix was in the general land-office, and the *testimonio* was duly recorded. The defendants must refute this by proof before they can call to their aid the judicial sentence contained in the thirteenth article of the present Constitution of Texas. That article, were it timely to consider it, would be found in conflict with the Constitution of the United States, because it impairs the obligation of contracts.

Edwards v. *Kearzey*, 96 U. S. 595, 603 (24: 793, 797); *White* v. *Hart*, 80 U. S. 13 Wall. 646, 651 (20: 685, 687); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Boyce* v. *Tabb*, 85 U. S. 18 Wall. 548 (21: 757); *Walker* v. *Whitehead*, 83 U. S. 16 Wall. 314 (21: 357); Cooley, Const. Lim. 289.

Messrs. **C. W. Ogden** and **Bethel Coopwood**, for defendants in error:

The instrument offered was therefore void for want of authority, and was properly rejected by the court.

Buyck v. *U. S.* 40 U. S. 15 Pet. 215 (10: 715); *O'Hara* v. *U. S. Id.* 275 (10: 737); *U. S.* v. *Delespine, Id.* 226 (10: 719); *U. S.* v. *Wiggins*, 39 U. S. 14 Pet. 334 (10: 481); *U. S.* v. *Kingsley*, 37 U. S. 12 Pet. 476 (9: 1163); *Hancock* v. *McKinney*, 7 Tex. 447-459; *Paschal* v. *Perez*, 7 Tex. 366; *Edwards* v. *James*, 7 Tex. 372; *McMullen* v. *Hodge*, 5 Tex. 79; *Hosner* v. *De Young*, 1 Tex. 769-770; *Holliman* v. *Peebles*, 1 Tex. 702.

This concession was the same character of grant as those in Louisiana and Florida, which have so often been passed upon by this court, and have been held to pass no interests, either legal or equitable, in the land, and to be "a naked authority or permission and nothing more.

Fremont v. *U. S.* 58 U. S. 17 How. 555 (15: 245); *De Vilemont* v. *U. S.* 54 U. S. 13 How. 266 (14: 139).

The presumption that officers have done their duty cannot supply proof of a substantive fact, and such presumptions are inadmissible, where the act of an officer appears to be in violation of the well ascertained law of the land.

U. S. v. *Ross*, 92 U. S. 281 (23: 707); *Holliman* v. *Peebles*, 1 Tex. 699; *Stoddard* v. *Chambers*, 43 U. S. 2 How. 318 [11: 288]; *Polk's Lessee* v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665).

[607] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is an action of trespass to try title, brought by the heirs of Juan Gonzales against the International and Great Northern Railroad Company and their tenant in possession (Ross), to recover eleven leagues of land situate in Kinney County, Texas, adjoining the Rio Grande. The defendants pleaded not guilty, and title from the sovereignty of the soil. At the trial a jury was waived, and the court found the facts specially (which are set out in a bill of exceptions), and rendered judgment for the defendants. The judgment is based upon the failure of the plaintiffs to make out their title; and their failure to make title arose from the court's overruling and rejecting the testimony offered by the plaintiffs as evidence of the extension of title to their ancestor, Juan Gonzales.

The court found and decided that the plaintiff had shown an application for, and concession of, eleven leagues of land in the name of Juan Gonzales, in the State of Coahuila and Texas, and gave the purport of the documents showing the same, being an exemplification of [608] the original in the archives of the Government of Coahuila, at Saltillo. These documents were in Spanish, accompanied by a verified translation. They were exemplified under date of August 20, 1874, and had been duly recorded in the clerk's office in the records of Kinney County on the 8th of February, 1878, as appeared by the clerk's certificate thereon.

The application of Gonzales, as translated, was as follows, to wit:

"To His Excel'cy: The citizen Juan Gonzales, before Your Excel'y, with greatest respect, states:

That in accordance with the provisions of the law of colonization of the State Your Excel'cy will please grant me the sale of eleven *sitios* of land of those vacant lands of the department of Monclova and places by me designated, promising to introduce in them the number of stock required by the same law and paying the value, delivering at once the fourth part of the same and binding myself to fulfill all requirements of the same law. Praying Your Excel'y will grant this petition as requested, will receive grace and justice.

"JUAN GONZALES."

The grant, bearing date Leona Vicario, October 16, 1832, was attached to the application, and was in the name of the Governor in the

usual form, and, as translated, was as follows:

"In accordance to article 18 of the new law of colonization enacted by the honorable Congress of the State, April 28, 1882, I grant the sale to petitioner of the eleven *sitios* of land prayed for at the place designated by him, provided that they shall be all in one tract and not under any title belonging to any corporation or person whatsoever.

"The commissioner for the division of lands in the enterprise to which corresponds the one which petitioner solicits, and in his default, or in case there is none, or not being engaged in any other enterprise, the alcalde 1st, or the only one acting of the respective municipality or the nearest one, complying with order given in the [609] matter, will place him in possession of the said *sitios*, and will extend the corresponding title to the same, first classifying the quality of said lands, so as to be able to state the amount to be paid the State, which payment must first be paid by the interested party in the manner and terms specified in the last part of said article 18, making the payment at once as provided by this article, in the treasury of the State, receipt of which he will present to the secretary, so that the secretary, upon sight of it, will proceed to give interested party copy of his petition, with which he will go to the commissioner and have its requirements complied with.

EOA Y MUSQUIZ. (One rubric.)
SANTIAGO DEL VALLE, *Secretary*. (One rubric.)"

The court next found as follows:

"Second. That Fortunato Soto was duly appointed by the proper authority of the State of Coahuila and Texas, as commissioner to extend titles in the Colony contracted for by Juan Carlos Beales and Diego Grant. That his commission of authority was dated March 18, 1884, and was signed by Francisco Vidan-n'y Vallestefior, the then Governor of the State of Coahuila and Texas, and by J. Mijuel Falcon, the then Secretary of State of Coahuila and Texas.

"Third. The plaintiffs are the legal heirs of Juan Gonzales, the beneficiary and grantee of the concession referred to in decision number one, above set forth.

"Fourth. That defendants are in possession of the land described in plaintiff's petition.

"Fifth. That the boundaries of the colony contracted for by Juan Carlos Beales and Diego Grant are shown by the following * * * contract of colonization entered into with the citizen Diego Grant and D'n Juan Carlos Beales as *empresarios* to introduce 800 families in the vacant lands of the State."

The contract referred to between the Government of Coahuila and Texas and Juan Carlos Beales and Diego Grant, is then set out in full, the application bearing date October 5, 1832, and the concession October 9, 1832. It [610] included, first, a grant for the whole territory lying between the Rio Grande and Nueces Rivers, and bounded south by the State of Tamaulipas, and north by the 29th parallel of latitude; secondly, a grant of a tract formerly granted to Woodbury and Vehlein, and subject to their right to colonize 200 families, embracing a territory over 200 miles in length, bounded north by the 32d parallel of latitude, south by the old road leading from Rio Grande to Bexar, west by the 100th degree of west longitude, and east by other grants in the interior of Texas. The first tract adjoins the southwest corner of the second; and Kinney County, in which the lands in question are situated lies in the angle between the two tracts, but outside of both. The 9th article of the concession to Beales and Grant has the following provision: "This Colony shall be regulated and their lands divided by a commissioner of the government, who in proper time will be appointed, and will discharge his duties in accordance with the laws and instructions that for said officials have been approved by the honorable Congress."

The bill of exceptions then exhibits two maps given in evidence by the plaintiffs, certified by the Secretary of State of the United States, one being a copy taken from Disturnell's map of the United Mexican States, published in 1847, and deposited with the Treaty of Guadalupe Hidalgo, 1848; the other showing the boundary line between the United States and Mexico, as laid down in Melish's map published in 1818, and agreed to in the Treaty of January 12, 1828. These maps show that the Province of Texas did not then embrace any territory west of the river Nueces.

In view of this evidence and the findings of the court thereon, the plaintiffs then offered in evidence a paper purporting to be a *testimonio*, with formal and sufficient proof of its execution, by which *testimonio* it appeared that in April, 1884, the possessory title of the land in controversy was extended to Juan Gonzales, the ancestor of the plaintiffs, by Fortunato Soto, commissioner for the State in the Colony of Rio Grande. This paper was in the Spanish language, and, together with the authentications and translation thereof, had been recorded in the clerk's office of Kinney County on the 21st of June, 1878, as appears by the clerk's certificate thereon. The following is a copy [611] of the said document as translated, to wit:

"In the Village of Dolores, State of Coahuila, Texas, on the 18th day of the month of April, 1884, I, the citizen Fortunato Soto, as commissioner for the supr. government of the State in the Colony of the Rio Grande, and in compliance with the contract (celebrated) (entered into) between said government and the citizen Juan Gonzales, and in accordance with the requirements and stipulations which the law provides in this matter, I extend the present title, in the name of the government and in accordance with the provision in its superior decree of the 16th of October, 1882, contained in the aforesaid contract, to the citizen Juan Carlo Beales, as attorney of the said citizen Juan Gonzales, which power of attorney he presented, of the eleven *sitios* of land to which said contract has reference, which said lands in their actual state I have classed as pasture lands, and which said boundaries are: Commencing from the place where the boundary line of the property of Doña Dolores Soto de Beales forms an angle between south and west, a line will be drawn to the south prolonging in the same direction, which will there terminate the said section at a distance of thirteen thousand seven hundred and fifty *varas;* from whence another line will be drawn in a right angle, which, crossing the *arroyo* (creek) of Pi-

edra Pinto, will have the length of twenty thousand *varas;* and from this point another line will be drawn towards the north parallel with the first and of the same length, and ends with another line to the east that, crossing the same *arroyo* (creek), will extend up to the place of beginning; so that in all form and right he, the said citizen Juan Gonzales, may at all times prove his rights to the said eleven *sitios* of land, I went with his attorney, citizen Juan Carlos Beales, which, after being surveyed by the surveyor, C. Guillo Egerton, I put him in possession, and, taking him by the right hand, and in the name of the supreme government of the State, walked him over the said eleven *sitios* of land, and caused him to perform all the other ceremonies, as provided by the laws in this case of real possession, being witnesses the citizens [612] Eduardo Little, Enrique Brown, and George Colwell, beside those of my assistance, all residents of the village, who for the validity of it, signed with me and the interested party, said day, month, and year, pledging himself to replace the proper paper with the seal that is required, not having at present any of the seal in this village nor its surroundings.

FORTUNATO SOTO.
THOS. H. F. O'S. ADDICKS, *De Assistencia.*
THOMAS PLUNCKETT, *De Assistencia.*
JUAN CARLOS BEALES.
ENRIQUE BROWN.
EDUARDO LITTLE.
GEORGE COLWELL.

"The citizen, Fortunato Soto, Commissioner for the Supreme Government of the State of Coahuila and Texas in this Colony, certify that the preceding *testimonio* is a literal copy legally taken from its original, which is of record in the proper book of these archives, and in compliance with article 8 of the instructions of the 25th of April, 1880, I give the present to the interested party as title, which is given on common paper, not having any of the proper seal, and for the validity of the same I signed it with the assisting witnesses in said village the 18th of April, 1884.

FORTUNATO SOTO.
THOS. H. F. O'S. ADDICKS, *De Assistencia.*
THOS. SAM. PLUNCKETT, *De Assistencia.*"

To the introduction of this paper the defendants objected for the following reasons:

1. It has not been proved and recorded according to law, and its registration was not authorized by law when it pretends to have been recorded. No protocol or matrix of it has been shown ever to have been filed in the archives of the General Land-Office, and no such is or ever was an archive of such office; no possession of the land claimed by anyone holding under it has been shown; no payment of taxes thereon by plaintiffs, or anyone for them, has [613] been shown; no compliance with or fulfillment of the conditions of the law under which it purports to have been issued has been or attempted to be proved; and if it ever had any validity, it appears from the face thereof that it is such a claim as was never perfected, but wholly abandoned, and the land remitted to the public domain, and that it is a stale demand and void.

2. It does not contain and is not based upon any executive grant, concession, or primitive title; nor does it contain any petition or application of the pretended grantee for a concession or for a survey of the land or the execution of final title of possession, nor any order referring it to the *empresario* order of survey, surveyor's field notes, or other constituent element of an *espediente* of final title, nor apt words to express a grant of land from the State by way of sale as required by law at its date; but it purports to be a kind of grant unknown to and not authorized by such law, and it appears therefrom that the same issued without authority of and against law.

3. It purports to have been issued by one unknown to the law, claiming to exercise the powers and perform the functions of an office not then existing, but the existence, powers, and jurisdiction whereof had already been repealed, styling himself commissioner of a colony not shown to have existed, and which, it is well known, never did exist; and it is claimed to be title embracing and relating to land situated in Kinney County, as averred in the petition, which is well known to have been embraced within the Woodbury Colony district at the date it bears, for which Colony the person purporting to have issued it was not, and does not by the terms of the instrument pretend to have been, a commissioner or officer.

4. It appears therefrom that its matrix or protocol, if it is in fact a *testimonio* of such, contained no executive concession or petition for such; no petition or application for a survey of the land, nor for the execution of final title; no reference to the *empresario* order of survey nor surveyor's field notes, and no one of the requisite antecedent steps, papers, documents, or acts entering into and forming the *espediente* of a valid final title or grant under the law in force when and where it purports to have been issued; none of which can be established by parol.

5. It does not express any consideration paid, or to be paid, or conditions to be performed or [614] required by law.

6. It purports to have been executed pursuant to a contract stated to have been ratified with the executive, while the only one so to be ratified was that of an *empresario.*

7. It pretends to be an absolute grant in fee, which was not authorized or contemplated by the law.

8. If the contract it refers to was an executive concession by way of sale, this instrument shows it to have been forfeited under the law, and constituting no authority for the execution of this paper on the 18th of April, 1884.

9. It has vices before the law, and is defective in manner and form, using bad grammar, awkward construction, and a form and style diverse from the usual general practice, and contains unaccustomed clauses without any reason therefor.

10. It is not written upon sealed or stamped paper, as required by law, nor upon paper validated by the proper offices of the municipality or any other; and its execution has not been proved, and no attempt has been made to show that the persons purporting to have signed it did so when and where it bears date or in the capacity therein stated.

11. It was never registered as required by

law, under the former Government of Coahuila and Texas, nor under the Republic or State of Texas; it was never presented nor any payment on it made to the collector of the former government, nor to any officer of the Republic or State of Texas; it was never presented to either of the commissions established by law to investigate titles to land in the section of the State where the demanded premises are situate, nor was it ever brought forward or set up as a claim to land till more than forty years after its date, and now only with the greatest want of verisimilitude in the matters it contains and expresses.

12. It attempts to conceal the fact that the land, if it relates to the demanded premises, was at its date embraced within a Colony for which the one purporting to have executed it did not by its terms pretend to be a commissioner or officer, and falsely claims to have been issued in and by the commissioner of a colony which never existed.

[615] 13. It has no receipt for any installment of the purchase money written out at the bottom of it, as required by law, nor has any attempt been made to prove such payment.

14. It is incompetent and irrelevant, and shows upon its face that it is not a subject of judicial cognizance, and it does not describe or identify the demanded premises, but is void for want of certainty.

15. It is prohibited from being used in evidence by the thirteenth article of the Constitution of Texas; and if it ever had any validity it is stale and forfeited, and the land to which it relates was reunited to the public domain by legislative equivalent for reunion by office found.

The bill of exceptions states that the court sustained the said objections, and refused to admit the said document in evidence, mainly on the ground that the same was issued without authority of law, the law and instructions under which the commissioner pretended to act having been repealed prior to the execution thereof; to which ruling rejecting said documents plaintiffs, by counsel, excepted.

The court thereupon rendered judgment for the defendants.

We will first consider the main reason assigned by the court below for rejecting the evidence offered; namely, that the law and instructions under which the commissioner pretended to act had been repealed prior to the execution thereof. The law under which the grant was made to Juan Gonzales, and under which the commissioner acted in extending the title, was that passed by the Congress of Coahuila and Texas, April 28, 1832. This law, it is true, was repealed and supplied by an Act of Congress passed at the City of Monclova, March 26, 1834, and the *testimonio* offered in evidence is dated at the Village of Dolores, April 18, 1834, some three weeks afterwards. But the laws of the Mexican States did not take effect in any part of the country until they were promulgated there; and as Dolores was situated in the present County of Kinney, about 200 miles from Monclova, and probably much more than that as the roads there ran, and as the means of communication in that region at that time were difficult and dilatory, it is not probable that the Act of March 26 was promulgated at Dolores prior to the 18th of April. Besides, the commissioner was a public officer, having a public [616] duty to perform, and in the absence of evidence to the contrary, the presumption would be that he acted in accordance with the law as known at the time. This presumption is strengthened by the language of another Act passed in the same session of the Congress, on the 3d of May, 1834, which declared that certain favorable terms as to the price of lands, proffered by a Law of 1830, should "be understood only in respect to the price of lands acquired until (*hasta*) the publication of the decree of 26th of March of this year," implying, it would seem, that the law of the 26th of March had not yet been published. Looking at the matter in every point of view, we think the presumption is that this Act, which was the repealing Act referred to, had not been promulgated at Dolores, or in that vicinity, when the commissioner extended the title of possession to Gonzales.

In the case of *Houston* v. *Robertson*, 2 Tex. 1, 28, *Chief Justice* Hemphill, delivering the opinion of the court, said: "The question then is as to the time at which the contract with Robertson ceased to exist. The annulling decree was enacted in May, 1835, and by its terms no date was fixed for its operative force and effect. The date of the publication of the law not being proven, the period of taking effect is a matter of presumption. * * * Under the former governments it was an undoubted principle that laws were of no binding obligation until after they were duly promulgated. L. 1, Tit. 2, Book 3, Recop. Novisima. The form of publishing decrees by the Executive, is prescribed in Decree 3, of the Constituent Congress of the State of Coahuila and Texas, p. 6. These decrees were transmitted to the inferior authorities, and by them published in their respective jurisdictions. * * * There was no specified period for the promulgation of the laws, nor for their going into operation, in proportion to the distance from the seat of government. The presumption would generally be in favor of the publication after a lapse of a reasonable time for its transmission from the capital; but from the peculiar circumstances of this case, we do not think that the decree ought to be enforced against the petitioner until the period of closing the land-office." In that case the decree [617] or Act referred to was passed 18th May, 1835, and the land-offices were not closed until the first of November—more than five months afterwards. It is true, the country was in an unsettled state at that time; and this may have been one reason why the court held that there was no presumption that the law had been promulgated. The principle enunciated, however, is applicable to the present case, and leaves little room for hesitation as to the nonpromulgation of the law under consideration at Dolores within three weeks or thereabouts after its passage.

Besides this, although the Act of 26th March, 1834, created a new system of disposing of the public lands, and repealed the Act of 1832, it did not abrogate the grants and sales which had been made under it; nor did it abolish the office and functions of commissioners, necessary for extending such grants.

But another objection raised to the author-

ity of the commissioner was, that he was only constituted such for the Colony of Beales and Grant. This is true. But the grant for that Colony comprised a territory of 20,000 square miles, and embraced in its southwest angle (though it did not include) the present County of Kinney; and we know from cotemporary history that a large addition was made to it on the west, including portions of Kinney County, by means of large grants made to individuals and transferred to the Rio Grande and Texas Land Company, which became the proprietors of the entire Colony. Indeed, this very grant of Gonzales was published as one of their accessions. The fact that Juan Carlos Beales himself was the attorney who received the possession of the Gonzales tract is corroborative of this fact. But, be this as it may, it was a matter of public notoriety that Beales and Grant, or the association which they formed, made large additions to their original grant in the country lying immediately west of the Woodbury and Vehlein tract, so that it must have nearly encompassed the premises in question. In Yoakum's History of Texas, Vol. 1, p. 317, we find the following notice of the Colony: "During the latter part of [618] the year 1833 began the settlement of the Colony of Beales and Grant. They had obtained a concession for 800 families to be located between the Rio Grande and the Nueces. In the last days of December, about sixty colonists, under Mr. Beales, reached the new settlement, and laid off the Town of Dolores, on Las Moras, a small stream about ten feet wide and two feet deep. They remained there about a year, when they dispersed." The affidavits annexed to the original *testimonio* offered in evidence, state that the town was destroyed by fire in 1836. Now Dolores was situated in the southern part of the present County of Kinney, several miles west of the Woodbury and Vehlein grant, and north of the first tract described in the concession to Beales and Grant, thus showing that the Colony was extended beyond the limits of those grants prior to 1834. In the certificate of the United States Consul at Matamoras, dated October 16, 1835, and annexed to the original *testimonio*, it is called the Colony of Dolores. In cotemporary documents it was sometimes called the Colony of Rio Grande, and sometimes the Beales 'River grant.' It is called the Rio Grande grant in Beales' Diary, inserted in Kennedy's History of Texas, Vol. 2, page 47. It will be observed that the grant to Gonzales was made directly after that to Beales and Grant, the latter being dated the 9th and the former the 16th of October, 1832. It is also evident that Gonzales indicated to the Governor the region in which he intended to locate his grant; namely, in the immediate neighborhood of the territory ceded to Beales and Grant. His application says: "Your Excellency will please grant me the sale of eleven *sitios* of land of those vacant lands of the department of Monclova, and *places by me designated*." The words of the grant are: "I grant the sale to the petitioner of the eleven *sitios* of land prayed for *at the place designated by him*, provided that they shall be all in one tract and not under any title belonging to any corporation or person whatsoever." So that it was undoubtedly understood where, in general terms, the land was to be located. The grant then proceeds to designate the commissioner who should locate the land and extend the title, as follows: "The commissioner for the division of lands in the enterprise to which corre- [619] sponds the one which petitioner solicits, and in his default, or in case there is none, or not being engaged in any other enterprise, the alcalde 1st, [that is the first alcalde,] or the only one acting, of the respective municipality." Now, what commissioner was meant, or could be meant, but the commissioner of the Beales and Grant Colony?—probably the only Colony within a hundred miles. It is not said, "the commissioner for the enterprise *in which the lands lie*," but "the commissioner for the enterprise *to which corresponds the one which petitioner solicits*." From all the circumstances taken together, it is obvious to us that the commissioner of the Beales and Grant Colony was the very one intended. We have only the translation of the grant before us, which is somewhat awkwardly expressed; but, according to that (which is our only guide), we think it was not the commissioner of the enterprise in which the lands were to be located (for as understood by the parties, they were not to be located in any existing enterprise), but the commissioner of the neighboring enterprise, that was intended to be designated. There was no other enterprise in that region, at least as far as we know.

A strong circumstance in favor of this conclusion is the fact that Soto's official acts as commissioner, in this case, were never repudiated by the government; on the contrary his protocol was received and deposited in the public archives, where it still remains. His official acts, accepted and acquiesced in by the government, must be considered as valid, even if done by him only as a commissioner *de facto*.

The pretense that Soto designates himself in the *testimonio* as commissioner in the Colony of Rio Grande, and that no such Colony is known to have existed, is too frivolous to deserve serious attention. It is well known, as already stated, that the Colony was designated by various names, "Rio Grande," among the rest, and Soto was well and publicly known as the commissioner thereof. It was the first great Colony attempted to be established in Coahuila and Texas on the Rio Grande, and nothing was more natural than to call it by that name. Besides, it was situated in the old district of Rio Grande, which was afterwards annexed to the [620] department of Monclova, as hereafter stated.

The criticism of the defendants in error, that it was not shown that the lands in question were in the department of Monclova, is not well founded. In the first place, it will be presumed that they were situated in that department if nothing is shown to the contrary. The public official who extended the lands must be presumed to have extended them in the proper department. But there cannot be any doubt that they were situated in the department of Monclova. Prior to the Constitution of March 11, 1827, the State of Coahuila and Texas was divided into five districts or departments, Saltillo, Parras, Monclova, Texas and Rio Grande; * but by that instrument (art. 7), it was declared that "For the better administration thereof, the territory of the State shall for the present be divided into three departments, as follows, viz.: "*Bexar*, embracing all the territory correspond-

*Convocation Law, Laws of Co. & Tex., p. 47.

ing to what was called the Province of Texas, which shall form one sole district; *Monclova*, consisting of the district of the same name and that of Rio Grande; *Saltillo*, comprehending the district of the same name and that of Parras."† Power was given to the Congress to alter and modify this division. We find only the following laws of the Congress on the subject: First, a law passed January 31, 1831, setting off a new district from the eastern part of Bexar, to be called the District of Nacogdoches; ‡ Secondly, a law passed in April, 1833, declaring that the District of Saltillo should constitute a sole department by itself; and that the District of Parras should constitute another separate department; § Thirdly, a law passed 18th March, 1834, dividing the State into seven departments or districts, to wit: Bexar, Brazos, Guerrero, Monclova, Nacogdoches, Parras, and Saltillo. Article 2 declared that in the section denominated Coahuila the limits and capital towns of each shall be the same as heretofore. Article 3 created Brazos from the eastern part of Bexar. By article 4 the limits of the department of Nacogdoches were continued as before. The boundaries of [621] Guerrero are not given.‖ This shows that no alteration was made in the limits of the departments in Coahuila. Saltillo and Parras were in the southern part of Coahuila, and Monclova comprised the northern part, and joined the department of Bexar, which (as shown above) corresponded with the old Province of Texas. This makes it certain that the department of Monclova included the lands in question; for the old boundary between Coahuila and Texas was situated over 100 miles east of the Rio Grande; and the northern boundary of Tamaulipas, which joined Coahuila on the southeast, and also separated the Province of Texas from the Rio Grande, was some 70 or 80 miles southeast of the County of Kinney. Captain Pike, who traversed the country from Chihuahua to Texas in 1807, passing through Coahuila and the center of the first tract described in Beales and Grant's purchase, and who was very minute and particular in his observations, locates the exact boundary between Coahuila and Texas at that time. After describing his passage of the Rio Grande near Presidio, and four days' travel from thence northeastwardly, a distance, in all, of 186 miles, he gives the following account of his fifth day's journey: *7th June, Sunday.*—Came on 15 miles to the River Mariano [now *Medina*], *the line between Texas and Coqquilla* [Coahuila]—a pretty little stream, Rancho. From thence in the afternoon to Saint Antonio."* Other authorities also state that the Medina was the old boundary between Coahuila and Texas. At a later date, perhaps in virtue of some law not published in the general collection of laws, Texas seems to have been extended to the River Nueces. It is so laid down on several maps;¶ and Hon. David G. Burnet, a resident of Texas long before its independence, and afterwards first President of the Republic, in a letter written in November, 1830, and published at the time, after stating that Texas in its most extensive acceptation was bounded by the Rio Grande, says: "This definition, however, is not in strict accordance with the political organization of the country, as the State of Tamaulipas and the department of Coahuila both cross the Rio Grande, making the Nueces strictly the western limit." (See also speech of Mr. Benton in [622] the U. S. Senate, May 16, 1844.) There can be no doubt, therefore, that in 1834 the State of Coahuila and the department of Monclova extended eastwardly as far as the River Nueces, at least, and consequently included the premises in question.

Another objection to the authority of the commissioner to extend the title in controversy was that the time limited by the Act of 1832 for reducing the grant to possession had expired. The 16th article of the law declares that purchasers shall enter into possession of the land acquired within eighteen months from the ratification of the contract, under penalty of forfeiture for the nonfulfillment thereof. In this case the concession was dated October 16, 1832, and the *testimonio* is dated April 18, 1834, two days more than eighteen months afterwards. This objection assumes that possession was given on the date of the *testimonio*. But that does not appear. The latter was executed at Dolores, ten or dozen miles from the premises in question. The document had to be prepared after the parties returned to the village. They may not have returned the same day. All favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary be shown, that a public officer acted in accordance with the law and his instructions. The government accepted Soto's acts, and it does not appear that any attempt was ever made to revoke or annul his proceedings, or to assert a forfeiture for the cause now insisted on. We think that the mere date of the *testimonio* is not sufficient under the circumstances to make it invalid. Besides, it will be observed that the law does not say that the delivery of possession after the eighteen months shall be void, but only that it shall be a ground of forfeiture of the grant. And, of course, the forfeiture, if incurred, might be waived by the government, and we think it was waived by accepting and acquiescing in the commissioner's acts.

On the whole we think it clear that Fortunato Soto had authority to extend the title in question, or, at least, that his official acts were acquiesced in by the government, and are to be considered as valid.

But objections were made to the instrument [623] itself; namely, to the *testimonio* which was offerred in evidence for the purpose of proving and authenticating the commissioner's acts. One of these objections was that it does not connect itself with any grant, concession or primitive title, nor contain any petition for a concession, or for a survey of the land, or execution of final title of possession, nor any order referring it to an *empressario's* order of survey. It is a sufficient answer to the first part of this objection to refer to the *testimonio* itself, which does in terms refer to the original contract between the government and Juan Gonzales, giving its date, and purporting to be executed in accordance with its provisions. We do not see how it could connect itself any more closely

†Laws of C. & T., 314. ‡Laws of C. & T., 171.
§Laws of C. & T., 210. ‖Laws of C. & T., p. 245.
*Pike's expedition, p. 265.
¶See map in Ward's "Mexico in 1827," and others of that period.

with the original concession, unless it were tied to it by a string, or fastened to it by a wafer, as is often done. But we do not remember to have seen it decided that a string or a wafer is a constituent or necessary part of the title. The objection is wholly without foundation. Gonzales had a grant which authorized a commissioner to extend it in possession. The proper commissioner did so extend it, and this was shown by the *testimonio*—the proper documentary evidence for that purpose. In the recent case of *Hanrick* v. *Jackson*, 55 Tex. 17, 27, the Supreme Court of Texas says: "We know of no authority for saying that the title is void because [the officer] has not incorporated into it the evidence of the concession or sale. If there was in fact no concession, there could be no legal grant by the alcalde. But whether there was a concession, and whether there was proper evidence of it presented to him by the interested party, was a matter for his official inquiry and determination; whether he set forth in the title the evidence upon which he acted, or merely recited as a fact that a concession had been granted and authority given him by the government to extend the title, the presumption, which is always indulged in favor of the validity of acts of officers of a former government, warrants the conclusion that the officer acted in conformity with law and not in violation of it."

As to the remainder of the objection, it is sufficient to say that no petition or order was [624] necessary to have the grant extended in possession. The grant itself, as stated above, gave power and authority to the proper commissioner to extend it and no further order for that purpose was required.

It was also objected that the *testimonio* was not written upon properly stamped paper. But this did not affect its validity. With a proper stamp it would require no proof of its execution. Without a proper stamp its execution must be proved. *Jones* v. *Montes*, 15 Tex. 352; *Chambers* v. *Fisk*, 22 Tex. 504. The court finds that formal and sufficient proof of its execution was offered. We think that the *testimonio* was sufficient in point of form, and that it contained all the requisites necessary to invest Gonzales with title in the land delivered to him; and that the description of the land was sufficiently specific to identify it.

We are, therefore, of opinion that the court below should have admitted the *testimonio* in evidence, unless it was incompetent by reason of some matter or thing occurring after its execution and delivery to Gonzales.

Analyzing the various and somewhat confused and multifarious objections of the defendants, we find three such matters assigned as grounds for rejecting the evidence: *First*, the nonfulfillment of the conditions of the grant; *Secondly*, that no protocol or matrix of the concession or *testimonio* was amongst the archives of the land-office, nor on record in the proper county in proper time; *Thirdly*, that not being amongst the archives, and not being recorded in proper time, and never being followed by actual possession, the *testimonio* was an absolute nullity by force of the XIIIth article of the Constitution of 1876.

These matters may constitute very good and substantial grounds of defense, and we are not disposed to intimate anything to the contrary in this opinion. But we think they can only be effectual by way of defense.

As to the supposed forfeiture for nonfulfillment of conditions of the grant, the only condition named therein is the payment of the purchase money. This was required by the 18th article of the Law of 28th of April, 1832, which, on this subject, declares as follows: "The purchaser shall deliver one fourth of the value of the land granted to the state treasury, [625] or where the Executive designates, at the time of the sale; and the remaining three fourths shall be paid, the first on the second, the second on the third, and the last on the fourth year, under penalty of forfeiting the right acquired in the part wherein this provision is not fulfilled;" that is, as we understand it, the forfeiture was to be in proportion to the amount not paid. Now, it is clear that the first payment was made in advance; for the grantee could not have obtained possession of his document of concession without such payment; and that he did obtain it is manifest, for the *testimonio* shows that it was exhibited to the commissioner. The other payments were to be made afterwards, and after the lands were extended; and the condition of forfeiture for nonpayment was a condition subsequent. Whether these payments were made, or not made, was not shown by proof at the trial. If not made, then there was a forfeiture which the government could enforce, either by judicial proceedings, or, perhaps, by granting the land to other parties. This forfeiture accrued, at the Revolution, to the Republic of Texas, and to the State of Texas, when it became a State. By the Constitution of the State, adopted in 1845, art. XIII, it was declared that "All fines, penalties, forfeitures and escheats, which have accrued to the Republic of Texas under the Constitution and laws shall accrue to the State of Texas; and the Legislature shall by law provide a method for determining what lands may have been forfeited or escheated." No such law was ever passed prior to the trial of this cause. We held in *Airhart* v. *Massieu*, 98 U. S. 491, 498 [25: 213, 215], that, under this provision, the Legislature must first act before any proceedings can be taken to annul the title of an alien, or any other escheatable titles; and this proposition would seem to apply with equal force to forfeitures. At all events, if a forfeiture for nonpayment, or other condition subsequent, can be availed of by a private person, it can only be after he has shown some right to the land in himself, by virtue of a subsequent purchase or grant from the sovereignty of the soil; and, hence, it can only be set up by way of defense after such purchase or grant is shown, and not as [626] an objection to the admission of the plaintiff's evidence.

The importance of that evidence to the plaintiff's case is manifest. The extension of title by the commissioner, in these Mexican grants, completed the title without any patent or other act of the government, and nothwithstanding the imposition of conditions subsequent. If the concession imposed conditions precedent, the case would be different. This subject is discussed in the case of *Hancock* v. *McKinney*,

7 Tex. 384, 451, where the court, after examining some decisions of this court, says: "The conditions, in the cases cited by counsel, were conditions precedent; and not until after their performance, as we have seen, was the title to be delivered. Titles issued to colonists and purchasers under the colonial laws of Coahuila and Texas were of an entirely different character. Under those laws the title of possession was the final title, vesting the fee absolutely in the grantee. Conditions were annexed, * * * but they were conditions subsequent, upon the nonperformance of which the titles were subject to forfeiture, but until which the fee or proproprietorship was in the grantee. They conveyed all the estate and interest which the government had to convey as absolutely and to the same extent as did the delivery of the final title, or the final act of confirmation by the Spanish Government, after the performance of the conditions. No act of confirmation by the government was required, or was contemplated by the colonization laws; but when the title of possession issued, the government had done the final act on her part." The *testimonio* in that case was substantially the same as in the present, and was sustained as conferring title upon the party.

As to the matter of registration, the laws of Texas prior to the adoption of the Constitution of 1876, so far as we can discover, did not require that a title should be registered in the county, or deposited amongst the archives of the land-office, in order to give it validity. It was only void as against third persons acquiring title from the sovereignty of the soil, not having notice of it. In this respect the laws of Texas were not dissimilar to those of most of [627] the States of the Union. Indeed, the original titles could not be deposited in the land-office when, as was often the case, they belonged to the archives of the foreign government at Saltillo, or other place where they were originally deposited. Copies of them, amounting to second originals, or *testimonios* of the final title, might be so deposited, or might be registered in the proper county: but even that was not necessary to their validity; although it might be necessary to protect the owners against titles subsequently acquired without notice of their existence. It is manifest, however, that titles thus subsequently acquired, if relied on by a defendant, must be proved as matter of defense, and cannot be urged against the competency of the plaintiff's evidence of his title.

This, as we understand it, was the condition of things (except with regard to certain extensive and fraudulent grants, which were specially abrogated by constitutional or legislative enactment) until the adoption of the Constitution of 1876. By the XIIIth article of that instrument it was decreed as follows:

"ARTICLE XIII.—SPANISH AND MEXICAN LAND TITLES.

"Section 1. All fines, penalties, forfeitures and escheats, which have heretofore accrued to the Republic and State of Texas, under their Constitutions and laws, shall accrue to the State under this Constitution; and the Legislature shall provide a method for determining what lands have been forfeited, and for giving effect to escheats; and all such right of forfeiture and escheat to the State shall, *ipso facto*, enure to the protection of the innocent holders of junior titles, as provided in sections 2, 3 and 4 of this article.

"Sec. 2. Any claim of title or right to land in Texas, issued prior to the 13th day of November, 1835, not duly recorded in the county where the land was situated, at the time of such record; or not duly archived in the General Land-Office; or not in the actual possession of the grantee thereof, or some person claiming under him, prior to the accruing of junior title thereto from the sovereignty of the soil, under circumstances reasonably calculated to give notice to said junior grantee, has never had, and shall not have, standing or effect against such [628] junior title, or color of title, acquired without such or actual notice of such prior claim of title or right; and no condition annexed to such grants, not archived, or recorded, or occupied as aforesaid, has been, or ever *shall* be released or waived, but actual performance of all such conditions shall be proved by the person or persons claiming under such title or claim of right in order to maintain action thereon, and the holder of such junior title, or color of title, shall have all the rights of the government which have heretofore existed, or now exist, arising from the nonperformance of all such conditions.

"Sec. 3. Nonpayment of taxes on any claim of title to land, dated prior to the 13th day of November, 1835, not recorded, or archived, as provided in section 2, by the person or persons so claiming, or those under whom he or they so claim, from that date up to the date of the adoption of this Constitution, shall be held to be a presumption that the right thereto has reverted to the State, and that said claim is a stale demand, which presumption shall only be rebutted by payment of all taxes on said lands, State, county and city or town, to be assessed on the fair value of such lands by the comptroller, and paid to him, without commutation or deduction for any part of the above period.

"Sec. 4. No claim of title or right to land, which issued prior to the 13th day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the General Land-Office, shall ever hereafter be deposited in the General Land-Office, or recorded in this State, or delineated on the maps, or used as evidence in any of the courts of this State, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession. By the words 'duly recorded,' as used in sections 2 and 4 of this article, it is meant that such claim of title or right to land shall have been recorded in the proper office, and that mere errors in the certificate of registration, or informality, not affecting the fairness and good faith of the holder thereof, with which the record was made, shall not be held to vitiate such record."

We do not see that these sections alter the character of the objections as matters of de- [629] fense. A man whose title was good in 1876, when the Constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple *ipse dixit* of the Constitution, any more than by a

legislative Act. Some proof, at least, must be given in a judicial proceeding to show that his title was forfeited, if that be the fact; and that proof, in a private action, must be given by a party exhibiting a title acquired from the sovereignty of the soil, or in some other legitimate way. When the *testimonio* in the present case was offered in evidence no such proof had been given. So far as appeared up to that moment the defendants were mere trespassers; and surely trespassers cannot claim the benefit of the constitutional provisions. Besides, it cannot be assumed, as is assumed in the objection of the defendants, either that the plaintiffs' muniments of title were not on file amongst the archives of the land-office, or that the taxes on the lands had not been paid, or that Gonzales and those claiming under him did not continue in possession of the land after possession was delivered to him by the commissioner in 1834. By the rules of law, possession will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers, that is, as against those who do not show some right of possession. So, with regard to the archive of title, it was held in *Byrne* v. *Fagan*, 16 Tex. 391, 398, that where there is a *testimonio* there is a presumption that the original is among the archives of the land-office, its proper place of deposit. At all events, it is for the defendants to show by proper proof that it was not there. As to the want of registration in the county where the lands lie, as before said, no registration was necessary to the validity of a title prior to the Constitution of 1876. It is unnecessary, at this time, to decide upon the effect of the provision contained in that Constitution prohibiting the future registration of titles, or the depositing of them in the land-office. If its effect is to make titles void which were before good, a grave constitutional question may arise, with regard to its validity, which we would [630] prefer not to pass upon until it has received the consideration of a local court, state or federal. In our judgment, all the matters of objection to the plaintiffs' title, arising under the Constitution, are matters of defense, and could not properly be urged to prevent the title of the plaintiffs from being received in evidence.

The judgment of the Circuit Court is reversed, and the case is remanded, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[630] JOHN A. DUSHANE ET AL., *Plffs. in Err.*,
v.
JOSEPH BENEDICT.

(See S. C. Reporter's ed. 630-648.)

Sales—breach of warranty—set-off to avoid circuity of action—general rules—review of authorities—Pennsylvania Act of 1705—applies only to defenses sounding in contract—warranty—what amounts to.

1. Under the Pennsylvania Statute giving the defendant a right of set-off in matters of contract, with the additional right to recover an affirmative judgment against the plaintiff, where the defendant, in an action to recover the price of goods sold, sets up an alleged breach of warranty he can avail himself only of a claim sounding in contract, in the nature of an action of assumpsit on the supposed warranty. If he fails to prove a warranty, express or implied, the statute has no application, as it extends to no claim sounding in tort only.

2. In an action brought in Pennsylvania to recover the price of rags sold, the defendants pleaded "payment with leave etc.," and set up in defense that the sale was upon a warranty or a fraudulent representation that the rags were clean and free from infection; and that they were infected with smallpox, which caused the disease to break out in the defendants' mill, with consequent injuries to their workmen and their business. *Held*, that the evidence offered by the defendants tending to show that the contract was for clean rags, while the rags delivered were infected with disease, and that the plaintiff knew them to be so infected, and fraudulently represented them to be clean and free from infection, was competent and was sufficient to be submitted to the jury.

3. The court below properly declined to permit one of the defendants to testify in general terms what he estimated the amount of their damages to be, and to permit workmen, not shown to be experts, to testify that the infected rags were the cause of smallpox, which they and their children had taken.

4. A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, if they cannot be made into pa er without killing or sickening those employed in the manufacture.

[No. 93.]

Argued Dec. 14, 15, 1886. Decided Mar. 14, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. Macrum** and *A. H. Clarke*, for plaintiffs in error.

Messrs. **Wm. F. Mattingly** and *Simon Wolf*, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action of assumpsit by a rag dealer against paper makers to recover $813.08 for rags sold and delivered by him to them. The plea was in the peculiar form used in Pennsylvania, with a counterclaim. The plaintiff had a verdict and judgment, and the case comes before us on a writ of error sued out by the de- [636] fendants.

The plaintiff's motion to dismiss the writ of error, for want of a sufficient amount in dispute to give this court jurisdiction, cannot be sustained, since the record shows that the defendants sought to recover the sum of $7,000 in excess of the plaintiff's claim, and this sum was therefore in dispute. *Ryan* v. *Bindley*, 68 U. S. 1 Wall. 66 [17: 559]; Act of Feb. 16, 1875, chap. 77, § 8, 18 Stat. at L. 316. Whether the defendants could lawfully recover it against the plaintiff in this case was a matter affecting the merits, and not the jurisdiction.

Before proceeding to consider the rulings and instructions at the trial, as applied to the facts of the case, it will be convenient to refer to the general rules of law, and to the statute and decisions in Pennsylvania, which bear upon the subject.

When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for

NOTE.—*Sales; warranty of quality; breach of; remedies of vendee.* See notes, Book 15, 663, and Book 17, 642.

that purpose. *Jones* v. *Just*, L. R. 3 Q. B. 197, 203; *S. C.* 9 B. & S. 141, 150; *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108 [28: 86]. In such a case, in Pennsylvania, as at common law, the action upon the warranty may be either in contract or in tort. *Vanleer* v. *Earle*, 26 Pa. 277; *Schuchardt* v. *Allens*, 68 U. S. 1 Wall. 359, 368 [17: 642, 645]. If the seller falsely represents to the buyer that the goods are of a certain quality, or fit for a certain purpose, he is liable to an action for the fraudulent representations, although they are not in a form to constitute a warranty; and in such a case the action must be in tort in the nature of an action of deceit, and must be supported by proof that he knew the representations to be false when he made them. *Kimmel* v. *Lichty*, 3 Yeates, 262; *McFarland* v. *Newman*, 9 Watts, 55; *King* v. *Eagle Mills*, 10 Allen, 548.

The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual [637] course of things, may result from the wrongful act. For instance, if a man sells hay or grain, for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French* v. *Vining*, 102 Mass. 132; *Wilson* v. *Dunville*, 4 L. R. Ir. 249, and 6 L. R. Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation (*Mullett* v. *Mason*, L. R. 1 C. P. 559; *Jeffrey* v. *Bigelow**, 13 Wend. 518; *Faris* v. *Lewis*, 2 B. Mon. 375; *Sherrod* v. *Langdon*, 21 Iowa, 518; *Marsh* v. *Webber*, 16 Minn. 418); or in an action on the warranty, either in tort (*Packard* v. *Slack*, 32 Vt. 9; *Smith* v. *Green*, 1 C. P. D. 92), or even in contract (*Black* v. *Elliott*, 1 Fost. & Fin. 595. See also *Randall* v. *Newson*, 2 Q. B. D. 102).

In an action for the price of goods sold, or of work done, the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of recoupment of the sum that the plaintiff may recover. In England, this is only allowed so far as it affects the value of the goods sold, or of the work done. *Davis* v. *Hedges*, L. R. 6 Q. B. 687, and cases there cited. But in this country the courts, in order to avoid circuity of action, have gone further, and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence, of the plaintiff, growing out of and relating to the transaction in question. It will be enough to cite a few cases in which the extent and the reason of the doctrine have been clearly brought out.

In a leading Massachusetts case, in which fraudulent representations as to the soundness of a horse sold were allowed to be set up in defense of an action on a promissory note given for the price, although the horse had not been returned to the seller, *Mr. Justice* Dewey, after [638] reviewing the previous decisions in England and in New York, said: "The strong argument for the admission of such evidence in reduction of damages in cases like the present is that it will avoid circuity of action. It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit; and it is upon this ground that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle allowing evidence in defense or in reduction of damages to be introduced, rather than to compel the defendant to resort to his cross action." *Harrington* v. *Stratton*, 22 Pick. 510, 517. And in a later case in that State, *Chief Justice* Bigelow observed that the essential elements on which the application of the principle of recoupment depended were two only: "The first is that the damages which the defendant seeks to set off shall have arisen from the same subject matter, or sprung out of the same contract or transaction, as that on which the plaintiff relies to maintain his action. The other is that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off or defense to the contract declared on shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as those relied on to defeat the action." *Sawyer* v. *Wiswell*, 9 Allen, 39, 42.

In *Bradley* v. *Rea*, 14 Allen, 20, in an action to recover the price of a number of pigs sold in one lot, it was held that the defendant might set up in defense that the pigs sold were warranted or fraudulently represented by the plaintiff to be sound and free from infectious or contagious diseases, and prove the existence of such a disease in some of the pigs at the time of the sale, which afterwards spread to the others, and of which they died. *Mr. Justice* Hoar, delivering judgment, after referring to *Mullett* v. *Mason*, L. R. 1 C. P. 559, above cited, in which it was held that in an action for fraudulently misrepresenting that a cow sold was free from infectious disease, the buyer, if he placed the cow with others which thereby caught the disease and died, could recover as damages the value of all the cows, said: "The nature of the subject matter of the warranty or deceit is such that when animals are sold in one lot to- [639] gether the warranty or representation as to the whole being single, we can have no doubt that the same principle should apply to the extent of a recoupment; and that the right to recoup in damages should not be confined to the diminished value of those which are proved to have the disease at the time of the sale." 14 Allen, 23. A similar decision was made in *Rose* v. *Wallace*, 11 Ind. 112.

The later decisions of this court, modifying the earlier decision in *Thornton* v. *Wynn*, 25 U. S. 12 Wheat. 183 [6: 595], affirm the same doctrine. *Withers* v. *Greene*, 50 U. S. 9 How. 213 [13: 109]; *Van Buren* v. *Digges*, 52 U. S. 11 How. 461 [13: 771]; *Winder* v. *Caldwell*, 55 U. S. 14 How. 484 [14: 487]; *Lyon* v. *Bertram*, 61 U. S. 20 How. 149, 154 [15: 847, 849]; *R. R. Co.* v. *Smith*, 88 U. S. 21 Wall. 255 [22: 513]; *Marsh* v. *McPherson*, 105 U. S. 709, 717 [26: 1139, 1142].

In *Winder* v. *Caldwell*, *Mr. Justice* Grier, who was equally familiar with the common law and with the Pennsylvania practice, said: "Al-

*See note at beginning and citations at close of case, Lawyers' edition. [Ed.]

though it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action." 14 How. 448 [*supra*, 491].

In *Railroad Co.* v. *Smith*, which was an action against a railroad corporation by a contractor to recover the price of a drawbridge, it was held that the defendant might show that the construction of the bridge was so defective as to make it unfit for its purpose, and the draw worked so imperfectly as to hinder and delay the running of the cars over it; and might prove the number of hands required to work the bridge as it was built, and the number that would be necessary if it had been properly constructed. *Mr. Justice* Field, delivering judgment, said: "All damages directly arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a separate action against the contractors, were provable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when the price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuity of action." 21 Wall. 261, [514].

[640]

The courts of Pennsylvania, having originally had no jurisdiction in equity, have always allowed equitable defenses in actions at law, under what is there known as a "plea of payment with leave," that is to say, with leave to prove any special matter. *Swift* v. *Hawkins* (1768), 1 U. S. 1 Dall. 17 [1: 18]; *Lewis* v. *Morgan* (1824), 11 Serg. & R. 234; *Light* v. *Stover* (1825), 12 Serg. & R. 431, 433; *Mackey* v. *Brownfield* (1825), 13 Serg. & R. 239; *Hawk* v. *Geddis* (1827), 16 Serg. & R. 23; *M'Connel* v. *Hall* (1831), 3 Penr. & W. 53; *Uhler* v. *Sanderson* (1861), 38 Pa. 128. And the practice was long ago recognized and acted on by *Mr. Justice* Washington in the circuit court. *Latapee* v. *Pecholier*, 2 Wash. C. C. 180, 184; *Webster* v. *Warren*, 2 Wash. C. C. 456, 458.

In matters of contract, the defendant's right of set-off, with the additional right to recover judgment against the plaintiff for any sum proved in excess of his claim, is given and regulated by a statute which has been in force in Pennsylvania since 1705, and is there commonly known as the Defalcation Act, by which "If two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court of this Province, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ, and shall pay the costs. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit. But if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant, more than will answer the debt or sum demanded;" and the sum so certified shall be recorded with the verdict, and be deemed a debt of record, and may be recovered by *scire facias*, or, under an Act of 1848, by judgment and execution therefor. 1 Dall. Laws of Pa. p. 65; 1 Purd. Dig. 11th ed. 603, 604.

[641]

This statute, in its very terms, embraces all matters of contract, and no matter of tort; and so it has always been construed. A breach of warranty is a breach of a contract, and may be sued on as such; and for that reason, and that only, has been allowed to be given in evidence by the defendant, under the statute, not only in an action on the same contract (in which it might be admissible by way of recoupment only, without the aid of the statute), but even in an action upon a distinct contract. *Steigleman* v. *Jeffries*, 1 Serg. & R. 477; *Nickle* v. *Baldwin*, 4 Watts & S. 290; *Phillips* v. *Lawrence*, 6 Watts & S. 150; *Carman* v. *Franklin Ins. Co.* 6 Watts & S. 155; *Ellmaker* v. *Franklin Ins. Co.* 6 Watts & S. 489; *Hunt* v. *Gilmore*, 59 Pa. 450; *Seinworth* v. *Leffel*, 76 Pa. 476; *Halfpenny* v. *Bell*, 82 Pa. 128. But from the earliest to the latest times, it has been uniformly held that a claim of damages for a mere tort is not within the statute. *Kachlin* v. *Mulhallon* (1795), 2 U. S. 2 Dall. 237 [1: 363]; *S. C. nom. Kachlein* v. *Ralston*, 1 Yeates, 571; *Heck* v. *Shener* (1818), 4 Serg. & R. 249; *Gogel* v. *Jacoby* (1819), 5 Serg. & R. 117; *Cornell* v. *Green* (1823), 10 Serg. & R. 14; *Light* v. *Stover* (1825), 12 Serg. & R. 431; *Hubler* v. *Tamney* (1836), 5 Watts, 51, 53; *Peterson* v. *Haight* (1838), 3 Whart. 150; *Hunt* v. *Gilmore* (1868), 59 Pa. 450, 452; *Ahl* v. *Rhoads* (1877), 84 Pa. 319, 325.

The distinction between the right of equitable defense or recoupment, independent of any statute, which may arise even out of a tortious act of the plaintiff, immediately connected with the contract sued on, and by which the defendant can do no more than defeat the plaintiff's claim, in whole or in part, and the right of counterclaim under this statute, which can be based only on contract, and by which the defendant may not only defeat the plaintiff's action, but recover an affirmative judgment against him, has been clearly brought out in the judgments of *Chief Justice* Tilghman.

[642]

In assumpsit to recover for services as a housekeeper, the defendant pleaded nonassumpsit, and payment, with leave to give the special matters in evidence; and offered to prove that the plaintiff, while in his service, clandes-

tinely took and sent away goods of his from the house. *Chief Justice* Tilghman, after observing that it was contended for the defendant "that the evidence was proper, either by way of set-off, or, under the plea of nonassumpsit, as a defense to the action," expressed the opinion that it was not admissible by way of set-off, because it had been settled that the statute did not comprehend matters of a tortious nature; but that, considering the impolicy of multiplying suits, and the hardship of not permitting the defendant to avail himself of matters arising out of the very transaction on which the plaintiff founds his suit, the evidence offered was admissible under the plea of non assumpsit, to show that the plaintiff's services were ill performed, and thus to affect the amount which she could recover; and on this ground alone the judgment below, which excluded the evidence, was reversed. *Heck* v. *Shener*, 4 Serg. & R. 249.

So in assumpsit for goods sold and delivered, it was held that the defendant could not give in evidence, by way of set-off, that the goods had been detained by the plaintiff and conveyed by him to third persons; and the same eminent judge said: "Without undertaking, at present, to draw the line which limits the right of defalcation, it may be safely affirmed that defalcation is not permitted by reason of any demand against the plaintiff for an act done by him of a tortious nature." "But there are cases in [643] which the defendant is permitted to give evidence of acts of nonfeasance or misfeasance by the plaintiff, where these acts are immediately connected with the plaintiff's cause of action; although perhaps such evidence is not so properly a defalcation, as a defeating, in whole or in part, the plaintiff's action." *Gogel* v. *Jacoby*, 5 Serg. & R. 117, 122.

Again; in debt against principal and surety on a bond given for the purchase money of a mill sold by the plaintiff to the principal defendant, the defendants proved that at the time of the sale the grantee supposed the dam was at its lawful height; whereas, it was in fact, as the plaintiff knew, so high as to overflow and injure the land and mill of a neighbor without his consent; and that if the grantee should lower his dam to its lawful height, the value of his mill would be greatly reduced; and then offered to show how much the value of his mill would be diminished by so lowering the dam. It was held that the evidence, though going to prove unliquidated damages, was admissible, for reasons thus stated by *Chief Justice* Tilghman: "It is very true that these damages were not in the nature of a debt, which can be set off. But they were not offered as a set-off. It was an equitable defense, showing that the plaintiff ought not to be permitted to recover the whole purchase money; and if not, then it was necessary to show what would be a reasonable abatement. Such defenses have always been admitted in our courts. Having no court of chancery, we could not get along without them. To permit the plaintiff to recover the whole purchase money, and leave the defendants to their remedy by an action for fraudulent concealment, would be most unjust. The purchase money and damages arise out of the same transaction; and the proper time for inquiry was before the money was taken from the pocket of the defendants. It might be too late afterwards. And certainly the plaintiff has no right to complain if the whole business is settled at once. What he is not in good conscience entitled to receive he should not be permitted to receive." *Light* v. *Stoever*, 12 Serg. & R. 431, 433.

The result of the Pennsylvania decisions may be summed up thus: First. Independently of the statute, any matter, either of contract or of tort, immediately connected with the plaintiff's [644] cause of action (which would seem to include everything that could be set up by way of recoupment, under the law as generally understood and administered in the American courts), may be set up by way of defense to the action and in abatement of the plaintiff's damages only. Second. Any matter of contract may be set up by way of counterclaim, under the statute, not only to defeat the plaintiff's action, in whole or in part, but also, if the defendant proves that the plaintiff owes him more than he owes the plaintiff, for the purpose of recovering the excess against the plaintiff. Third. No mere matter of tort can be availed of by the defendant under the statute.

The defendants in the present case pleaded "payment, with leave, etc.," and the special matter stated in the affidavits of defense previously filed, with a counterclaim upon the cause of action stated in those affidavits. Their purpose in so pleading apparently was to give notice to the plaintiff, both of the special matter to defeat his claim, and also of a defalcation or set-off, on which the defendants would ask for a certificate and judgment against the plaintiff, under the statute, for any balance due from him. In the words of *Chief Justice* Black, "A notice of special matter must state the facts upon which the defendant relies, and not either the evidence by which they are to be established, or the inferences to be drawn from them." *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466, 475. The plaintiff might perhaps have objected to the admission of any other evidence than of payment, for want of any notice to him, independently of the affidavits, of the matters intended to be relied on by way of defense and of counterclaim. *Finlay* v. *Stewart*, 56 Pa. 188. But no such objection having been made at the trial, it could not be taken for the first time in this court. *Calvin* v. *McClure*, 17 Serg. & R. 385; *Rearick* v. *Swinehart*, 11 Pa. 233; *Partridge* v. *Ins. Co.* 82 U. S. 15 Wall. 573, 580 [21: 229, 230]. Indeed, no objection to the sufficiency of the notice of special matter was taken in argument here.

The special matter stated in the affidavits of [645] defense was that the plaintiff came to the defendants' mill, and there solicited and obtained an order for good merchantable rags, free from infection; that the defendants had no opportunity to inspect the rags before delivery; that the rags sent were infected with smallpox before the plaintiff shipped them; that when some of them were unpacked and used at the defendants' mill, the infection in the rags caused the smallpox to break out in the mill, in consequence of which some of the workmen died, others were disabled from working, it became impossible to hire new ones at the usual rates, and customers were deterred from buying the defendants' paper; that by reason of the inter-

ruption and injury to the defendants' business thereby occasioned, and the money paid by the defendants to those disabled by the disease, they were put to loss and expense far exceeding the amount of the plaintiff's bill; that the plaintiff shipped the rags, knowing them to be infected, and intending to deceive, cheat and defraud the defendants; and that the defendants, as soon as they discovered the infection, informed the plaintiff of the fact, and held those which had not been consumed subject to his order, until their foreman by mistake used them up. The affidavits concluded by submitting that the defendants ought not to pay the prices charged, but such amount only as the rags were reasonably worth, if anything; and by asking for a certificate for the amount of their damages in excess of what the plaintiff might be entitled to.

In short, the matter stated in the affidavits of defense was a sale of rags, upon a warranty or a fraudulent representation that they were clean and free from infection, and a delivery by the plaintiff, under that contract of sale, of rags infected with the smallpox, causing the breaking out of the disease in the defendants' mill, and consequent injuries to their workmen and their business. The plaintiff, by counter affidavit of claim, met all the issues so notified to him by the defendants' plea and affidavits.

At the trial, the defendants, as appears by the answer of their counsel to an inquiry of the court after the arguments to the jury, and by [646] the statement thereupon made by the court in its charge, did not deny the sale and delivery of the rags at the prices sued for; but relied on their counterclaim for damages on the cause of action growing out of the infected condition of the rags, both by way of a full defense to the plaintiff's action, and also as a ground for obtaining a certificate and judgment for the damages sustained by them in excess of his claim.

The defendants offered evidence tending to show that the contract was for clean rags, that the rags delivered were filthy and infected with the smallpox, and that their infected condition caused the breaking out of the disease in the defendants' mill. This was of itself sufficient evidence to be submitted to the jury of a warranty and a breach of it. A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all, without killing or sickening those employed in the manufacture.

Upon the question whether the plaintiff, when he shipped the rags, knew them to be infected with the smallpox, and fraudulently represented to the defendants that they were clean and free from infection, the evidence was as follows: The plaintiff, having been called as a witness in his own behalf, admitted on cross examination that the rags were collected by him in Pittsburgh and Allegheny City and the country round about, where he knew that the smallpox was then epidemic, and that he bought rags from any and all dealers, not knowing where they were collected; and further testified that the rags were assorted and baled up under his instructions in his establishment, and had been baled up and lain in his warehouse for a year or more before that to the best of his knowledge and belief they were clean and free from infection, and there was no sulphur, carbolic acid or other disinfectant in the bales, and that he never used disinfectants in his establishment. In contradiction of this testimony, the defendants produced a letter sent to them by him with the first invoice of rags, showing that he did not then have all the rest on hand; and introduced the testimony of three workwomen in the mill, that the rags, when opened, smelt strongly of sulphur and carbolic [647] acid.

This evidence, taken in connection with that already mentioned, was in our opinion sufficient to be submitted to the jury, as tending to prove that the plaintiff knew that the rags which he sold and shipped as clean rags, fit to be used in the manufacture of paper, were in fact infected with the smallpox, and that he fraudulently represented them to be clean, intending to deceive and defraud the defendants.

Upon the question of damages, there was distinct proof, not only of the rags being so infected with the smallpox that they could not be made into paper without injury to the workmen, but also of sums paid by the defendants to support those workmen who had been disabled by the disease; besides evidence that the defendants, in consequence of the injury to their business by the smallpox introduced in the rags, were obliged to run their mill short-handed, and lost a considerable part of a profitable country trade. This evidence was competent for the consideration of the jury; and the want of more full and definite proof of the amount of damages, resulting to the defendants from the unfitness of the rags to be manufactured into paper, while it might lessen the sum which the jury could find in the defendants' favor, did not justify the court in withdrawing the defendants' claim from the jury.

In the rulings excluding evidence offered by the defendants in the course of the trial, there was no error. The court might properly decline to permit one of the defendants to testify in general terms what he estimated the amount of their damages to be, when he had not testified to the items of damages, or to any facts upon which his opinion was based. The testimony of workmen, not shown to be experts, that the infected rags were the cause of smallpox, which they or their children had taken, was clearly incompetent.

But for the reasons above stated, we are of opinion that the court erred in instructing the jury that the evidence admitted would not justify them in finding that the plaintiff knowingly and fraudulently shipped to the defendants rags infected with the smallpox; as well as in instructing them that there was no evidence which would enable the jury to estimate the amount of damage, if any, which the defendants had sustained; and in directing the jury to return a verdict for the plaintiff for the whole [648] amount of his claim. The defendants' exceptions to these instructions must therefore be sustained, and a new trial had.

For the guidance of the parties and their counsel, it may be well to restate exactly what will be open to the defendants upon another trial.

By way of recoupment or equitable defense, which is limited to defeating the plaintiff's ac-

tion, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods were worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequences of the breach of warranty, or the fraudulent representation.

But under their counterclaim, seeking, as permitted by the Statute of Pennsylvania, not only to defeat the plaintiff's action, but also to recover an affirmative judgment against him, they can avail themselves only of a claim sounding in contract, in the nature of an action of assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only, whether in the nature of an action of deceit, or of such an action as these defendants might maintain against a person, with whom they never had any contract, who wilfully or negligently introduced the smallpox into their mill.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[775] KATE W. GOODWIN ET AL., *Appts.*,
v.
ELEANOR FOX ET AL.

(See S. C. Reporter's ed. 775-778.)

Practice—approval of appeal bond, equivalent to citation—whether cause was docketed in time—orders as renewals of allowance of appeal.

On motion to dismiss an appeal for want of a citation and for failure to docket the cause in time it is *held:* that an indorsement on the bond by counsel for appellees approving it "as to form and surety" was the equivalent of a citation; and that the cause was docketed in time; various orders entered by stipulation extending the time for filing the appeal bond and certificate of evidence being equivalent to an order at the date of each respectively, renewing the allowance of the appeal in open court in the presence of the parties.

[No. 759.]

Submitted March, 14, 1887. Decided March 21, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss. *Denied.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **W. C. Goudy,** for appellees, in support of motion:

No notice was given of the application for an appeal, nor that it had been taken by the filing of a bond. This action was not taken at the same term at which the main decree was entered; no citation was signed by the judge, and, of course, none was served. Upon such a state of facts the appeal must be dismissed.

Yeaton v. *Lenox*, 32 U. S. 7 Pet. 220 (8:664), *Ex parte Crenshaw*, 40 U. S. 15 Pet. 119; (10:682); *Villabolos* v. *U. S.* 47 U. S. 6 How. 90 (12:356); *Alviso* v. *U. S.* 72 U. S. 5 Wall. 824 (18.492); *Garrison* v. *Cass Co. Id.* 823 (18:492); *Vansant* v. *Gas Light Co.* 99 U. S. 213 (25:265); *Haskins* v. *St. L. & S. E. R. Co.* 109 U. S. 106 (27·873).

In *Hewitt* v. *Filbert*, 116 U. S. 144 (29:582), this court reviewed the cases on this subject, and reiterated that a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the term to which it must be made returnable, the appeal becomes inoperative, and that without a citation or its waiver this court cannot take jurisdiction.

An appeal must be dismissed if the transcript has not been filed at the term next succeeding the one at which the appeal is allowed.

U. S. v. *Pacheco*, 61 U. S. 20 How. 261 (15:820), *Castro* v. *U. S.* 70 U. S. 3 Wall. 46 (18:168); *Villabolos* v. *U. S.* 47 U. S. 6 How. 81 (12:352); *The Virginia* v. *West*, 60 U. S. 19 How. 182 (15:594); *Grigsby* v. *Purcell*, 99 U. S. 505 (25:354); *The Lucy*, 75 U. S. 8 Wall. 307 (19:394); *The Tornado*, 109 U. S. 110 (27:874); *Caillot* v. *Deetken*, 113 U. S. 215 (28:983); *Mesa* v. *U. S.* 67 U. S. 2 Black, 721 (17:350); *Killian* v. *Clark*, 111 U. S. 784 (28:599).

Messrs. **Charles H. Wood** and **John N Jewett,** solicitors for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which this motion rests are these:

On the 17th of February 1877, Kate W. Fox filed a bill in equity against I. Willard Fox and Eleanor Fox to enforce a lien on certain property held by her through a deed from them, absolute on its face as security for a debt. Pending the suit she was married to Charles S. Goodwin, and Sarah E. R. Smith, wife of Charles M. Smith, in some way acquired title to a part of the mortgaged property. To the original bill some amendments were made, and answers were filed. On the 8th of December, I. Willard Fox and Eleanor Fox filed a cross bill against Kate W. Goodwin, Charles S. Goodwin, Sarah E. R. Smith, and Charles M. Smith. To this cross bill answers were filed, and on the issues made in the suit there was a final hearing, which resulted in a decree July 29, 1884, [776] fixing the amount of debt due and allowing a redemption on terms specified in the decree.

The record then shows that on the 6th of August, 1884, the "complainant" came into court and prayed an appeal, which was "allowed on her filing a bond in the penal sum of one thousand dollars within sixty days from this date, with surety to be approved by the court." and the time for filing certificate of evidence was extended to October 1.

On the 29th of August, I. Willard Fox died testate, leaving Eleanor Fox, his widow, and Isaac B. Fox, Flora F. Clark, Truman G. Fox, Emily F. Beckley, Eleanor J. Fox, and Gertrude R. Fox, his heirs at law, all of whom were legatees and devisees under his will.

On the 29th of September an amendment of some kind was made to the decree, and on the 6th of October an order was entered in accord-

ance with a stipulation that day filed, extending for twenty days the time for filing a certificate of evidence and a bond. On the 25th of October the court ordered an extension of eight days for filing bond, and on the first of November, 1884, upon a stipulation that day filed, a further extension of twenty-five days for the bond and certificate was granted. Upon the 25th of November, under a like stipulation, a further extension was granted until January 1, 1885, and on the 26th of December, 1884, until thirty days after January 1. This last order was also made upon stipulation.

On the 12th of January, 1885, the death of I. Willard Fox was suggested on the record, and his heirs made parties in his stead. The defendants were thereupon required to convey the property in accordance with the decree. On the 26th of January, the master reported the execution of the deeds and they were confirmed. On the 31st of January, the time for filing certificate of evidence and bond was extended until March 1; afterwards, February 28, by stipulation, until March 20; then March 19, also by stipulation, for thirty days; and finally, by stipulation, the time for filing the certificate [777] of evidence was extended until May 1. On the first of May the certificate of evidence was signed and filed. On the 20th of June, 1885, an appeal bond in the penal sum of $1,000, executed by Kate W. Goodwin, Charles S. Goodwin, Sarah E. R. Smith, and Charles M. Smith, with J. Bradner Smith as surety, to Eleanor Fox and the above named heirs and representatives of I. Willard Fox, was duly approved by the district judge, and filed with the clerk. The bond, when it was approved, had on it this indorsement: "This bond, as to form and surety is satisfactory. W. C. Goudy." Mr. Goudy was the counsel of the appellees.

The appeal was docketed in this court October 20, 1885, but no citation was ever signed or issued. The times for holding the terms of the Circuit Court for the Northern District of Illinois are fixed by law on the first Monday of July and the third Monday of December, and there are adjourned terms held on the first Monday of October and the first Monday of March in each year.

The grounds of the motion to dismiss are, (1) that no citation has ever been issued or served; and (2) that the appeal was not docketed here before the end of October Term, 1884.

In our opinion, the entries on the stipulation of the parties of the various orders extending the time for filing the appeal bond and certificate of evidence, were equivalent to an order at the date of each respectively, renewing the allowance of the appeal in open court in the presence of both parties. They were evidently made to keep alive the original allowance, but to give it effect as of the new date, and this because the record in its then condition was incomplete and not ready for filing in this court. Under these circumstances, the docketing of the cause here at October Term, 1885, was in time. The appeal was not actually taken until the entry of the last extension of time for filing a bond and certificate of evidence. This was March 19, 1885, too late to make it returnable at October Term, 1884.

Had the appeal bond been taken and approved by the court at the same term no citation would have been necessary, because the allowance of the appeal was, under the operation of the stipulation, the same in its effect for the purpose of a citation as the allowance of an ap- [778] peal in open court during the term at which the decree was rendered. But as the bond was not filed until after the term, a citation or something equivalent was necessary, as matter of procedure, to give the appellees notice that the appeal which had been allowed in term time had not been abandoned by the failure to furnish the security before the adjournment. *Dodge* v. *Knowles*, 114 U. S. 430 [29:144]; *Hewitt* v. *Filbert*, 116 U. S. 143 [29:582]. In the present case the indorsement by the counsel for the appellees, of his approval of the bond, was the equivalent of such a notice, and there was no necessity for a citation in form.

The motion is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LEATHER MANUFACTURERS' NATIONAL BANK, *Plff. in Err.*, [778]
v.
WILLIAM B. COOPER, JR.

(See S. C. Reporter's ed. 778-784.)

Removal of causes—right of national banks to remove limited—colorable assignment to give state court jurisdiction—decision by this court, in another suit, of questions involved.

1. Under section 4 of the Act of July 12, 1882, national banks cannot remove suits to which they are parties merely on the ground that they are federal corporations; said banks being thereby put on the same footing as to the jurisdiction of the courts of the United States as the banks of the State in which they are located.

2. A case is not removable because a colorable assignment has been made to give a state court exclusive jurisdiction.

3. A case does not arise under the laws of the United States simply because a federal court has decided in another suit the questions of law which are involved therein.

[No. 1818.]

Submitted March 7, 1887. Decided March 21, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Review of an order of the circuit court remanding the cause to the state court from which it had been removed. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Noel B. Sanborn** and **Charles M. DaCosta**, for plaintiff in error:

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.

Tennessee v. *Davis*, 100 U. S. 257, 264 (25: 648, 650); *R. R. Co.* v. *Mississippi*, 102 U. S. 141 (26: 98); *Starin* v. *N. Y.* 115 U. S. 248, 257 (29: 388, 390).

And this rule includes within its operation all cases where the due or operative effect of a

judgment of a court of the United States is drawn in question.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Factors & T. Ins. Co.* v. *Murphy*, 111 U. S. 738 (28: 582); *New Orleans S. F. & L. R. R. Co.* v. *Delamore*, 114 U. S. 501 (29: 244).

A circuit court may acquire by removal jurisdiction which it is inhibited from exercising originally.

Green v. *Custard*, 64 U. S. 23 How. 484 (16: 471); *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 (19: 736); *City of Lexington* v. *Butler*, 81 U. S. 14 Wall. 282 (20: 809); *Claflin* v. *Commonwealth Ins. Co.* 110 U. S. 81 (28: 76).

The firm of Ashburner & Co., the principals and assignors of Cooper, commenced in April, 1881, an action in the Circuit Court of the United States for the Southern District of New York, on the identical causes of action in declaration herein set forth. Judgment went in their favor, which, however, this court reversed, and remanded the cause for a new trial and for further proceedings in conformity with this opinion.

Leather Mfrs. Bank v. *Morgan*, 117 U. S. 96, 122 (29: 811, 821).

On the mandate coming down, Ashburner & Co. voluntarily discontinued the action and paid the costs. Immediately thereafter this action was commenced by Cooper, the present plaintiff.

Admonished by what this court held in *Provident Sav. L. Assur. Society* v. *Ford*, 114 U. S. 635 (29: 261), and reiterated in *Oakley* v. *Goodnow*, 118 U. S. 43 (*ante*, 61), to the effect that a colorable assignment made to deprive federal courts of jurisdiction furnishes no ground for removal, the plaintiff in error did not seek to remove the case on that ground. But it may not be inappropriate to say that the remedy there suggested by this court, *i. e.*, a defense to the action in the state court would, as to the State of New York, be illusory.

It is a settled law in New York that a person to whom a cause of action is transferred by assignment absolute on its face is the real party in interest within the meaning of the Code, although it may conclusively appear that the assignment was founded on no or only on a nominal consideration, and that the recovery in the suit is to be for the sole benefit of the assignor.

Allen v. *Brown*, 44 N. Y. 231; *Stone* v. *Frost*, 61 N. Y. 614; *Sheridan* v. *The Mayor*, 68 N. Y. 30.

Mr. **John M. Bowers**, for defendant in error.

[779] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a writ of error brought under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court remanding a suit which had been removed from the Supreme Court of the County and State of New York. The suit was begun June 1, 1886, by William B. Cooper, Jr., a citizen of New York, against the Leather Manufacturers' National Bank, to recover a balance of account due from the Bank to the firm of Ashburner & Co., which had been assigned to him. The Bank was originally organized under the National Banking Act, chap. 106, 13 Stat. at L. 99, on the 27th of May, 1865, and its corporate existence was extended May 27, 1885, under the Act of July 12, 1882, chap. 290, 22 Stat. at L. 162. Its place of business is in the City of New York, in the State of New York.

Section 4 of the Act of July 12, 1882, is as follows:

Section 4. "That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States and other Acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession; *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks, not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

On the 23d of September, 1886, the Bank presented its petition to the state court for the removal of the suit to the Circuit Court of the [780] United States for the Southern District of New York under the Act of March 3, 1875, on the ground of its being a national Bank, and consequently the suit was one arising under the laws of the United States. The cause was duly entered in the circuit court October 4, 1886; and, on the 9th of the same month, Cooper moved that it be remanded. This motion was granted October 22, because section 4 of the Act of July 12, 1882, had taken away from national banks the right of removing suits under the Act of 1875 on the ground of their being federal corporations. To reverse that order this writ of error was brought.

The Act of 1882 repeals in express terms "all laws and parts of laws of the United States" inconsistent with its provisions, and enacts that jurisdiction for suits thereafter brought by or against national banks, with few exceptions, "shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States" doing business where the national bank "may be doing business when such suits may be begun." This was evidently intended to put national banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the courts of the United States. The first national banking Act, that of February 25, 1863, chap. 58, 12 Stat. at L., 681, provided, in section 59, that suits by and against banks organized thereunder might be brought in any "circuit, district or territorial court of the United States held within the district in which such association may be established." By the Act of June 3, 1864, chap. 106, § 57, 13 Stat. at L. 116, there was added to this, "or in any state, county or municipal court in the county

or city in which such association is located, having jurisdiction in similar cases." Both these provisions were carried into section 5198 of the Revised Statutes by the amendatory Act of February 18, 1875, chap. 80, 18 Stat. at L. 320.

The removal of this class of cases from a state court to a circuit court was first provided for by the Act of March 3, 1875, in that clause of section 2 which relates to suits "arising under the Constitution or laws of the United States," as construed in the *Pacific Railroad Removal Cases*, 115 U. S. 1 [29: 319]. Thus the federal and state courts had concurrent [781] jurisdiction for suits brought by or against national banks, and a suit of that character begun in a state court could be removed by either party to a Circuit Court of the United States, if the value of the matter in dispute exceeded $500, because, as a national bank is a federal corporation, a suit by or against it is necessarily a suit arising under the laws of the United States. But the Act of 1882 provided in clear and unmistakable terms that the courts of the United States should not have *jurisdiction* of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a state bank doing business in the same State with the national bank. The provision is not that no such suit shall be brought by or against such a national bank in a federal court, but that a federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there, for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the Act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States.

A suggestion was made in argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers National Bank* v. *Morgan*, 117 U. S. 96 [29: 811], decided by this court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind, however, appears in the record, and if it did it would not authorize a removal. This is not that suit, and a case does not arise under the laws of the United States, simply because this court, or any other federal court, has decided in another suit the questions of law which are involved.

A case is not removable because a colorable assignment has been made to give a state court exclusive jurisdiction. *Provident Sav.* [782] *L. Assur. Society* v. *Ford*, 114 U. S. 635 [29: 261], followed in *Oakley* v. *Goodnow*, 118 U. S. 43 [*ante*, 61].

Order to remand is affirmed.

Mr. Justice **Blatchford** did not take part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Supreme Court, U. S.

Ex Parte:

In the Matter of HOLLON PARKER, *Petitioner.* [737]

(See S. C. Reporter's ed. 737-747.)

Jurisdiction—mandamus *to reinstate an appeal—notice to codefendant to join—evidence—Code of Washington Territory—construction of.*

1. This court has power to issue a writ of *mandamus* when the inferior court refuses to take jurisdiction, where by law it should do so, or where, having obtained jurisdiction, it refuses to proceed in the due exercise thereof.

2. A notice of his intention to appeal by one of two codefendants to the other, requesting him to join in it, is a sufficient compliance with section 454 of the Code of Washington Territory, which does not require the notice to be of an appeal already actually taken.

3. Upon appeal to the Supreme Court of Washington Territory in an equitable proceeding, where it appears with certainty from the record that it contains all of the evidence introduced by the parties on the trial, an objection that the evidence was not properly certified under sections 451 and 464 of the Code of said Territory cannot be sustained.

[No. 3. Orig.]

Argued March 7, 1887. Decided March 21, 1887.

PETITION for writ of *mandamus* to the Supreme Court of Washington Territory, directing that court to take jurisdiction of an appeal which it had declined to do. *Granted.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John H. Mitchell**, *Alfred E. Isham, A. T. Britton, A. B. Browne*, and *W. W. Upton*, for petitioner.

Messrs. **J. H. Hoffecker, Jr.**, and *John B. Allen*, for respondents.

Mr. Justice **Matthews** delivered the opinion of the court: [739]

This is an application under section 688 of the Revised Statutes for a writ of *mandamus*, directed to the Supreme Court of Washington Territory, to reinstate an appeal from a decree of the District Court of the Territory for the First Judicial District, in a suit in equity wherein Elizabeth Denney, executrix of the estate of Timothy P. Denney, is plaintiff, and Hollon Parker and John F. Boyer are defendants. The decree in question was against each of the defendants severally, and the appeal was taken by the defendant Hollon Parker. Upon his petition heretofore filed a rule to show cause has been issued, to which the Chief Justice and Associate Justices of the Supreme Court of the Territory of Washington, on behalf of the court, have made and filed their return. They set forth that at the time the said Hollon Parker sought to appeal said cause referred to from said district court to said Supreme Court of Washington Territory, the manner of taking such appeal was defined by section 458 of the Territorial Code, still in force, as follows:

"Sec. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order of the court appealed from is entered, a notice, stating the appeal from the same, or some specific part thereof,

NOTE.—Mandamus; *control of inferior tribunal; discretion; rules.* See *Ex parte* Morgan, 114 U. S. bk. 29, p. 135, note.

and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or writ of error must be signed by the party taking the same or his attorney of record, and must contain the title of the district court in which the proceedings sought to be reviewed were had; the title of the cause as in the district court; a particular description of the judgment, decree, or order sought to be reviewed; and in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as grounds for a reversal or modification of the judgment, order, or decree; and in case of a writ of error, a particular description of the errors assigned."

The return further sets forth that the defendant, John F. Boyer, did not join in said appeal [740] as an appellant, nor was he made an appellee therein, as appears by the notice of appeal which is set out. This notice of appeal is entitled "In the District Court of the First Judicial District of the Territory," with the title of the cause, and is addressed to Timothy P. Denney, the plaintiff, James K. Kennedy, W. A. George, John B. Allen, and T. J. Anders, attorneys for plaintiff, and A. Reeves Ayres, clerk of the court, giving notice that the said Hollon Parker in the above entitled action "hereby appeals to the Supreme Court of Washington Territory from the decree and judgment therein made and entered in the District Court of the First Judicial District of Washington Territory, in and for Walla Walla County, in favor of the plaintiff, Timothy P. Denney, in said action, and against the defendants, Hollon Parker and John F. Boyer, and from the whole thereof, said decree and judgment rendered on the 31st day of March, 1882, against the defendants, Hollon Parker and John F. Boyer."

It is further stated in the return that no notice of appeal was served on Boyer, nor was service thereof waived by him. The Statute of Washington Territory relative to coparties on appeal is as follows:

"Sec. 454. A part of several coparties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other coparties, and file the proof thereof with the clerk of the supreme court."

It is further set forth that section 464 of the Code of Washington Territory prescribed the only means by which, in a cause appealed to the Supreme Court of the Territory, the evidence upon which the same was tried could be certified to said supreme court. That section is as follows:

"Sec. 464. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpenas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence, are to be certified up to the supreme court, and shall be [741] so certified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified, when not material to the determination of the appeal or writ of error, the court may direct the person blamable therefor to pay the costs thereof."

It is further set forth that, accompanying a large quantity of written testimony, and a great number of detached papers in said cause, were two certificates, copies of which are, respectively, as follows:

"*Certificate of referee.*

"I, B. L. Sharpstein, referee in the case of *Timothy P. Denney* v. *H. Parker* and *J. F. Boyer*, do hereby certify that the foregoing evidence, consisting of five packages or bundles numbered one (1), two (2), three (3), four (4) and five (5) is the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitute the evidence submitted to and taken by me in said action.

"B. L. SHARPSTEIN, *Referee.*

"Dated March 10, 1882."

"*Certificate of clerk.*

"I, A. Reeves Ayres, clerk of the District Court of Washington Territory and for the First Judicial District thereof, holding terms at Walla Walla, Walla Walla County, in said Territory, do hereby certify that the five packages of testimony herewith transmitted to the supreme court, and numbered by pages from 1 to 1572, is all the testimony in the case of *Timothy P. Denney* v. *Hollon Parker* and *John F. Boyer* as taken before B. L. Sharpstein, Esquire, referee in said case, and by him deposited with the clerk of said court; and I further certify that the letters, papers, and exhibits herewith transmitted and numbered in red ink figures from 1 to 130, respectively, are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said District [742] Court this 15th day of June, 1883.

"[SEAL.] "A. REEVES AYRES, *Clerk,*

"By FRANK W. GOODHUE, *Deputy,*

"*U. S. District Court, First Judicial District,*

"*Walla Walla, Washington Territory.*"

The evidence in said cause was in no other manner authenticated.

It further appears that the said cause was docketed in the supreme court as upon the appeal of Hollon Parker. That after divers motions had been determined in said cause, the same was argued on the merits at the regular July Term, 1883, and taken under advisement; but before a decision had been reached, by an Act of Congress, the organization of the Supreme Court of Washington Territory was so altered as to make the same consist of four justices, and as to disqualify the justice rendering a decision or judgment from sitting in the review thereof.

The death of the appellee was suggested, and due showing made; and thereupon Elizabeth Denney, executrix of the last will of Timothy P. Denney, deceased, was substituted as appellee; and thereupon the cause was again placed upon the docket of the supreme court for hear-

ing at its regular July Term, 1885. At that time the appellee moved to dismiss the appeal on the grounds: first, that all the coparties had not joined in said appeal, and had not been served with any notice of appeal; and second, because no evidence was properly certified. After argument it was determined by the court and decided that each of the grounds in said motion was well taken; and thereupon, for want of jurisdiction, to hear and determine the cause upon its merits, a final judgment of the court was entered that the appeal from the judgment of the said district court be dismissed, with costs.

Although the Supreme Court of Washington Territory rendered judgment in this case for costs against Parker, the appellant, it, nevertheless, dismissed his appeal for want of juris- [743] diction in that court to entertain it. There were two grounds alleged in the motion to dismiss, and in the opinion of the court giving its reasons for granting the same, on which it was contended and decided that Parker had failed to take the necessary preliminary steps to transfer his cause from the district court to the Supreme Court of the Territory. It was adjudged against him that he had not complied with the requisition of the law prescribing the conditions precedent to perfecting his appeal. The supreme court refused to hear the cause and to decide it upon its merits, because it considered that the cause was not lawfully before the court; that the parties were not in court for the purposes of an appeal. This presents a case for the exercise of the jurisdiction of this court in *mandamus* according to the principles and practice applicable thereto. That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. As was said in *Ex parte Brown*, 116 U. S. 401 [29: 676] "*Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction." In that case the motion for the writ was denied because the court below, having entertained jurisdiction of the cause, had dismissed it for want of due prosecution. That is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action; although the statement in the report does not sufficiently recite the facts from the record on which the opinion is based. In the present case, the Supreme Court of Washington Territory, on consideration, decided that it could not legally exercise jurisdiction upon the appeal of the petitioner Parker. The question for our determination is whether that decision was in conformity with law.

It appears from the record that on the 19th day of June, 1882, Parker addressed to his codefendant, Boyer, a notice, in which, after setting out the title of the court and of the [744] cause, it proceeds as follows:

"*To John F. Boyer, one of the defendants in the above entitled cause:*

"You will please take notice that your codefendant, Hollon Parker, in the above entitled action, will, on this the 19th day of June, 1882, file a notice of appeal and stay bond, and appeal said cause to the Supreme Court of Washington Territory, holding terms at Olympia, July Term, 1883; and you are herewith requested to join in said appeal."

This notice was duly signed and dated. Service of this notice was acknowledged in writing by Boyer, as follows:

"I hereby accept service of the above notice this 19th day of June, 1882, and decline to join in an appeal in said cause, wherein T. P. Denney is plaintiff and Hollon Parker and John F. Boyer are defendants."

It was held by the Supreme Court of the Territory that this notice upon Boyer was not a sufficient compliance with section 454, because it was a notice of an intention to appeal, and not notice of an actual appeal. The language of that section, already quoted, is:

"Sec. 454. A part of several coparties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other coparties and file a proof thereof with the clerk of the supreme court."

This was a notice of a present intention to appeal, with a request to Boyer, as a codefendant, to join in it. We cannot understand how it could more exactly and effectually comply with this section of the statute. If the required notice must be of an appeal already actually taken, then it is not a condition precedent to the perfecting of the appeal, and the failure to give it would not deprive the court of jurisdiction to proceed in the cause; but if the notice is a necessary prerequisite to perfecting the appeal, then it cannot be a notice of an appeal already taken. Besides which, the codefendant Boyer expressly declined to join in the appeal, which, of itself, was a waiver of any further notice.

The other ground on which the court proceeded was that there was nothing in the transcript to certify to the court that it had before [745] it the whole of the evidence. Section 451 of the Code of Washington Territory is as follows:

"When a cause is tried by the court it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record; but the supreme court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties, or their attorneys, or, in case the evidence consists wholly of written testimony, from the certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below."

By section 464, heretofore set out, it is provided that "In an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified, when not material to the determination of the appeal or writ of error, the court may direct the person blamable to pay the costs thereof."

In this case the appellant, in writing, in his notice of appeal, gave the following direction to the clerk of the court:

"And you, the clerk of said court, will please transmit to the supreme court *all the papers filed* in this cause (except subpenas), as by law provided in sections 459 and 464, Code of 1881, together with your certificate, as provided in Rule 2 of the Supreme Court."

The cause, it will be remembered, while in the district court had been referred to B. L. Sharpstein as a referee. The order of reference directed him to "take the evidence and a full accounting of said cause, and find the facts thereon, and that he report the same to this court," etc. The cause was heard by the district court upon exceptions to the report of the referee, consisting of the testimony as returned by him, with his findings of fact thereon. The decree sought to be appealed from was based upon that report and the findings and conclusions of the referee, the exceptions to which on behalf of Parker were overruled. The certificate of the referee returned into the district court, and sent up to the supreme court as a part of the transcript by the clerk of the district court, in pursuance of the appeal, was as follows:

[746]

"I, B. L. Sharpstein, referee in case of *Timothy P. Denney* v. *H. Parker and J. F. Boyer*, do hereby certify that the foregoing evidence, consisting of five packages or bundles, numbered one (1), two (2), three (3), four (4), five (5), is the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitutes the evidence submitted to and taken by me in said action."

The clerk of the district court stated in his certificate, contained in the transcript transmitted to the supreme court, "that the five packages of testimony herewith transmitted to the supreme court, and numbered by pages from 1 to 1572, is all the testimony in the case of *Timothy P. Denney* v. *Hollon Parker and John F. Boyer*, as taken before B. L. Sharpstein, Esquire, referee in said case, and by him deposited with the clerk of said court. And I further certify that the letters, papers, and exhibits, herewith transmitted and numbered in ink figures from 1 to 130 respectively, are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court."

The transcript on appeal also was certified by the clerk, stating "that the foregoing is a full, true, and correct transcript of so much of the record in the above entitled cause as I am by statute and directions of attorneys in said cause required to transmit to the supreme court."

It appears from these documents very clearly that nothing was omitted in the transcript by direction of attorneys except the subpenas; that all the testimony introduced by the parties on the trial before the referee was returned into the supreme court, duly certified as such, and that that constituted all the evidence introduced by the parties on the trial in the court below, in accordance with section 451 of the Territorial Code, because it appears by the decree sought to be appealed from that the cause was finally heard upon the report of the referee, the exceptions thereto of the defendant Parker being overruled, and the report of said referee being in all things confirmed, except as modified and altered by the findings and conclusions of the court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the court below. It follows that Parker's appeal had been duly taken and perfected, and the cause had been properly transferred from the District to the Supreme Court of the Territory; and that the latter, having acquired jurisdiction thereof, should have proceeded in the exercise of its jurisdiction to hear and determine the same upon its merits. *For the failure to do so the writ of* mandamus *must issue, and it is accordingly so ordered.*

[747]

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U.S.

NEW ORLEANS NATIONAL BANKING ASSOCIATION ET AL., *Appts.*, [765

v.

E. D. LE BRETON, Assignee in Bankruptcy of NOLAN S. WILLIAMS; SAMUEL H. KENNEDY ET AL.

(See S. C. Reporter's ed. 765-774.)

Foreclosure of mortgage—bill to foreclose and set aside former sale—Louisiana laws—pact de non alienando—*sale without notice to other creditors, valid—acknowledgment of amount due on unliquidated account and confession of judgment by mortgagor for amount of advances—fraud—Statute of Limitations—laches.*

1. In an action to foreclose a mortgage containing the *pact de non alienando*, on a plantation in Louisiana, and to set aside a former sale made by executory process at the suit of others secured by the same instrument, it is *held:* that the holders of the first mortgage were not bound to give notice to any person but the debtor in possession; that the acknowledgment by the mortgagor of the amount due on their unliquidated account of advances, to secure which the mortgage was given, and his confession of judgment for the amount so acknowledged, did not invalidate the sale; that any irregularities in the sale are within the Statute of Limitations; that the charge of fraud and conspiracy on the part of the holders of the first mortgage and the mortgagor is not sustained by the evidence; that said holders of the first mortgage were not trustees for the complainants; and that the delay of more than eight years in filing the present bill is a very serious objection.

2. A mortgage to cover future advances is valid under the Code of Louisiana.

[No. 554.]

Argued and submitted Oct. 21, 22, 1886. Decided March 21, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John A Campbell, J. D. Rouse,** and *Wm. Grant*, for appellants.

Mr. J. McConnell, for S. H. Kennedy & Company, appellees.

Mr. Justice **Bradley** delivered the opinion of the court: [766

The bill in this case is brought to foreclose a certain mortgage on a plantation in Terre-

bonne Parish, Louisiana, called the Ardoyne Plantation, with the stock thereon, and to have the same sold, and the proceeds distributed amongst the parties secured by the mortgage, and to set aside, as illegal, fraudulent, and void, a former sale made by executory process at the suit of S. H. Kennedy & Co., one of the parties secured by the same instrument.

The mortgage referred to was given by notarial act on the 12th of April, 1872, by one Nolan S. Williams, to secure various creditors large amounts respectively due to them; amongst others, to secure the complainants in the bill (the appellants here) the sum of $50,606.83, with interest at 8 per cent per annum, due to the New Orleans National Banking Association, and $6,856.95, with like interest, due to McComb. The mortgage contained the *pact de non alienando*. In the same instrument it was agreed that Williams should conduct and cultivate the plantation, and should receive $2,000 per year for his support out of the advances to be made as hereafter stated; and Samuel H. Kennedy, one of the appellees, for his firm of S. H. Kennedy & Co., agreed to make all necessary advances in cash and in purchase of supplies to carry on and cultivate the plantation during the existence of the mortgage, not to exceed $30,000 per year, to be evidenced by an open account to be kept by said firm between them and the plantation. To secure Kennedy & Co. for these advances, Williams, by the same instrument, mortgaged the plantation to said firm, with the like *pact de non alienando;* and it was agreed by all the parties, both mortgagor and mortgagees (who all joined in the act), that the mortgage granted in favor of Kennedy & Co. should have priority and rank of first mortgage over the one granted in favor of the other creditors. To further secure Kennedy & Co., Williams also mortgaged to them the crops of the plantation, and agreed to consign the same to them for sale in New Orleans, and Kennedy and Co. were to have the usual commissions and charges; and, after they were reimbursed for their advances, interest, and costs, the balance of the proceeds of the crops was to be applied by them, each year, to the debts due to the other mortgagees.

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The accounts of Kennedy & Co. with the plantation, for the year 1872, showed that the advances required for that year amounted to over $40,000, and that the net proceeds of the crop were less than that sum.

In anticipation of this state of things another instrument was executed before a notary by all the parties, on the 30th of December, 1872, by which it was agreed that Kennedy & Co. should advance $40,000 for that year, and $35,000 for each succeeding year, instead of $30,000, as provided by the first agreement; and to secure them for such advances, Williams mortgaged to them the plantation anew; and the other creditors agreed and consented that the new mortgage should have priority and rank of first mortgage over that granted in their favor by the act of April 12, 1872.

The accounts of the next year, 1873, showed that the proceeds of the crop were insufficient to pay Kennedy & Co's advances by more than $28,000; and it seemed evident that the plantation could not be carried on without serious loss to all the parties concerned.

In this condition of things Kennedy & Co. justly considered themselves authorized to proceed upon their mortgage for the collection of the amount due to them. It stood at that time upon an open account; and, on the 28th of January, 1874, they procured Williams to make an acknowledgment before a notary public of the balance due, which amounted to $28,097.36, for which he, at the same time, confessed judgment, and consented and agreed that, under said act, and the two acts of mortgages before referred to, Kennedy & Co. should have the right to seize and sell the plantation under execution process.

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Thereupon, on the 31st of January, 1874, Kennedy & Co. presented a petition for executory process to the judge of the District Court for the Parish of Terrebonne, setting out therein the two mortgages, the fact that the plantation was incurring indebtedness every year, instead of paying anything, the amount of balance due them, and the notarial act by which Williams had admitted the amount, and confessed judgment therefor, and praying for an order of seizure and sale to be directed to the sheriff, for the purpose of satisfying their claim. Williams indorsed the petition, waiving all notices and legal delays. An order was accordingly made, and Williams having waived all formal notices, the property was advertised and sold by the sheriff on the 7th of March, 1874, and S. H. Kennedy became the purchaser for the sum of $17,435.32, the appraised value being $26,142.62.

The grounds on which the complainants seek to set this sale aside are illegality and fraud.

The illegalities alleged are: first, that the complainants and other mortgage creditors were not made parties to the proceeding and were not notified of the sale; and secondly, that the debt, being an open account until acknowledged by Williams, was not an exigible debt under the mortgage alone, and that the seizure and sale had no validity except in virtue of the confession of judgment made by Williams on the 31st of January, and hence could not affect the complainants who had a prior mortgage.

Neither of these objections seems to be well founded. A holder of a first mortgage, duly executed before a notary, with *pact de non alienando*, is not bound to give notice to any person but the debtor in possession.

[769]

The Code of Practice (art. 732) declares that "Executory process can only be resorted to in the following cases: 1. When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor."

Art. 733. "An act is said to import a confession of judgment in matters of privileges and mortgage, when it is passed before a notary public or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage."

Art. 734. "When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold, on a simple petition, and without previous citation of the debtor, in the manner laid down in the third paragraph, second section, third chapter of the first part of this Code."

Art. 735. "In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot; adding a day for every twenty miles, between the place of his residence and the residence of the judge to whom the petition has been presented."

The Civil Code, art. 3397 (3360), declares that "The mortgage has the following effects: 1. That the holder cannot sell, engage or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor."

These sections do not, it is true, speak of the *pact de non alienando* and its peculiar effect. This pact and its consequences were derived from the Spanish law and were not affected by the Code, and have been firmly established in the jurisprudence of Louisiana. *Nathan* v. *Lee*, 2 Mart. (La.) N. S. 82; *Donaldson* v. *Maurin*, 1 La. 89, and other cases cited in Hennen's Dig. arts. Executory Process, III. (b.); Mortgage, VI. (c.), 6); Louque's Dig. *ib.* This rule not only applies to subsequent purchasers from [770] the mortgagor, but to subsequent incumbrancers. *Guesnard* v. *Soulis*, 8 La. Ann. 58. The mortgage of Kennedy & Co. contained all the requisites required for this process. It was a first mortgage by agreement of all the parties, and contained the pact in question. The fact that the complainants and other creditors had a junior mortgage by virtue of the same instrument makes no difference. They agreed to stand on the plane of second mortgagees, and must be bound by the conditions attaching to such a position. It has even been held by the Supreme Court of Louisiana that where two separate notes, drawn in favor of different individuals, were secured by the same mortgage, either mortgagee may sue to enforce his rights without a joinder of the other. *Utz* v. *Utz*, 34 La. Ann. 752. And, in another case, it was held that where there are concurrent mortgagees, one of them may proceed by executory process to foreclose the mortgage without giving special notice to the others. *Soniat* v. *Miles*, 32 La. Ann. 164. In such cases the other interested parties are entitled to their proper shares of the common proceeds. *Carite* v. *Trotot*, 105 U. S. 751, 755 [26: 1223, 1224].

But in this case, Kennedy & Co. had not only the joint mortgage of April 12, 1872, as security for their claim, but the separate one of December 30, 1872, in which the complainants and other creditors repeated their consent that it should be a first mortgage and have priority over theirs. We think, therefore, that there can be no doubt that Kennedy & Co. had a right to proceed by executory process without giving special notice to the other mortgagees, if they had a right to executory process at all.

The complainants, however, deny that Kennedy & Co. had any such right, because their claim stood in the form of an open, unliquidated account, and the balance had to be acknowledged by the debtor Williams before it was in a proper shape for executory proceedings. We do not think that this objection can prevail. The mortgage on its face was good for any sum not exceeding $35,000; and though this was to cover future advances, it was none the less efficacious as a mortgage to the extent of those advances, less the amount of any credits realized from the proceeds of the crop or [771] otherwise. The law on the subject of such mortgages is laid down in the Civil Code as follows:

Art. 3292 (3259): "A mortgage may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage by way of security for an endorsement which another promises to make for him."

Art. 3293 (3260): "But the right of mortgage in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfillment of the promise, however, shall impart to the mortgage a retrospective effect to the time of the contract."

These articles, read in connection with those previously quoted, and the express agreement of the parties, are sufficient to show that there is no foundation for the objection. As matters stood in January, 1874, all that was necessary was an ascertainment of the balance due from the plantation of Kennedy & Co.; and for this balance, to any amount less than $35,000, the mortgage was as good as if the precise sum had been named in it when it was executed. To ascertain this balance, for the purposes of executory process, all that was wanted under the Code was the acknowledgment of the debtor. Such an acknowledgment was made in solemn form before a notary and satisfied the conditions of the law.

It is true that the other mortgagees were interested in the amount of the balance due at the end of each year, and were undoubtedly entitled to inspect the accounts which Kennedy & Co. were to keep with the plantation; but the latter were not required to render accounts to them in the ordinary sense of those terms. Their accounts were with Williams, to whom the advances were made, or with the plantation, which was the same thing; and their settlements were properly made with him; and being so made, were binding on all the parties, unless fraud or collusion could be shown. The evidence shows that Kennedy & Co. were always ready and willing to have their accounts inspected, if the other parties had desired to inspect them. This was all that the agreement implied or required. Hence the acknowledgment by Williams of the correctness of the ac- [772] counts, and of the balance due to Kennedy & Co., was a sufficient ascertainment of the amount due to them to "impart to the mortgage a retrospective effect to the time of the contract."

The fact that Williams, in addition to making an acknowledgment of the amount of the debt, also confessed judgment for it, did not deprive Kennedy & Co. of their rights under the mortgages, which themselves had the force of confessed judgments. The executory process was sued out upon them all, and had the effect due to all or any of them. The acknowledgment, it is true, was all that was needed under the law to make the mortgages exigible, and the confession of judgment was a supererogatory formality which did not affect their validity.

The complainants' case, therefore, must stand or fall upon the charge of fraud and conspiracy on the part of Kennedy & Co. and Williams. We have carefully examined the

evidence in relation to this charge, and are satisfied with the conclusions reached by the circuit court on the subject. The main stress of the argument of the appellants on this point is laid on the want of notice to them of the executory proceedings, and the haste with which the proceedings were conducted. We have already shown that they were not entitled to notice, and the haste in the proceedings is accounted for by the fact that unless a sale were made in the early spring, the purchaser could not make a crop for that year; and, hence, the property would command a greater price at an early sale than at a later one. The evidence shows that everything was done in good faith and with all due publicity. The charge that Kennedy induced parties not to appear and bid at the sale is not substantiated by satisfactory proof; on the contrary, we think it is disproved. None of the parties interested seem to have thought the proceedings assailable, either for fraud or any other cause. The sale was made March 7, 1874; Kennedy took immediate possession, and carried on the plantation. The complainant Bank had suspended October 4, 1873, and went into bankruptcy. A receiver (Cockrem) was appointed October 20, 1873, and another receiver (Casey) July 1, 1874. The [773] latter, in his report to the comptroller, classed the claim against Williams as worthless. He, or his predecessor, must have examined into the condition of the security at the time, and must have ascertained all about the sale to Kennedy, if they were not aware of it when it took place. The receiver paid no further attention to the claim until shortly before the filing of the bill in this case, which was May 15, 1882, more than eight years after the sale took place. The notes given to the complainants had then been due over five years, and no interest or principal had ever been paid on them. Surely such an important asset of the Bank, the principal of which was over $50,000, could not have been overlooked. The other second mortgagees were equally oblivious to any illegality or fraud in the sale until this suit was brought. It seems incredible that parties so deeply interested, represented as they were by vigilant and able counsel, did not in all this period discover the alleged illegalities and frauds. The proceedings incident to the sale were matter of record; the petition for executory process, the order, the acknowledgment of the debt, the appraisement of the property, the purchaser's bid, the sheriff's deed, all lay open to inspection; and no sign was ever made for more than eight years by any of these parties. They must have been satisfied with the regularity of the proceedings, and the good faith of Kennedy & Co. and Williams. Their conduct is inexplicable on any other hypothesis.

As to any irregularities in the sale, the Statute of Limitations of 1855, now to be found in sections 2809 and 3392 of the Revised Statutes, and article 3543 of the Civil Code, clearly applies. This statute declares that "All informalities connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

But it is alleged that the defendants, Kennedy & Co., were trustees for the complainants and the other mortgage creditors; and, therefore, that they are answerable for all profits and gains realized by Mr. Kennedy from the plantation purchased by him. We are of opin- [774] ion, however, that the relation of trustees did not arise from the agreement. Kennedy & Co. were to receive the crops and dispose of them, and if any surplus remained after reimbursing themselves for their advances and proper charges, they were to pay it over to the other mortgagees, instead of paying it to Williams. They only occupied the position of factors, legally responsible for any surplus in their hands. For this surplus, if they neglected to pay it over, they were liable in an action at law. This is a very different position from that of a trustee in the chancery sense of that term. The fact is, they never had any surplus, and were never liable in any amount to the complainants or their comortgagees.

But if we were not satisfied that the complainants have no case on the merits, we should still regard the great lapse of time which intervened between the transaction complained of and the filing of the bill for relief as a very serious obstacle to a decree in their favor. Eight years passed away before any complaint was made. The principal of the notes did not mature till April, 1877, it is true; but the interest became annually due, and none was ever paid. The ground of relief, if any existed, commenced to exist on the day of sale; and if the complainants, or the assignees, did not know of it at once, they must have known of it within a short period thereafter. There is nothing alleged as a ground of disturbing the sale, which they did not know, or which they were not put upon inquiry to ascertain, within a year from the sale at most.

On the whole we are satisfied that the decree of the Circuit Court was right, and it is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

In the Matter of THOMAS H. HARDING, [782]
Petitioner.

Habeas corpus—*jurisdiction—irregularities in proceedings.*

(See S. C. Reporter's ed. 782-784.)

1. This court has no jurisdiction for the discharge on *habeas corpus* of a person who is imprisoned under the sentence of a territorial court in a criminal case, on account of irregularities in the proceedings.

2. The objections that the grand jury was improperly constituted and that the defendant was denied compulsory process for witnesses go only to the regularity of the proceedings, not to the jurisdiction of the court.

Motion for leave to file petition, submitted March 11, 1887. Leave granted to file brief in support of motion March 14, 1887. Motion denied March 21, 1887.

ON motion for leave to file petition for writs of *habeas corpus* and *certiorari*. *Denied.*

The petition accompanying the motion was as follows;

The petitioner avers that he is deprived of his liberty and is imprisoned and about to be deprived of his life by the Sheriff of Beaverhead County, in Montana Territory, under the pretended judgment of conviction of the crime of murder, made and entered by the district court in and for said county, and the sentence of said court imposed thereunder. He avers that the indictment, judgment, and sentence were "contrary to the Constitution and laws of the United States," and the laws of said Territory under which these acts are done, and were unconstitutional, null and void:

First. Because the indictment under which he was prosecuted, tried, convicted and sentenced was not found by a legal grand jury, one of the members thereof being an alien.

Second. That an Act of the Territorial Legislature, whereunder said grand jury was selected and impaneled (Sess. Laws of Montana Legislature, 1881, p. 57), is in conflict with article 6 of the Amendments of the Federal Constitution and the laws of the United States, in that such Act makes any male person of lawful age, other than a citizen of the United States, competent to serve on said grand jury.

Third. Because said court denied his right to have compulsory process for obtaining witnesses in his favor, in derogation of his constitutional right under said article 6.

Wherefore he prays the issuance of the writ of *habeas corpus*, and also the writ of *certiorari* addressed to said district court, whereby the entire record of his indictment, trial and conviction may be brought before this court.

Messrs. **A. T. Britton, A. B. Browne** and **J. K. Toole,** for petitioner.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. This court has no jurisdiction for the discharge on *habeas corpus* of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, [784] or there is no authority to hold him under the sentence. *Ex parte Wilson,* 114 U. S. 420 [29:90], and the cases there cited. The fact that a law of the Territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury, and that an alien did in fact sit on the jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the court. The same is true of the allegation in the petition that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor. For such errors or irregularities, if they exist, a judgment is not void, and a writ of *habeas corpus* gives this court no authority for their correction.

True copy. Test:
James H. McKenney, Clerk Sup. Court U. S.

[747]

FOURTH NATIONAL BANK OF THE CITY OF NEW YORK, *Plf. in Err.,*

v.

CHARLES G. FRANCKLYN, Exr. of EDWIN HOYT, Deceased.

(See S. C. Reporter's ed. 747-759.)

Corporations—liability of stockholders under Statutes of Rhode Island—statutory remedy exclusive—courts of the United States take judicial notice of state laws—practice.

1. Where a statute creates a right or liability and prescribes a remedy, the remedy prescribed is exclusive and must be strictly pursued.
2. Under the Statutes of Rhode Island regulating the liability of the stockholders for the obligations of a corporation, the debt must first be established by a judgment against the corporation before the creditor can proceed against the stockholder. The execution under the earlier statute and the action against the stockholder under the Statute of 1877 must be founded on that judgment.
3. The individual liability of stockholders in a corporation for the payment of its debts being a statutory one, the courts of the United States follow the statutes and decisions relating thereto of the State which creates the corporation, although it is sought to enforce such liability in a court held beyond the limits of the State.
4. The Circuit Court of the United States, as well as this court on appeal or error from that court, takes judicial notice of the laws of every State of the Union.
5. It would be unreasonable to apply the general rule that this court should not review a judgment on a ground not presented to the court below, when the effect would be to make the rights of the parties depend upon a statute which the court is judicially bound to know does not govern the case. The case of Flash v. Conn, Bk. 27, distinguished.

[No. 134.]

Argued Jan. 14, 1887. Decided March 21, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action at law, brought December 10, 1879, by a National Bank against the [748] executor of Edwin Hoyt, a stockholder in the Atlantic De Laine Company, to recover the amount of a debt for upwards of $100,000, due from that corporation to the plaintiff on promissory notes made and payable in December, 1873, and January, 1874.

The parties duly waived a jury, and submitted the case to a referee under a rule of court; and also agreed in writing upon "a statement of certain of the facts in this action," which defined the amount of the debt due from the corporation to the plaintiff, and the material parts of the rest of which were as follows:

The Atlantic De Laine Company was a manufacturing corporation, established in the State of Rhode Island, under a charter granted in 1851 by the General Assembly of that State, which fixed and limited its capital stock at $300,000, and by section 8 of which "The liability of the members and officers of this corporation for the debts of the company shall be fixed and limited by, and the corporation, its members and officers, shall in all respects be subject to, the provisions of an Act" mentioned below. R. I. Laws, May Sess. 1851, pp. 33-36.

"Fourth. In and by an Act entitled 'An Act in Relation to Manufacturing Corporations,' passed at the June session of 1847 by the afore-

said General Assembly of the State of Rhode Island, it was provided, among other things, as follows: 'The members of every manufacturing company that shall be hereafter incorporated shall be jointly and severally liable for all debts and contracts made and entered into by such company until the whole amount of the capital stock, fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter, shall have been paid in, and a certificate thereof shall have been made, and recorded in a book kept for that purpose in the office of the city or town clerk of the city or town wherein the manufactory is established, and no longer, except as hereinafter provided.'

"It was also therein provided that 'When the stockholders in a manufacturing company shall be liable, by the provisions of this Act, to [749] pay the debts of such company, or any part thereof, their persons and property may be taken therefor, on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions against them for their individual debts. The person to whom said officers or stockholders may render themselves liable as aforesaid may, instead of the proceedings aforementioned, have his remedy against said officers or stockholders by a bill in equity in the supreme court.' R. I. Laws, June sess. 1847, pp. 30, 35.

"The foregoing provisions were substantially continued in force by chapter 128 of the revision of the Statutes of the State of Rhode Island of 1851, and by chapter 142 of the revision of said Statutes of 1872, and continued to be, and at all times mentioned and set forth herein were, and still are, in full force and effect as Statutes of the State of Rhode Island."

The whole amount of the capital stock of the Atlantic DeLaine Company was never paid in, nor a certificate filed, as required by these provisions. Hoyt was a resident of New York, and a stockholder in that company, from its incorporation until his death in May, 1874. He left a will, under which letters testamentary were issued to the defendant in New York; but it was never proved in Rhode Island, nor were letters testamentary or of administration upon his estate ever issued there.

"Tenth. No writ of attachment or execution has ever been issued against the Altantic De Laine Company for or on account of the claim of the plaintiff upon the aforesaid promissory notes; and no suit in equity has ever been begun in the Supreme Court of Rhode Island against any of the officers or stockholders of the Atlantic DeLaine Company, founded upon the plaintiff's claim herein.

"Upon the 30th day of March, 1874, the said Atlantic DeLaine Company was duly adjudicated a bankrupt by the United States District Court for the District of Rhode Island."

The referee found the facts as agreed by the parties; and, against the objection and exception of the plaintiff, admitted in evidence the reports of the cases, adjudged in the Supreme Court of Rhode Island, of *New England Bank* v. *Stockholders of Newport Factory*, 6 R. I. 154, and *Moies* v. *Sprague*, 9 R. I. 541, as proof of the [750] law of Rhode Island, and found the following as an additional fact:

"Twelfth. Prior to the making of the aforesaid notes, it had been judicially determined by the Supreme Court of the State of Rhode Island, that court being the highest judicial tribunal of the said State, that the remedies provided in favor of creditors of corporations therein referred to against their stockholders by said Act of June session of 1847 were exclusive of, and did not include, the remedy of an action in favor of such creditor against such stockholder."

"Upon the foregoing facts," the referee reported as a conclusion of law that the defendant was entitled to judgment. The court confirmed his report, specially found the facts as stated by him, and gave judgment for the defendant. The plaintiff sued out this writ of error.

Messrs. **Benj. H. Bristow** and *Wm. S. Opdyke*, for plaintiff in error:

The company's charter, granted in 1851, applied the provisions of the Statute of 1847, and thereby the broad terms subjected all the holders of the shares of stock of the DeLaine Company to a joint and several liability for the debts of that company, until the capital stock was fully paid. The statute expressly imposes a personal liability in the broadest terms.

A liability, such as that imposed by this statute, unlike that frequently imposed upon the directors or officers of a corporation, is contractual. It is not a liability for a penalty, but upon a contract.

Hawthorn v. *Calef*, 69 U. S. 2 Wall. 10 (17: 776); *Flash* v. *Conn*, 109 U. S. 371 (27: 966); *Cuykendall* v. *Miles*, 10 Fed. Rep. 342; *Corning* v. *McCullough*, 1 N. Y. 47; *Wiles* v. *Suydam*, 64 N. Y. 173.

Being thus a general liability upon a contract and for an amount certain, it is a liability at law.

Mills v. *Scott*, 99 U. S. 25 (25: 294); *Flash* v. *Conn*, *supra*.

"A general liability created by a statute without a remedy may be enforced by an appropriate common-law action.

Pollard v. *Bailey*, 87 U. S. 20 Wall. 520 (22: 376).

The statute creating the liability may make the liability one of general obligation, and at the same time give as cumulative remedies particular modes of redress peculiar to the State of the company's domicil; but yet leave the liability enforceable everywhere by proceedings appropriate to the forum.

Ex parte Van Riper,* 20 Wend. 614; approved in *Penniman's Case*, 103 U. S. 714 (26: 602).

Again, the statute may make the liability one of general obligation, enforceable generally, but in the same Act so provide a special mode of enforcing the liability in its own courts as thus to enact special rules of procedure binding as rules of practice upon the local courts, but not precluding other appropriate proceedings in other jurisdictions.

If the statute prescribes a remedy for the enforcement of the liability of residents alone, that cannot be deemed to exclude all remedies against nonresidents. So far as nonresidents are concerned, the case is one where the liability is imposed, but no remedy whatever is prescribed. It is not to be supposed that the State of Rhode Island, by prescribing a mode of en-

*See indexed citations at close of case. Lawyers' edition. [Ed.]

forcing the liability of stockholders which was peculiar to that State and impossible of application elsewhere, meant to enact that nonresident stockholders should be virtually released from the liability imposed upon them by the express terms of the statute.

So long as no greater measure of liability is sought, the form of remedy is a mere matter of local procedure, regulated by the law of the forum. Even if a statute creating a liability provide that it shall be enforced only in the court of the State, an action in appropriate form to enforce the liability will nevertheless lie in the national courts.

R. Co. v. *Whitton*, 80 U. S. 13 Wall. 270 (20: 571); *LeRoy* v. *Beard*, 49 U. S. 8 How. 457 (12: 1155); *Davis* v. *James*, 10 Biss. 51; *Suydam* v. *Broadnax*, 39 U. S. 14 Pet. 67 (10: 357); *Union Bank* v. *Jolly's Admrs.* 59 U. S. 18 How. 503 (15: 472); *Hyde* v. *Stone*, 61 U. S. 20 How. 170 (15: 874); *Warren* v. *R. R. Co.* 6 Biss. 425; *Cuykendall* v. *Miles*, 10 Fed. Rep. 842.

The adjudication of the DeLaine Company as a bankrupt dispensed with whatever necessity there might otherwise have been to recover judgment against it.

Flash v. *Conn*, *supra*; *Shellington* v. *Howland*, 53 N. Y. 372; *Paine* v. *Stewart*, 33 Conn. 516.

Mr. **William Allen Butler**, for defendant in error:

The sole question before this court is whether the liability of defendant's testator as a stockholder in the Atlantic DeLaine Company, a Rhode Island corporation, was a general liability on contract, enforceable against his estate in New York, where he resided and died, irrespective of the provisions of the Rhode Island law regulating the mode of enforcement of the liability of stockholders of the corporation.

Where the statute creating the liability also provides the special mode in which it shall be enforced, the remedy thus given by the statute, and that alone, must be followed.

Pollard v. *Bailey*, 87 U. S. 20 Wall. 520 (22: 376); *Lowry* v. *Inman*, 46 N. Y. 119; *Jessup* v. *Carnegie*, 80 N. Y. 441.

The Supreme Court of Rhode Island has construed the statute in question and held that the remedies which it provides are exclusive.

Moies v. *Sprague*, 9 R. I. 541.

This decision is controlling in the federal courts, as it is not in conflict with the Constitution, laws or treaties of the United States.

Fairfield v. *County of Gallatin*, 100 U. S. 47 (25: 544), and cases cited; *Post* v. *Supervisors*, 105 U. S. 667 (26: 1204); *Norton* v. *Shelby Co.* 118 U. S. 425 (*ante*, 178); *Jessup* v. *Carnegie*, 80 N. Y. 441.

If the right to an independent personal action against the stockholder cannot be maintained in the State of the domicil of the corporation, it cannot be maintained in any other State.

Lowry v. *Inman*, 46 N. Y. 128; *Merrick* v. *Van Santvoord*, 34 N. Y. 208; *Patteson* v. *Baker*, 34 How. Pr. 180; Thompson, Liability of Stockholders, § 80, and cases cited.

[751] *Mr. Justice* **Gray**, after stating the case as above reported, delivered the opinion of the court:

This was an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by a creditor of a Rhode Island manufacturing corporation, against the executor of a stockholder in that corporation, to enforce the liability which the Statutes of Rhode Island impose upon stockholders in such corporations for the corporate debts.

In the court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the Circuit Court of the United States, as well as this court on appeal or error from that court, takes judicial notice of the laws of every State of the Union. *Hanley* v. *Donoghue*, 116 U. S. 1, 6 [29: 535, 537], and cases there collected. No reference was made to the Statute of 1877, chap. 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that this court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. *Klein* v. *Russell*, 86 U. S. 19 Wall. 433 [22: 116; *Badger* v. *Ranlett*, 106 U. S. 255 [27: 194]. But it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know, and are judicially bound to know, is not the statute that governs the case. And under either statute the [752] result is the same, as will appear by a sketch of the history of the legislation and of its judicial construction, and a consideration of the principles upon which that construction rests.

The Statutes of Rhode Island, upon which the case was argued and decided in the circuit court, were sections 1 and 14 of the Manufacturing Corporation Act of 1847, re-enacted in the Revised Statutes of 1851, chap. 128, §§ 1, 19, 20, and in the General Statutes of 1872, chap. 142, §§ 1, 20, 21.

By the first section of each of those statutes, the members of every manufacturing company afterwards incorporated "shall be jointly and severally liable for all debts and contracts made and entered into by such company," until the whole amount of the stock shall have been paid in, and a certificate thereof made and recorded in a certain public office; and by the other sections, when the stockholders shall be so liable to pay the debts of the company, or any part thereof, "their persons and property may be taken therefor, on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions against them for their individual debts;" or, the creditor may, instead of such proceedings, have his remedy against the stockholders by bill in equity.

These provisions were substantially copied from the Revised Statutes of Massachusetts of 1836, chap. 38, §§ 16, 30, 31, as clearly appears on a comparison of the statute books of the two States, and as has been expressly recognized by the Supreme Court of Rhode Island. *Moies* v. *Sprague*, 9 R. I. 541, 544.

The provisions of the Revised Statutes of Massachusetts, as well as the similar provisions of the earlier statutes therein embodied and re-enacted, were always construed by the Supreme Judicial Court of Massachusetts to allow the stockholders to be charged for the debts of the

corporation by no other form of proceeding than that given by the statutes themselves.

This was clearly laid down, before the enactment of the statute in Rhode Island, in judgments delivered by *Chief Justice* Shaw, as follows: "The individual liability of stockholders, [753] created by the Statute of 1808, was of a particular and limited character, and could only be enforced in the manner pointed out by the statute." *Ripley* v. *Sampson* (1830), 10 Pick. 370, 372. "The construction uniformly put upon Statute 1808, chap. 65, § 6, has been, that it was a new remedy, given by statute; and as the mode of pursuing it was specially pointed out, that mode must be pursued; that it did not create a legal liability, to be enforced by an action." *Kelton* v. *Phillips* (1841), 3 Met. 61, 62. "This liability of an individual to satisfy an execution on a judgment to which he was not a party, and to which he had no opportunity to answer, is created and regulated by statute, and is not to be extended, by construction, beyond the plain enactments of the statute, as found by express provision or necessary implication." *Stone* v. *Wiggin* (1842), 5 Met. 316, 317. See also *Gray* v. *Coffin* (1852), 9 Cush. 192, 199.

That court accordingly held in *Ripley* v. *Sampson*, above cited, as well as in the earlier case of *Child* v. *Coffin* (1820), 17 Mass. 64, and in the later case of *Dane* v. *Dane Mfg. Co.* (1860), 14 Gray, 488, that an execution against a corporation could not be levied on the estate of a stockholder who died before the commencement of the action; in *Kelton* v. *Phillips*, above cited, as well as in *Bangs* v. *Lincoln* (1858), 10 Gray, 600, that the statute liability of a stockholder was not a debt provable against his estate in insolvency; in *Stone* v. *Wiggin*, above cited, that the estate of a stockholder, though attached on mesne process in an action against the corporation, could not be taken in execution on the judgment in that action, without first making a demand upon the officers of the corporation for payment or satisfaction of the execution; and in *Knowlton* v. *Ackley* (1851), 8 Cush. 93, in accordance with the opinion of *Chief Justice* Shaw in *Kelton* v. *Phillips*, above cited, that a creditor of a corporation could not maintain an action at law against a stockholder.

In 1869, before the debt was contracted on which this action was brought, the Supreme Court of Rhode Island, in accordance with *Knowlton* v. *Ackley*, and the other Massachusetts cases, above referred to, applied to the [754] Statute of Rhode Island the rule that "When a statute creates a right or liability and prescribes a remedy, the remedy prescribed is the only remedy;" and, while leaving open the question whether the statute liability of a deceased stockholder survived in any manner at law against his estate, adjudged that at all events his estate could not be charged, either at law or in equity, except in the mode of proceeding prescribed by the statute, and therefore such a liability could not be proved before commissioners on the insolvent estate of a deceased stockholder. *Moies* v. *Sprague*, 9 R. I. 541. So in the Circuit Court of the United States for the District of Rhode Island, *Judge* Shepley and *Judge* Lowell held that the liability of a stockholder under that statute, unless liquidated and ascertained by a decree in equity, was not a debt that could be proved against his estate under the Bankrupt Act of the United States; and *Judge* Lowell's decision was affirmed by this court, without any contest upon that point. *James* v. *Atlantic DeLaine Co.* 11 Bankr. Reg. 390; *Garrett* v. *Sayles*, 1 Fed. Rep. 371, 377, and 110 U. S. 288 [28: 150].

The Statute of Rhode Island of March 27, 1877, chap. 600, is as follows:

"An Act Defining and Limiting the Mode of Enforcing the Liability of Stockholders for the Debts of Corporations.

"Sec. 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.

"Sec. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

"Sec. 3. All Acts and parts of Acts inconsistent herewith are hereby repealed.

"Sec. 4. This Act shall take effect from and after the date of the passage thereof." [755]

This statute permits the alternative remedy by suit in equity—whether before or only after recovering judgment against the corporation we need not now inquire—and modifies the previous statutes in no other respect than by abolishing the right to take the person of the stockholder for the debt of the corporation; by substituting, for the taking of his property on attachment and execution against the corporation, a new form of remedy, by action of debt against him upon a judgment obtained against the corporation; and by authorizing him, when so sued, either in equity or at law, to make any defense that the corporation might have made. As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the Legislature, even as applied to debts contracted by the corporation before its enactment. *Hawthorne* v. *Calef*, 69 U. S. 2 Wall. 10 [17: 776]; *Penniman's Case*, 103 U. S. 714 [26: 602], affirming 11 R. I. 333; *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 213, 262, 349 [6: 606, 622, 653]; *Webb* v. *Den*, 58 U. S. 17 How. 576 [15: 35]; *Curtis* v. *Whitney*, 80 U. S. 13 Wall. 68 [20: 513]; *Tennessee* v. *Sneed*, 96 U. S. 69 [24: 610].

Under either statute of Rhode Island, the debt must be established by a judgment recovered against the corporation, before the creditor can proceed against the stockholder. The execution under the earlier laws, and the action against the stockholder under the existing statute, must be founded on that judgment. In short, it is only a judgment creditor of the corporation who can collect a corporate debt

from its stockholders, at least at law. What state of facts would be necessary to support a bill in equity by a creditor of the corporation against one or all of its stockholders is a question not before us. See *Cambridge Water Works* v. *Somerville Dyeing & Bleaching Co.* 4 Allen, 239; *New England Bank* v. *Stockholders of Newport Factory*, 6 R. I. 154; *Smith* v. *R. R. Co.* 99 U. S. 398 [25: 437]; *Case* v. *Beauregard*, 101 U. S. 688 [25: 1004].

[756] The question of the manner in which the liability of stockholders under the statutes of the State which creates the corporation may be enforced in the courts of the United States is not a new one in this court.

In the leading case of *Pollard* v. *Bailey*, 87 U. S. 20 Wall. 520 [22:376], under a Statute of the State of Alabama incorporating a bank, and providing in one section that the stockholders should "be bound respectively for all the debts of the bank in proportion to their stock holden therein," and in other sections that they might be charged by bill in equity, it was held that the remedy prescribed in these sections was the only one, and a creditor of the bank could not maintain an action at law against the stockholders in the Circuit Court of the United States; and the Chief Justice, in delivering judgment, affirmed the following principles, which have been constantly adhered to in subsequent cases: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement." "The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." 20 Wall. 526, 527 [22:378].

Pursuant to these principles, this court has repeatedly held, not only that suits, either at law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the Statute of Limitations of the State, —*Terry* v. *Tubman*, 92 U. S. 156 [23: 537]; *Carrol* v. *Green*, 92 U. S. 509 [23: 788],—*Terry* v. *Anderson*, 95 U. S. 628 [24:365]; but also that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the State. *Mills* v. *Scott*, 99 U. S. 25 [25:294]; *Terry* v. *Little*, 101 U. S. 216 [25:864]; *Patterson* v. *Lynde*, 106 U. S. 519 [27:265]; *Flash* v. *Conn*, 109 U. S. 371 [27:966]. See also *Blair* v. *Gray*, 104 U. S. 769 [26:922]; *Chase* v. *Curtis*, 113 U. S. 452, 460 [28:1088, 1041].

[757] The case of *Flash* v. *Conn* [*supra*], upon which the learned counsel for the plaintiff greatly relied, is in principle quite in line with the other cases, and was decided in favor of the plaintiff because of essential differences between it and the case at bar.

In *Flash* v. *Conn*, the Statute of New York, there in question, did not direct that the stockholder should be charged by execution or action upon a judgment against the corporation, and thus in effect limit the right of proceeding against a stockholder to judgment creditors of the corporation; but it allowed any creditor, after bringing a suit against the corporation and having an execution returned unsatisfied, to bring an independent action against the stockholder upon his original liability; and the Court of Appeals of New York had decided, in *Shellington* v. *Howland*, 53 N. Y. 371, that the fact that a corporation had been adjudged bankrupt was a sufficient excuse for not proceeding against it, before suing a stockholder, under that statute. In short, this court upheld a suit in the Circuit Court of the United States in Florida, upon exactly the same conditions on which it appeared that it would have been sustained in the courts of New York.

In the case at bar, on the other hand, neither of the Statutes of Rhode Island gives any action at law against the stockholder upon his original liability, or any right whatever of proceeding against him at law, except by execution or action upon a judgment recovered against the corporation. Before the passage of the Rhode Island Statute of 1877, it had been determined by a decision of the Court of Appeals of New York, nearly contemporaneous with that in *Shellington* v. *Howland*, above cited, and affirmed by this court, as well as by a decision of the Supreme Judicial Court of Massachusetts, that proceedings in bankruptcy against a corporation do not dissolve it, or discharge it from its debts, or prevent any creditor from suing it for so much of his debt as remains unpaid, and recovering a judgment against it for the purpose of charging its stockholders. *Ansonia Brass & Copper Co.* v. *New Lamp Chimney Co.* 53 N. Y. 123, and 91 U. S. 656 [23: 336]; *Chamberlin* v. *Huguenot Mfg. Co.* 118 Mass. 532. And there is no decision, in Rhode Island [758] or elsewhere, so far as we are informed, that under such a statute a creditor of a corporation can sue a stockholder, without first establishing, by judgment against the corporation, its liability for the debt with which it is sought to charge him.

In *Burgess* v. *Seligman*, 107 U. S. 20 [27:359], the question was whether the defendant was such a holder of stock in a corporation as to be liable for its debts, and no question of the form of the remedy was presented or considered. In *Garrett* v. *Sayles* [*supra*], the remedy against the stockholders was sought by bill in equity, under the Rhode Island Statute, after obtaining judgment against the corporation.

In all the diversity of opinion in the courts of the different States, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the State which creates it, can be pursued in a court held beyond the limits of that State, no case has been found in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative Acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders.

The provision of the Rhode Island Statutes, which made the stockholders of the Atlantic

DeLaine Company liable for its debts, was coupled with provisions prescribing the form of remedy, which still remain in force, except so far as they have been modified by the later statute of the same State. By the decisions of this court, as well as by those of the courts, both state and federal, held within the State and District of Rhode Island, and of the highest court of Massachusetts where these provisions had their origin and their first judicial construction, this liability can be enforced only in the mode prescribed by the Statutes of Rhode Island. The present suit, therefore, not being a bill in equity, or an action upon a judgment against the corporation, which are the only [759] forms of remedy authorized by these statutes, but being an independent action at law upon the original liability of the stockholder, cannot be maintained, and the circuit court rightly so held.

Judgment affirmed.

Mr. Justice **Blatchford** did not sit in this case, or take any part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[649] HENRY H. PORTER, *Appt.*,

v.

PITTSBURGH BESSEMER STEEL COMPANY (Limited); CLEVELAND ROLLING MILL COMPANY; SMITH BRIDGE COMPANY ET AL.

(See S. C. Reporter's ed. 649-678.)

*Railroads—foreclosure proceedings—distribution of proceeds—unsecured claims due on construction account, not entitled to priority over bonds secured by mortgage and representing funds expended in construction—validity of bonds—*bona fide *holders—subrogation—control of corporation by owner of majority of stock—estoppel—bonds not affected by construction contract—acts of* de facto *directors—construction of contracts.*

1. Unsecured floating debts due contractors and materialmen, on account of the original construction of a railroad, are not entitled to priority of lien over bonds, secured by mortgage, representing funds actually expended in the construction of the road and held by *bona fide* purchasers.

2. Upon appeals from certain decrees and orders of the court below, distributing the proceeds of a sale in foreclosure proceedings of the Chicago and Great Southern Railway, it is *held*: that the mortgages of November 1, 1881, and April 9, 1883, securing bonds which represent, in the hands of appellant, actual values received by the company and expended on account of construction and in the purchase of the Chicago and Block Coal Railroad, are valid and binding as against the company, there being no bad faith, irregularity, deceit or fraud in their execution or in the issuing of the bonds thereunder; that the mere fact that Henry Crawford, the promoter of the enterprise and the contractor for the construction of the road, owned a majority of its stock did not give him the legal control of the company; that from such ownership by Crawford the legal inference cannot be drawn that he dominated the board of directors; that appellees, whose unsecured claims are on account of the original construction of the road, cannot raise the objection that the bonds secured by the mortgages are invalid for want of a legal board of directors, the contracts under which their claims arise being open to the same objection; that the directors being directors *de facto*, their official acts bind the corporation and all persons claiming under it; that the mortgages and bonds are not affected by the existence of Crawford's construction contract, which was made March 18, 1882; that as subsequent creditors the appellees cannot be heard to impeach that contract; that the appellant is a *bona fide* holder of the bonds and is entitled to protect his title by that of the previous holders who were also purchasers thereof in good faith; that the evidence shows that appellant acquired the legal title to the bonds and the right of Crawford to redeem, and became subrogated to all the rights of the former holders thereof; that a certain contract between Crawford and appellant, extinguishing the former's said right to redeem, did not create an equity or lien in favor of the appellees, the appellant having thereby agreed to pay only such claims against the company as should be held by the court to be entitled to priority over the bonds; that to consider Crawford, as all the time substantially the owner of the road, would not affect the rights of appellant; that the decree of February 16, 1886, though a final decree of foreclosure and sale, as respected the interest of the mortgagor, and in some other respects, was not such in respect of the matters involved in these appeals from the decree of October 9, 1886; and that the entire purchase money now in the registry of the court below, after paying the costs and the receiver's indebtedness, must be applied toward the payment of the bonds and coupons secured by the mortgages.

[No. 1280.]

Submitted Jan. 7, 1887. Decided March 21, 1887.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **J. E. McDonald, John M. Butler, A. L. Mason, O. Peckham** and **R. B. F. Pierce,** for appellant.

Messrs. **John S. Cooper, Addison C. Harris, William H. Calkins, E. W. Tolerton, U. Z. Wiley, P. S. Kennedy** and **Baker, Hord & Hendricks,** for appellees:

The rights of these appellees in the property of the railroad and proceeds arising from the sale were adjudicated by the terms of the decree directing the sale of the property. The only question remaining was to ascertain the amounts, and for that purpose the claims were referred to the master. The amounts are not questioned. By procuring a sale, confirmation, title and possession before the report was in, appellant waived or abandoned all further exception to the claim.

The decree was final.

Mills v. *Hoag*, 7 Paige, 18; *Beebe* v. *Russell*, 60 U. S. 19 How. 285 (15:668); *Ray* v. *Law*, 7 U. S. 3 Cranch, 179 (2: 404); *Forgay* v. *Conrad*, 47 U. S. 6 How. 201 (12: 404); *Thompson* v. *Dean*, 74 U. S. 7 Wall. 342 (19: 94); *R. R. Co.* v. *Bradleys*, 74 U. S. 7 Wall. 575 (19: 274); *Green* v. *Fisk*, 103 U. S. 518 (26: 486); *Grant* v. *Phœnix Ins. Co.* 106 U. S. 429 (27: 237); *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 (27:73): *R. R. Co.* v. *Express Co.* 108 U. S. 24 (27: 638); *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180 (27: 898).

The relations which Henry Crawford sustained towards each of the appellees when their respective claims accrued, and also his relations to the railway corporation, were such as to preclude him, under the principles enforced by courts of equity, from acquiring the mortgage bonds in controversy, to the prejudice of appellees.

At the time these bonds were delivered, all

the evidence shows this corporation to be insolvent. In other words, its property on a sale would not have paid its debts.

That under such circumstances the property was a trust fund to pay its creditors is well settled.

Wood v. *Dummer*, 3 Mason, 313; *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705).

Crawford's construction contract was fraudulent and void as against the appellees, creditors of the corporation.

Had Crawford, instead of having resigned at the opening of the meeting of the board of directors, of March 18, 1882, continued his official positions as president and director for about ten or fifteen minutes longer (the period covered by the meeting), there would then, under the authorities, have been no question or doubt as to the invalidity of the contract.

Thomas v. *Brownville, Ft. K. & P. R. R. Co.* 109 U. S. 522 (27: 1018); *Wardell* v. *R. R. Co.* 103 U. S. 651 (26: 509); *Gilman, Clinton, etc., R. R. Co.* v. *Kelly*, 77 Ill. 426.

The legal situation was that of a corporation, only in name, vested with the legal title to the railway property for the use of Henry Crawford as sole beneficiary.

See *Sawyer* v. *Hoag*, 84 U. S. 17 Wall. 610 (21: 731).

Dull and McCormick received the bonds subject to the same equities against them which could be urged whilst they were in Crawford's possession.

The equities of the creditors against the million dollars of bonds in the hands of Drexel, Morgan & Co. are precisely what they were in the hands of Crawford.

By the purchase of the securities, on December 26, 1884, under the syndicate agreement, appellant was charged with full notice of all the facts, from which the equities of appellees against Henry Crawford and the bonds in said suit arise.

Swift v. *Smith*, 102 U. S. 442, 448 (26: 193, 196.

The First National Bank acquired no better rights against appellees by the assignment of Crawford's interest in the syndicate agreement than Crawford himself had.

See Colebrook, Collateral Securities, 568 *et seq.*, and section 422. See also *Cowdrey* v. *Vandenburgh*, 101 U. S. 572 (25: 923); *Judson* v. *Corcoran*, 58 U. S. 17 How. 612 (15: 231); *Wickham* v. *Morehouse*, 16 Fed. Rep. 324.

The equities of appellees to be paid the amounts due them respectively, as decreed by the circuit court, out of the fund in controversy, are superior to those of appellants, as the nominal party to this appeal, or to those of Henry Crawford, the real party.

Mr. Justice **Blatchford** delivered the opinion of the court:

These are five appeals brought by Henry H. Porter, in which the Pittsburgh Bessemer Steel Company (Limited), the Cleveland Rolling Mill Company, the Smith Bridge Company, Crerar Adams & Company, and Volney Q. Irwin are severally appellees.

The material facts out of which the questions for consideration arise are as follows:

In March, 1880, the Indiana and Chicago Railway Company was incorporated to construct and operate a railroad from a point on the state line of Indiana, in Lake County, to Attica, in Fountain County, Indiana. William Foster was the chief promoter of this enterprise, and was the president of the company, and of its successor, the Chicago and Great Southern Railway Company, from the organization of the Indiana and Chicago Railway Company down to March 15, 1882. From March, 1880, to June 23, 1881, Foster owned substantially all of the stock of the Indiana and Chicago Railway Company which had been issued, a few shares being held by the other directors, and he controlled the enterprise. Prior to June 23, 1881, the work of construction and of procurement of the right of way had progressed so far as Foster could procure and pay for the same, by the issuing of $50,250, par value, of paid-up capital stock of the company, of all of which stock Foster had on June 23, 1881, become the owner.

Prior to June, 1881, Henry Crawford purchased from A. J. Dull and Henry McCormick the entire capital stock, being 8,648 shares, of the Chicago and Block Coal Railroad Company. This was a company organized and incorporated by the purchasers, at a foreclosure sale, of the Indiana North and South Railroad, and it owned and operated a railroad extending south from Attica, through Veedersburg, in Fountain County, to Yeddo, a little over twenty miles in length. It had also procured some right of way and constructed some roadbed south of Yeddo, in the direction of Brazil, Indiana. The purchase price of this stock was $200,000. Crawford made a cash payment of part at the time and gave his notes for the residue, the stock remaining in pledge with the vendors, as security for the payment of the notes. [650]

On June 23, 1881, Foster sold to Crawford 1,005 shares of the capital stock of the Indiana and Chicago Railway Company, of the par value of $50,250, under a written contract, by which Foster guaranteed to Crawford that the stock thus sold was all of the capital stock of the company, excepting $10,000 par value still held by Foster, and that the company was under no obligation to issue any more stock, except a small amount for rights of way contracted to be paid for in stock. In connection with this contract, a certificate of the secretary of the Indiana and Chicago Railway Company was delivered to Crawford, showing the exact amount of capital stock then outstanding. The $10,000 of stock retained by Foster had been issued to him in payment of his salary and personal expenses in connection with the enterprise.

On June 23, 1881, the company had no assets excepting the roadbed and right of way, which had been constructed and procured with the money represented by the $50,250 of stock, and excepting some $50,000 of aid voted by certain townships along the line, but not yet collected.

Foster remained president, and his board of directors remained directors, until March 15, 1882. Immediately after his purchase of the stock on June 23, 1881, Crawford, without any specific contract with the Indiana and Chicago Railway Company, began furnishing from his own means the money and material with which the work of constructing the road was carried on. [651]

On July 14, 1881, the board of directors of the company, at a special meeting, adopted a resolution, changing its name to that of "The Chicago and Great Southern Railway Company." On October 29, 1881, the board of directors of the Chicago and Great Southern Railway Company adopted resolutions authorizing the execution of the mortgage and the issuing of the bonds involved in this litigation. At that time Crawford was not a director or officer of the company. The mortgage and the bonds bear date November 1, 1881. The resolutions authorized the issuing of bonds to the amount of $2,000,000, and the mortgage secures that amount. The mortgage was made to John C. New, as trustee, and describes the mortgaged premises as follows: "All and singular the northern division of railway of the said party of the first part, as the same now is or may hereafter be constructed, between Brazil, Clay County, Indiana, extending thence northwardly through the Counties of Clay, Parke, Fountain, Warren, Benton, Newton, and Jasper to a junction with the Louisville, New Albany and Chicago Railway, at or northwest from Rensselaer, Indiana, being about one hundred miles in length."

Between June 23, 1881, and January 1, 1882, Crawford furnished from his own means over $300,000, which was paid out for work and material used in constructing the road between Attica and the junction at Fair Oaks, northwest of Rensselaer. In addition to this, Crawford, prior to January 1, 1882, had paid out of his own means to Dull and McCormick, upon his purchase of the stock of the Chicago and Block Coal Company, the sum of $85,000, leaving $115,000 and all interest still unpaid.

From June 23, 1881, onwards Foster and his board of directors looked to Crawford to furnish the money and material with which to carry on the work of construction.

In pursuance of the resolutions of October 29, 1881, the mortgage was prepared and executed, and was duly recorded, in November, [652] 1881, in the several counties through which the line of the railroad ran.

About the last of December, 1881, Foster, then president of the Chicago and Great Southern Railway Company, executed and delivered to Crawford—the actual delivery being made to one Starin, an employé of Crawford, at Crawford's office at Chicago, Crawford being absent —1,000 bonds, each for $1,000, negotiable in form, and payable to New or bearer, making $1,000,000, the payment of the bonds and of the interest coupons attached thereto being secured by the said mortgage. At the same time with the delivery of the bonds, Foster also delivered to Starin, for Crawford, the following memorandum, unsigned, but in the handwriting of Foster:

"Memorandum of agreement between the Chicago and Great Southern Railway Company and Henry Crawford as to applying the proceeds of an issue of one million dollars of bonds under date of November 1, 1881.

"First. In payment of Block Coal road, purchased by said Crawford, and the contract assigned by him to the Chicago and Great Southern Railway Company, with which it is to be consolidated, as provided by law.

"Second. To reimburse said Crawford for money advanced, and to be hereafter advanced, for construction and equipment of the Chicago and Great Southern Railway, which the bills of purchase and vouchers for the necessary payments shall be the evidence of expenditures made.

"Third. Any balance from the proceeds of the first issue or any subsequent issue shall be used and applied to the extension and development of the line of road covered by the mortgage of November 1, 1881.

"Fourth. It is understood and agreed that said Crawford is to furnish the necessary amount of money to pay the debts contracted since the first of July, 1881 and to complete grading and superstructure, and to furnish and equip the line of road from junction with Air Line to Attica, as fast as the work can be done."

Prior to the delivery of the bonds by Foster to Crawford, Crawford had assigned to the Chicago and Great Southern Railway Company his contract with Dull and McCormick [653] for the purchase of the stock of the Chicago and Block Coal Railroad Company. When the bonds were thus delivered to Crawford he had no official connection with the company, but owned $50,250 of its stock, and had furnished to it a large amount of money, which it had paid out for construction.

In December, 1881, Crawford's note to Dull and McCormick matured and was unpaid. Crawford negotiated with Dull for an extension of time, and Dull agreed to give the extension if Crawford would deposit with him, as additional collateral security, all of the bonds then issued by the Chicago and Great Southern Railway Company, and all the stock which he had bought from Foster, and if he would also, by an agreement with New, the trustee, prevent the issue of any more bonds without Dull's written consent. This arrangement was carried out, and on the 27th of January, 1882, Crawford delivered to Dull all of the stock which he had bought from Foster, and the 1,000 bonds which Foster had delivered to him, and also procured from New the following paper, which was delivered to Dull:

"I, John C. New, of the City of Indianapolis, in the State of Indiana, do hereby make known that, as trustee in a certain mortgage or deed of trust, bearing date the first day of November, 1881, made and executed by the Chicago and Great Southern Railway Company, a corporation of the State of Indiana, to me, as trustee, covering the railroad and other property of said company, to secure a certain issue of first mortgage bonds of said company, aggregating the sum of two millions of dollars, I have, as such trustee, certified for issue one thousand of said bonds, of one thousand dollars each, and no more, and, at the request of Henry Crawford, Esq., of Chicago, I agree that I will, as such trustee, certify no more of said bonds without the consent in writing of A. J. Dull, Esq., of Harrisburg, Pa.

"Dated at New York, January 27, 1882.

"JNO. C. NEW, *Trustee.*"

At this time, the balance due to Dull and McCormick was $115,000 and interest. The [654] $85,000 which Crawford had paid to Dull and McCormick was in addition to the money he had furnished for constructing the new road north from Attica.

In February, 1882, the work of constructing the railroad being still in progress, and Crawford still continuing to furnish, without any contract with the company, the money used in prosecuting the work, he requested Foster and his board of directors to enter into a construction contract with him, and he sent to the board a written contract which he desired it to execute. The board, on the 7th of February, 1882, unanimously rejected the contract. Crawford then procured Foster to call another meeting of the board, which was held on March 15, 1882. Crawford attended this meeting, it being the first at which he was present. Becoming satisfied that Foster would prevent any contract or settlement from being made with him, unless he would buy from Foster the $10,000 of stock still held by Foster, he purchased that stock from Foster, and the two entered into a written contract, dated March 15, 1882, by which Crawford became the owner of all the remainder of the capital stock of the company. Crawford on the same day assigned and transferred to each of the following persons one share of the capital stock of the company, viz: Henry Crawford, Jr., William A. Starin, D. H. Conklin, F. F. Lacey, H. Moore, G. W. McDonald, D. J. Lyon, and H. Meiselbar. On the same day, Foster and his board of directors, at the request of Crawford, resigned, and Crawford caused himself and the eight persons above named to be elected directors of the company. On the same day, Crawford was elected president of the company, and remained such for four days, until March 18, 1882, when he ceased to be president and director; and he had no official connection with the company from that time until April or May, 1883, when he was again elected director and president.

On March 18, 1882, the new board of directors passed a resolution approving the mortgage to New, and ordering it to be copied at length in the minutes of the meeting, which was done. At the same meeting the board of directors entered into a construction contract with Crawford. [655] Between June 23, 1881, the date of Crawford's first purchase of stock from Foster, and March 18, 1882, the date of the construction contract, Crawford had paid out of his own means, for labor and material used in the construction of the company's railroad north from Attica, about $400,000, and for the purchase of the stock of the Chicago and Block Coal railroad, extending south from Attica, $85,000.

The Chicago and Block Coal Railroad Company and the Chicago and Great Southern Railway Company were consolidated in the spring of 1883, under the name of "The Chicago and Great Southern Railway Company." On the 9th of April, 1883, the consolidated company executed and delivered to John C. New, as trustee, a deed of further assurance, covering the railroad and property of the Chicago and Block Coal Railroad Company, extending southwardly from Attica to Yeddo, in addition to the property covered by the mortgage of November 1, 1881, and making the first named property a further security for the bonds issued under mortgage of November 1, 1881. This deed of further assurance was duly recorded in the counties along the line of the railroad.

The work of construction was carried on until January, 1883, Crawford furnishing from his own means all the money paid for labor and material used in the construction between June 23, 1881, and January 5, 1883, except about $40,000 received on account of aid voted by certain townships along the line, which was also expended in paying for construction. Between January 23, 1882 (the date at which Crawford pledged the bonds and stock to Dull and McCormick), and January 5, 1883, Crawford had been endeavoring either to sell the bonds so pledged to Dull and McCormick or to hypothecate them for a loan sufficiently large to pay off Dull and McCormick, and also to furnish money to build the road from Fair Oaks to Attica. Between June 23, 1881, and January 5, 1883, there had been paid out for the construction of the railroad about $500,000, all of which had been furnished by Crawford, except about $40,000 received from township aid.

On January 5, 1883, Crawford negotiated a loan from Drexel, Morgan & Co., a banking [656] house in the City of New York, under a written contract. This contract provided for a loan of $400,000, $250,000 to be paid at once, out of which the balance due to Dull and McCormick for the Chicago and Block Coal Railroad was to be paid; $50,000 more to be paid when the new road should be completed from Iroquois River to Fair Oaks; $50,000 more when the road should be completed eight miles south from Oxford, and when Crawford should furnish satisfactory proof to Drexel, Morgan & Co. that he had put into the work $50,000 of his own money, in addition to all the moneys theretofore expended by him upon the construction of the road; the last $50,000 to be paid when the line should be completed from Fair Oaks to Yeddo. Crawford was to procure the consolidation of the Chicago and Block Coal Railroad with the Chicago and Great Southern Railway. As security for this loan, all of the capital stock of the Chicago and Block Coal Railroad Company, all of the capital stock of the Chicago and Great Southern Railway Company, and all of the bonds of the latter company, either then issued or thereafter to be issued, were to be delivered to and held by Drexel, Morgan & Co. Crawford was to give his individual notes for the loan, and Drexel, Morgan & Co. were to appoint, and did appoint, an agent to superintend the expenditure of all the money to be advanced by them, the money to be paid out only upon drafts drawn by Crawford and approved and countersigned by such agent. Under this contract, Drexel, Morgan & Co. advanced $350,000. As part of it, they paid to Dull and McCormick, on January 5, 1883, $132,379.99, being the entire balance due on the purchase of the stock of the Chicago and Block Coal Railroad Company, and received from Dull and McCormick all of the stock and bonds which they held as collateral. Drexel, Morgan & Co. received this stock and these bonds, not from Crawford, but from Dull and McCormick, Crawford never having had possession or control of the stock or the bonds from the time when he pledged them

to Dull and McCormick. The remaining $217,620.01 was paid by Drexel, Morgan & Co., through their agent, directly for labor and material used in the construction of the railroad, and was paid at various times between [657] January 5, 1883, and September, 1883. During the same period, Crawford, in addition to what he had theretofore expended out of his own means in the work of construction, and in addition to the money so paid by Drexel, Morgan & Co., paid out of his own means more than $50,000 for labor and material used in the construction of the railroad between Oxford and Attica. From January 5, 1883, to September, 1883, the contractors, subcontractors, furnishers of material and laborers were informed and understood that the money paid to them from time to time during that period was mainly derived from a loan negotiated upon the mortgage bonds of the railway company. Each of these five appellees knew of the pledge of these bonds to Drexel, Morgan & Co. for this loan, and knew that they were getting part of the money loaned by Drexel, Morgan & Co.

After the Drexel, Morgan & Co. loan was exhausted, the work of construction was continued, the money paid for labor and material being furnished by Crawford, until about February, 1884, when the new road was so far constructed as to enable trains to be run from Attica to the junction at Fair Oaks. On the 18th of February, 1884, Crawford submitted to the board of directors a report, showing the then condition of the work, and asked the board to issue to him, in addition to the $1,000,000 of first mortgage bonds theretofore issued, a further sum of $200,000 of the first mortgage bonds, $1,200,000 of capital stock, and $1,200,000 of income bonds, as a payment to him on account. On the same day the board of directors passed the following resolution: "That, as a payment on account for the work done and material furnished up to the present time under such construction contract, there be allowed and paid to the contractor or order the sum of two hundred thousand dollars of first mortgage bonds (in addition to the one million dollars heretofore appropriated), and also ($1,200,000) one million two hundred thousand dollars of income bonds, and ($1,200,000) one million two hundred thousand dollars in the common stock, full paid, of this company, the proper officers of the company to execute the foregoing resolutions and take the proper vouchers for all payments."

[658] No income bonds were ever issued by the company. On the 5th of May, 1884, at the request of Crawford, the board of directors adopted a resolution, providing for an exchange of the old Indiana and Chicago Railway Company stock and of the old Chicago and Block Coal Railroad Company stock for new stock of the consolidated Chicago and Great Southern Railway Company. At the same meeting the board passed a resolution that, in addition to the consolidated stock to be issued in exchange for the old stock of the original companies, the secretary should issue and deliver to the contractor additional new stock, as payment under the construction contract, so as to make the total consolidated stock outstanding amount to $1,200,000, par value. This exchange of stock was made, and enough additional new stock of the consolidated company was issued to make its total stock outstanding amount to $1,200,000, par value, all of which stock was delivered to Drexel, Morgan & Co. under their contract of loan. When Dull and McCormick, on January 5, 1883, delivered their stock and bonds to Drexel, Morgan & Co. they also delivered to the latter the following consent:

"John C. New, trustee:

"I hereby consent to the issue and certification of the remaining $1,000,000 of Chicago and Great Southern railway bonds, whenever you are so requested to do by Drexel, Morgan & Co. A. J. DULL."

"New York, Jan. 5, 1883.

The additional $200,000 of bonds which Crawford was authorized to receive by such resolution of the board of February 18, 1884, were issued. Drexel, Morgan & Co. procured New, as trustee, to certify them, and they were delivered by Crawford to Drexel, Morgan & Co., in August, 1884.

While the construction of the railroad was in progress, Crawford became indebted to the First National Bank of Chicago in the sum of about $300,000, about two thirds of which money Crawford expended in the construction of the Chicago Air Line Railroad, and about one third of it in the construction of the Chicago [659] and Great Southern Railway. While the bonds and stock of the Chicago and Great Southern Railway Company were so held in pledge by Drexel, Morgan & Co., Crawford gave to the First National Bank of Chicago a second pledge of the same bonds and stock, to secure the payment of his indebtedness to the bank, he having already pledged to it certain other securities and property, as collateral. Crawford's notes to Drexel, Morgan & Co. matured and were not paid. Drexel, Morgan & Co., under the power given to them in their contract with Crawford, of January 5, 1883, advertised the pledged bonds and stock to be sold on June 2, 1884. By a written agreement between Crawford and Drexel, Morgan & Co., made May 27, 1884, the sale was postponed to June 20, 1884. In the meantime, Samuel M. Nickerson, President of the First National Bank of Chicago, which held the second pledge of the securities held by Drexel, Morgan & Co., and Henry H. Porter, a director and stockholder of the bank, entered into negotiations with Drexel, Morgan & Co. respecting the purchase of the bonds and stock from them, if Crawford should further fail to pay his debt to them and to redeem the securities. These negotiations resulted in a contract between Crawford and Drexel, Morgan & Co., by which the time of payment was extended for sixty days from June 20, 1884; and a further contract between Nickerson and Porter of the one part, and Drexel, Morgan & Co. of the other part, by which Nickerson and Porter agreed to buy the pledged securities from Drexel, Morgan & Co., and to pay them their claim in full with interest, if Crawford should fail to pay his debt to them at the expiration of the sixty days. These two contracts were both of them dated June 25, 1884. Crawford failed to pay his debt to Drexel, Morgan & Co. within the sixty days. Prior to January 12, 1885, Porter purchased Nickerson's interest in the contract of June 25, 1884, between Nickerson and Porter, and Drexel,

Morgan & Co. On January 12, 1885, Porter paid to Drexel, Morgan & Co. $392,363.24 by drafts, and sent them the drafts enclosed in a letter, in which Nickerson concurred. Drexel, Morgan & Co. received the payment, and delivered the pledged bonds and stock to [660] Porter, accompanying the delivery with a letter giving in detail a list of the stocks, bonds, notes, agreements and papers held by them as collateral to the loan. One of the papers enclosed by them to Porter was a consent signed by them, authorizing New, as trustee, to certify the remaining uncertified $800,000 of first mortgage bonds whenever so requested to to do by Porter. Porter associated with himself certain other persons, who entered into a subscription or syndicate agreement, for the purpose of buying in the railroad, and reorganizing, completing and extending it. By this agreement it was provided that Porter, as the agent and attorney of the parties concerned, should go on "in his own name" and foreclose the mortgage, sell the property, bid it off, reorganize the company, and convey the property to be purchased under the foreclosure to the reorganized company. The agreement was, in effect, one by the subscribers to pay so much money for so much stock and bonds of the new company to be organized after the foreclosure and sale by Porter. It gave to Porter absolute power over and control of all the bonds of the existing company, with full authority in his own name to foreclose the mortgage and reorganize the company upon the foreclosure purchase, and conduct and control the new enterprise.

On the 26th of December, 1884, Porter and Crawford entered into a contract, under which Porter and the syndicate represented by him purchased and became the absolute owner of any and all right Crawford might have to redeem from Porter the bonds and stock he should receive from Drexel, Morgan & Co., by paying to him the amount he should pay to them. This contract recognized the right of Crawford so to redeem the bonds and stock. Drexel, Morgan & Co. did not sell the bonds and stock at public auction on notice, but sold to Porter at private sale their debt against Crawford, and put Porter in their place as to the collateral security for the debt. Crawford was willing that Porter should take the bonds and stock in this way if he, Crawford, could still have an opportunity to protect his second pledge of them to the First National Bank of Chicago. By this contract [661] Porter and his associates fixed the ultimate price they were willing to pay for the bonds and stock, which price left a margin for the bank after paying off Drexel, Morgan & Co. On the same day, and as a part of the same transaction, Crawford, by written assignment, transferred to the First National Bank of Chicago all of his right, title, and interest in and to the contract of the same date between himself and Porter, and all the rights, claims, demands, moneys, and payments he, Crawford, might be or become entitled to by reason of and under that contract. These two instruments simply constituted the method pursued to protect the bank in its second lien upon the bonds and the stock, and were entered into for the purpose of securing to it any margin of value there might be in the bonds and stock, after paying the Drexel, Morgan & Co. debt.

The amount of money furnished by Crawford and expended in the construction of the railroad during the time the Drexel, Morgan & Co. loan was being used in construction, and during the time after that loan was exhausted, amounted to at least $250,000, in addition to the moneys which Crawford had theretofore paid out for such construction. The total expenditure in constructing the Chicago and Great Southern railway was something over $1,000,000, all of which came from Crawford's private means, and from the Drexel, Morgan & Co. loan, except some $40,000 or $50,000 received from aid voted by some townships along the line. The mortgage bonds involved in this litigation represent this $1,000,000 expended in construction and the accrued interest thereon. The railroad from Yeddo to Fair Oaks was opened for business in April or May, 1884. Prior to the appointment of a receiver, on October 28, 1884, the company did not earn sufficient money to pay its operating expenses. No interest was ever paid on any of the mortgage bonds issued by the company. Crawford never received anything from the company for personal services or expenses, or any repayment of moneys expended by him in constructing the railroad.

On October 27, 1884, John Hack and others filed a creditors' bill in the Circuit Court of Jasper County, Indiana, against the Chicago & Great Southern Railway Company and Henry [662] Crawford. On the same day that court entered an order appointing Philip B. Shumway receiver. Afterwards, on March 5, 1885, Crawford filed his answer in the suit, disclaiming all interest in its result, and upon that answer an order was entered that Crawford recover from the plaintiffs his costs, and that he had no interest in any controversy pertaining to the action. On February 26, 1885, the court removed Shumway and appointed as receiver in his stead William Foster. In the order appointing Foster there was this provision:

"And the court, as a condition of the appointment of said receiver, reserves the right to make any further order respecting the priority and payment of labor and supply claims accruing prior to the receivership herein as may hereafter seem and appear to the court to be equitable and just."

On the 4th of April, 1885, the Hack suit was removed into the Circuit Court of the United States for the District of Indiana. On the 9th of March, 1885, Porter filed in that court his bill of complaint against the Chicago and Great Southern Railway Company, John C. New, trustee, and others, alleging that New as trustee refused to bring the suit, and praying for the foreclosure of the mortgage of November 1, 1881, and of the deed of further assurance of April 9, 1883. On the 18th of April, 1885, this suit and the Hack suit were consolidated under the title of the Porter suit. On April 29, 1885, and August 15, 1885, orders were entered authorizing the receiver to issue certificates to pay receiver's indebtedness and to make needed repairs and replacements on the railroad. Under these orders receiver's certificates amounting in the aggregate to $153,000 were issued. The railway company filed an answer in the consolidated suit, admitting the averments of the bill. A decree *pro confesso* was entered against New, trustee. Various creditors of the

company were made parties defendant to the bill, some being judgment creditors and some not. Other creditors filed intervening petitions. In May, 1885, the trustees of four townships, two in Benton County and two in Newton County, which had voted aid in the construction of the railroad amounting to about $40,000, applied to the court as trustees of common schools to be made defendants and to be allowed to defend against the foreclosure; but the application was denied.

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In June, 1885, the same trustees, as trustees of the townships voting aid, applied to be permitted to defend against the foreclosure as minority stockholders. This application was denied on the ground that under the Statutes of Indiana the individual taxpayers of the townships which had voted aid were entitled to the benefit of the stock, in proportion to the amount of taxes paid by them respectively. Thereupon John W. Swan and Cephas Atkinson, as taxpayers of two townships, applied for leave to become defendants and to defend against the foreclosure. Without disposing of that application the court, on the 17th of August, 1885, entered a decree of foreclosure and sale.

On the 30th of September, 1885, the application of Swan and Atkinson was reheard by the court, and it entered an order admitting Swan and Atkinson as defendants, and allowing them to file their petition and answer. The order contained this provision: "This order shall in nowise affect the decree heretofore made for the sale of the railroad by the court or rights of parties thereunder." Swan and Atkinson filed their petition and sworn answer, charging that the mortgage and the bonds were fraudulently executed and issued, and were without consideration and void, and that Crawford's construction contract was fraudulent and void. On October 8, 1885, Swan and Atkinson and others filed a petition to set aside the foreclosure decree of August 17, 1885, containing substantially the same charges against the mortgage that were contained in the answer of Swan and Atkinson. On the 12th of October, 1885, the court set aside the foreclosure decree and made an order giving the defendants thirty-nine days in which to take their evidence "as to so much of said case as involves the validity of the mortgage and mortgage debts, as the same are described in the bill of said Porter and the defendants' answers." Porter filed a replication to the answer of Swan and Atkinson.

Voluminous testimony was taken, on which the case was heard, and a decree of foreclosure was entered on the 16th of February, 1886. That decree denied the relief prayed by the answer of Swan and Atkinson as stockholders, and dismissed their petition. It declared that 1,200 of the mortgage bonds were issued and delivered by the company to Crawford; that 1,000 thereof were to be accounted for by Crawford under the construction contract; that 200 of them were delivered to Crawford under that contract; that the 1,200 bonds were sold and delivered by Crawford to Porter and his associates; and that the remaining 800 of them had never been issued. It recited the making, delivery and recording of the two mortgages of November 1, 1881, and April 9, 1883; that the company defaulted in paying the interest due July 1, 1882, on the bonds; that there were $291,860 of interest in default upon the bonds issued; and that the mortgages "are valid and binding obligations as against the" company, and a paramount lien on all the property thereby conveyed, "excepting as hereinafter provided." It then proceeded to decree as follows:

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"Sixth. That all unpaid valid claims against said railway company, accrued for right of way, lands, labor, rolling stock and material used in the construction and betterment of said railway, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior and paramount to the lien of the said mortgages or deeds of trust and the bonds secured thereby; that all unpaid valid claims for labor, supplies, rolling stock and material used in the operation of said railway prior to the appointment of a receiver, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior and paramount in lien to the said lien of said mortgages or deeds of trust and the bonds secured thereby; and all of said claims accrued in the construction of said railway and its betterment; and all of said claims accrued in the operation of said railway, prior to the appointment of a receiver, as hereinabove in this paragraph of this decree described, are hereby adjudged and decreed to be prior, superior and paramount in lien to the lien of any and all receiver's certificates issued under the order of this court in this cause, excepting only receiver's certificates to the amount of twenty-three thousand dollars ($23,000) issued under the order of this court of April 29, A. D., 1885, the proceeds of said certificates other than said twenty-three thousand dollars ($23,000) representing construction or betterment of said railway.

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"Seventh. That all court and receiver's indebtedness accrued against said property since the appointment of a receiver is hereby adjudged and decreed to be prior, superior, and paramount in lien to the lien of said mortgages or deeds of trust and the bonds secured thereby."

It then provided for the sale of the mortgaged property at public auction, by a master, for not less than $500,000; for the payment of the purchase money into the registry of the court; and for a reference to the master to take testimony and report his findings and such testimony as to certain specified matters, among which was the following:

"5. The amount due the several claimants under the sixth paragraph of this decree, showing the amount due each claimant and the aggregate amount due upon each of the two classes of the claims mentioned in said sixth paragraph."

On March 27, 1886, the railroad was sold by the master, and bought by Porter, for $501,000 On April 5, 1886, the sale was confirmed by the court, and the purchaser was empowered to pay, as cash, in part payment of the purchase money, all receiver's certificates outstanding, then amounting, with interest, to $157,884.64, the remainder of the purchase money, $343,-115.36, being paid in cash.

The reference was had before the master, and

much testimony was taken upon it. On August 31, 1886, the master filed his first report under the reference, in which he allowed the following claims at the following amounts: The Cleveland Rolling Mill Company, $29,643.97; Crerar, Adams & Company, $7,809.94; the Smith Bridge Company, $20,900.24; the Pittsburgh Bessemer Steel Co. (Limited), $12,944,-20. Porter duly filed exceptions to these allowances. On the 8th of October, 1886, the master filed his report as to the claim of Irwin, allowing it at the sum of $10,950.30. Porter duly excepted to this allowance. On the 9th of October, 1886, on a hearing on the reports [666] and exceptions, the court made the following decree:

"First. That the said five several defendants, claimants, and intervening petitioners hereinbefore named, have each done work or furnished materials which have been used in the construction and betterment of the railway of said Chicago and Great Southern Railway Company prior to the appointment of the receiver therefor, which respective claims for such labor and material are valid claims against said railway company to the amounts hereinafter named, and which said amounts are adjudged and decreed to be valid claims under and in pursuance of the sixth paragraph of the decree heretofore, on the 16th day of February, 1886, entered in this cause, prior and superior and paramount to the lien of the mortgages or deeds of trust in said decree mentioned and the bonds secured thereby.

"Second. And the court further finds that there is now in the registry of this court, to the credit of this cause, the sum of $825,194.27, derived from the sale of said property, and remaining after the payment of all receiver's certificates and certain of the indebtedness incurred by the court since it assumed the control and management of said railroad, and which sum is largely in excess of the total amount of claims filed or proven under the terms of said decree entered on the 16th day of February, 1886, including all unpaid costs and indebtedness incurred by the court since it took possession of said railway property.

"Third. And the court further finds that there is due to the Smith Bridge Company the sum of $20,900.24, with interest to be added from the 27th day of October, 1884, at the rate of 6 per cent per annum.

"That there is due to the Cleveland Rolling Mill Company the sum of $29,643.97, with interest to be added from the 27th day of October, 1884, at the rate of 6 per cent per annum.

"That there is due to Crerar, Adams & Co. the sum of $7,809.94, with interest to be added from the 27th day of October, 1884, at the rate of 6 per cent per annum.

"That there is due to the Pittsburgh Bessemer [667] Steel Company the sum of $12,944.20, with interest to be added from the 27th day of October, at the rate of 6 per cent per annum.

"That there is due Volney Q. Irwin the sum of $11,450.30, with interest to be added from the 27th day of October, 1884, at the rate of 6 per cent per annum.

"Which several sums of money are due to said above named parties respectively, for and on account of labor or material used in the construction and betterment of said railway, as provided and set forth in the sixth paragraph of said decree, entered in said cause on the 16th day of February, 1886.

"It is, therefore, finally ordered, adjudged and decreed by the court that the clerk of this court shall pay out of the said fund in the registry of the court to the credit of this cause, the said several sums of money, with interest to be computed thereon, to the said parties, respectively, or their solicitors of record, viz.: To the Smith Bridge Company, the sum of $23,-845.54; to the Cleveland Rolling Mill Company, the sum of $33,112.82; to Crerar, Adams & Co., the sum of $8,723.71; to the Pittsburgh Bessemer Steel Company, the sum of $14,458,-65; to Volney Q. Irwin, the sum of $12,789.98.

"Said several payments shall be made, with interest at the rate of 6 per centum per annum from the date of the entry of this decree, in full payment and discharge of said respective claims against said railway property and franchises."

Porter has appealed separately from each of these decrees and orders of payment, and these are the appeals now presented for consideration.

It is alleged that the circuit court erred in decreeing the several claims of these five appel- [668] lees to be liens on the railroad and property of the original Chicago and Great Southern Railway Company superior to the lien of the mortgage of November 1, 1881; and that it also erred in decreeing these claims to be liens on the railroad and property of the consolidated company superior to the lien of the mortgage of April 9, 1883, conveying the railroad and property formerly known as the Chicago and Block Coal Railroad.

It is urged, in the maintenance of the decree below, that the relations which Crawford sustained towards the several appellees when their claims respectively accrued, and his relations to the railway company, were such as to preclude him from acquiring the mortgage bonds in controversy to the prejudice of the appellees; that his construction contract was fraudulent and void as against the appellees, as creditors of the company; that, as between him and the appellees, he is estopped, by the provisions of his construction contract, from claiming the right to a prior lien upon, or an equal distribution of, the proceeds of sale of the property of the company; that the legal situation was that of a nominal corporation vested with the legal title to its property for the use of Crawford as sole beneficiary; that Dull and McCormick received the bonds subject to the same equities against them which could be urged while they were in Crawford's possession; that the equities of the appellees against the $1,000,000 of bonds, in the hands of Drexel, Morgan & Co., were precisely what they were while the bonds were in the hands of Crawford; that the appellees are entitled, in equity, to be paid out of the assets of the company the amounts of their respective claims in preference to Crawford; that all rights which Nickerson and Porter might have had to be subrogated to the position of Drexel, Morgan & Co. were lost by the syndicate agreement of December 26, 1884; that the legal effect of that agreement was a purchase by Porter directly from Crawford; that the amounts in controversy on these appeals are a part of the purchase price of the securities on

such purchase of them by Porter, reserved by him to be paid either to Crawford or to the appellees; that the real controversy here is between Crawford and the First National Bank of Chicago on the one hand and the appellees [669] on the other; that the appellant had no interest in that controversy; that, by the purchase of the securities under the syndicate agreement, Porter was charged with full notice of all the facts from which the equities of the appellees against Crawford and the mortgage bonds arise; that the First National Bank acquired no better rights against the appellees, by the assignment to it of Crawford's interest in the syndicate agreement, than Crawford himself had; that the equities of the appellees to be paid the amounts due to them out of the fund in court are superior to those of Porter, as the nominal party, and to those of Crawford, as the real party; and that Porter, by reason of his ownership and possession of over $700,000 of unpaid capital stock of the company, had no right, as against the appellees, to foreclose the mortgage for the benefit of his bonds until the claims of the appellees should first be paid.

The considerations which seem to us to show that the circuit court erred in awarding priority to the claims of these creditors over the mortgage bonds, are few and controlling.

The mortgages and the bonds are valid and binding as against the company; the company owes a large debt for the construction of its road, which is represented by the bonds; there was no bad faith, irregularity, deceit or fraud in the execution of the mortgages or in the issuing of the bonds thereunder; the bonds in the hands of Porter represent actual values received by the company; they represent the entire purchase money that was paid for the Chicago and Block Coal Railroad, extending south from Attica to Yeddo; they represent all the money that was paid directly by Drexel, Morgan & Co., through their agent, for the construction of the railroad north of Attica, a considerable portion of which money was paid to these five appellees; they represent all the money that was paid by Crawford out of his own means for the construction of the new railroad north of Attica; in fact, they represent all the money that has ever been paid by the company for the Chicago and Block Coal Railroad and for the construction of the sixty miles of new road from Attica to Fair Oaks, excepting [670] only some $40,000 or $50,000 received from aid voted by townships.

To the objection, that, at the time the mortgage of November 1, 1881, was executed and the bonds were issued, Crawford owned the entire stock of the company and dominated the board of directors, and that the mortgage and bonds were issued under his dictation and coercion, even if such an objection could be legally tenable, it is a sufficient answer, that, when the mortgage was made, and the $1,000,000 of bonds were issued and pledged to Dull and McCormick, Crawford was not a director or officer of the company. Foster was its president, and he and his associates constituted the entire board of directors, and they remained in full control until March 15, 1882. That this board was not dominated or controlled by Crawford is shown by the fact that when, on February 7, 1882, eleven days after Crawford had delivered in pledge to Dull and McCormick the $1,000,000 of bonds, Crawford asked the board to enter into a construction contract with him, and sent them a draft of the contract which he desired, the board unanimously rejected it. At the time the mortgage was executed, and at the time the bonds were issued and pledged to Dull and McCormick, Crawford held $50,250 par value of the stock and Foster held $10,000 par value of it. The mere fact that Crawford owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors. *Pullman Palace Car Co.* v. *Missouri Pac. R. Co.* 115 U. S. 587, 596 [29:499, 501].

The circumstances attending the issuing of the $1,000,000 of bonds show that they were issued by Foster and his board of directors in good faith, and largely for indebtedness of the company then existing. There is no foundation for the suggestion that the mortgage and the bonds were without consideration; nor does it lie in the mouths of these appellees to raise the objection as to the absence of a legal board of directors of the company; for, if the mortgage and the bonds are invalid for want of such legal board, and for want of the legal existence of the corporation, the contracts between these appellees and the company, upon which their claims are based, are invalid for the same reason, and the consolidation by which the company procured the Chicago and Block Coal Company's road would be void, and that road would be free from all debts incurred by the Chicago and Great Southern Railway Company. Moreover, the directors were directors *de facto*, who held themselves out to the world as such, under such circumstances that their [671] official acts bind the corporation and all persons who claim under it.

The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds, and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or of material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after $1,000,000 of the bonds secured by it had been issued and pledged to innocent *bona fide* holders for value.

We are not aware of any well considered adjudged case which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way.

[672] On the facts of this case, the mortgage and the bonds are not affected by the existence of Crawford's construction contract, which was made on the 18th of March, 1882, after the issuing of the bonds and the pledging of them to Dull and McCormick. The amount of those bonds constitute the present value of the entire railroad property. By the construction contract, Crawford, in consideration of the bonds and stock which he was to receive under it, bound himself not only to complete, but to equip the road. The contract was not an unfair one. It was performed in part. Only $200,000 of the bonds were issued after the construction contract was made. At the date of that contract, Crawford was a large creditor of the company for money advanced by him and expended in construction. He had been advancing from his own means large amounts of money, and it was to reimburse to him the $300,000 or $400,000 of his own means already expended in the work, and to enable him to complete the payment for the Chicago and Block Coal Railroad, and to proceed with the work of construction, that the $1,000,000 of bonds were issued to him. All the money received by the company for the bonds went into the property. The property produced by that money has never been worth what was expended in its production. From the date of the construction contract, the company was never able to issue or deliver a single bond under it, except by the consent of Dull and McCormick, or of Drexel, Morgan & Co., the parties who held the bonds and stock in pledge. The advances of money made by Crawford after the date of the construction contract were made without any security to him. Every bond issued after the date of the contract with Drexel, Morgan & Co. was required by that contract to be delivered directly to them, as additional security to them. Crawford realized no profits out of the mortgaged property, and never received anything for his services, or any reimbursement of the large sums of money he expended in this work. On these facts, it is impossible to see that the existence of the construction contract can have any bearing upon the case. Under any circumstances, no contract under which about sixty miles of railroad had been constructed [673] would be held invalid for the reasons assigned in this case, without the repayment to the contractor of the amount actually expended by him in good faith under the contract. *Thomas* v. *Brownville, Ft. K. & P. R. R. Co.* 109 U. S. 522, 526 [27: 1018, 1019].

Moreover, it is a well settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the the company, of which they claim the benefit, occurred after the contract became an executed contract. *Graham* v. *R. R. Co.* 102 U. S. 148 [26: 106]. The claims of all the appellees except the Cleveland Rolling Mill Company accrued after the construction contract was made. As to that Company, it, after the construction contract was made, and while Crawford was carrying on the work of construction under it, knowingly received on account of its claims money which came directly from Drexel, Morgan & Co., as a result of the pledge of the bonds to that firm.

Dull and McCormick, Drexel, Morgan & Co., and Porter were respectively, in succession, purchasers in good faith of these bonds, as negotiable commercial securities, without notice of any irregularity or infirmity in them; and are entitled to the benefit of the principles applicable under such circumstances. Porter paid to Drexel, Morgan, & Co. more than $392,000 in money for the bonds, and, under all circumstances, is entitled to protect his title by that of Drexel, Morgan & Co., and through them, by the title of Dull and McCormick.

It is contended for the appellees that Porter did not purchase the bonds from Drexel, Morgan & Co. but bought them directly from Crawford. The evidence shows that Crawford, after January 27, 1882, the date at which he pledged the $1,000,000 of bonds to Dull and McCormick, never had one of those bonds in his possession or under his control. Dull and McCormick, not Crawford, delivered the bonds to Drexel, Morgan & Co., upon the payment to them by Drexel, Morgan & Co. of the debt due to them on account of the purchase of the Chicago and Block Coal Railroad. The $200,000 of bonds issued after the negotiation of the loan from Drexel, Morgan & Co. were at once delivered to them, under their contract of pledge. This pledge vested in them the legal title to the bonds, and Porter purchased that legal title from them. In [674] opposition to this view, it is urged that the terms of the written agreement between Crawford and Porter of December 26, 1884, show that the purchase by Porter was from Crawford; but the true purport and effect of that instrument is, as before stated, a sale by Crawford to Porter and his associates of Crawford's right to redeem the bonds from Porter and his associates by paying the amount of money which Porter had paid to Drexel, Morgan & Co. By the contract of June 25, 1884, between Porter and Nickerson and Drexel, Morgan & Co., the former bound themselves to pay to the latter Crawford's debt to them, upon receiving from them the stock and bonds which they held as collateral to the debt. Nickerson assigned to Porter his interest in this contract, and Porter paid to Drexel, Morgan & Co. the amount of Crawford's debt to them, and took from them the bonds pledged to them by Crawford as collateral. By this transaction Porter became the owner of the legal title to the bonds, and was subrogated to all the rights of Drexel, Morgan & Co. in them. The contract of December 26, 1884, between Crawford and Porter, merely extinguished Crawford's right to redeem the pledged bonds. Under these circumstances, whatever it was that Porter purchased from Crawford, the former would, in equity, be subrogated to all the rights of Drexel, Morgan & Co., and, through them, to all the rights of Dull and McCormick.

Certain clauses in the agreement between Crawford and Porter of December 26, 1884, are cited as creating an equity or lien in favor of the appellees. By one clause in the agreement

the syndicate represented by Porter agrees: "Second. To pay and clear off any and all claims against said Chicago and Great Southern Railway Company which may be decided by the court to be liens upon the said line of railway paramount to the lien of the bonds and coupons secured by the trust deed to said John C. New, dated November 1, 1881, or which the court may decide shall be equitably payable out of the proceeds of the sale of the said line of railway prior to any payment of the said bonds or coupons, including therein any and all claims for right of way and depot grounds, [675] engine house and station buildings, water tanks and shops, between Fair Oaks and Yeddo, both inclusive, bridges and other structures heretofore built and put in place on said railway, and essential to the operation thereof, but the title to which is not in said railway company, and which the court may decide must be paid for in preference to said bonds, and also any and all indebtedness incurred by the receiver in possession of said property prior to January 15, 1885, and not paid out of moneys earned by the operation of said road prior to January 15, 1885." By the same instrument, Crawford agrees as follows: "Section 5. The party of the first part hereby, in consideration of the premises, guarantees and agrees that the claims, liens, and other possible indebtedness mentioned in subdivision two, which shall be held to be prior in right to payment over said twelve hundred bonds and coupons, shall not in any event exceed the sum of one hundred thousand dollars ($100,000)."

These clauses do not create the lien or equity supposed. They leave the question as to the existence of any such "claims, liens, and other possible indebtedness," mentioned in the agreement, to be adjudicated by the court, and also leave to be decided by the court the question of the priority of such claims over the bonds, and merely provide for the rights of the parties as between themselves in case the court establishes such priority. As before said, the purpose of Crawford, in making the agreement of December 26, 1884, was to protect the second pledge of the bonds and stock to the First National Bank of Chicago, he having put into the construction of the railroad about $100,000 of the money which he had borrowed from the bank; and he immediately assigned to the bank all his interest in the contract with Porter. The contract between Porter and Crawford, and that between Crawford and the bank, having been entered into in contemplation of the purchase of the bonds from Drexel, Morgan & Co. by Porter, the legal relation of the appellees to the company and to its property, as unsecured holders of construction claims, was not affected by these transactions, so as to give them any greater rights against the mortgaged property than they had previously had. In any event, as before said, the bonds would be sustained in [676] the hands of Porter, as a first lien, to the amount actually advanced upon the faith of the pledge of them and expended in constructing the railroad, with interest. It is found by the final decree that there is now in court $325,194.27 derived from the sale of the mortgaged property. All the money advanced by Drexel, Morgan & Co., went directly into this property. The amount paid by Porter to Drexel, Morgan & Co., on January 12, 1885, was $392,368.24, exceeding by $67,168.97 the entire net proceeds in court, saying nothing about interest for over two years on the amount paid by Porter. This view is entirely conclusive of this case, and shows that there is no fund in court arising from the sale of the property that can upon any principle be held applicable to the payment of the construction claims of these appellees; and this is irrespective of the fact that, in addition, Crawford put into this property, in good faith, out of his own individual means, the further sum of $600,000.

It is contended, however, that Crawford was all the time substantially the owner of the entire railroad property, and that the claims of the appellees were debts due to them from Crawford for work and material in constructing his railroad, and that these claimants have a lien, in this way, superior to the lien of the mortgage bonds. In answer to this view, in addition to the suggestions already made, and treating Crawford as the owner of the railroad, it may be said that the rights of Porter would be no different from his rights as dealing with the company as owner of the property. The delivery by Crawford of the bonds secured by a mortgage made by himself on the railroad, to a third person, for a valuable consideration, made the mortgage a valid security, and made the bonds in the hands of Dull and McCormick a valid lien on the railroad. An owner of a railroad, though he may be in debt to those who aid in constructing it by furnishing materials, may still execute a mortgage on it which will be good against unsecured creditors. No more than this was done, upon the theory we are now considering. The creditors would have no lien superior to the lien of the bonds. The mortgage was recorded, and the $1,000,000 of bonds were issued before the claims accrued. It results from these views [677] that the entire purchase money now in court, arising from the foreclosure sale, after paying the costs and the receiver's indebtedness, should be paid out upon the bonds and coupons secured by the mortgage, in preference to the payment of the claims of the appellees, such net amount being less than the amount of money advanced by Drexel, Morgan & Co. on the pledge of the bonds and reimbursed to them by Porter.

It has been contended for the appellees, that the appeals by Porter now under consideration are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final decree; that the errors which Porter now insists on were errors committed in entering the decree of February 16, 1886; and that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

It is a sufficient answer to these contentions to say that the decree of February 16, 1886, though a final decree of foreclosure and sale as respected the interest of the mortgagor, and in some other respects, was not a final decree in respect of the matters involved in these appeals. The sixth clause of that decree merely provided that all unpaid, valid claims against the com-

pany for right of way, lands, labor, rolling stock and material used in the construction and betterment of the railway were prior, superior and paramount to the lien of the mortgages and the bonds; but determined nothing as to who were the holders of such claims, or as to what were their amounts. It designated no persons who could be appellees in any appeal by Porter in respect of such claims, and it provided for a reference to ascertain who were the several claimants under the sixth paragraph of the decree, and what were the amounts due to them severally. The first and only decree from which Porter could appeal, in respect of the claims of these appellees, was the decree of October 9, 1886. The sale made under the decree of February 16, 1886, was not made subject to [678] any claim of any of these appellees. An amendment of that decree, made on the 2d of March, 1886, prior to the sale, provided "that the sale of the property hereinbefore ordered shall pass to the purchaser a title thereto free and discharged of all liens and claims, including the two classes of claims mentioned in the sixth paragraph of said decree." The question of the existence and priority of those claims is, therefore, one open for consideration on these appeals.

The various questions above stated as being raised by the appellees, which are not particularly adverted to, have been fully considered, and it is not regarded as necessary to further remark upon them, or upon the special points made in regard to the particular claims of the appelles, as the views on which we have rested the case seem to us to be controlling on those questions and points.

The decree of the Circuit Court, made October 9, 1886, is reversed, in so far as it decrees that the claims of the five appellees are prior, superior, and paramount to the lien of the mortgages or deeds of trust mentioned in the decree of February 16, 1886, and of the bonds secured thereby; and in so far as it provides for the payment to the appellees, out of the fund in the registry of the court, of the several sums of money specified in the said decree of the 9th of October, 1886; and the case is remanded to the circuit court, with a direction to take such further proceedings as shall not be inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

END OF VOL. 120.

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558–561	Metropolitan R. R. Co. v. Moore.	1022
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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1886.

Vol. 121.

ment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court, that the rule entered herein against him be discharged, and the prayer of the petition be denied."

[3] The Attorney-General of the United States and the District Attorney for the Eastern District of Virginia appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ.

Upon principles which may be considered to be well settled in this court it can have no right to issue this writ as a means of reviewing the judgment of the circuit court simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds: the first of these relates to matters connected with the impaneling of the grand jury and its competency to find the indictment under which the petitioner was convicted; the second refers to a change made in the indictment, after it was found, by striking out some words in it, and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first.

Section 5209 of the Revised Statutes of the United States, under which this indictment is found, reads as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

[4] Section 5211 requires every banking association organized under this Act of Congress to "make to the Comptroller of the Currency not less than five reports during each year, verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors."

The indictment in this case, which contains but a single count, and is very long, sets out one of these reports, made on the 17th day of March, 1885, by the petitioner, as cashier, and Charles E. Jenkins, John B. Whitehead, and Orlando Windsor, as directors, of the Exchange National Bank of Norfolk, a national banking association. The indictment also points out numerous false statements in this report, which, it is alleged in the early part of it, were made "with intent to injure and defraud the said association and other companies, bodies politic and corporate, and individual persons to the jurors aforesaid unknown, and with the intent then and there to deceive any agent appointed by the Comptroller of the Currency to examine the affairs of said association." Following this allegation come the specifications of the particulars in which the report is false, and the concluding part charges that the defendants, "and each of them, did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth; and that they, and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association, and to injure, deceive, and defraud the United States and said association and the depositors thereof, and other banks and national banking associations, and divers other persons and associations to the jurors aforesaid unknown, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The defendants having been permitted to withdraw the pleas of not guilty which they had entered, were then allowed to demur to the indictment, and, as it is important to be accurate in stating what was done about this demurrer, the transcript of the record on that subject is here inserted: [5]

"United States *vs.* Geo. M. Bain, Jr., John B. Whitehead, Orlando Windsor and C. E. Jenkins.	Indictment for making false entries, etc.

"This day came the parties, by their attorneys, pursuant to the adjournment order entered herein on the 18th day of November, 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered, which being granted, they submitted their demurrer to the indictment, which, after argument, was sustained; and thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words '*the Comptroller of the Currency and*' therein contained.

"Thereupon, on motion of John B. Whitehead and C. E. Jenkins, by their counsel, for a severance of trial, it was ordered by the court that the case be so severed that George M. Bain, Jr., cashier and director, be tried separately from John B. Whitehead, Orlando Windsor and C. E. Jenkins, directors.

"Thereupon the trial of George M. Bain, Jr., was taken up, and the said defendant, George M. Bain, Jr., entered his plea of not guilty."

This was done December 13, 1886, thirteen months after the presentment of the indictment by the grand jury, and probably long after it had been discharged.

A verdict of guilty was found against Bain, a motion for a new trial was made, and then a

motion in arrest of judgment, both of which were overruled. The opinion of the circuit judge on the question which we are about to consider, delivered in overruling that motion, is found in the record.

The proposition, that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the fifth [6] of those articles of amendment, adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one.

We are thus not left to the requirements of the common law in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that "no person shall be held to answer" for such a crime, "unless on a presentment or indictment of a grand jury."

But even at common law it is beyond question that in the English courts indictments could not be amended. The authorities upon this subject are numerous and unambiguous. In the great case of *Rex* v. *Wilkes*, 4 Burr. 2527, tried in 1770, which attracted an immense deal of public attention, Wilkes, after being convicted by a jury of having printed and caused to be published a seditious and scandalous libel, was brought up before the court of King's Bench on a motion to set aside the verdict, on the ground that an amendment had been made in the language of the information on which he was tried. In the course of an opinion delivered by *Lord* Mansfield overruling the motion, he remarks, on this subject (page 2569), that "There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner as any plaintiff may do."

Mr. Justice Yates, on the same occasion, said that indictments, being upon oath, cannot be amended.

Hawkins, in his Pleas of the Crown, Book 2, chap. 25, sec. 97, says:

"I take it to be settled that no criminal [7] prosecution is within the benefit of any of the statutes of amendments; from whence it follows that no amendment can be admitted in any such prosecution but such only as is allowed by the common law. And agreeably hereto I find it laid down as a principle in some books that the body of an indictment removed into the King's Bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because, by the city charter, a tenor of the record only can be removed from thence."

He further says, in section 98:

"It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party."

This language is repeated in Starkie's Criminal Pleading, p. 287. There are, however, several cases in which it has been decided that the caption of an indictment may be amended, and we therefore give here the language of Starkie, p. 258, as describing what is meant by the phrase "caption of an indictment."

"Where an inferior court," he says, "in obedience to a writ of *certiorari* from the King's Bench, transmits the indictment to the Crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the Crown office. The history of the proceedings, as copied or extracted from the schedule, is called the caption, and is entered of record immediately before the indictment."

It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury.

Wharton, in his work on Criminal Pleading and Practice, section 90, says: "No inconsider- [8] able portion of the difficulties in the way of the criminal pleader at common law have been removed in England by the 7th Geo. 4, chap. 64, §§ 20, 21; 11 & 12 Vict. chap. 46, and 14 & 15 Vict. chap. 100, and in most of the States of American Union, by statutes, containing similar provisions." He also cites cases in the English courts, where amendments have been made under those statutes; but they can have no force as authority in this country, even if they permitted such amendments as the one under consideration.

No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. On the contrary, in the case of *Commonwealth* v. *Child*, 13 Pick. 200, *Chief Justice* Shaw says: "It is a well settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict; and that an indictment bad on demurrer must be held insufficient upon a motion in arrest of judgment."

In the case of the *Commonwealth* v. *Mahar*, 16 Pick. 120, the court, having held upon the arraignment of the defendant that the indictment was defective, the Attorney-General moved to amend it, and the prisoner's counsel

consented that the name of William Hayden, as the owner of the house in which the offense had been committed, should be inserted, not intending, however, to admit that Hayden was in fact the owner. "But the court were of opinion that this was a case in which an amendment could not be allowed, even with the consent of the prisoner."

In the case of *Commonwealth* v. *Drew*, 8 Cush. 279, *Chief Justice* Shaw said: "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects of the first."

In the case of the *State* v. *Saxton*, 3 Hawks, [9] Law & Equity (N. C.), 184, the Supreme Court of that State said: "It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year; but it is unnecessary to prove, in any case, the precise day and year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and cannot therefore be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed."

It will be perceived that the amendment in that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material.

The same proposition was held in the New York Court of General Sessions, in the case of *People* v. *Campbell*, 4 Parker, Crim. Rep. 387, where it was laid down that the averments in an indictment could not be changed, even by consent of the defendant.

The learned judge who presided in the circuit court, at the time the change was made in this indictment, says that the court allowed the words "Comptroller of the Currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found [10] by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

The importance of the part played by the grand jury in England cannot be better illustrated than by the language of *Justice* Field in a charge to a grand jury reported in 2 Sawy. C. C. 667:

"The institution of the grand jury," he says, "is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country that it was at first a body which not only accused, but [11] which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government, or be prompted by partisan pas-

sion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

The case of *Hurtado* v. *People of California*, 110 U. S. 516 [28:232], was a writ of error to the Supreme Court of that State by a party who had been convicted of the crime of murder in the state court upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the Fourteenth Amendment to the Constitution of the United States, that no State shall "deprive any person of life, liberty, or property, without due process of law," required an indictment as necessary to due proces[12] of law. This court held otherwise, and that it was within the power of the States to provide punishment of all manner of crimes without indictment by a grand jury. The nature and value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with references to Coke, *Magna Charta*, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by *Mr. Justice* Harlan in a dissenting opinion.

It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of *Chief Justice* Shaw (in the case of *Jones* v. *Robbins*, 8 Gray, 329), "individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury; and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions."

It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to [13] try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S. 418 [29:89], and the later one of *Mackin* v. *U. S.* 117 U. S. 348 [29:909], establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision.

It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be "held to answer," he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence [14] or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 85 U. S. 18 Wall. 163 [21:872]; *Ex parte Parks*, 93 U. S. 18 [23:787]; *Ex parte Wilson* [*supra*], and other cases.

These views dispense with the necessity of examining into the questions argued before us concerning the formation of the grand jury and its removal from place to place within the district.

We are of opinion that the petitioner is entitled to the writ of habeas corpus, *and it is accordingly granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALVA WORDEN ET AL., *Appts.*, [14]
v.
ANSON SEARLS.

(See S. C. Reporter's ed. 14-17.)

Patents—infringement—reissue No. 5400, void—fines for violation of preliminary information

for benefit of complainant—jurisdiction of this court to review orders imposing—section 725 R. S. —discretion.

1. The claim of original letters patent No. 70627, for an improvement in whip sockets, is not infringed by the device covered by letters patent No. 70075.

2. The reissue of said letters patent No. 70627 is void, its claims being an unlawful expansion of the original, and designed to cover the device claimed in said letters patent No. 70075.

3. Section 725 R. S. does not make the action of the court below, in imposing fines for the violation of a preliminary injunction, such a matter of discretion as to prevent this court from reviewing its orders imposing such fines.

4. Fines nominally imposed as a punishment for a contempt, in the violation of a preliminary injunction, but in fact imposed for the benefit of the complainant and measured by the damages he had sustained and expenses he had incurred, cannot be sustained.

[No. 118.]

Argued March 16, 17. Decided March 28, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. Opinion below, 11 Fed. Rep. 501. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Charles J. Hunt** and *Thomas S. Sprague*, for appellants:

A reissue in which the specification contains new matter, or the claims are enlarged, is void.

Gill v. *Wells*, 89 U. S. 22 Wall, 1 (22:699); *Burr* v. *Duryee*, 68 U. S. 1 Wall. 531 (17:650); *Case* v. *Brown*, 69 U. S. 2 Wall. 320 (17:817); *McMurray* v. *Mallory*, 111 U. S. 97 (28:365); *Torrent & Arms L. Co.* v. *Rodgers*, 112 U. S. 659 (28:842); *Wood Paper Patent*, 90 U. S. 23 Wall. 566 (23:31); *Powder Co.* v. *Powder Works*, 98 U. S. 126 (25:77); *Ball* v. *Langles*, 102 U. S. 128 (26:104); *James* v. *Campbell*, 104 U. S. 356 (26:786); *Heald* v. *Rice*, 104 U. S. 737 (26:910).

A reissue with expanded claims is lost when the application for the reissue is made, as in this case, more than five years after the date of the original letters patent.

Miller v. *Brass Co.* 104 U. S. 350 (26:783); *Bantz* v. *Frantz*, 105 U. S. 160 (26:1013); *James* v. *Campbell*, *supra*; *Mahn* v. *Harwood*, 112 U. S. 354 (28:665); *Clements* v. *Odorless Excavating etc. Co.* 109 U. S. 641 (27:1060).

If the proceedings to punish the defendants, appellants, had been in the name of the United States, to fine the defendants for the contempt, they would have had to pay the fine, and the case would not have been appealable; but being orders in the case they must come up with the case, on appeal after the final decree.

Hayes v. *Fischer*, 102 U. S. 121 (26:95).

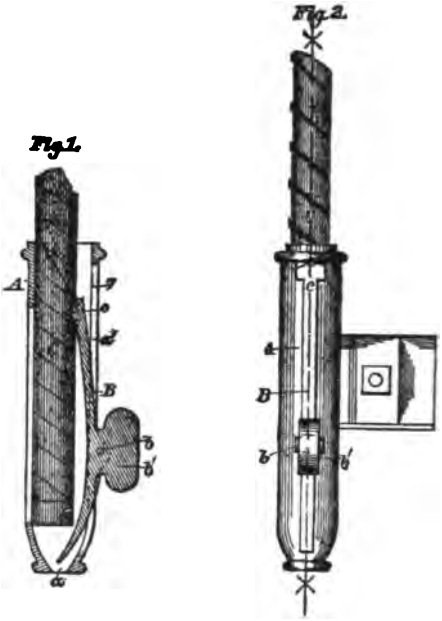
Mr. **J. P. Fitch**, for appellee.

[15] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Michigan, by Anson Searls against Alva Worden and John S. Worden, for the alleged infringement of reissued letters patent No. 5400, granted to Erastus W. Scott and Anson Searls, May 6, 1873, for an "improvement in whip sockets," on an application for reissue filed January 16, 1873, the original letters patent, No. 70627, having been granted to E. W. Scott, November 5, 1867, on an application filed August 23, 1867. One of the defenses set up in the answer is that the reissued letters patent are not for the same invention as that described and claimed in the original letters patent, and contain new matter not contained or claimed in the original.

The specification and claim and drawings of the original patent are as follows:

"Be it known that I, E. W. Scott, of Wauregan, in the County of Windham and State of Connecticut, have invented a new and useful improvement in whip sockets; and I do hereby declare that the following is a full, clear, [16]



and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon.

This invention relates to a new and improved fastening applied to a whip socket in such a manner as to hold the whip firmly therein, prevent it from moving or shaking laterally, and at the same time not interfere in the least with its ready insertion in the socket and its withdrawal therefrom. In the accompanying sheet of drawings, Figure 1 is a vertical central section of my invention taken in the line *x x*, Fig. 2; Fig. 2, an external view of the same. Similar letters of reference indicate like parts.

The whip socket A may be made of cast iron, hard rubber, or any of the materials now used for such purpose. Cast iron, however, would probably be the preferable material. The socket may have an opening, *a*, at its bottom, to admit of the escape of water, dust, etc., and in the side of the socket there is an opening or slot, *d*, extending nearly its whole height or length. In this slot there is secured a fulcrum pin, *b*, a lever, B, which is slightly curved, as shown clearly in Fig. 1, the fulcrum pin being [17] rather below the center of the lever, and the latter provided with a projection, *b'*, near its fulcrum pin, which renders the lower part of the lever heavier than its upper part, with its center of gravity at one side of its fulcrum pin,

so that the upper end *c* of the lever will have a tendency to move out from within the socket, as indicated by the arrow 1. The lower end of the lever B is so curved as to extend within the lower part of the socket at all times, and, when the socket is empty, no whip in it, the upper end *c* of the lever will be in the slot *a*, if not out from it, so as not to form any obstruction to the butt of the whip C as it is shoved into the socket; but when the butt of the whip reaches the lower part of the socket, it strikes the lower curved end of the lever B, and throws the upper end *c* of the same in contact with the butt (see Fig. 1), the weight of the whip keeping the upper end *c* of the lever in contact with the butt, and holding the whip steady in the socket. In withdrawing the whip from the socket the upper end *c* of the lever moves freely outward from the butt as soon as the lower end of the lever is relieved of the weight of the whip. This simple device has been practically tested, and it operates well. There are no springs required, and no parts used which are liable to get out of repair, or become deranged so as to be inoperative.

Having thus described my invention, I claim as new and desire to secure by letters patent:

A whip socket provided with a fastening composed of a lever, arranged or applied substantially as shown and described, to hold the whip steady or firm in its socket, as set forth."

The specification and claims of the reissue are as follows, the drawings of the reissue being substantially the same as those of the original:

"Be it known that I, Erastus W. Scott, of Wauregan, in the County of Windham, and State of Connecticut, have invented certain new and useful improvements in whip sockets, which are simple in construction, efficient in operation, and durable in use; and the improvements consist in the use of a lever with the stationery or upright portion of the socket, and [18] in the construction and combination of the parts, as hereinafter more fully described; and I do hereby declare that the following is a full, clear and exact description thereof, which will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawing, with letters of reference marked thereon, forming a part of this specification, in which Figure 1 is a central vertical section, taken on line *a a* of Fig. 2, of a socket embodying my invention, and Fig. 2 is an elevation of the same.

A represents a tubular socket provided with a suitable flange at the top, and the interior of the bottom part of the socket gradually decreases in size, being constructed in a partially cone form, as shown. The socket A is provided with a suitable fastener for the purpose of securing the same to the carriage. The socket A is provided with a slot *d*, extending a sufficient distance to admit the lever B, which is suitably pivoted to the part A in such a manner as to move on its pivot, for a purpose presently described. This lever B extends upward and downward from its pivot and inclines or curves inward from the pivot to each end, so that each end of the lever, or a point near each end of the lever, forms a bearing point for the whip C when inserted in the socket, while the opposite side of the whip stock C bears upon the socket A, as shown in Fig. 1. The lever B is pivoted to the socket A at a point inside of its center of gravity, so that when the whip is removed the upper part of the lever automatically moves outward, as indicated by the arrow, leaving the top of the socket open for the reception of the whip. The same outward movement of the top of the lever would be caused by the butt of the whip when withdrawn from the socket.

The operation is as follows: The whip C being removed from the socket, the upper part of the lever falls outward, as above described, leaving the top of the socket open. The whip, then being again inserted in the socket, first comes in contact with the lower inclined or curved part *e* of the lever B, and, as the whip passes down, the lower part *e* of the lever is pressed outward, which action brings the upper part *c* inward until it is brought to bear [19] firmly against the whip C, and thus holding the whip securely between the lever and the opposite side of the socket A. By this means a whip of any ordinary size may be firmly and securely held in position.

Having thus fully described the invention, what is claimed and desired to be secured by letters patent is:

1. The combination of a stationary part of a whip socket and a lever, the lever being hinged or pivoted so that the lever bears against the whip at or near the ends of the lever, to hold the whip in position for the purpose set forth.

2. The lever B, curved or inclined inward from its point of pivot, and used in connection with the stationary part A, substantially as and for the purpose specified.

3. The lever B, pivoted at a point inside of its center of gravity, so that when left free the upper part of the lever will fall outward, substantially as and for the purpose set forth."

The bill was filed in July, 1880. On the 19th of July, 1880, a preliminary injunction was issued and served. In the answer, filed in September, 1880, it was set up that the defendants were making and selling whip sockets constructed under and in accordance with the specification and drawings of letters patent No. 70075, owned by them, granted to Henry M. Curtis and Alva Worden, October 22, 1867, for an "improvement in self-adjusting whip-holder." After replication and proofs, the case was heard, and, on the 24th of February, 1882, an interlocutory decree was made, declaring that the reissue was valid and had been infringed, and awarding a perpetual injunction and a reference as to profits and damages. On the 6th of March, 1882, an order was made, entitled in the cause, imposing a fine of $250 on the defendants, to be paid by them to the complainant, for a violation of the preliminary injunction. This order was opened on the 29th of April, 1882, for a further hearing, and on the 9th of October, 1882, an order was made entitled in the cause, imposing a fine of $1,182 on the defendants for such violation, to be paid to the clerk of the court, and by him to be paid over to the plaintiff for damages and costs, the defendants to stand committed until the same should be paid. 13 Fed. Rep. 716 An appeal by the defendants from this order was allowed, and an order was made that all [20] proceedings to enforce the collection of the fine be stayed until the further order of the circuit

court, on the giving of a specified bond, which bond was given. On the report of a master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover against the defendants $24,573.91 as profits and $386.40 costs. From this decree the defendants have appealed.

The specification and claim and drawings of the Curtis and Worden patent are as follows:

"Be it known that we, Henry M. Curtis and Alva Worden, of Ypsilanti, in the County of Washtenaw and State of Michigan, have invented a new and useful machine for holding carriage whips, which we denominate 'Curtis and Worden's Self-Adjusting Whip-Holder;' and we do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of this specification, in which Figure 1 is a sectional view. Fig. 2 is a perspective view of the whip holder complete, and ready for use, without the whip. Fig. 3 is a perspective view of the whip holder complete, closed upon the whip handle.

The whip holder is formed of metal, cast or pressed to the desired shape, and is composed of two pieces only, Fig. 1 representing one sectional half and the other sectional half being formed exactly like it, with the exception of the loops A A, used for the purpose of attaching the same to the carriage seat or dashboard. Each section of the whip holder is a cone shaped half cylinder, the cone being reversed near the bottom of the whip holder, forming each half section bilged or barrel shaped, and connected together at the bilge by an ear shaped hinge, B, on each half section, the ears being connected together by a rivet, forming the hinge. The edge or face of each cylinder section is formed by an obtuse angle at the hinge, so constructed that when the two sections are connected together at the hinge B the whip holder above the joints or hinge is open, and

No. 2.

No. 3.

No. 1.

shut or closed below from its own weight as in [21] Fig 2. When the whip is inserted the holder opens at the bottom, below the joints or hinge, by the pressure of the whip upon the convex conical sides of the holder, and closes at the top of the holder around the whip, thus clasping the whip firmly at the top and bottom of the holder, and holding it steady and firmly in its place. The whip may be easily drawn out by a perpendicular motion, the holder opening at the top and closing at the bottom, so that the whip is readily detached.

What we claim as our invention, and desire to secure by letters patent is:

The shape and construction of the whip holder, and the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the same time, the holder being formed of metal, cast or pressed into proper shape, substantially as and for the purpose set forth and described."

The circuit court, in deciding the case (11 Fed. Rep. 501, and 21 Off. Gaz. 1955), said: "A glance at the drawings and specifications will show that the patents" (the original and the reissue) "are for the same invention; viz., a whip [22] socket arranged with a lever swung upon a central pivot, and operating so as to admit the whip without difficulty, and hold it firmly in position, and at the same time not preventing its easy withdrawal. So far from there being any attempt in the reissue to expand the claim of the original patent, and embrace devices which might have come into use since the original patent was granted, its purpose was evidently only to make that definite which had before been obscure, and to set forth in more precise and accurate terms the details of the invention. I regard the reissue in this case as a perfectly legitimate use of the privileges conferred by the Act upon that subject."

As we are of opinion that the defendants' whip socket did not infringe the claim of the original Scott patent, and that the reissue was, in its claims, an unlawful expansion of the original, designed to cover the defendants' structure, it is not necessary to consider any other matter of defense.

The application for the original Scott patent and the application for the Curtis and Worden patent were before the Patent Office at the same time. The application for the Scott patent was filed August 23, 1867. It was issued November 5, 1867. The Curtis and Worden patent was issued October 22, 1867. The date it was applied for is not shown. Although the date of the Scott invention may be earlier than that of the Curtis and Worden invention, each patent was evidently granted for the specific apparatus covered by its claim. There was no conflict or interference between them, and no interference between their claims was declared. Their claims, as granted, placed side by side, were as follows:

Curtis and Worden.	*Scott.*
"The shape and construction of the whip holder, and the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the	"A whip socket provided with a fastening composed of a lever, arranged or applied substantially as shown and described, to hold the whip steady or firm in its socket, as set forth." [23

same time, the holder being formed of metal, cast or pressed into proper shape, substantially as and for the purpose set forth and described."

The specification of the original Scott patent stated the invention to be "a new and improved fastening applied to a whip socket." The socket is described as a complete whip socket, complete in itself without the fastening, and having in its side an opening or slot, extending nearly its whole height or length, in which slot is inserted a lever. The claim is for "a whip socket," that is, a complete whip socket, "provided with a fastening composed of a lever, arranged or applied substantially as shown and described," that is, inserted in the slot in the socket. The defendants' structure consists only of two sectional halves, each like the other, and each a cone shaped half cylinder, and bilged, with an ear shaped hinge on each half section, a rivet connecting the two forming the hinge. This arrangement does not infringe the claim of the Scott original patent. It is not a complete whip socket provided with a lever arranged or applied substantially as in Scott's apparatus, that is, pivoted in a slot in the socket. It is true that the result in each arrangement is to hold the whip steady or firm in a socket, but the mechanisms are different.

That the specification and claims of the reissue were designedly so worded as to cover a structure which the claim of the original patent would not cover is manifest. Thus, the original specification says that the invention relates to a "fastening applied to a whip socket in such a manner as to hold the whip firmly therein." This means that you have a complete whip socket and you apply a fastening to it, which fastening is so arranged as to hold the whip [24] firmly in the socket in which the whip is placed. The description in the original specification describes a complete whip socket with an opening or slot in the side of the socket, extending nearly its whole height or length, with a fastening lever secured in the slot by a fulcrum pin rather below the center of the lever, the lever having near the fulcrum pin a weighting projection, *b'*. The reissued specification says that the "improvements consist in the use of a lever with the stationary or upright portion of the socket." The socket is referred to as if it had a part which is not stationary. The first and second claims carry out the same idea, by making the "stationary part" of the socket an element in each of those claims. The defendants' holder is not a complete holder with its stationary part alone, and without its movable part, while the plaintiff's is. Moreover, all mention of the weighting projection *b'* is omitted in the reissued specification. The design manifest in it is to cover such a structure as that of the defendants, and the evidence tends to the conclusion that that was the object of obtaining the reissue. The description and claim of the original specification were entirely adequate to cover the Scott device. No inadvertence, accident or mistake is shown.

The reissue is sought to be sustained, by the counsel for the appellee, on the ground that the invention described in each of the two specifications is "the combination with a whip socket of a lever which operates to hold the whip firmly therein and prevent it from moving or shaking laterally." Even if such a claim would be valid, it is not the claim made in the original patent. And even if it were the claim made by that patent, the reissue purports to claim, not a combination of a whip socket and a lever, but the combination of the stationary part of a whip socket and a lever.

We are, therefore, of opinion that this reissued patent is invalid.

The appellants ask for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this court cannot review the action of the circuit court in punishing a contempt committed by a violation of such injunction, (1) because the proceedings were criminal in [25] their character; (2) because the action of the circuit court is, by section 725 of the Revised Statutes, expressly made discretionary

All the proceedings which resulted in the imposition of the fines were taken and entitled in the suit. The order of March 6, 1882, is entitled in the suit, and adjudges "that the said defendants are guilty of the contempt charged against them for a violation of the injunction issued in this cause, and that said defendants, Alva Worden and John S. Worden, pay to said complainant, Anson Searls, the sum of two hundred and fifty dollars, as a fine for said violation, together with costs of said proceedings, to be taxed, and that said defendants stand committed until the same is paid." The order of October 9, 1882, is entitled in the suit, and orders "that said defendants, Alva Worden and John S. Worden, do pay a fine of eleven hundred and eighty-two dollars to the clerk of this court, to be paid over by said clerk to complainant for damages and costs, and that said defendants do stand committed until the same is paid." It appears that the $1,182 was made up of $682, the profits of the defendants on 62 gross of whip sockets sold, and $500, expenses of the plaintiff in the contempt proceedings.

We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that of *Ex parte Kearney*, 20 U. S. 7 Wheat. 39 [5:391]. That was an application to this court for a writ of *habeas corpus* where a person was imprisoned by the Circuit Court of the District of Columbia, for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied, on the ground that this court had no appellate jurisdiction in a criminal case.

So, the fact in the present case (that though [26] the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses) distinguishes the case from that of *New Orleans* v. *Steamship Co.* 87 U. S. 20 Wall. 387 [22:354]. There, in a suit in equity, a Circuit Court of the United States

imposed a fine on a defendant for obtaining, during the pendency of the suit, from a state court, an injunction against the plaintiffs, as to a matter within the scope of the litigation. On appeal from the final decree, it was sought to review the order imposing the fine, but this court said that the fine was beyond its jurisdiction, and added: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

Section 725 of the Revised Statutes provides that the courts of the United States shall have power to punish, "by fine or imprisonment, at the discretion of the court, contempts of their authority," provided that such power "shall not be construed to extend to any cases except * * * the disobedience by * * * any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." We do not think this provision makes the action of the circuit court in this case such a matter of discretion that the orders imposing the fines are not reviewable. They were, to all intents and purposes, orders in the course of the cause, based on the questions involved as to the legal rights of the parties.

Although the court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was unwarranted as a matter of law, and the orders imposing the fines must, so far as they have not been executed, be held, under the special circumstances of this case, to be reviewable by this court, under the appeal from the final decree. The result is that they cannot be upheld.

[27] *The final decree of the Circuit Court, and the orders of March 6, 1882, and October 9, 1882, are reversed, and the case is remanded to that court, with a direction to dismiss the bill, with costs, but without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders, by a proper proceeding.*

The preliminary injunction was in force until set aside. See *Re Chiles*, 89 U. S. 22 Wall. 157 [22: 819].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[67] MERCHANTS MUTUAL INSURANCE COMPANY, *Appt.*,
v.
GEORGE D. ALLEN.

MERCHANTS MUTUAL INSURANCE COMPANY, *Appt.*,
v.
SILAS WEEKS.

(See S. C. Reporter's ed. 67-78.)

Marine insurance—ship to navigate Atlantic Ocean—Gulf of Mexico included—seaworthiness—practice on appeal.

1. An insurance on a New Orleans ship "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea," certain ports excepted, the policy being issued when the ship was at sea, bound on a voyage from Liverpool to New Orleans, is held to cover the ship while in the Gulf of Mexico.

2. Where the court below has found the ultimate facts, the appellant is not entitled to have incorporated in the bill of exceptions mere incidental facts which only amount to evidence bearing on the ultimate facts of the case, as this court, since the Act of 1875, cannot retry the case on all the evidence.

3. This court, while declining to decide whether, since the Act of February 16, 1875, new testimony can, under any circumstances, be taken after an appeal in admiralty, or amendments to the pleadings allowed, denies a motion for that purpose, the depositions filed as to over insurance of the cargo failing to make out such a case as would tend to establish a fraudulent loss of the vessel.

[Nos. 77, 78.]

Argued March 17, 18, 1887. Decided March 28, 1887.

APPEALS from the Circuit Court of the United States for the Eastern District of Louisiana. Opinion below, 16 Fed. Rep. 916. *Affirmed.*

The history and facts of the cases appear in the opinion of the court.

Messrs. **Joseph P. Hornor, Charles W. Hornor** and **Francis W. Baker**, for appellant:

A mere reference to the map will show that no part of the Gulf of Mexico is between Europe and America. The most southern point of Europe is in about 36° north latitude; the most northern of the Gulf of Mexico is in about 30°.

The moment therefore The Orient entered the Gulf of Mexico, the policy sued on was forfeited; the waiver of this forfeiture must of course be voluntary and with knowledge.

L. R. 2 Eng. & I. Appeals, 43, *Darnley* v. *R. R.*, quoted and approved; *Bennecke* v. *Ins. Co.* 105 U. S. 355 (26: 990); *New Haven Steam Saw Mill Co.* v. *Security Ins. Co.* 7 Fed. Rep. 847; *Uhde* v. *Walters*, 3 Camp. 16; *Robertson* v. *Clarke*, 1 Bing. 445.

As regards this question of deviation, all courts have ever construed such clauses strictly, and in favor of the insurers as against the assured, for the reason that the insurer has a right to specify what risks he takes, and that the assured has no right to attempt to impose upon him a different one, no matter whether the risk be really either increased or diminished.

Pearson v. *Commercial Union Assur. Co.* L. R. 8 C. P. 548; *Stevens* v. *Commercial Mut. Ins. Co.* 26 N. Y. 397; *Burgess* v. *Equitable Marine Ins. Co.* 126 Mass. 70.

All the American authorities concur that in time policies, as well as in voyage policies, the vessel must be kept by the insured in a seaworthy condition when it is in their power to make her so.

Hoxie v. *Pacific Mut. Ins. Co.* 7 Allen, 224; *Hazard* v. *New England Marine Ins. Co.* 33 U. S. 8 Pet. 581 (8: 1052); *Hoxie* v. *Home Ins. Co.* 32 Conn. 41; *Donnally* v. *Merchants Ins. Co.* 28 La. Ann. 940; *Bradlie* v. *Maryland Ins. Co.* 37 U. S. 12 Pet. 379, 403 (9: 1124, 1134), ; *Dupeyre* v. *Western Ins. Co.* 2 Rob. (La.) 457.

Mr. **J. R. Beckwith**, for George D. Allen, appellee.

Messrs. **Richard H. Browne**, *Charles R. Singleton* and *O. B. Sansum*, for Silas Weeks, appellee. [68]

Mr. Chief Justice **Waite** delivered the opinion of the court:

These appeals present the same questions, and may be considered together. The suits were brought on two policies of insurance, one insuring the interest of George D. Allen and the other that of Silas Weeks, in the ship Orient, from April 15, 1882, to April 15, 1883, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." At the time the policy was issued the ship was on the Atlantic Ocean, bound on a voyage from Liverpool, England, to New Orleans, Louisiana, laden with a general cargo. The Company knew of this when it executed and delivered the policy, and insured the vessel, lost or not lost. New Orleans was the home port of the ship, and there the home office of the Company was situated. All parties knew that the ship was sailing to and from that port. The policy also contained this clause:

"Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands between July 15 and October 15; nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe, north of Antwerp, between November 1 and March 1."

This warranty is part of the printed portion of the policy, but the portion describing what the insurance covered is in writing.

The ship arrived safely in New Orleans on her voyage from Liverpool, and, after unloading, proceeded to Ship Island, where she took on a cargo of timber for Liverpool, and while on her voyage to that port she was struck by a cyclone about one hundred miles out in the Gulf of Mexico and wrecked.

The first question presented by the appellants is whether the insurance covered the ship while in the Gulf of Mexico. This depends on the meaning of the language of the policy, construed in the light of the circumstances which [69] surrounded the parties at the time of its execution. The evident purpose was to insure a New Orleans ship engaged in the Atlantic trade between Europe and America for a year, both at sea and in port. At the time the insurance was effected she was on a voyage between Liverpool and New Orleans, and all parties knew that the business in which she was engaged took her in and out of the last named port. That was her home port, and that was where the Insurance Company had its own office. That the navigation of the Gulf was contemplated during the life of the policy is shown by the fact that certain of its ports were excluded from the risks the Company assumed. This fairly implies that all others might be used, and as the ship was to be insured all the time during the year if she was employed in navigating the Atlantic between Europe and America, whether at sea or in port, it is evident the parties intended to cover her by the policy while sailing from port to port in that general trade. New Orleans is a leading American port in that trade. To get to and from it ships must navigate the Gulf of Mexico.

No one can doubt that the policy would cover at all times during the year a voyage to all the ports of Great Britain except those northeast of the Thames, and to all ports on the Continent of Europe north of the Mediterranean as far as Antwerp, and elsewhere on the northern coast between March and November. Yet in doing so the ship would have to sail in waters other than those of the Atlantic Ocean. Taking the whole policy together, we cannot doubt it was the intention of the Company to cover the ship while engaged in the Atlantic trade between ports in Europe and America other than those specially warranted against. Whether this would include ports east of Gibraltar it is unnecessary now to decide.

It is true that if there is a conflict between the written words of a policy and those that are printed, the writing will prevail, but, if possible, the writing and the print are to be construed so that both can stand. Here we think it clear that the written clauses, when construed in connection with those that are in print, have [70] the effect of describing the trade in which the vessel was to be employed rather than confining her navigation exclusively to the waters of the Atlantic Ocean. If it were otherwise, while the ship would be insured in port and on the ocean, she would be uninsured while performing that part of her voyage from the ocean to the port and from the port to the ocean. Such a condition of things will never be presumed in the absence of the most convincing proof to the contrary.

We have no hesitation in deciding that the insurance covered the ship at the time of her loss.

This disposes of all the questions which arise on the finding of facts.

The principal controversy in the case was as to the seaworthiness of the vessel. The court has found as a fact that she was seaworthy when she left Liverpool on the voyage during which the policies were issued, and also when she sailed from Ship Island on the voyage in which she was lost. To these questions the testimony was largely directed, and it was to some extent conflicting. At the trial the court was asked to find as follows:

"The ship Orient, prior to her departure on her last voyage, on 1st August, 1882, was run aground on Ship Island Bar, where she remained for three days and two nights in bad and squally weather, 'rolling and pounding heavily,' and while on the bar, and after coming off, drew and continued to draw four inches of water per hour until the final wreck, and that when she was thrown upon her beam ends by the force of the storm she was prevented from righting herself by the large amount of water which had leaked into her hold; and hence the cutting away of her masts was of no avail, and the said leak was the direct cause of her loss, and she was unseaworthy when she started on her last voyage;" and "that when the ship Orient was hauled off the bar at Ship Island where she had been aground as aforesaid, she leaked four inches of water per hour, and said leak did not diminish from said time, 3d August, 1882, until 5th September, 1882, when she went to sea on her last voyage, nor until she was finally [71] wrecked, and said leak could have been discovered only by unloading said vessel and taking her to New Orleans and putting her in the dry dock, which was not done; and no other precaution was taken to ascertain whether said ves

sel was injured by having been aground, or to ascertain the leak or leaks, save by a cursory examination of her bottom by a diver, without taking her out of the water;" and "that the ship Orient was knowingly sent to sea by the assured in an unseaworthy state and in an unfit condition, which necessarily increased the danger which led to her loss."

This was refused, and an exception taken. To present the question of the propriety of that refusal to this court, a bill of exceptions was prepared, containing the entire evidence in the cause, which was signed by the circuit judge with the remark that "this bill is claimed by the respondent under the authority of *The Francis Wright*, 105 U. S. 381 [26: 1100], considering which case the court does not feel at liberty to deny the bill.

In the case of *The Francis Wright*, it was ruled, p. 387 [1101], and, as we are satisfied, correctly, "that if the circuit court neglects or refuses, on request, to make a finding one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case, a refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when in truth there was none." "But," it was added, "this rule does not apply to mere incidental facts which only amount to evidence bearing on the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends."

[72] In the present case, the ultimate fact to be proved was the seaworthiness of the vessel. That ultimate fact has been found. What the Company wanted to have incorporated in the findings were the "mere incidental facts" which only amounted to evidence from which the material fact of seaworthiness or unseaworthiness was to be ascertained. This was properly refused.

Another bill of exceptions was taken, because the court made the following findings, when there was no evidence whatever to support them:

"Fourth. That when said risk was taken by the said defendant and said policy executed and delivered, the said ship Orient was on the Atlantic Ocean, bound on a voyage from the Port of Liverpool to the Port of New Orleans, in the United States, laden with a general cargo; that the defendant at the time of the execution and delivery of the policy of insurance was well aware of the fact, and had notice and knowledge that the said vessel was prosecuting said voyage, bound to the Port of New Orleans, and insured the vessel, lost or not lost.

"Fifth. That the Port of New Orleans was the home port of the said Orient and was the domicil of the underwriting Company; and that all parties knew that the ship was sailing to and from that port, and when the policy sued on was issued it was the intention of the assured and the underwriters that the said policy was to cover risks while said ship was navigating the Gulf of Mexico, except excluded ports.

"Twenty-first. That at the time said ship Orient was wrecked and destroyed she was under the protection of said policy of insurance, and was lost and wrecked by a peril of the sea insured against."

So far from there being no evidence to support these findings, the record is full of facts from which the conclusions reached by the court might be drawn. The apparent purpose of counsel in preparing the bills of exceptions was to have the whole case retried here on all the evidence. That this cannot be done, since the Act of 1875, has long been settled. *The Abbotsford*, 98 U. S. 440 [25: 168]; *The Benefactor*, 102 U. S. 214 [26: 157]; *The Adriatic*, 103 U. S. 780 [26: 605]; *The Annie Lindsley*, 104 U. S. 187 [26: 717].

The case as tried below is reported as *Baker* [73]
v. *Merchants Mut. Ins. Co.* 16 Fed. Rep. 916, where the discussion upon the effect of the evidence will be found

It only remains to consider an application which has been made in this court for leave to amend the pleadings and introduce new testimony. At an early day in the present term leave was granted the appellants on their motion to take additional testimony. Under this leave depositions have been taken which are now on file. Their purpose is to show an over insurance by the owners of the vessel on the cargo, which was also owned by them in whole or in part. The pleadings, as they stood in the court below, present no issue to which such testimony is applicable; and the appellants now ask leave to amend their answers so as to let it in.

Without determining whether, since the Act of February 16, 1875, "to facilitate the disposition of cases in the supreme court, and for other purposes, ch. 77, 18 Stat. at L. 315, new testimony can, under any circumstances, be taken after an appeal in admiralty to this court, or amendments to the pleadings allowed, and, if so, what would be the proper practice to give effect to an application for that purpose, we deny this motion. An over insurance of the cargo is not a breach of a warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount, and the new testimony, standing by itself, fails to make out such a case of over insurance on the cargo as would tend to establish a fraudulent loss of the vessel. The over insurance of the cargo, if any there was, grew out of an insurance by Barings Brothers & Co., in London, for their protection as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of the timber which composed the cargo; at least that is the fair inference from the testimony.

The decree in each of the cases is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

HENRY R. KIBBE ET AL., Doing Business as KIBBE, CHAFFEE, SHREVE & COMPANY, *Appts.*

v.

ABRAHAM G. JENNINGS ET AL.

THOMAS DOLAN, *Appt.*,

v.

ABRAHAM G. JENNINGS ET AL.

(See S. C. Reporter's ed. 122)

Design patents—infringement—practice—affirmance without opinion.

This court affirms without an opinion, the decrees of the court below, granting relief for the infringement of design patents Nos. 10388 and 10448 on comparison of the manufactured article with the designs of the patents.

[Nos. 152, 153.]

Argued March 21, 1887. Decided March 28, 1887.

APPEALS from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The bills in these cases were filed by the appellees to recover damages for the infringement of design patents Nos. 10388 and 10448, for designs for lace fabrics.

The answer denies the infringement, and sets up various defenses to both patents. In taking proofs for final hearing, the counsel for the defendants being present, the plaintiffs put in evidence the two patents and assignments to the plaintiffs and a nubia. The counsel for the defendants admitted, on the record of proofs, that the said nubia was purchased from the defendants prior to the commencement of these suits. The plaintiffs then rested their case. The defendants took no testimony. The plaintiffs introduced no witness to show the identity of design between what was found in said nubia and in the plaintiffs' patent. The defendants contend that it is not sufficient for the plaintiffs to show merely the sale of the nubia by the defendants, and to leave the court to inspect the nubia and compare it with the patents, but that the plaintiffs must produce a witness to testify to identity of design. But the court held under the authority of *Gorham Mfg. Co.* v. *White*, 81 U. S. 14 Wall. 511 (20: 781), that the true test of identity of design is sameness of appearance; in other words, sameness of effect upon the eye; that it is not necessary that the appearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer—the eyes of men generally—of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation, which men of ordinary intelligence give. The court further held that, in view of this test or identity and of the simple character of designs in the present case, and of the absence of any testimony on the part of the defendants, the absence of testimony as to identity did not make it improper for the court to compare the defendants' nubia with the patents as to design and to determine the question of identity from such comparison. On such comparison it was found that the defendants' nubia infringes both of the patents, and decrees were entered accordingly.

Mr. **John R. Bennett**, for appellants.

Mr. **Arthur v. Briesen**, for appellees.

Mr. Chief Justice **Waite** announced the affirmance of the decree below with costs and interest.

No opinion.

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[89]

UNITED STATES, *Appt.*,

v.

JOHN PAUL JONES, Admr. of GEORGE McDOUGALL, Deceased.

(See S. C. as "*U. S.* v. *McD's Admr.*," Reporter's ed. 89-102.

Claim, arising on contract with an Indian agent, for cattle furnished—the United States, not legally liable—statute—treaties—allowance of claim by Congress, not a recognition of similar claims.

1. There is no principle of law that would justify a court in treating the allowance of particular claims by Congress as a recognition by the Government of its liability, upon other demands of like character in the hands of claimants.

2. The agreement of April 5, 1852, between George McDougall and O. M. Wozencraft, an agent and commissioner of the United States to negotiate treaties with the Indians of California, for cattle delivered by the former for the use of the Indians, imposed no legal obligation upon the United States.

3. By the Act of June 30, 1834, Congress did not invest the President, the head of the department, nor any officer of the Government, with unrestricted authority in the making of treaties with the Indians, nor in regulating intercourse with them; to purchase merchandise for them, nor to make payments of money or goods to them.

[No. 1024.]

Submitted Jan. 7, 1887. Decided Mar. 28, 1887.

APPEAL from the Court of Claims. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. H. Garland**, *Atty-Gen.*, and **Heber J. May**, *Assist. Atty.*, for appellant.

Messrs. **James W. Denver** and **John Paul Jones**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court: [96]

The only question discussed by counsel is as to the liability of the United States, under the written agreement between McDougall and Wozencraft of April 5, 1852, for the cattle delivered by the former. The argument in support of the judgment below proceeds mainly, if not altogether, upon the ground that the allowance by special Acts of Congress of claims similar to the one here in suit, in connection with the failure or refusal of the proper officers to prosecute appeals from judgments in the court of claims against the United States upon contracts like the one in suit, constitute a sufficient basis, in law, for a recovery in this case.

Tracing the history of the claims referred to, we find that, by an Act approved July 29, 1854, the Secretary of the Treasury was directed, out of any money not otherwise appropriated, to pay to John C. Fremont the sum of $183,825, with interest at the rate of 10 per cent per an-

[97] [98] [99]

sum from June 1, 1853, "in full of his account for beef delivered to Commissioner Barbour for the use of the Indians of California in 1851 and 1852." 10 Stat. at L. 804.

In *Hensley's Case* the court of claims delivered an opinion, which was transmitted to Congress February 2, 1850. H. R. 35th Cong. 2d Sess. R. C. Cls. No. 189. It is immaterial to the present inquiry that that court had no power at that time to give a judgment for money against the United States; for, if it had been then invested with all the jurisdiction it now has, the Government would have succeeded. Its conclusion, upon the whole case, was that "the United States are not legally liable upon the contract claimed upon, because it was not made by their authority." At the same time the court disposed of McDougall's case—involving the identical claim presented in this case—and held, upon the grounds stated in Hensley's suit, that the United States came under no legal liability to McDougall by reason of his agreement with Wozencraft, or of anything done under it. Congress, nevertheless, made provision, by special Act of June 9, 1860, to pay Hensley's claim (12 Stat. at L. 847), but failed or refused to make an appropriation to pay McDougall.

Norris also sued upon a similar contract; but, for the reasons given in *Hensley's Case*, his claim was also rejected. Congress, however, by Joint Resolution of June 22, 1866, referred that claim back to the court of claims "for examination *and allowance*," and directed "that in fixing the amount to be paid the claimant, the rule shall be the actual value of the supplies furnished at the times and places of delivery, of which due proof shall be made by the claimant." 14 Stat. at L. 608. In obedience to that resolution, and not because of any change of opinion in the court as to the legal rights of Norris under his written agreement with Wozencraft, the court of claims gave judgment against the United States, at its December Term, 1866, for $69,900. *Norris* v. *U. S.* 2 Ct. Cl. 155.

Subsequently, in *Fremont* v. *U. S.* 2 Ct. Cl. 462, judgment was given against the United States upon one of this class of claims. That judgment did not proceed upon the ground that the claimant was entitled to recover if the case stood on the contract there in question—a contract similar to McDougall's—but upon the ground that the foregoing Acts of Congress constituted a clear and distinct legislative recognition of the obligation of the United States to pay the fair value of the subsistence furnished for the Indians, as well under the contracts with Fremont, Hensley and Norris, as under similar contracts with other parties. This decision was followed in *Fremont* v. *U. S.* 4 Ct. Cl. 252. Finally, in *Belt* v. *U. S.* 15 Ct. Cl. 106, upon a review of the circumstances connected with this class of claims, the court below adjudged that the United States were in law liable for the value of the subsistence furnished to Indians in California under the agreement there in suit, and which was similar to the one of April 5, 1852, with McDougall. In none of the cases, in which judgments were rendered against the United States, were appeals prosecuted to this court.

The judgment in the present case was not accompanied by an opinion of the court below, for the reason perhaps, that the claim of McDougall's administrator is covered by the decision in *Belt's Case*. After a careful examination of the opinion in the latter case we are unable to find any solid ground upon which to hold the United States legally liable upon the agreement between Wozencraft and McDougall, or for the value of the cattle delivered under it. That Congress, by special Acts, made provision for the payment of particular claims of the same class furnishes no ground whatever for the assumption that the Government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. Such legislation may well furnish the basis for an appeal to the legislative department of the Government to place all claimants, of the same class, upon an equality. But we are aware of no principle of law that would justify a court in treating the allowance by Congress of particular claims as a recognition by the Government of its liability upon every demand of like character in the hands of claimants. We may properly take judicial notice of the fact that many claims against the United States cannot be enforced by suit, but provision for which may, and upon grounds of equity and justice ought to be, made by special legislation. But the discretion which Congress has in such matters would be very seriously trammeled, if the doctrine should be established that it cannot appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class.

The same considerations apply to the suggestion that the liability of the United States to McDougall's administrator, as upon contract, may arise from the failure or refusal of their law officers to prosecute appeals from judgments against the Government in suits brought by other parties, holding similar claims. The question to be determined is not whether the representatives of the Government have heretofore been guilty of neglect in not prosecuting such appeals, but whether, in the case in hand, the plaintiff has a valid claim in law against the United States.

Coming then to the inquiry whether the United States is legally liable on the contract between Wozencraft and McDougall, we are met at the threshold by the fact, found by the court below, that, although the instructions to Wozencraft and his colleagues did not extend to or embrace contracts for the subsistence of the Indian Tribes in California, they yet pursued the policy of providing for such subsistence in advance of the ratification by the Senate of treaties made with those tribes. That such a policy was, under all the circumstances, vital to the ends which those in charge of Indian affairs desired to accomplish, may be conceded under the facts found by the court of claims; and it may be that information of the proceedings of Wozencraft and his colleagues in making contracts for the supply of the Indians with provisions, beef, etc., and in all other respects, was given to the proper department at Washington, and that what they did was either approved or was not repudiated.

While all this may be admitted, the question comes back upon us, what statute, in express words or by necessary implication, invested Wozencraft with power to bind the United States by such a contract as that made with McDougall, even had he been previously directed or authorized by the Interior Department to make contracts of that character in holding treaties with the Indians?

It is suggested that such authority may be found in the Act of June 30, 1834, 4 Stat at L. 735, chap. 162, the thirteenth section of which provided that "All merchandise required by any Indian treaty for the Indians, payable after making such treaty, shall be purchased under the direction of the Secretary of War [afterwards changed to Secretary of the Interior, 9 Stat. at L. 395, chap. 108, § 5], upon proposals to be received, to be based on notices previously to be given, and all merchandise required to the making of any Indian treaty shall be purchased under the orders of the commissioners, by such persons as they shall appoint, or by such persons as shall be designated by the [100] President for that purpose; and all other purchases on account of the Indians, and all payments to them of money or goods, shall be made by such person as the President shall designate for that purpose. And the superintendent, agent or subagent, together with such military officers as the President may direct, shall be present and certify to the delivery of all goods and money required to be paid or delivered to the Indians." The seventh section of the same Act provides that "it shall be the general duty of Indian agents and subagents to manage and superintend the intercourse with the Indians within their respective agencies agreeably to law; to obey all legal instructions given to them by the Secretary of War [afterwards changed to Secretary of the Interior], the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as may be prescribed by the President." These statutory provisions, it is argued, conferred authority upon officers of the Executive Department to purchase, without limit as to amount, "merchandise required to the making of any Indian treaty," and invested the President, through others, with power as well to make "other purchases on account of the Indians," as to make "payments to them of money or goods."

This, in our judgment, is too broad a construction of the statute. Congress did not intend to invest the President or the head of a department, or any officer of the Government, with unrestricted authority in the making of treaties with Indians, or in regulating intercourse with them, to purchase merchandise for them, or to make payments of money or goods to them. It appropriated certain sums to enable the President to hold treaties with the various Indian Tribes in California. To the extent of such appropriations the President, through persons designated by him, could purchase merchandise, required in the making of a treaty, and could make payment of money or goods on account of the Indians. But no officer of the Government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by Congress. It is not claimed that the agreement between Wozencraft and McDougall was made with reference to such appropriations. On the contrary, Wozencraft [101] and his colleagues were informed by a communication from the Indian office, under date of June 27, 1851, that "when the appropriation of $25,000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress." The findings show that when the written agreement with McDougall was made, Wozencraft and his colleagues knew that the appropriations had been exhausted. Besides, the contract on its face shows that it was made with reference to appropriations to be thereafter made. The parties evidently relied upon Congress recognizing the wisdom and necessity of the policy adopted for the pacification of the Indians in California, and, by legislation, supplying the want of authority upon the part of Wozencraft and his colleagues to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them. That the policy pursued by Wozencraft and his colleagues was the only one that would have given peace to the inhabitants of California; that the Indians were induced by the promises of subsistence held out to them to abandon their lands to the whites, and settle upon reservations selected for them; and that the United States thereby acquired title to the lands so abandoned, are considerations to be addressed to Congress in support of a special appropriation to pay the claim of McDougall's administrator. They do not, in our judgment, establish or tend to establish, a claim against the United States enforcible by suit.

It appears, from the finding of facts, that McDougall did not die until after the expiration of nearly twenty years from the time his claim accrued, nor until after more than nine years from the passage of the Act giving jurisdiction to the court of claims of suits against the United States founded upon contract, express or implied. It is stated that McDougall's claim was pending in the Interior Department at the time of his death in 1872. When it was presented to that department is not stated. It may not [102] have been so presented until after the expiration of the period within which it would have been cognizable by the court of claims, had suit been brought thereon without first filing the claim in the department. Whether, in that event, the bar of limitation was removed by the mere fact that the claim was transmitted to the court below by the Interior Department, is a matter upon which we express no opinion. No such question is formally raised, and, in view of the conclusion reached, it is not necessary to determine it. We rest our decision solely upon the ground that the contract of April 5, 1882, imposed no legal obligation upon the United States.

The judgment is reversed, with directions to dismiss the petition.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[27] ALONZO RICHMOND, ET AL., AND WILLIAM HENRI ADAMS, Admr. *de bonis non* of WILLIAM H. ADAMS, Deceased, *Appts.*,

v.

AGNES F. IRONS AND ANDREW H. FOSKETT, EXRX. and EXR. of JAMES IRONS, Deceased, ET AL.

(See S. C. Reporter's ed. 27-66.)

National banks—voluntary liquidation—bill to reach assets and enforce liability of stockholders—amendments—discretion of court—extent of liability of stockholders—transfer of stock of director on day of suspension, fraudulent as to creditors—Statute of Limitations—relation.

I. Upon a bill filed February 3, 1875, by a judgment creditor of the Manufacturers' National Bank of Chicago, then in voluntary liquidation, against the bank and its president, various other creditors and stockholders of the bank having since become parties, it is *held:*

1. That the original bill was not strictly a creditors' bill for the purpose of subjecting equitable assets to the payment of the complainant's judgment, but was necessarily, though not in form, for the benefit of all the creditors.
2. That the court below properly permitted the complainant to file the amended bill of October 5, 1876, and the amendment at the hearing, making it a bill to reach the assets of the bank and to enforce the statutory liability of the stockholders for the benefit of all the creditors.
3. That the Act of June 30, 1876, authorising any creditor of the banking association in voluntary liquidation to file a bill in equity on behalf of himself and all other creditors to enforce the statutory liability of the stockholders, warranted the court in permitting the complainant to file said amended bill without regard to whether said Act was merely declaratory of the law as it stood under the original Banking Act, or as providing a new remedy.
4. That, as said amended bill was for the benefit of all the creditors, when any creditor appeared and established his claim he became by relation a complainant from the beginning; and that the Illinois Statute of Limitation, if applicable, ceased to run against creditors at the date of said amended bill.
5. That a stockholder's liability survives against his personal representatives.
6. That a transfer of the stock of a director on the books of the association, on the day of the suspension, is fraudulent as against creditors, although the stock was previously sold and delivered to the president of the bank.
7. That the stockholders, are not liable on account of the claims of creditors who made settlements with the president of the bank after it went into liquidation, the presumption being that they received its assets in settlement of their claims.
8. That interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension.
9. That the stockholders are not liable for the expenses of the receiver appointed under the original bill.
10. That no creditor is entitled to recover, who does not come forward to present his claim.

II. The allowance of amendments of equity pleadings must, at every stage of the case, rest in the discretion of the court, governed largely by the special circumstances of the case presented.

[No. 982.]

Submitted Jan. 7, 1887. Decided Mar. 28, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry G. Miller, Melville W. Fuller** and **H. B. Hurd,** for appellants:

The circuit court erred in allowing the amendment of July 28, 1883, by which it was attempted to turn a creditor's bill into an original bill for the enforcement of a statutory stock liability under the Act of Congress of June 30, 1876.

The cause of action, under the Act of Congress of June 30, 1876, is between the creditors and stockholders. The cause of action under these creditors' bills is by way of subrogation through the corporation for the recovery of assets and debts. The two causes of action are distinct and independent, and could not be properly joined in one bill.

Story, Eq. Pl. § 271; *Walker* v. *Powers*, 104 U. S. 245 (26: 729).

Upon the hearing the court allowed the bill to be so amended as to be turned into a bill filed by the complainant on behalf of himself and other creditors, and to amend the prayer so as to ask a *pro rata* distribution instead of the payment of the complainant in full. This made a new bill of it, and is directly condemned in *Shields* v. *Barrow*, 58 U. S. 17 How. 144 (15: 162).

See also *Snead* v. *M'Coull*, 53 U. S. 12 How. 407, 422 (13: 1043, 1049); *Walden* v. *Bodley*, 39 U. S. 14 Pet. 156 (10: 398).

The court will not permit a bill to be so amended on hearing as to make an entirely new case.

Smith v. *Woolfolk*, 115 U. S. 148 (29: 359); *Goodwin* v. *Goodwin*, 3 Atk. 370; *Milward* v. *Oldfield*, 4 Price, 325; *Denistoun* v. *Little*, 2 Sch. & Lef., 11 n.; *Busby* v. *Seymour*, 1 Jones & L. 527.

The court erred in holding that the amended bill of October 5, 1876, was a supplemental bill, and as such sustainable under the Act of Congress of June 30, 1876. A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff must dismiss his original bill and file an entirely new one.

Milner v. *Milner*, 2 Edw. Ch. 114; *Pinch* v. *Anthony*, 10 Allen, 477.

The amended bill of October 5, 1876, was not a bill on behalf of the complainant and all other creditors. Even as amended, it was a bill under which the complainant sought priority of payment by reason of superior diligence. Nor does it purport to be on behalf of the other creditors. "The bill must state the fact that it is filed in behalf of the complainant and all others."

Fish v. *Howland*, 1 Paige, 20.

The statutory stock liability is not part of the assets of the bank.

See *Irons* v. *Manufacturers Nat. Bank*, 6 Biss. 301; *Godfrey* v. *Terry*, 97 U. S. 171 (24: 944); *Terry* v. *Tubman*, 92 U. S. 156 (23: 537); *Carrol* v. *Green*, 92 U. S. 509 (23: 738); *Jacobson* v. *Allen*, 12 Fed. Rep. 454; *Story* v. *Furman*, 25 N. Y. 214: *Farnsworth* v. *Wood*, 91 N. Y. 308; *Hanson* v. *Donkersley*, 37 Mich. 184; *Wright* v. *McCormack*, 17 Ohio St. 86; *Hewett* v. *Adams*, 50 Me. 271.

The cause of action against defendants as having property of the bank cannot be joined with the cause of action based on the personal liability.

Cambridge Water Works v. *Dyeing & Bl. Co.*

14 Gray, 193; *Pope* v. *Leonard*, 115 Mass. 286; *Walker* v. *Powers*, *supra*.

Under the Statute of Illinois all civil actions not otherwise provided for must be commenced within five years after the cause of action accrued.

The lapse of five years bars the implied promise of the stockholders to fulfill the engagements of the corporation, arising from the acceptance of the Act creating it.

Carrol v. *Green*, 92 U. S. 510 (23: 788).

The statute begins to run from the date when the liability of the shareholders becomes fixed in the sense that the creditor may, without obstruction, proceed against them.

Baker v. *Atlas Bank*, 9 Met. 182; Thompson, Liability Stockholders, § 290.

The theory of the original bill, as amended October 5, 1876, was that the personal liability was to the corporation and to be reached by subrogating the creditor to the place of the corporation.

In this view no privity exists between the stockholders and any creditor of the corporation. He can only be reached by the creditor through the corporation; and if the debt due from the stockholder is barred by the Statute of Limitations against the corporation, the creditor of the corporation cannot enforce its payment in equity.

Cherry v. *Lamar*, 58 Ga. 541; *Branch* v. *Knapp*, 61 Ga. 615; *Mfg. Co.* v. *Bank*, 6 Rich. Eq. (S. C.), 284; *Terry* v. *Anderson*, 95 U. S 635 (24: 367); *Bassett* v. *Hotel Co.* 47 Vt. 313.

The running of the Statute of Limitations between the corporation and the stockholder cannot be suspended by the recovery of judgment against the corporation or by any note or written obligation of the latter, given by the officers after it has gone into liquidation.

Stilphen v. *Ware*, 45 Cal. 110.

The bank was in voluntary liquidation and therefore in the condition of a dissolved copartnership.

National Bk. v. *Ins. Co.* 104 U. S. 74 (26:701).

No new debt can be made after insolvency declared by involuntary liquidation.

White v. *Knox*, 111 U. S. 784 (28: 603).

After a copartnership is dissolved, neither of the former parties has authority to bind the firm by new contracts, not even a partner authorized to settle.

Shaw, *C. J.*, *Parker* v. *Macomber*, 18 Pick. 505.

Stock liability cannot be renewed or extended by any renewal or extension made by the creditor with the corporation.

Parrott v. *Colby*, 6 Hun, 55; *S. C.* 71 N. Y. 597.

If the amendment of July 23, 1883, changing the bill into one on behalf of all the creditors, had been properly allowed, which we deny, it simply amounted to a new suit as to all creditors then made parties, and the statute ran as to them up to that date.

Busby v. *Seymore*, 1 Jones & L. 527; *Allen* v. *Link*, 5 Lea (Tenn), 454; *Christmas* v. *Mitchell*, 8 Ired. Eq. 535; *Holmes* v. *Trout*, 32 U. S. 7 Pet. 181 (8: 651); S. C. 1 McLean, 1; *Miller's Heirs* v. *M'Intyre*, 31 U. S. 6 Pet. 61 (8: 320), *Sicard* v. *Davis*, *Id.* 124 (8: 342); *Ill. Cent. R. R. Co.* v. *Cobb*, 64 Ill. 141; *Phelps* v. *Ill. Cent. R. R. Co.* 94 Ill. 548.

Where a claim is in the nature of a legal claim, though enforcible in equity, the Statute of Limitations applies directly and furnishes a complete bar to the prosecution of the suit.

Hancock v. *Harper*, 86 Ill. 450; *Quayle* v. *Guild*, 91 Ill. 383; *Carrol* v. *Green*, 92 U. S. 509 (23: 788); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431).

The bank went into voluntary liquidation September 26, 1873. The cause of action then accrued, and suit might have been brought by any or all the creditors whose demands were due; they were then in the shape of credit balances on deposit.

Terry v. *Tubman*, *Carrol* v. *Green*, and *Godfrey* v. *Terry*, *supra*; *Baker* v. *Alton Bank*, 9 Metc. 182–197.

The court erred in including in the decree a large number of claims which had been extinguished in the process of liquidation, and in including in the decree a large number of claims based upon engagements entered into after liquidation had commenced.

National Bank v. *Ins. Co.* 104 U. S. 54 (26: 693); *White* v. *Knox*, *supra*; *People's Bank* v. *Nat. Bank*, 101 U. S. 181 (25: 907); *Palmer* v. *Dodge*, 4 Ohio, 21; *Nat. Bk.* v. *Norton*, 1 Hill, 572; *Parker* v. *Cousins*, 2 Gratt. 372; *Martin* v. *Kirk*, 2 Humph. 529; *Long* v. *Story*, 10 Mo. 638; *Stone* v. *Chamberlin*, 20 Ga. 259; *Hanson* v. *Donkersley*, 37 Mich. 184; *Moss* v. *McCullough*, 5 Hill, 131; *Sullivan* v. *Sullivan Mfg. Co.* 20 S. C. 79; *Shaw* v. *Republic L. Ins. Co.* 69 N. Y. 286.

Messrs. **D. J. Schuyler** and **Edward G. Mason**, for appellees:

There was no error in allowing the original bill to be amended for the purpose of enforcing the liability of the stockholders or in allowing the subsequent amendment thereto, nor was the bill as amended multifarious.

In this case an accounting was necessary, as the recovery was for an amount less than the par value of the stock, and the proceedings therefore necessarily in equity.

Carrol v. *Green*, 92 U. S. 512 (23: 789); *Pollard* v. *Bailey*, 87 U. S. 20 Wall. 521 (22: 376), Dan. Ch. Pl. & Pr. § 1, 235; *Hornor* v. *Henning*, 93 U. S. 228 (23: 879); *Patterson* v. *Lynde*, 112 Ill. 196.

The liability of stockholders, in associations organized under the National Banking Act, is conditional only for the payment of the debts after all the ordinary resources of the bank have been exhausted.

Bank v. *Kennedy*, 84 U. S. 17 Wall. 19 (21: 554); *Casey* v. *Galli*, 94 U. S. 673 (24: 168).

When it was ascertained that the bank had no resources with which to meet the outstanding debts, the liability of the stockholders at once attached, and by operation of law became a trust fund, from which payment could be made, but unavailable until the amount of the bank's indebtedness had been ascertained and the amount of the assessments to be made on the stockholders determined.

There can be no question about the power of the court to allow amendments to the bill by making new parties and allegations, and inserting new matter for the purpose of showing the necessity for the amendment and to advise the parties in the case what they were required to meet.

Dan. Ch. Pl. & Pr. §§ 8, 401, 245; *Morgan* v.

N. Y. & A. R. R. Co. 10 Paige, Ch. 291; *McDougald* v. *Dougherty*, 14 Ga. 674; *Hewett* v. *Adams*, 50 Me. 271.

The form of the pleadings is immaterial if the case made by the proofs justify the relief prayed; and so it has been held that upon an ordinary creditor's bill, filed by two judgment creditors of an insolvent insurance company to collect their debt, an assessment might be made on the stockholders of the company sufficient to pay its debts; and that such fund, after paying the complainants, inured to the benefit of all the creditors.

Pennell v. *Lamar Ins. Co.* 73 Ill. 308; *Derrick* v. *Lamar Ins. Co.* 74 Ill. 404.

In courts of equity the pleadings are made to conform to the case made by the proofs, even to the substitution of an entirely new set of pleadings.

Neale v. *Neale*, 76 U. S. 9 Wall. 1, 8 (19: 590, 591); *Battle* v. *Mut. L. Ins. Co.* 10 Blatchf. 417.

Interest runs on debts of the bank. The Illinois Statute allows interest on a balance struck and for unreasonable and vexatious delay of payment.

Ill. Rev. Stat. Cap. 74, § 2. See also *National Bank* v. *Mechanics' Nat. Bank*, 94 U. S. 437, 439 (24: 176, 178); *Chemical Nat. Bank* v. *Bailey*, 12 Blatchf. 480.

The Statute of Limitations is not a bar.

A liability of any kind cannot be barred until it comes due. It would seem that stock liability does not become due until an assessment is ordered, for then only is the amount ascertained and drawing interest. Where the Comptroller of the Currency imposes the assessment, stock liability bears interest from the date of his letter ordering the assessment.

Bowden v. *Johnson*, 107 U. S. 251, 263 (27: 386, 390); *Casey* v. *Galli*, 94 U. S. 677 (24: 169).

A final and conclusive answer to the plea of the Statute of Limitations is that within three years and one month after the failure of the bank, the original Irons suit was by amendment brought in behalf of all the creditors against all stockholders.

The transfers of Comstock's stock were invalid.

"No transfer of stock can be completed unless shown on the books of the bank."

First Nat. Bank v. *Smith*, 65 Ill. 44; *Wheelock* v. *Kost*, 77 Ill. 296; *Brown* v. *Adams*, 5 Biss. 181; *Hale* v. *Walker*, 31 Iowa, 344.

Transfers of stock made in contemplation of the bank's insolvency are void.

National Bank v. *Case*, 99 U. S. 628 (25: 448); *Nathan* v. *Whitlock*, 9 Paige, 152; *Bowden* v. *Santos*, 1 Hughes, 158; *Bowden* v. *Johnson*, *supra;* Thompson, Liability Stockholders, §§ 211, 215.

The stock liability in a national bank survives against the estate of a deceased share holder.

Davis v. *Weed*, 44 Conn. 569, 581; *Davis* v. *Stevens*, 17 Blatchf. 259; *Laing* v. *Burley*, 101 Ill. 591.

Mr. **James H. Roberts**, for certain bankrupt defendants.

[28] *Mr. Justice* **Matthews** delivered the opinion of the court:

The original bill in this case was filed February 3, 1875, by James Irons, the defendants being the Manufacturers' National Bank of Chicago, organized under the National Banking Act, and Ira Holmes, its president. The bill alleged that the complainant had recovered a judgment against the bank for the sum of $12,408.51 damages, besides costs, an execution on which had been returned unsatisfied; that on or about October 11, 1873, the bank had [29] suspended payment and business, and, in pursuance of section 44 of the Banking Law, had gone into voluntary liquidation, its affairs having been put into the hands of the defendant Holmes, its president, for that purpose; that the defendant Holmes had thereafter settled a large amount of the indebtedness of the bank by giving notes made by him as president of the bank and guaranteed by him as such, and by using the assets of the bank in payment of its indebtedness; that he had also converted and appropriated to his own use an amount of the assets of the bank charged to be not less than $250,000; that he also had in his possession and control a large amount of the personal and real property purchased with the funds and moneys of the bank, but which he had fraudulently withheld and disposed of for his own use; "that the said voluntary liquidation aforesaid, and the proceedings thereunder by the said defendant Holmes, were a pretense and sham, and were suggested, instituted, and carried on for the sole and only purpose of concealing and covering up the transactions of the said bank, and of dissipating and disposing of its assets in such a way and manner most agreeable to the wishes and interests of the said defendant Holmes and those in his interest, and in fraud of the rights of your orator and the other creditors of the said bank;" that the capital stock of the bank actually paid in amounted to the sum of $500,000, owned by twenty-four stockholders, a schedule of the names of whom, with their respective places of residence, and the number of shares owned by each, are set out in an exhibit to the bill.

The bill prays for a discovery under oath of "what moneys, cash, notes, bills receivable, United States bonds, and other property and effects the said bank had in its possession and was the owner of at the time of the said suspension thereof, and at the time the same went into voluntary liquidation in the manner as aforesaid, or what moneys, cash, notes, bills receivable, United States bonds, and other property the said bank has since had in its possession or control, or been the owner of, or the said Holmes, as president thereof, or otherwise, has since had in his possession or control be- [30] longing to the said bank, and what disposition, payment, sale, or transfer has been made of the property and effects of the same and every part thereof." It also prays that all sales and conveyances made by the bank or by the defendant Holmes of property belonging to the bank may be set aside as fraudulent, and that all the property and effects of the bank in its possession, or in the possession of Holmes, may be delivered up into the possession and control of the court, and applied, so far as necessary, to the payment of the complainant's judgment; that the defendants may be enjoined from making any further transfers of the property of the bank; that a receiver may be appointed of all the property and effects of the bank; and for general relief.

At various times subsequent to the filing of the bill other judgment creditors of the bank filed petitions for leave to be made parties, and were allowed to join in the bill as cocomplainants. On the 12th of February, 1875, the defendants interposed a demurrer to the bill. The grounds of the demurrer were, among others, that a creditor's bill in behalf of one or more creditors would not lie, because the assets must be equally distributed among all; that a receiver of a national bank could only be appointed and the assets distributed by the Comptroller of the Currency under the Act of Congress, and that the court had no power to enjoin a national bank from disposing of its assets in voluntary liquidation.

On the 26th of February, 1875, the demurrer was overruled, and Joel D. Harvey was appointed a receiver with full power and authority to take and receive possession and control of all the property of the bank, with directions to collect and convert the same into money, to be applied according to the order and direction of the court.

On the first of April, 1875, the defendants [31] filed a joint and several answer to the bill. They admit that the bank went into voluntary liquidation on September 26, 1873, and between that time and the time of filing the bill that it settled a large amount of its indebtedness, so that there remained due to its depositors only $89,000; and alleges that these settlements were made mainly by paying out to creditors the assets of the bank, in some cases the defendant Holmes giving his personal obligations, which in a few instances were indorsed by him as president of the bank. The defendant Holmes denies all the fraud charged in the bill, and particularly that he had converted and appropriated to his own use any of the assets of the bank, and denies that he has any of such assets in his possession or under his control; and alleges, on the other hand, that he had given his private obligations in payment of the debts of the bank, which had more than exhausted all his resources and brought him into a state of bankruptcy.

The said Holmes, as president, and for himself personally, also avers in the answer, "that at the time said bank went into voluntary liquidation as aforesaid he verily believed that said bank and himself were solvent, and would be able to pay their debts in full by making settlements with the creditors to their satisfaction, and they, these defendants, so believed, while making said settlements, and he was advised by his attorneys, and so believed himself, that all settlements made with the creditors of said bank in the manner aforesaid, pursuant to said 42d section of the National Banking Act, would be valid, and that both said bank and its creditors so settled with would be protected, and that said settlements could not be set aside or in any manner interfered with; that, acting upon this advice, and what he believed to be the unquestioned law in the premises, said bank and its creditors, believing that they were within the letter and spirit of said section of the Banking Act, effected settlements to the amount of about $900,000, aside from reducing its capital stock to $178,000, and these defendants now claim that said settlements are all valid, and cannot be inquired into."

On October 5, 1876, leave was given the complainant to file an amended bill making additional defendants, and it was filed on the same day. The amended bill alleges that the bank suspended payment on September 22, 1873; that it had been previously and ever since has continued to be insolvent; that the complainant was a creditor by judgment, as stated in the original bill, on which execution had been returned unsatisfied; that the bank, after suspending payment, went into voluntary liquidation under the management of the defendant Holmes, who settled a large amount of the indebtedness of the bank, so as to reduce it to about $40,000. The amended bill then sets out the names of the various stockholders of the bank, with the amount of shares owned by each, and alleges that while the bank was contemplating insolvency, and was in fact insolvent, [32] and after the suspension of payment, certain of the persons named as stockholders, and who were also made defendants, combining and confederating with the defendant Holmes, surrendered and delivered up to him, the said Holmes, the certificates of shares of stock held by them respectively, on some pretended contract of purchase, the same having been purchased with the money and assets of the bank, and canceled at the request and by the direction of the said stockholders for the avowed purpose of releasing them, and each of them, from any personal liability on account thereof to the creditors of the said bank; but that, nevertheless, the same were never in fact canceled or transferred on the books of the bank, but now stand on said books in the names of the said defendants; and it is charged that the said pretended purchase and attempt at cancellation of the said stock was a fraud upon the complainant and the other creditors of the said bank, and should be set aside.

The bill accordingly prays for a discovery from the defendants of the facts in relation to the said transactions, and that the same may be set aside and decreed to have been made in fraud of the rights of the complainant and the other creditors of the bank; and "that the said stockholders, and each of them, he subjected to the liability created by the statute thereon in the same manner and to the same extent as though such sales, transfers or surrenders had never been made; and that the said stockholders, or such of them as have sold, transferred or surrendered, or pretended to sell, transfer or surrender, etc., the shares of stock so as aforesaid held and owned by them at the time the said bank suspended payment, in the manner as aforesaid, may be decreed to hold the moneys, property and effects received by them for said stock, in the manner as aforesaid, in trust for [33] the creditors of the said bank, and, upon the respective amounts being ascertained, that they be decreed to pay the same to creditors thereof, or to such person or persons as your honors shall order and direct."

The bill also prays "that an account be taken of the amounts due from each of the said defendants to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the Act

under which the said bank was organized, and by which the liability of the stockholders thereof is fixed and determined. That a full and complete and accurate account be taken of all the sales, transfers or surrenders, or pretended sales, transfers, etc., of stock made by the said stockholders of the said bank, or any of them, after the same suspended payment in the manner as aforesaid, and to the amounts received by them respectively for any such sales, transfers, etc., and that they may be decreed to hold the same in trust for the creditors of said bank in the manner as hereinbefore prayed, and that upon such accounts being taken the said defendants, or such of them as shall be found liable to your orator and the judgment and other creditors of the said bank upon the said stock liability created by the said Banking Act, and such of them as shall be liable for the amounts received by them for the sales and transfers of stock so made by them in the manner as aforesaid, be decreed to pay whatever amount shall be due from them, and each of them respectively, into court or to the receiver duly appointed by said court, and that out of the fund so created your orator's judgment be paid in full, and the balance thereof be distributed among the other creditors of said bank in such way and manner as your honors shall direct."

All of the defendants named in the amended bill within its jurisdiction were served with process and appeared. On behalf of certain of these defendants a motion was made to strike the amended bill from the files, and others [34] filed demurrers, for the reason, in substance, that it made a new case, different from that set out in the original bill, and inconsistent with it, containing matters and asking relief that could only be properly obtained by an original bill.

On the 9th of May, 1877, the complainant, James Irons, having died, a bill of revivor was filed in the name of his personal representatives.

On October 1, 1878, the motion to strike from the files and the demurrers interposed to the amended bill were overruled, and the defendants required to answer. Subsequently, answers were filed at various times by the several defendants who appeared, the contents of which it is not necessary here particularly to notice, except to say that issue was joined by replication duly filed. On July 23, 1883, on the final hearing the complainant had leave to amend, and did amend, the amended bill of complaint so as to allege expressly that it was filed on behalf of himself and all other creditors of the Manufacturers' National Bank of Chicago; the prayer being amended so as to require an account to be taken of the amount due the complainant and other creditors of the defendant; striking out those parts which asked that the complainant's judgment be decreed to be a first lien on the property of the bank, and paid first in full out of the fund for distribution; and adding a prayer that the fund so created might be distributed among all the creditors of said bank *pro rata*, in such a way and manner as should be directed. To this amended bill, as finally amended, various defendants filed several answers *instanter*, setting up by way of a bar to the relief prayed for against the defendants, as holders of the shares of stock in the banking association, the statute of limitations of five years of the State of Illinois; and also insisting that the bill as amended was multifarious and inconsistent, because it prayed for further and different relief from that authorized by the Act of Congress approved June 30, 1876. On the same day a decree was entered in the cause, which finds, among other things, as follows: That the Manufacturers' National Bank of Chicago became insolvent and suspended payment September 22, 1873, and, in pursuance of the Act of Congress, went into voluntary liquidation on September 26, 1873; that debts of the bank are still due [35] and unpaid; that at the time of the bank's insolvency and suspension of payment, the capital stock of the bank consisted of 5,000 shares, of the par value of $100 each, setting out the names of the owners thereof, with the number of shares owned by each; that after the said bank had become insolvent and suspended payment, certain shareholders of said bank transferred the stock held by them, but that all and each of such transfers were and are in derogation of the rights of creditors, and were and are invalid; and that certain named defendants, shareholders of said bank, setting out their names, are individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of the bank to the extent of the amount of stock standing in their names respectively, on the 23d of September, 1873, and before any transfers were made that day, at the par value thereof, in addition to the amount invested in such bank.

The death of the defendant, William H. Adams, on the 5th of June, 1882, was suggested, and Elizabeth Adams, his executrix, made a party defendant in his stead.

By an order entered May 7, 1879, the case was referred to Henry W. Bishop, Esquire, a Master in Chancery, to take proof and report, first, the amount of the debts of said bank still unpaid and the amount due each creditor thereof; second, the value of the assets, if any, of the bank; third, the amount of assessment necessary to be made on each share of the capital stock of said bank in order to fully pay the indebtedness of the bank, and the amount due and payable from each shareholder upon such assessment.

On the 6th of January, 1885, the master reported his findings under the decree of July 23, 1883 He reported the amount of the debts of the bank unpaid as of the 1st of November, 1884, to be $368,971.50, the name of each creditor and the amount due him being set out in a schedule. The claims of these creditors are also classified by the master as follows: 1, for clerical services to the bank, $183.31; 2, for past services of the receiver and his attorneys, $4,487.04; 3, claims arising before the failure of the bank, upon which no collaterals were taken, [36] $179,231.81; 4, claims arising before the failure of the bank, on account of which worthless collaterals had been subsequently received, $185,119.34. The master further reported that there were no assets of the bank outside of the stockholders' liability, and that the amount of assessment necessary to be made upon each share of the capital stock of the bank, in order to fully pay the indebtedness,

was 90 per cent. A schedule attached to the report gives the name of each stockholder, and opposite his name the number of his shares of stock in the bank, the par value thereof, the per cent of assessment to be levied thereon, and the amount due and payable from him upon such assessment. These stockholders were also classified as embracing, 1, stockholders who had been duly served with process or entered their appearance in the cause; 2, stockholders who had obtained a discharge in bankruptcy and were not liable to stock assessments on that account; and, 3, stockholders who reside outside the jurisdiction of the court and have not been found within the district.

On February 2, 1885, various exceptions were filed on behalf of the defendant stockholders to this report of the master. An exception thereto was also filed on behalf of the receiver and creditors so far as it reported in favor of certain stockholders claiming to have been discharged from their liability by their certificates in bankruptcy. Upon the hearing of these exceptions, the court referred the cause again to the master to compute from the proofs already taken in the cause, 1, the indebtedness of the bank at the time of the failure; 2, subsequent actual payments upon indebtedness; 3, net amount of indebtedness, with interest on same at the rate of 6 per cent per annum from the time of the failure of the bank; and, 4, the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership.

In pursuance of this direction, on the 25th of May, 1886, the master made a supplemental report, in which he finds that the indebtedness of the bank at the time of the failure thereof, to wit, the 23d day of September, 1873, amount-
[37] ed in the aggregate to the sum of $410,064.10; that the subsequent actual payments upon said indebtedness amounted to the sum of $213,-018.46; that the net amount of the indebtedness was the sum of $197,045.64; that the interest upon said last mentioned sum from the 23d of September, 1873, when the bank failed, down to May 21st, 1886, at the rate of 6 per cent per annum, is the sum of $149,686.98, making the total unpaid indebtedness of said bank on the last mentioned date the sum of $346,732.62; that 20 per cent upon said last mentioned sum, amounting to the sum of $69,346.52, is necessary to be added thereto for the expenses of the receivership, making a total sum of $416,-079.11; and that the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership, is 83.2 per cent upon the capital stock of $500,000.

In addition to those filed to the original report, exceptions were filed to the supplemental report, objecting to the allowance of interest upon the claims of the creditors, and to the addition of 20 per cent to the amount of the indebtedness, for the purpose of providing for the payment of the expenses of the receivership. All the exceptions to the master's reports were overruled, and a final decree was entered against the defendants according to its findings; a decree being entered against each stockholder defendant severally for the amount computed to be due from him upon the assessment of the stock ascertained to be standing in his name on the books of the bank at the date of its suspension, at the rate of assessment fixed in the report of the master. From this decree Alonzo Richmond, Charles Comstock, Thomas Lord, and William Henri Adams, administrator *de bonis non* of the estate of William H. Adams, deceased, severally appealed.

Some of the questions raised by the assignments of error are common to all the appellants, and others are peculiar to the individual cases. So far as necessary to the disposition of the case, they will be considered in their order.

The first assignment of error relates to the pleadings. It is objected that the court erred in permitting the complainant to file the amended bill of October 5, 1876, and also in permitting the amendment made at the hearing on July 23, 1883; and we are asked to reverse the decree on that account, and on remanding the cause to direct that the amended bill as amended be dismissed. The grounds of objection to the amendments as made are: 1, that the amended bill stated a case entirely different from that contained in the original bill; and 2, that it made the bill as amended multifarious. The changes made in the case as originally stated in the bill are alleged to be: 1, that it converted a creditor's bill, the object of which was to subject to the payment of the complainant's judgment assets of the corporation which could not be reached at law, into a bill for the additional purpose of enforcing the statutory liability of the stockholders of the bank to answer for its contracts, debts, and engagements; and 2, that it converted the bill filed by the complainant in his own right into a bill on behalf of himself and all other creditors of the corporation.

It is a mistake, however, to assume that the bill as originally filed was strictly and technically a creditor's bill merely, for the purpose of subjecting equitable assets to the payment of the complainant's judgment. That undoubtedly was a part of its purpose and prayer, and in pursuance of it a small amount of the assets of the bank were recovered by the receiver, converted into money, and applied to the payment of the costs in the cause, but the whole of this recovery amounted only to $3,346.96, and it was not until after this result became manifest that application was made and leave given to file the amended bill. But the main purpose of the bill as originally framed was to
[44] obtain a judicial administration of the affairs of the bank on the ground that its capital stock and property was a trust fund for the benefit of its creditors, the company being insolvent and in liquidation, and that under the management of its officers and directors this trust was being violated and perverted. The bill contained allegations that Holmes, the president and manager of the bank, had converted its assets to his own use and to the use of others, in violation of his trust and in fraud of creditors, applying the assets of the bank so as to prefer some creditors over others, and otherwise dissipating and squandering them. It accordingly prayed for a full discovery of all the transactions on the part of Holmes, in reference to the affairs of the bank since its suspension; for an injunction prohibiting any further transfers of its assets; for the appointment of a receiver with the general powers of receivers in like cases, and for general relief.

If this bill had been prosecuted, as originally framed, to final decree, and had resulted in the recovery of assets of the bank applicable to its purposes, it would necessarily have been made to appear during the progress of the suit that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained, equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of having reduced his claim to judgment or by reason of having first filed a bill to enforce the trust. In the case of an insolvent incorporation thus brought into liquidation, and wound up by judicial process at the suit of a creditor, whether he sues in his own right, or on behalf of himself and other creditors, the rule of distribution is the same, and is founded upon the principle of equality in which equity delights; unless a claimant or some other judgment creditor had, previously to the filing of the bill, obtained a lien at law upon some portion of the property distributed, or could establish a superior equity, [45] existing at the time of the filing of the bill. *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 [14: 705]; *Wood* v. *Dummer*, 3 Mason, 308; *Ogilvie* v. *Knox Ins. Co.* 63 U. S. 22 How. 387 [16: 351]; *Sawyer* v. *Hoag*, 84 U. S. 17 Wall. 610 [21: 731].

When the amended bill was filed, the resources of the bank, discovered and delivered to the receiver, had been exhausted. The amended bill set out the names of all the stockholders, and all of those claimed to have been stockholders at the date of the suspension, by name, with the number of shares belonging to each. It charged that certain of them combined and confederated with the defendant Holmes for the purpose of committing a fraud upon the creditors of the bank, by surrendering and transferring their shares of stock, receiving in exchange therefor a portion of the assets of the bank applicable to the payment of its debts. It accordingly prays, as a part of the relief, that these transactions may be inquired into and set aside; that the assets of the bank so received by any of these stockholders may be decreed to be delivered up and applied to the payment of the debts of the bank; and that, in addition thereto, an account be taken of all the present indebtedness of the bank and of the amounts due from each of the defendants "to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the Act under which the said bank was organized and by which the liability of the stockholders thereof is fixed and determined."

In some respects it is quite true that this amended bill is a departure from the case as stated in the original bill. It was, however, germane to the original bill to have included in it the statements of the amended bill in respect to such of the stockholders as were charged by name with having, in combination with the president of the company sold their stock, receiving assets of the bank in payment therefor after it had gone into liquidation, or in contemplation of insolvency, and in fraud of the creditors. Assets of the bank received by any of them in such circumstances were such as were clearly within the purview of the bill as originally framed, and those allegations were [46] certainly the subject of a proper amendment. Having thus brought in a number of the stockholders properly as defendants, to subject them to a decree to account for assets of the bank received by them in breach of trust and in fraud of creditors, it does not seem inappropriate or foreign to the general purposes of the bill for the court, having jurisdiction over them in behalf of the complainant, who, as we have seen, necessarily represented all creditors entitled to share in the results of the suit, to proceed upon the basis of granting the additional and complete relief prayed against them as stockholders, requiring them to answer under the statute for all the contracts, debts, and engagements of the bank. But to do this made it necessary to bring in all other stockholders of the bank within the reach of the process of the court, although they may not have been charged as participating in the alleged breaches of trust and fraud. The various matters, therefore, contained in the amended bill and the original bill were thus connected with each other in such a way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. In reviewing the exercise of that discretion on this appeal, we should not feel justified in any case in reversing the action of the circuit court, if it appeared that the appellants were not put to any serious disadvantage or materially prejudiced thereby. The amendment made at the hearing, whereby the amended bill was changed so as to state that it was filed by the complainant on behalf of himself and all other creditors, we regard as purely formal and properly permitted for the purpose of making the bill explicitly to conform to all that had taken place previously in the progress of the cause. The litigation had been conducted, from the time of the filing of the first amended bill, upon the supposition and theory that it included in its scope all creditors of the bank alike. The defendants, therefore, could not have been taken by surprise by the amendment, and would not be deprived of the benefit of any defense or put to any disadvantage on account thereof.

The action of the circuit court in permitting these amendments we think is justified by the rules on that subject as stated by this court in [47] the case of *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 [19: 590]; in *The Tremolo Patent*, 90 U. S. 23 Wall. 518 [23: 97]; and *Hardin* v. *Boyd*, 113 U. S. 756 [28: 1141]. In the last mentioned case it was said, p. 761 [1142]: "In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that, in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly great

caution should be exercised when the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted when it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."

By the original National Banking Act, section 5151 of the Revised Statutes, it was declared that "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." By section 5220, it was also provided that "Any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock." But no provision is contained in the original Act specifying what course may or shall be taken, in case of voluntary liquidation, to enforce the individual liability of the shareholders. It is provided by section 5234 that when the Comptroller of the Currency has become satisfied of the default of the association under sections 5226 and 5227 to redeem any of its circulating notes, he may forthwith appoint a receiver who, under his direction, shall take possession of the books, records, and assets of the association, collect all debts, dues, and claims belonging to it, "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his [48] acts and proceedings."

It thus appears that in the case of an involuntary liquidation under this section, the business of liquidation, as defined and required by the law, involved the appointment of the receiver, who should, in addition to the collection of the ordinary assets of the bank, also enforce against the stockholders their individual liability, so far as necessary to create a fund sufficient to pay all the debts of the association. It can hardly be supposed that the omission of the statute to provide an express and specific course of proceeding, by way of judicial remedy, in case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against either a deficiency of assets or the results of a fraudulent maladministration. Section 5151 imposes upon the shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders.

As all the shareholders are bound in that way to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity. Besides this, it must, we think, be admitted that a court of equity would be entitled, upon the general principles of its jurisdiction, to entertain a bill by one or more creditors whose suit would necessarily be for the benefit of all against the association and its officers and managers, and all those participating in its voluntary liquidation for the purpose of preventing and redressing any maladministration or fraud against creditors contemplated or executed. In the liquidation of such an association, those entrusted with its management occupy the relation of trustees, first for creditors, and the terms of that trust, implied [49] by law, require them to reduce the assets of the association to money or its equivalent, and to pay out those assets or their proceeds equally among creditors.

The omission in the original Banking Act of 1864, to provide expressly similar remedies in case of voluntary liquidation to those specified in case of involuntary liquidation was supplied by the Act of June 30, 1876, 19 Stat. at L. 63; Supp. Rev. Stat. 216. The first section of that Act provides for the appointment of a receiver by the Comptroller of the Currency, as provided in section 5234 of the Revised Statutes, whenever any national bank shall be dissolved and its charter forfeited as prescribed in section 5239 of the Revised Statutes, or whenever any creditor shall have obtained a judgment against it which has remained unpaid for a space of thirty days, or whenever the Comptroller shall become satisfied of its insolvency after due examination. This receiver, it is declared, shall proceed to close up such association and enforce the personal liability of the shareholders. Section 2 of the Act of June 30, 1876, is as follows: "That when any national banking association shall have gone into liquidation, under the provisions of section 5220 of said statutes, the individual liability of the shareholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established." This section was in force when the first amended bill was filed in October, 1876. Whether we regard it as merely declaratory of the law as it stood under the original Banking Act, or as giving a new remedy which could not have been resorted to before, we think it warranted the court below in permitting the complainant to file his first amended bill.

In the case of involuntary liquidation under the supervision of the Comptroller of the Cur- [50] rency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, so far as may be necessary, to enforce the individual liability of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least, so closely connected with it as to constitute but one continuous transaction. When, in

case of voluntary liquidation, the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceeding should be considered as changed. The intention of Congress evidently was to provide ample and effective remedies in all the specified cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of the stockholders. Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation nor in its name, yet it is treated as a means of creating a fund to be applied with and in aid of the assets of the bank towards the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank. It was, therefore, proper to describe the bill to be filed by and on behalf of creditors as in the nature of a creditors' bill so as to enlarge the scope and purpose of a bill that might be more strictly limited as a creditors' bill merely.

We think, therefore, that if such a bill would have been objectionable without the statute, it is warranted by the statute. It is no objection that the original bill was filed prior to the passage of the Act of June 30, 1876. The bill as amended, being authorized by the statute in force at the time the amendment was filed, would justify such a proceeding in a pending suit to which it was made germane by the statute itself, as well as an original bill then for [51] the first time filed. Neither do we consider the objection valid that it does not purport to have been filed in pursuance of the Act of June 30, 1876, and is not filed by the complainant on behalf of all the creditors. The scope and prayer of the bill under the operation of the statute made it a bill for the benefit of all the creditors, notwithstanding it erroneously claimed priority on behalf of the complainant individually. The only proper decree that could have been rendered upon it would have been for the equal distribution of the fruits of the litigation among all the creditors of the bank who in the meantime had come in and proved their claims. The final amendment, as we have already seen, only had the effect to make the bill conform to the course of the proceeding which had actually been had under it, and was, therefore, purely formal. Its only effect was to make the bill profess to be what in law it was, and what in point of fact it had been considered to be.

Mr. Daniell (Ch. Pr. chap. 5, § 1, p. 245, 4th ed.) says: "The court will generally at the hearing allow a bill, which has been originally filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class."

Our conclusion on this point is that the court below committed no error in permitting the amendments complained of to be made.

The assignment of error next to be considered arises upon the defense made on behalf of the defendants below, of the Statute of Limitations. The limitation relied upon is that prescribed by an Act of Illinois, which provides that "Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Rev. Stat. Ill. 1881, 705.

It is not necessary to decide in this case whether the Statute of Illinois relied upon is applicable, because in the view which we have already taken of the nature of the amended [52] bill filed in October, 1876, the statute, if applicable, ceased to run against the creditors of the bank entitled to the benefit of the decree, at that date. That amended bill is to be considered from the date of its filing, as a bill on behalf of all the creditors of the bank who should come in under it and prove their claims. When any creditor appeared during the progress of the cause to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank; any defense which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master, or on the hearing to the court The creditor, having established his claim, became entitled to the benefit of the proceeding as virtually a party complainant from the beginning, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing of the bill. This being so, it is not disputed that in October, 1876, the bar of the statute had not taken effect, even on the supposition that the statute applied.

In the case of *In Re General Rolling Stock Co., Joint Stock Discount Company's Claim*, L. R. 7 Ch. App. 646, Mellish, *L. J.*, stated that in a case where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the court of chancery in an administration suit, "the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against his claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

Mr. Daniell (1 Ch. Pr. chap. 15, par. 2, p. 643, 4th ed.) states that "a decree for the pay- [53] ment of debts under a creditor's bill for the administration of assets is also considered as a trust for the benefit of creditors, and will in like manner prevent the statute from barring the demand of any creditor coming in under the decree. The creditor's demand, however, must not have been barred at the time when the suit was instituted, for if the creditor's demand would have been barred by the statute before the commencement of the suit the stat-

ute may be set up. It is to be remarked upon this point, that it has been held that it was the decree only which created the trust, and that the mere circumstance of the bill having been filed, although it might have been pending six years, would not take the case out of the statute, but according to the later decisions, it seems that the filing of the bill will operate by itself to save the bar of the statute, though the plaintiff by delay in prosecuting the suit may disentitle himself to relief."

He also says (chap. 29, par. 1, p. 1210): "It may be observed here that where a person, not a party to the suit, carries in a claim before the master under the decree, the party representing the estate out of which the claim is made has the right to the benefit of any defense which he could have made if a bill had been filed by the claimant in equity or an action had been brought at law to establish such claim. Therefore, as we have seen, an executor may in the master's office set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced."

The authorities abundantly sustain the proposition also that a creditor who comes in under and takes the benefit of a decree is entitled to contest the validity of the claim of any other creditor, except that of the plaintiff whose claim is the foundation of the decree. 2 Dan. Ch. Pr. chap. 29, § 1, p. 1210, note 4, and cases cited.

In *Sterndale* v. *Hankinson*, 1 Simons, 393, decided in 1827, it was stated by *Vice Chancellor* Leach, that "every creditor has to a certain extent an inchoate interest in a suit instituted [54] by one on behalf of himself and the rest, and it would be attended with mischievous consequences to estates of deceased debtors if the court were to lay down a rule by which every creditor would be obliged either to file his bill or bring his action."

It is supposed by counsel for the appellants that the authority of this case is shaken by what was said by Jessel, M. R., in his decision of *Re Greaves, deceased, Bray* v. *Tofield*, L. R. 18 Ch. Div. 551. It is true that in this case the Master of the Rolls said that creditors had better not rely upon that decision for the future, but he points out as the reason that at the time he was speaking—in 1881—bills in equity had been abolished in England, and that wherever it is an action to recover a debt upon a contract the Statute of James was binding upon the High Court in every case in which it applies; and that it was no longer the practice, so far as personal estate was concerned, to bring an action by one creditor on behalf of others, because of a provision in the Act of 1852, since the passing of which the practice had been abandoned of suing by one creditor on behalf of all, except in cases relating to real estate, as to which the section of the statute does not apply, unless it has been ordered to be sold or there is a trust or power of sale, and that, therefore, there were no longer any suits brought by any creditor, except for the payment of his own debt. In the present case, the suit, although in the nature of a creditor's bill, is not a bill merely for the administration of the assets of an insolvent corporation. There is no fund formerly belonging to the corporation in court for distribution. It is a suit for the enforcement of a personal liability of the defendant stockholders to pay the debts of the corporation, in which the creditors are the complainants. Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The be- [55] ginning of the suit as between the creditor and the stockholder is the date of the filing of the bill if during its progress and pendency he proves his right to be considered as a cocomplainant. It follows, therefore, that the statute sought to be applied in the present case ceased to run as against the complainants from the date when the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree. Whether or not the Statute of Limitations of Illinois would in any case operate to bar such a suit as the present, being a bill in equity in the Circuit Court of the United States, founded upon an obligation arising under an Act of Congress, is a question which we are, therefore, not called upon to consider or decide.

Another assignment of error is peculiar to the appeal of the administrator *de bonis non* of William H. Adams, deceased. William H. Adams in his lifetime was one of the defendants in the amended bill of 1876, and at the time of the suspension of the bank a stockholder to the extent of 240 shares. He died June 6, 1882, during the pendency of the suit, which stands revived as against his administrator *de bonis non*. The administrator contended that the personal liability of his intestate did not survive as against the administrator, and that, therefore, no decree could be rendered against him subjecting the estate of Adams in his hands for administration. The judicial decisions more directly relied upon by the appellant in support of this contention are those of *Dane* v. *Dane Mfg. Co.* 14 Gray, 488; *Bacon* v. *Pomeroy*, 104 Mass. 577; *Ripley* v. *Sampson*, 10 Pick. 370; *Bangs* v. *Lincoln*, 10 Gray, 600; *Gray* v. *Coffin*, 9 Cush. 192. These cases, however, so far as they are in point, are based upon the particular language of the Statutes of Massachusetts, materially differing from that contained in the National Banking Act. Under that Act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and ac- [56] cepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives

as against his personal representatives. *Flash* v. *Conn*, 109 U. S. 371 [27: 966]; *Hobart* v. *Johnson*, 19 Blatchf. 359. In Massachusetts it was held, in *Grew* v. *Breed*, 10 Metc. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity.

The next assignment of error to be considered arises upon the separate appeal of Charles Comstock, who is charged by the decree with an assessment upon 150 shares of the capital stock of the bank standing in his name as owner at the time of its suspension. In his answer, which is under oath as called for, Comstock "admits that at the time of the said suspension he was the owner and holder of certain shares of capital stock thereof; that previous to—about in the year 1872 he was the owner of one hundred and fifty shares of said stock; that on or about the 8th day of February, 1873, this defendant sold, [57] assigned, and delivered fifty shares of the said stock to Ira Holmes, and on or about June, 1873, this defendant sold, assigned, and delivered fifty other shares of said stock to Preston C. Maynard; that he endeavored repeatedly to have said stock transferred on the books of the bank, but that said Maynard refused to allow said stock to be so transferred, although he had before promised to have the same transferred. That at the time of the said several sales of stock as aforesaid the said banking association was carrying on its regular business of banking, and was in fact solvent and fully able to pay its debts, and, as he is informed and believes, not indebted to any of the present creditors of said bank. That afterwards, on or about the 23d day of September, 1873, this defendant sold, assigned, and delivered to the said Ira Holmes his other fifty shares of stock in said bank, with other property, receiving in payment therefor, and for the other property sold to said Holmes at the same time, certain promissory notes of one Wm. Patrick, payable to the said Ira Holmes, and was secured with certain other notes by mortgage from said Wm. Patrick to said Ira Holmes, which said notes and mortgage have proven to be of little value to this defendant, and in consequence of the incumbrances and taxes upon said property, and the expense of foreclosing, and how much of the value of said notes and security should be attributable to the consideration of this sale of said stock, this defendant is unable to state, but he insists that at the time of said sale to said Holmes this defendant was informed and believed said bank was able to pay all its debts in full, and the consideration received by him was paid by said Holmes out of his individual property and not from the assets or property of said bank."

The stock books introduced on the part of the complainant show that fifty shares of this stock were transferred September 23, 1873; fifty more on September 24, 1873, and fifty more were canceled on the last date; and the testimony of Holmes is that, as to the last fifty shares, they must have been transferred at the said time. The transfers in each case were to Ira Holmes. It is found by the decree of July 23, 1883, that the bank became insolvent and suspended payment September 23, 1873, and went into voluntary liquidation on September 26, 1873. The resolutions of the shareholders of the bank, instructing the directors to put the bank into voluntary liquidation, were passed at a meeting held on September 25, 1873. One of the resolutions is as follows: "That this bank, in its endeavors to continue business through the existing panic, has substantially exhausted its cash resources and is unable to continue cash payments, and that we regard it for the best interests of the stockholders and depositors alike that its affairs be placed in voluntary liquidation in accordance with the 42d section of the National Currency Act in that [58] behalf provided." The directors, at a meeting held on the same day, resolved to go into voluntary liquidation and close up the affairs of the bank in pursuance of this resolution. The notice to the public, addressed to the creditors of the bank, was issued and advertised the next day. As to the fifty shares of stock sold by Comstock to Holmes on September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts, notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of fifty shares in February, 1873, and of the other fifty shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be upon the books of the bank the owner of these shares until September 23 and September 24, when they were respectively transferred.

By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. It follows, therefore, that Charles Comstock, in respect to the shares sold by him in February and June, 1873, was the statutory owner on the 23rd day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes, but such a sale and transfer could only have been made that day by Comstock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank; it would operate as a fraud on the creditors, an effect which the law will not permit. The case is not within the rule laid down in *Whitney* v. *Butler*, 118 U. S. 655 [*ante*, 266]. Here there is no proof, as there was in that case, of the delivery of the certificate to the bank and a power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. The [59] delivery was to Holmes, not as president, but as vendee. We are, therefore, constrained to hold that the decree below, in charging Comstock with liability as the owner of 150 shares, was not erroneous.

The next assignment of error is based upon that part of the decree which directs payment

of the claims reported by the master under the denomination of Class D, amounting in the aggregate to $185,119.84. They are designated by the master as claims "arising before the failure of the bank, upon which worthless collaterals were subsequently received." It is averred by the appellees that they are claims arising for the most part, if not in all instances, upon indorsements and guarantees made in the name of the bank by Holmes, its president, after the suspension of the bank, and while it was in liquidation. It appears clearly from the evidence that, in many cases, parties having claims against the bank accepted from Holmes commercial paper held by the bank which it had received in the course of its business, and which constituted a part of its assets, running some of it several months and some of it several years, bearing interest, some at the rate of 8 and some at the rate of 10 per cent per annum, indorsed and guaranteed in the name of the bank by Holmes as president. The books of the bank show that in these cases the paper so received was charged against the account of the party receiving it, thus closing the account as settled. In these cases, it is testified by Holmes that the creditors gave their checks to the bank for the amount standing to their credit. In some cases, the creditors or their agents testifying to the transactions, without contradicting Holmes in respect to what was in fact done, nevertheless state that the paper accepted by them was received, not in payment, but as security. It is obvious, however, that in most, if not all instances, the witnesses are referring to the security which they supposed they had received and were entitled to rely upon, by means of the indorsement and guarantee of the paper thus received, made by Holmes as president in the name of the bank. They [60] certainly acted upon this belief, for in many instances they proceeded to obtain judgments against the bank, after the maturity and dishonor of the paper so received, upon these indorsements and guarantees, and in this proceeding proved their claims in that form by transcripts of such judgments. It is true that, in the final decree, the master was directed to correct his computation of interest so as to equalize the claims of the creditors by allowing interest at a uniform rate from the time of the suspension upon the amounts as they appeared to be due from the books of the bank, but all the claims in Class D, notwithstanding the settlements made, were included in the amounts found due and ordered to be paid. In this respect we are of the opinion that the decree is erroneous. Those creditors who made settlements after the bank was put into liquidation and received from the president in that settlement paper of the bank, or as in some cases the individual notes of Holmes himself, indorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. No such express authority appears in this case, and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation is that which results by implication from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the bank *in specie*, and the title [61] to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose in the name of the bank, but such indorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract, or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the fact of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation looking to future payment, it must be from other parties. It is not within the power of the officers of the bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank when it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word "liquidation." *Mr. Justice* Story said, in *Fleckner* v. *Bank of U. S.* 21 U. S. 8 Wheat. 362 [5: 636]: "Its ordinary sense, as given by lexicographers, is to clear away, to lessen debt, and, in common parlance, especially among merchants, to liquidate the balance is to pay it." In *White* v. *Knox*, 111 U. S. 787 [28: 603], it was said: "The business of the bank must stop when insolvency is declared." In *National Bank* v. *Insurance Co.*, 104 U. S. 54 [26: 693], the liquidation of such an association was said to be like that which follows the dissolution of a copartnership.

In this view, it is contended, on behalf of the creditors interested, that, as they relied upon the continuing liability of the bank and of its shareholders, by virtue of these indorsements and guarantees, if they are deprived of the benefit of the latter, the settlements themselves should be set aside, and they, the creditors, restored to the situation in which they were at the time of the suspension of the bank. But [62] this is clearly inadmissible; such a restoration cannot in fact be made. The circumstances of the situation have greatly changed by the lapse of time. The creditors who entered into these settlements have no ground of complaint

against the bank as a corporation or as against its stockholders; they were not misled to their hurt by any fraudulent misrepresentations or concealments of any matters of fact. Whatever mistake was made was their own, and it was a mistake consisting merely in a misapprehension of their legal rights. They were bound to know, as well as Holmes, the limits of his authority, and ought to have acted on the presumption that he had no right to bind the bank or its shareholders *in futuro* by any new engagement. If they chose, in their eagerness to obtain a settlement in advance of other creditors equally entitled, to accept a part of the assets of the bank or the personal obligation of its president in settlement of their claims, they must abide by the election which was then made, and which cannot now be set aside. They made their settlements in view of their own estimate of the present advantage; they cannot now undo them to the disadvantage of other creditors, over whom they sought to obtain preferences, nor to the prejudice of the stockholders, who have a right to be exonerated from the payment of all contracts, debts, and engagements of the bank contracted since the date of its suspension.

In respect to these claims in Class D, Ira Holmes, the president, testified as follows:

"Q. In each case where you settled with the creditor of the bank and turned him out bills receivable of the bank, how was that settlement—was it a payment, or what was the transaction? A. It was a full payment of the demand. He gave me his check on the bank for the amount, the same as if we were doing a regular business and the parties should come in and buy so much bills receivable and give me a check on another bank.

"Q. Was there any case in which there was any other understanding than that he took these bills receivable in payment of his demand [63] against the bank? A. Not any."

On his cross examination he is asked:

"Q. If creditors agree to take paper in full payment, why would the bank guarantee it? A. I didn't say they agreed to take it in full; a great many people took the paper without guarantee, and others would not take it unless they had a guarantee; only when it got down to the last settlement, and they would not take it unless the bank would guarantee it."

The force of this testimony is, we think, that the party accepted the paper, with or without the guarantee, in settlement of the claim as it stood on the books of the bank on the day of the suspension. Those who insisted upon the guarantee or indorsement by the bank undoubtedly relied upon it as an obligation which they might thereafter enforce, but their reliance was upon that contract and not upon the original claim. It does not detract from the binding nature of the settlement that this guarantee was given and received and relied upon. The only mistake now asserted as a ground for going behind the settlement is, that the guarantee or indorsement is not effective as an obligation of the bank for which the stockholders are individually responsible. But this is not a mistake as to what the parties intended to do; it is only a mistake as to the effect of what they did. As the bank was in liquidation, and the officers were not authorized to enter into new contracts, the presumption is, in every case where the creditor accepted paper in settlement of his claim, that it was received in payment and operated as a satisfaction. If there was any other agreement by which that paper was received merely as collateral to the original debt and received as security and not in payment, it must be affirmatively shown.

We have carefully examined all the evidence contained in the record in respect to each of the claims embraced in Class D of the master's report. We are not able to find as to any one claim, that it is an exception from the general rule as to settlements established by the testimony of Holmes. In several instances, it is true that the witnesses with whom the settlements were made alleged that the notes with the indorsements or guarantees were not taken in payment and satisfaction, but as additional security for their claims; and that the transactions were made upon the faith that the remedy against the bank and against its stockholders was not thereby impaired. But it is quite evident, we think, that in each of these cases the reliance was not upon the liability arising upon [64] the claim as it stood prior to the settlement, but upon the indorsement or guaranty of the bank, and the belief that the liability of the stockholders remained unaffected by the transaction. The facts in each case are that the claim as it stood upon the books of the bank was settled between the parties by the creditor accepting bills receivable out of the assets of the bank, or the individual note of its president indorsed or guaranteed in the name of the bank; supposing that, in the event of default in payment by the other parties to the paper, the obligation of the bank itself was preserved by the indorsement or guaranty, and that for that contract the stockholders continued to be liable. Upon this view of the facts, the stockholders are by law exonerated from the obligation to contribute to the payment of any claims of this class. All those enumerated in Class D in the master's report, therefore, should have been excluded from the benefits of the decree.

Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment.

The next question arises upon the objection [65] of the appellants to the allowance made by the decree of 20 per cent of the amount of the debts of the bank due at the date of the suspension, in addition thereto, to cover the expenses

of the receivership. This sum, we think, ought not to have been allowed. The ordinary costs of the cause are, of course, taxable as against the defendants as in other cases, but we see no reason why the stockholders should be required to contribute, as a debt due from the bank or themselves, to a fund for the payment of the expenses of the receivership. The receiver in this case was appointed under the original bill, before any claim was set up on behalf of the complainant and the other creditors against the stockholders upon their individual liability. The purpose for which the receiver was appointed was to collect the proper assets of the bank and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and the fund so realized may be and was properly charged with the expenses of its collection, but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case differs in this respect from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. The equivalent for them, in the case of creditors who upon the voluntary liquidation of the bank seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause. No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.

[66]

It is also objected to the decree that it included among the claims directed to be paid out of the assessment upon the shareholders an amount, alleged to be about $5,000, in behalf of persons assumed to be creditors, but who did not appear in the cause or before the master to file and prove their claims. This was erroneous. No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by Henry B. Mason, one of the attorneys of the receiver, that he had "made a personal investigation of all the claims against the Manufacturers' National Bank, and, from the evidence introduced in the cause, and from outside knowledge confirmatory thereof, states that the Manufacturers' National Bank of Chicago is justly indebted to the several persons mentioned in the schedule hereunto annexed and made part of this affidavit, in the principal sums set opposite their several names, with interest thereon from March 12, 1875, at the rate of 6 per cent per annum in each case," etc. No one appeared as claimant, and no authority is shown to any one to act for him or in his own name. These claims should have been disallowed.

The decree of the Circuit Court is accordingly reversed, and the cause is remanded, with directions to proceed therein as justice and equity may require in conformity with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FIRST NATIONAL BANK OF CLEVELAND, OHIO ET AL., *Appts.*, [74]
v.
JOHN M. SHEDD ET AL., Trustees.

(See S. C. Reporter's ed. 74-87.)

Railroads—foreclosures of mortgages—trustee as representative of bondholders—right of majority to control—sale before settlement of questions as to priority and extent of lien.

1. The trustee of a railroad mortgage as a rule represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties; and where differences of opinion exist among them as to what their interests require, he should act, within the provisions of his trust, in accord with the wishes of the majority acting in good faith and without collusion.

2. In a proceeding for the foreclosure of two railroad mortgages and the determination as to the extent of the priority of lien of the first mortgage and the amount due on the issue of bonds thereunder, the law does not require that a sale shall be postponed, until all disputed questions as to the distribution of the proceeds are settled, against the wishes of the trustees and a large majority of the bondholders, merely because the intervenors, representing a minority interest, object.

[No. 1317.]

Submitted Jan. 24, 1887. Decided Mar. 28, 1887.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

Motion to dismiss, with which is united a motion to affirm. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George T. Bispham** and **Dunning & Edsall**, for John M. Shedd, appellee; and *Messrs.* **Francis Rawle** and **D. T. Watson**, for Henry Rawle, appellee, in support of motions.

Mr. **John Dalzell**, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which these motions rest are as follows: The Shenango and Allegheny Valley Railroad Company is a corporation organized under a charter granted by the State of Pennsylvania to build and operate a railroad from a point of intersection or junction with the Erie

and Pittsburgh Railroad, in the Township of West Salem, in the County of Mercer, to Bear Creek, in the County of Butler. In March, 1869, the directors of the company resolved to issue bonds to the amount of $1,000,000, and [75] secure them by a mortgage or deed of trust to Henry Rawle, Trustee, on that portion of its road "constructed and to be constructed between the western terminus thereof at its junction with the Erie and Pittsburgh Railroad in West Salem Township, Mercer County, and a point in Butler County forty miles southeastwardly from said western terminus, and to be denominated a first mortgage." Under this authority a mortgage or trust deed was actually executed to Rawle, as Trustee, not only on this forty miles of road, with its rolling stock and appurtenances, but also upon "any lateral or branch roads, with their appurtenances, that may hereafter be constructed by or come into possession of the company along the line of the aforementioned forty miles of main line or connected therewith; all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and also all franchises connected with or relating to the said railroad, or the construction, maintenance, or use thereof, now held or hereafter acquired by the said party of the first part (the company), and all corporate and other franchises which are now or may be hereafter possessed or exercised by the" company. This mortgage was duly recorded, and all the bonds authorized were issued thereunder.

By an Act of the Legislature of Pennsylvania, approved April 14, 1870, the company was authorized "to so extend their eastern terminus as to connect with the Allegheny Valley Railroad, and to so extend the western terminus as to connect with any other railroad;" and by another Act, approved March 7, 1872, "to construct three branches from their railroad as may be necessary and convenient for the development and transportation of coal, ore, limestone, and other minerals in the vicinity of their railroad, provided the said branches shall not exceed a distance of ten miles from the main line of said company."

The main line of the road was afterwards extended from its eastern terminus to the Allegheny Valley Railroad on the east side of the Allegheny River, and from its western end to the Atlantic and Great Western Railroad near the Town of Greenville, making the entire length of that line forty-seven miles. The company [76] also built sundry branch roads, and on the first of July, 1877, it executed another mortgage or deed of trust to John H. Devereux, Trustee, to secure another proposed issue of $1,000,000 of bonds. This mortgage covered "the entire railroad, built and to be built, * * * from its junction with the Atlantic and Great Western Railroad * * * to the Allegheny Valley Railroad on the east side of the Allegheny River, together with all its branches, extensions, side tracks, switches and turnouts, built and to be built, and also all the lands, rights, franchises, and appurtenances thereto belonging, * * * and also all the corporate rights and franchises of said railroad company;" but it was expressly made "subject to a previous mortgage on forty miles of the northwestern end of the railroad aforesaid and its appurtenances executed to Henry Rawle, Trustee."

Under this mortgage $200,000 of bonds were issued, and $175,000 in addition were placed with the following parties as collateral security for the following sums:

1. First National Bank of Cleveland, O.....	$64,000	to secure	$30,000
2. Second National Bank of Erie, Pa....	60,000	"	35,000
3. First National Bank of Greenville.....	22,000	"	20,000
4. Mahoning Nat. Bank of Youngstown.....	16,000	"	10,000
5. Wick Brothers & Company.....	5,000	"	2,500
6. Thomas H. Wells...	8,000	"	5,000
In all—bonds.....	$175,000	to secure	$102,500

On the 15th of March, 1884, Charles L. Young and Henry Tyler, subjects of Great Britain, claiming to be the owners of the $200,000 of bonds issued under the Devereux mortgage, filed their bill against the Railroad Company in the Circuit Court of the United States for the Western District of Pennsylvania to have a receiver appointed. This was done on the same day the bill was filed by the appointment of Thomas P. Flower, receiver, and he was at once authorized to borrow $100,000 upon his certificates, to be used in the payment of wages, interest, taxes, and other preferred claims.

On the 1st of May, 1884, Devereux, as trustee under the second mortgage, filed his bill against the company in the same court, to foreclose his mortgage, and asking the appointment of a receiver. To this the company filed an [77] answer, June 26, 1885, substantially admitting all the averments in the bill, and setting forth the appointment of Flower as receiver in the suit of Young & Tyler.

On the 6th of June, 1885, Rawle filed a petition in the suit of Young & Tyler, asking permission to sell under his mortgage; but on the 31st of July, 1885, the court, although of opinion that "an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of its creditors," postponed the order asked for until a sale could be made under both mortgages, by the two Trustees acting conjointly.

On the 5th of September, 1885, Devereux, by leave of the court, filed an amended bill, to which, in addition to the railroad company, he made Rawle, Trustee, Flower, the receiver, The British and South Wales Railway Wagon Company (Limited), The Union Rolling Stock Company (Limited), and William A. Adams, defendants. In this amended bill it is averred that the Devereux mortgage is a first lien on all the main line of the company excepting only "forty miles of said main line extending southeasterly from its junction with the Erie and Pittsburgh Railroad at Shenango," and "upon all the lateral branches of said road." The whole line, including the lateral branches, is stated to be seventy-five miles in length, and the part on which the Devereux mortgage is the first lien thirty-five miles. The prayer is for an account of the amount due on the bonds outstanding secured by the mortgages to Devereux and Rawle respectively, the amount due on the receiver's certificates issued by Flower, the expenses of the receivership, and certain car-trust contracts, and also for a determination of the respective priorities of all the incumbrances and charges on the property, and for a

sale of the mortgaged premises, free of liens, to pay the amounts found due in the order of their priority. This bill also prays the appointment of a receiver to take charge of the property and manage the business during the pendency of the suit. The British and South Wales Railway Wagon Company, The Union Rolling Stock Company, and William A. Adams answered, setting up certain car-trust contracts [78] which are immaterial on the present appeal. Devereux, the trustee, having died pending the suit, John M. Shedd was duly appointed in his place and substituted for him as complainant, April 16, 1886.

On the 18th of May, 1886, the First National Bank of Cleveland, The Second National Bank of Erie, The First National Bank of Greenville, The Mahoning National Bank, Wicks Brothers and Company, and Thomas H. Wells appeared in court, and on the 10th of June, 1886, were permitted to intervene in the suit, *pro interesse suo*, because of averments in their petition that Shedd, the substituted trustee, "is committed to a course, and is acting in a manner which is calculated to injure them in their security; in this, to wit, that there is on foot a certain scheme for the reorganization of said railroad company, which contemplates a 'united and friendly foreclosure' and sale of the entire road under the two mortgages named in plaintiff's amended bill, and this action now pending is to be used as the means of carrying forward said reorganization scheme in connection with certain proceedings to be instituted upon the mortgage; in which Henry Rawle is named as trustee, and mentioned in plaintiff's said bill; that there are certain questions as to the extent of the lien of the said Rawle mortgage, and the number of the bonds outstanding, and the amount that is due thereon, which should be determined in this action, and which the petitioners are informed and believe that the said Shedd, Trustee, does not intend to raise, and which, petitioners are informed and believe, if raised, will be determined against the validity and amount of a large portion of said bonds, but if left to the claim of the holders thereof and their trustee would amount to over one million dollars ($1,000,000,), and be made a charge and lien upon said premises superior to that of the bonds held by the petitioners, and there are also disputes as to the extent of the liens of the two mortgages, the said Rawle claiming a first lien upon the entire road, and the petitioners claiming that it is only a lien upon forty (40) miles of the main line, and that theirs is a first lien upon the entire balance. That petitioners are informed and believe that it is a part of said scheme to which said Shedd, [79] Trustee, is committed to have the interest in said railroad covered by the conveyance to Devereux sold without a determination of these questions, and by so doing the petitioners say that the value of their security will be greatly diminished, first, by not being able to know the exact extent thereof; and secondly, by being unable, by reason of the uncertainties existing as to the extent of their lien, to protect the property from being sacrificed upon sale, and as to these matters they beg leave of the court to refer for a fuller statement of the same to their pleadings allowed by the court to be filed in case No. 17, in equity, May Term, 1884," the Young & Tyler suit.

On the 12th of June, 1886, Rawle filed a cross bill, in which, after setting up the mortgage in his favor and the default of the company in the payment of interest on the bonds secured thereby, he asked to be permitted to sell the mortgage property free of all liens, and to bring the proceeds into court to be distributed in accordance with the respective liens and priorities of the parties.

On the 18th of June, 1886, the railroad company answered both the amended and cross bills, and, leaving the parties to litigate among themselves as to their respective rights under the mortgages, joined in the prayers that the property might be sold.

On the 26th of June each of the intervenors filed an answer to the cross bill of Rawle, setting up their respective claims and insisting that the lien of his mortgage should be confined to the forty miles of main line included in the resolution of the company authorizing its execution. It is also insisted that the amount actually due upon the outstanding bonds is much less than $1,000,000, for reasons which are specially stated, and "that owing to the disputes existing as to the amount of the first mortgage bonds outstanding, and the extent of the lien thereof, and the dispute as to the extent of the lien of the second mortgage bonds, and as disputes have arisen as to the amount and validity of the receiver's certificates, it is necessary, in order to protect its rights as a lien creditor, to have a court of competent jurisdiction to determine the amount of said bonds outstanding, and the amount due thereon, and the extent of the lien thereof, as well as the amount and the [80] extent of the lien of said second mortgage bonds, as well as the amount and validity of the said certificates, before a sale of the said property."

"And the respondent respectfully represents that if the property of the defendant company is sold before the validity and extent of said liens are judicially determined, bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed at said sale.

"Wherefore your respondent prays that an accounting may be had and taken in the premises; that the amount of the bonds outstanding in the hands of *bona fide* holders for value may be determined; that the extent of the lien of each may be judicially determined, and upon the final determination of the matters and not before that an order of sale may be issued to sell the mortgaged premises; and for such other and further relief as may be just and equitable in the premises and to your honors shall seem meet."

After these answers were in, both Shedd and Rawle, the Trustees, moved the court for leave to sell the mortgaged property under their deeds of trust, and upon these motions, on the 13th of July, the district judge, sitting in the circuit court, filed an opinion, in which the circuit judge concurred, as follows:

"When this case was formerly before us, upon the petition of Henry Rawle, Trustee, for leave to sell the Shenango and Allegheny Railroad under the power of sale in the mort-

gage to him, we expressed the opinion that an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of all its creditors. This opinion is greatly strengthened by what has since transpired. Under the operation of the receivership the financial condition of the company is constantly growing worse, and it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale. In this view the creditors generally concur. The controlling objection to the sale as formerly proposed has been removed by the joint application of the Trustees [81] under the two mortgages to sell by virtue of the powers of sale conferred upon them respectively, they agreeing to unite in the sale so as to assure to the purchaser an undoubted title to the whole property, and to so conduct the sale as to secure the highest price attainable.

"We have no hesitation in finding in the case of the Devereux-Shedd mortgage that there has been a default in the payment of interest coupons for more than eighteen months, and that by the election of one tenth in amount of the bondholders the principal of the bonded indebtedness has become due and payable, and that by reason thereof the Trustee is entitled to foreclose the mortgage or exercise his power of sale.

"The sale by the Trustee will be under the control and subject to the approval of the court, and we can see to it that no unfair advantage is taken of the minority of the bondholders by reason of any improper combination among the majority or otherwise.

"The court having reached the conclusion that the mortgage Trustees should be permitted to exercise their powers of sale under the direction of the court, it is to be hoped that the parties can speedily agree as to the manner in which the property shall be offered for sale, but if they do not agree we will hear them further upon that point before a decree is framed."

Pursuant to this decision a decree was entered on the 14th of October, as follows:

"This cause came on to be heard * * * upon a motion by and on behalf of the said John M. Shedd, Trustee, and also by and on behalf of the said Henry Rawle, Trustee, that the court shall order and decree a sale of all and singular the property, real, personal and mixed, of the Shenango and Allegheny Railroad Company, freed and discharged from all liens and incumbrances whatsoever; and also upon a motion made by and on behalf of the said John M. Shedd, trustee; and also by and on behalf of the said Henry Rawle, Trustee, to the effect that each Trustee shall be authorized and em- [82] powered under and in accordance with the terms of his mortgage to proceed and sell all and singular the property, real, personal, and mixed, covered by or included within his said recited mortgage, and upon a motion by and on behalf of both Trustees for a sale of the entire property of the defendant company as incumbered and unable to pay the liens upon it, and so that the proceeds thereof may be distributed among the creditors entitled thereto. Due notice having been given to all parties in interest of these motions, and that the same would be heard, and the same having been already heard, all the parties in interest appearing by counsel and taking part in the argument, and the various papers and proceedings and record in the case of *Young et al.* v. *Shenango & Allegheny V. R. R. Co.*, now pending at No. 17, May Term, 1884, of this court, as well as also all papers, affidavits, and other proceedings in this case and other documents, were produced, heard, and considered by the court in support of the said motions, and the court, after consideration, being of the opinion that it was to the best interest of all parties concerned that the said railroad and all the property of the Shenango and Allegheny Railroad Company should be sold as speedily as possible; and having filed an opinion to that effect, and the parties in interest being unable to agree upon the form of a decree directing said sale, and the court having fixed the 30th day of September, A. D., 1886, for settling the form of a decree, and counsel for all the respective parties having appeared and having been duly heard, and the court having considered the premises, do now order, adjudge and decree as follows".

Then follows a detailed statement of all the property of the company, describing particularly its main line and branches, and also its lands, rolling stock, and other property. There is then a finding of the execution of the two mortgages to Rawle and Devereux, the amount of bonds originally issued thereunder, and a default in the payment of interest such as would entitle the several Trustees to take possession and sell under the powers vested in them respectively, and an adjudication that the Trustees are severally "entitled to proceed and foreclose the said mortgage." It is also found that the mortgages are each valid and existing liens on so much of the property "as was there- [83] by lawfully conveyed to the said respective Trustees, and which thereafter became vested in the said Trustees respectively as after acquired property, according to the terms of said mortgages, or either of them;" that all of the original issue of bonds under the Rawle mortgage was outstanding with interest coupons attached, from October 1, 1884, and under the Devereux, $375,000 and all the interest warrants from their date, but there is no finding of the amount actually due on either of the issues. It is also found that there are $155,849.87 of receiver's certificates outstanding on which interest is payable at the rate of 6 per cent per annum from their respective dates, and that these "together with the costs, charges, and lawful expenses in this cause, and the costs, charges, expenses of the liabilities of the receivership, including the costs in the case of *Young* v. *Shenango & Allegheny V. R. R. Co.* in this court and all just and proper compensation, expenses, and allowances to the said receiver and the Trustees under the said mortgages, and to any of the parties to the said cause, are entitled to be paid out of the proceeds of the * * * sale in the first instance," and in preference to the bondholders.

The decree then proceeds as follows:

(8.) "And this court does further find, adjudge and decree that all the property, real, personal, and mixed, of the said Shenango and Allegheny Railroad Company is subject to the lien of either the said mortgage to the said Henry Rawle, Trustee, or to the said mortgage

to the said John H. Devereux, Trustee, as also to the outstanding receiver's certificates, and that there are conflicting claims in reference to the priority of liens and their extent, and that there are conflicting claims between the said mortgagees and some of the bondholders in reference to the number of bonds legally outstanding and unpaid under the said respective mortgages to the said Henry Rawle, Trustee, and to the said John H. Devereux, Trustee, and, also, that there are conflicting claims in reference to the amounts of money due on the said respective bonds outstanding under the said mortgages which the holders thereof are entitled to receive; and this court also finds that the Shenango and Allegheny Railroad Company is insolvent, and that it would be to the best interests of all parties concerned that the said property, real, personal, and mixed, of the said defendant company should be sold; and it appearing to the said court that such sale by this court of the said property is prayed for under the amended bill filed by the said John M. Shedd, Trustee, and also in the cross bill filed by the said Henry Rawle, Trustee, this court does now, upon motion of the solicitors for the said John M. Shedd, Trustee, and also upon motion of the solicitors of the said Henry Rawle, Trustee, the solicitors for the company and the receiver acquiescing herein, order, adjudge and decree that the said Henry Rawle and John M. Shedd be, and they are hereby, appointed special commissioners by this court to make sale of all and singular the property, real, personal, and mixed, including the franchises of the said Shenango and Allegheny Railroad Company; said sale shall be on the 25th day of January, 1887, at Shenango, the junction of the Shenango and Allegheny Railroad with the Atlantic and Great Western, now New York, Pennsylvania and Ohio Railroad, near Greenville, Mercer County, Pennsylvania, at twelve (12) o'clock noon, and it shall be at public auction, and the sale shall be made to the highest and best bidder, and report thereof made to this court."

[84]

It is then ordered that the whole property be sold as an entirety, at not less than $625,000, and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, etc., and the conclusion is as follows:

(13th) "All disputes and controversies between the two mortgage Trustees, the said Rawle and the said Shedd, or the bondholders under the said two mortgages, touching the extent of the lien of the said mortgages, respectively, or the priority of the lien of the said mortgages, respectively, as well as all questions concerning and touching the amounts due bondholders, respectively, under the said two mortgages, are hereby expressly reserved for future consideration and determination, unaffected by anything in this decree."

[85]

From this decree the intervenors alone have appealed, and that appeal Shedd and Rawle move to dismiss because it was "taken from an interlocutory decree or order of sale and not a final decree." With this motion is also united a motion to affirm under Rule 6, section 5.

The motion to dismiss is overruled, but the motion to affirm is granted. The appeal in its present form brings up for review the single question of the propriety of ordering a sale before the rights of the parties under the several mortgages have been fully ascertained and determined. All parties, including the mortgage Trustees, are satisfied, except these appellants, who have been allowed to intervene *pro interesse suo*, and who represent but a small minority of the mortgage indebtedness. The only substantial issues presented by their answers relate to the extent of the priority of the lien of the Rawle mortgage, and the amount due on that issue of bonds. They do not deny that the property must in the end be sold under the mortgages, and, while insisting that Rawle can only enforce his lien to the extent of the past due interest on that issue of bonds, there is no offer to provide means for the payment of that interest, and there is no pretense that the part of the property covered by his mortgage, whatever it may be, can be sold to advantage otherwise than as an entirety. Neither is it claimed that the property covered by the Devereux mortgage alone can be sold separate from the rest as advantageously as if the whole road and its branches were offered together. The entire opposition to a sale now rests on the claim that it is necessary, in order to protect the rights of these intervenors as lien creditors, that all disputed questions should be settled, or "bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed."

Against this is the fact that both the Trustees agree in the opinion that the interests of their respective beneficiaries will be best subserved by an immediate sale, in which the creditors generally concur. In addition to this, the court finds, and the evidence shows, that the financial condition of the company under the administration of the receiver, is continually growing worse. The receiver's certificates have increased since March 15, 1884, when the first loan was authorized, from $100,000 to nearly $156,000 in October, 1886, and the receiver, in his answers, says, that from his knowledge "of the condition of said railroad company and its property and finances, he verily believes it would be for the best interest of all parties concerned, including the stockholders, bondholders, and creditors, * * * that all its property should be sold as soon as possible, and in such manner as to give the purchasers thereof an unincumbered title thereto." This also was the opinion of the court when Rawle made his application in the suit of Young & Tyler for leave to sell, and which was then denied because the Trustee of the Devereux mortgage did not unite in the application, and the court was satisfied that a fragmentary sale would operate injuriously upon the rights of all who were interested in securing the largest price for the property to be sold.

[86]

Against all this we do not find a word of evidence in the record, so that the only question is whether the law requires that a sale should be postponed against the wishes of the mortgage Trustees and a large majority of the bondholders, simply because these intervenors, representing a minority interest, object. As a rule the trustee of a railroad mortgage represents the bondholders in all legal proceedings

carried on by him affecting his trust, to which they are not actually parties. There is here no evidence to show fraud or unfairness on the part of the Trustees. The company is satisfied with what they are doing, and so are all the bondholders under the Rawle mortgage, and a majority of those under that to Devereux. As was said in *Shaw* v. *R. R. Co.* 100 U. S. 612 [25: 759]: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions [87] of his trust." Here the majority want an immediate sale. In this the Trustees both agree, as does the railroad company itself. There is no evidence whatever of a want of good faith in anyone. The court below, having the practical workings of the receivership under its own eye, did not hesitate to say that "it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale," and we see nothing to the contrary.

Of the power of the court to make such an order in a proper case we have no doubt. The property is in the possession of the court and is depreciating in value by the accumulation of receiver's indebtedness, while the litigation between the parties as to their respective interests in it is going on. There cannot be a doubt that the whole ought to be sold together. If in the end it shall be found that the Rawle mortgage covers only a part, it will be as easy to fix the rule for dividing the proceeds equitably between the two securities after a sale, as before, and there is nothing in the decree as entered to interfere in any way with such a distribution.

Upon the facts as presented to us we are entirely satisfied that the decree of the court below was right, *and it is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[87] H. A. CARPER, *Appt.*,
v.
RICHARD L. FITZGERALD.

(See S. C. Reporter's ed. 87-89.)

Habeas corpus—*what appeals lie to this court under Act of March 3, 1885—judge sitting without the district—decision as judge not decision of the court—Rule 34.*

1. The Act of March 3, 1885, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.

2. The order of a circuit judge, in *habeas corpus* proceedings, that the papers be filed and his order of discharge recorded in the circuit court of another district within which the petitioner is confined, does not make his decision as judge a decision of the court; neither does Rule 34, adopted by this court at the last term, have that effect.

[No. 1841.]

Argued March 18, 1887. Decided March 28, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia. *Dismissed.*

The appellee is a sample merchant, who travels for the house of Austin, Field & Co., of Philadelphia, in the State of Virginia and sells their goods by sample. He tendered the State's tax receivable coupons to the proper officer in payment of his license tax, and demanded his license, but the coupons were refused and the license also. He thereupon proceeded with his business without a license, and was arrested by the state authorities for so doing. He applied to the Hon. H. L. Bond, United States Circuit Judge for the Fourth Circuit, at Baltimore, Maryland, for a writ of *habeas corpus*, upon the ground that he was held in violation of the Constitution of the United States. The Judge at Baltimore ordered the writ to issue from the clerk's office of the Circuit Court, at Richmond, Virginia, to be returnable before himself at Baltimore. The body of the petitioner was produced before him on the day named, when he ordered his discharge; and also ordered "that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court." Thereupon the respondent therein appealed to this court.

Messrs. **R. A. Ayers**, *Atty-Gen. of Virginia*, for appellant.

Messrs. **D. H. Chamberlain, Bradley T. Johnson,** and *William L. Royall*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court. [88]

This was a proceeding before the Circuit Judge for the Fourth Circuit at his Chambers in Baltimore, Maryland, for the discharge of Richard L. Fitzgerald from the custody of H. A. Carper, jailer of Pulaski County, Virginia, under a *mittimus* from John H. Cecil, a justice of the peace of that county. The petition was presented to the judge in Baltimore, who directed the clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of *habeas corpus*, and make it returnable before him at the United States court house in Baltimore. The writ was accordingly issued, under the seal of the court, in the usual form of circuit court writs, and made returnable "before the Honorable Hugh L. Bond, Judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States court house in Baltimore, Maryland." The record shows that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of this order was the following:

"And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court.

"HUGH L. BOND, *Circuit Judge.*" [89]

From this order the jailer was allowed an appeal to this court by the circuit judge, and the case was docketed here as "an appeal from the Circuit Court of the United States for the Eastern District of Virginia." The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under section 752 of the Revised Statutes, before the judge

sitting as a judge, and not as a court. The Act of March 3, 1885, chap. 353, 23 Stat. at L. 437, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.

The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S. 708 [29:4] adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes.

Appeal dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

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[102] WILLIAM L. ROYALL, *Plff. in Err.*,
v.
STATE OF VIRGINIA.

(See S. C. Reporter's ed. 102-105.)

Constitutional law—tender of Virginia coupons in payment of license tax—demurrer to plea, effect of.

1. Under the laws of Virginia, an assessment, made by law a condition precedent to obtaining a license for pursuing a profession, is payable in coupons of certain bonds issued by the State.
2. Where an applicant for a license has tendered coupons in payment therefor, he need not resort to a *mandamus* to compel its issue upon its being wrongfully withheld, but may, without a license, pursue the business of his calling, which is not unlawful in itself, and which he has the constitutional right to prosecute.
3. In the case presented, the demurrer to the plea is an admission of record that the coupon tendered was genuine, and bore on its face the contract of the State, making it receivable in payment of the license tax in question. This is held to show a good tender.

[No. 1851.]

Argued March 18, 1887. Decided March 28, 1887.

IN ERROR to the Supreme Court of Appeals of the State of Virginia. *Reversed.*

The plaintiff in error is an attorney at law. On the first day of May, 1886, he tendered the treasurer of Richmond city the State's coupons in payment of his license tax for the ensuing year and demanded his license. The tender was rejected and a license refused. He thereupon proceeded with the practice of his profession without a license. He was prosecuted for this in the Hustings Court of the City of Richmond, convicted and fined. He applied to the court of appeals for a writ of error, which was refused him; whereupon he sued out this writ of error.

Messrs. **D. H. Chamberlain, Bradley T. Johnson** and *William L. Royall*, in person, for plaintiff in error.

Mr. **R. A. Ayers,** *Atty-Gen. of Virginia*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case cannot be distinguished in principle from that of *Royall* v. *Virginia*, 116 U. S. 572 [29:735]. The demurrer to the plea is an admission of record that the coupon tendered in payment of the license tax was genuine, "and [105] bore on its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due said State." This shows a good tender, which brings this case within the ruling by this court in the other.

The judgment of the Supreme Court of Appeals of the State of Virginia is reversed on the authority of Royall *v.* Virginia, *supra, and the cause remanded for further proceedings, not inconsistent with this opinion and the judgment in that case.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

VESTA LAIDLY, *Appt.* [179]
v.
COLLIS P. HUNTINGTON ET AL.

(S. C. Reporter's ed. 179-182.)

Removal of causes—separable controversy—petition too late, after hearing on demurrer.

1. A bill for assignment of dower, filed by a citizen of the State in which the action is brought, against a corporation of the same State, holding the legal title to the land, and citizens of another State, through whom the corporation immediately holds, does not present a separable controversy to support a removal of the cause.
2. A petition for removal, filed after a demurrer has been heard and sustained, is too late.

[No. 160.]

Argued March 22, 1887. Decided April 4, 1887.

APPEAL from the District Court of the United States for the District of West Virginia. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **J. F. Brown,** for appellant.

No counsel appeared for appellees.

Mr. Chief Justice **Waite** delivered the opin- [180] ion of the court:

This is a suit begun by Vesta Laidly, a citizen of West Virginia, the widow of Albert Laidly, deceased, on the 20th of December, 1881, in the Circuit Court of Cabell County, West Virginia, against C. P. Huntington and Elizabeth Huntington his wife, citizens of New York, and the Central Land Company, a West Virginia corporation, for an assignment of dower in certain land in that county conveyed by and for Albert Laidly to C. P. Huntington, and afterwards by Huntington, during the life of Laidly, to the Land Company, in whose possession it was, under that conveyance, when the suit was begun. The prayer of the bill is: 1, for an assignment in money, to be estimated according to the valuation of the land at the time of the alienation, or if that cannot be done, then, 2, in land. Attached to the bill as exhibits are copies of the deeds under which the conveyances were made to Huntington, two of which purport to have been executed by Laidly and his wife, and a third by another person who held title for Laidly. In addition to these exhibits there is a copy of the deed by Huntington and wife which purports to convey all the land to the Land Company.

To this bill a joint demurrer was filed by

against the bank as a corporation or as against its stockholders; they were not misled to their hurt by any fraudulent misrepresentations or concealments of any matters of fact. Whatever mistake was made was their own, and it was a mistake consisting merely in a misapprehension of their legal rights. They were bound to know, as well as Holmes, the limits of his authority, and ought to have acted on the presumption that he had no right to bind the bank or its shareholders *in futuro* by any new engagement. If they chose, in their eagerness to obtain a settlement in advance of other creditors equally entitled, to accept a part of the assets of the bank or the personal obligation of its president in settlement of their claims, they must abide by the election which was then made, and which cannot now be set aside. They made their settlements in view of their own estimate of the present advantage; they cannot now undo them to the disadvantage of other creditors, over whom they sought to obtain preferences, nor to the prejudice of the stockholders, who have a right to be exonerated from the payment of all contracts, debts, and engagements of the bank contracted since the date of its suspension.

In respect to these claims in Class D, Ira Holmes, the president, testified as follows:

"Q. In each case where you settled with the creditor of the bank and turned him out bills receivable of the bank, how was that settlement—was it a payment, or what was the transaction? A. It was a full payment of the demand. He gave me his check on the bank for the amount, the same as if we were doing a regular business and the parties should come in and buy so much bills receivable and give me a check on another bank.

"Q. Was there any case in which there was any other understanding than that he took these bills receivable in payment of his demand [63] against the bank? A. Not any."

On his cross examination he is asked:

"Q. If creditors agree to take paper in full payment, why would the bank guarantee it? A. I didn't say they agreed to take it in full; a great many people took the paper without guarantee, and others would not take it unless they had a guarantee; only when it got down to the last settlement, and they would not take it unless the bank would guarantee it."

The force of this testimony is, we think, that the party accepted the paper, with or without the guarantee, in settlement of the claim as it stood on the books of the bank on the day of the suspension. Those who insisted upon the guarantee or indorsement by the bank undoubtedly relied upon it as an obligation which they might thereafter enforce, but their reliance was upon that contract and not upon the original claim. It does not detract from the binding nature of the settlement that this guarantee was given and received and relied upon. The only mistake now asserted as a ground for going behind the settlement is, that the guarantee or indorsement is not effective as an obligation of the bank for which the stockholders are individually responsible. But this is not a mistake as to what the parties intended to do; it is only a mistake as to the effect of what they did. As the bank was in liquidation, and the officers were not authorized to enter into new contracts, the presumption is, in every case where the creditor accepted paper in settlement of his claim, that it was received in payment and operated as a satisfaction. If there was any other agreement by which that paper was received merely as collateral to the original debt and received as security and not in payment, it must be affirmatively shown.

We have carefully examined all the evidence contained in the record in respect to each of the claims embraced in Class D of the master's report. We are not able to find as to any one claim, that it is an exception from the general rule as to settlements established by the testimony of Holmes. In several instances, it is true that the witnesses with whom the settlements were made alleged that the notes with the indorsements or guarantees were not taken in payment and satisfaction, but as additional security for their claims; and that the transactions were made upon the faith that the remedy against the bank and against its stockholders was not thereby impaired. But it is quite evident, we think, that in each of these cases the reliance was not upon the liability arising upon [64] the claim as it stood prior to the settlement, but upon the indorsement or guaranty of the bank, and the belief that the liability of the stockholders remained unaffected by the transaction. The facts in each case are that the claim as it stood upon the books of the bank was settled between the parties by the creditor accepting bills receivable out of the assets of the bank, or the individual note of its president indorsed or guaranteed in the name of the bank; supposing that, in the event of default in payment by the other parties to the paper, the obligation of the bank itself was preserved by the indorsement or guaranty, and that for that contract the stockholders continued to be liable. Upon this view of the facts, the stockholders are by law exonerated from the obligation to contribute to the payment of any claims of this class. All those enumerated in Class D in the master's report, therefore, should have been excluded from the benefits of the decree.

Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment.

The next question arises upon the objection [65] of the appellants to the allowance made by the decree of 20 per cent of the amount of the debts of the bank due at the date of the suspension, in addition thereto, to cover the expenses

of the receivership. This sum, we think, ought not to have been allowed. The ordinary costs of the cause are, of course, taxable as against the defendants as in other cases, but we see no reason why the stockholders should be required to contribute, as a debt due from the bank or themselves, to a fund for the payment of the expenses of the receivership. The receiver in this case was appointed under the original bill, before any claim was set up on behalf of the complainant and the other creditors against the stockholders upon their individual liability. The purpose for which the receiver was appointed was to collect the proper assets of the bank and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and the fund so realized may be and was properly charged with the expenses of its collection, but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case differs in this respect from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. The equivalent for them, in the case of creditors who upon the voluntary liquidation of the bank seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause. No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.

[66]

It is also objected to the decree that it included among the claims directed to be paid out of the assessment upon the shareholders an amount, alleged to be about $5,000, in behalf of persons assumed to be creditors, but who did not appear in the cause or before the master to file and prove their claims. This was erroneous. No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by Henry B. Mason, one of the attorneys of the receiver, that he had "made a personal investigation of all the claims against the Manufacturers' National Bank, and, from the evidence introduced in the cause, and from outside knowledge confirmatory thereof, states that the Manufacturers' National Bank of Chicago is justly indebted to the several persons mentioned in the schedule hereunto annexed and made part of this affidavit, in the principal sums set opposite their several names, with interest thereon from March 12, 1875, at the rate of 6 per cent per annum in each case," etc. No one appeared as claimant, and no authority is shown to any one to act for him or in his own name. These claims should have been disallowed.

The decree of the Circuit Court is accordingly reversed, and the cause is remanded, with directions to proceed therein as justice and equity may require in conformity with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FIRST NATIONAL BANK OF CLEVELAND, OHIO ET AL., *Appts.*, [74]
v.
JOHN M. SHEDD ET AL., Trustees.

(See S. C. Reporter's ed. 74-87.)

Railroads—foreclosures of mortgages—trustee as representative of bondholders—right of majority to control—sale before settlement of questions as to priority and extent of lien.

1. The trustee of a railroad mortgage as a rule represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties; and where differences of opinion exist among them as to what their interests require, he should act, within the provisions of his trust, in accord with the wishes of the majority acting in good faith and without collusion.

2. In a proceeding for the foreclosure of two railroad mortgages and the determination as to the extent of the priority of lien of the first mortgage and the amount due on the issue of bonds thereunder, the law does not require that a sale shall be postponed, until all disputed questions as to the distribution of the proceeds are settled, against the wishes of the trustees and a large majority of the bondholders, merely because the intervenors, representing a minority interest, object.

[No. 1317.]

Submitted Jan. 24, 1887. Decided Mar. 28, 1887.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

Motion to dismiss, with which is united a motion to affirm. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George T. Bispham** and **Dunning & Edsall**, for John M. Shedd, appellee; and *Messrs.* **Francis Rawle** and **D. T. Watson**, for Henry Rawle, appellee, in support of motions.

Mr. **John Dalzell**, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which these motions rest are as follows: The Shenango and Allegheny Valley Railroad Company is a corporation organized under a charter granted by the State of Pennsylvania to build and operate a railroad from a point of intersection or junction with the Erie

and Pittsburgh Railroad, in the Township of West Salem, in the County of Mercer, to Bear Creek, in the County of Butler. In March, 1869, the directors of the company resolved to issue bonds to the amount of $1,000,000, and [75] secure them by a mortgage or deed of trust to Henry Rawle, Trustee, on that portion of its road "constructed and to be constructed between the western terminus thereof at its junction with the Erie and Pittsburgh Railroad in West Salem Township, Mercer County, and a point in Butler County forty miles southeastwardly from said western terminus, and to be denominated a first mortgage." Under this authority a mortgage or trust deed was actually executed to Rawle, as Trustee, not only on this forty miles of road, with its rolling stock and appurtenances, but also upon "any lateral or branch roads, with their appurtenances, that may hereafter be constructed by or come into possession of the company along the line of the aforementioned forty miles of main line or connected therewith; all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and also all franchises connected with or relating to the said railroad, or the construction, maintenance, or use thereof, now held or hereafter acquired by the said party of the first part (the company), and all corporate and other franchises which are now or may be hereafter possessed or exercised by the" company. This mortgage was duly recorded, and all the bonds authorized were issued thereunder.

By an Act of the Legislature of Pennsylvania, approved April 14, 1870, the company was authorized "to so extend their eastern terminus as to connect with the Allegheny Valley Railroad, and to so extend the western terminus as to connect with any other railroad;" and by another Act, approved March 7, 1872, "to construct three branches from their railroad as may be necessary and convenient for the development and transportation of coal, ore, limestone, and other minerals in the vicinity of their railroad, provided the said branches shall not exceed a distance of ten miles from the main line of said company."

The main line of the road was afterwards extended from its eastern terminus to the Allegheny Valley Railroad on the east side of the Allegheny River, and from its western end to the Atlantic and Great Western Railroad near the Town of Greenville, making the entire length of that line forty-seven miles. The company [76] also built sundry branch roads, and on the first of July, 1877, it executed another mortgage or deed of trust to John H. Devereux, Trustee, to secure another proposed issue of $1,000,000 of bonds. This mortgage covered "the entire railroad, built and to be built, * * * from its junction with the Atlantic and Great Western Railroad * * * to the Allegheny Valley Railroad on the east side of the Allegheny River, together with all its branches, extensions, side tracks, switches and turnouts, built and to be built, and also all the lands, rights, franchises, and appurtenances thereto belonging, * * * and also all the corporate rights and franchises of said railroad company;" but it was expressly made "subject to a previous mortgage on forty miles of the northwestern end of the railroad aforesaid and its appurtenances executed to Henry Rawle, Trustee."

Under this mortgage $200,000 of bonds were issued, and $175,000 in addition were placed with the following parties as collateral security for the following sums:

1. First National Bank of Cleveland, O.....	$64,000	to secure	$30,000
2. Second National Bank of Erie, Pa....	60,000	"	35,000
3. First National Bank of Greenville.....	22,000	"	20,000
4. Mahoning Nat. Bank of Youngstown.....	16,000	"	10,000
5. Wick Brothers & Company.....	5,000	"	2,500
6. Thomas H. Wells...	8,000	"	5,000
In all—bonds.....	$175,000	to secure	$102,500

On the 15th of March, 1884, Charles L. Young and Henry Tyler, subjects of Great Britain, claiming to be the owners of the $200,000 of bonds issued under the Devereux mortgage, filed their bill against the Railroad Company in the Circuit Court of the United States for the Western District of Pennsylvania to have a receiver appointed. This was done on the same day the bill was filed by the appointment of Thomas P. Flower, receiver, and he was at once authorized to borrow $100,000 upon his certificates, to be used in the payment of wages, interest, taxes, and other preferred claims.

On the 1st of May, 1884, Devereux, as trustee under the second mortgage, filed his bill against the company in the same court, to foreclose his mortgage, and asking the appointment of a receiver. To this the company filed an [77] answer, June 26, 1885, substantially admitting all the averments in the bill, and setting forth the appointment of Flower as receiver in the suit of Young & Tyler.

On the 6th of June, 1885, Rawle filed a petition in the suit of Young & Tyler, asking permission to sell under his mortgage; but on the 31st of July, 1885, the court, although of opinion that "an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of its creditors," postponed the order asked for until a sale could be made under both mortgages, by the two Trustees acting conjointly.

On the 5th of September, 1885, Devereux, by leave of the court, filed an amended bill, to which, in addition to the railroad company, he made Rawle, Trustee, Flower, the receiver, The British and South Wales Railway Wagon Company (Limited), The Union Rolling Stock Company (Limited), and William A. Adams, defendants. In this amended bill it is averred that the Devereux mortgage is a first lien on all the main line of the company excepting only "forty miles of said main line extending southeasterly from its junction with the Erie and Pittsburgh Railroad at Shenango," and "upon all the lateral branches of said road." The whole line, including the lateral branches, is stated to be seventy-five miles in length, and the part on which the Devereux mortgage is the first lien thirty-five miles. The prayer is for an account of the amount due on the bonds outstanding secured by the mortgages to Devereux and Rawle respectively, the amount due on the receiver's certificates issued by Flower, the expenses of the receivership, and certain car-trust contracts, and also for a determination of the respective priorities of all the incumbrances and charges on the property, and for a

sale of the mortgaged premises, free of liens, to pay the amounts found due in the order of their priority. This bill also prays the appointment of a receiver to take charge of the property and manage the business during the pendency of the suit. The British and South Wales Railway Wagon Company, The Union Rolling Stock Company, and William A. Adams answered, setting up certain car-trust contracts [78] which are immaterial on the present appeal. Devereux, the trustee, having died pending the suit, John M. Shedd was duly appointed in his place and substituted for him as complainant, April 16, 1886.

On the 18th of May, 1886, the First National Bank of Cleveland, The Second National Bank of Erie, The First National Bank of Greenville, The Mahoning National Bank, Wicks Brothers and Company, and Thomas H. Wells appeared in court, and on the 10th of June, 1886, were permitted to intervene in the suit, *pro interesse suo*, because of averments in their petition that Shedd, the substituted trustee, "is committed to a course, and is acting in a manner which is calculated to injure them in their security; in this, to wit, that there is on foot a certain scheme for the reorganization of said railroad company, which contemplates a 'united and friendly foreclosure' and sale of the entire road under the two mortgages named in plaintiff's amended bill, and this action now pending is to be used as the means of carrying forward said reorganization scheme in connection with certain proceedings to be instituted upon the mortgage; in which Henry Rawle is named as trustee, and mentioned in plaintiff's said bill; that there are certain questions as to the extent of the lien of the said Rawle mortgage, and the number of the bonds outstanding, and the amount that is due thereon, which should be determined in this action, and which the petitioners are informed and believe that the said Shedd, Trustee, does not intend to raise, and which, petitioners are informed and believe, if raised, will be determined against the validity and amount of a large portion of said bonds, but if left to the claim of the holders thereof and their trustee would amount to over one million dollars ($1,000,000,), and be made a charge and lien upon said premises superior to that of the bonds held by the petitioners, and there are also disputes as to the extent of the liens of the two mortgages, the said Rawle claiming a first lien upon the entire road, and the petitioners claiming that it is only a lien upon forty (40) miles of the main line, and that theirs is a first lien upon the entire balance. That petitioners are informed and believe that it is a part of said scheme to which said Shedd, [79] Trustee, is committed to have the interest in said railroad covered by the conveyance to Devereux sold without a determination of these questions, and by so doing the petitioners say that the value of their security will be greatly diminished, first, by not being able to know the exact extent thereof; and secondly, by being unable, by reason of the uncertainties existing as to the extent of their lien, to protect the property from being sacrificed upon sale, and as to these matters they beg leave of the court to refer for a fuller statement of the same to their pleadings allowed by the court to be filed in case No. 17, in equity, May Term, 1884," the Young & Tyler suit.

On the 12th of June, 1886, Rawle filed a cross bill, in which, after setting up the mortgage in his favor and the default of the company in the payment of interest on the bonds secured thereby, he asked to be permitted to sell the mortgage property free of all liens, and to bring the proceeds into court to be distributed in accordance with the respective liens and priorities of the parties.

On the 18th of June, 1886, the railroad company answered both the amended and cross bills, and, leaving the parties to litigate among themselves as to their respective rights under the mortgages, joined in the prayers that the property might be sold.

On the 26th of June each of the intervenors filed an answer to the cross bill of Rawle, setting up their respective claims and insisting that the lien of his mortgage should be confined to the forty miles of main line included in the resolution of the company authorizing its execution. It is also insisted that the amount actually due upon the outstanding bonds is much less than $1,000,000, for reasons which are specially stated, and "that owing to the disputes existing as to the amount of the first mortgage bonds outstanding, and the extent of the lien thereof, and the dispute as to the extent of the lien of the second mortgage bonds, and as disputes have arisen as to the amount and validity of the receiver's certificates, it is necessary, in order to protect its rights as a lien creditor, to have a court of competent jurisdiction to determine the amount of said bonds outstanding, and the amount due thereon, and the extent of the lien thereof, as well as the amount and the [80] extent of the lien of said second mortgage bonds, as well as the amount and validity of the said certificates, before a sale of the said property."

"And the respondent respectfully represents that if the property of the defendant company is sold before the validity and extent of said liens are judicially determined, bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed at said sale.

"Wherefore your respondent prays that an accounting may be had and taken in the premises; that the amount of the bonds outstanding in the hands of *bona fide* holders for value may be determined; that the extent of the lien of each may be judicially determined, and upon the final determination of the matters and not before that an order of sale may be issued to sell the mortgaged premises; and for such other and further relief as may be just and equitable in the premises and to your honors shall seem meet."

After these answers were in, both Shedd and Rawle, the Trustees, moved the court for leave to sell the mortgaged property under their deeds of trust, and upon these motions, on the 13th of July, the district judge, sitting in the circuit court, filed an opinion, in which the circuit judge concurred, as follows:

"When this case was formerly before us, upon the petition of Henry Rawle, Trustee, for leave to sell the Shenango and Allegheny Railroad under the power of sale in the mort-

gage to him, we expressed the opinion that an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of all its creditors. This opinion is greatly strengthened by what has since transpired. Under the operation of the receivership the financial condition of the company is constantly growing worse, and it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale. In this view the creditors generally concur. The controlling objection to the sale as formerly proposed has been removed by the joint application of the Trustees under the two mortgages to sell by virtue of [81] the powers of sale conferred upon them respectively, they agreeing to unite in the sale so as to assure to the purchaser an undoubted title to the whole property, and to so conduct the sale as to secure the highest price attainable.

"We have no hesitation in finding in the case of the Devereux-Shedd mortgage that there has been a default in the payment of interest coupons for more than eighteen months, and that by the election of one tenth in amount of the bondholders the principal of the bonded indebtedness has become due and payable, and that by reason thereof the Trustee is entitled to foreclose the mortgage or exercise his power of sale.

"The sale by the Trustee will be under the control and subject to the approval of the court, and we can see to it that no unfair advantage is taken of the minority of the bondholders by reason of any improper combination among the majority or otherwise.

"The court having reached the conclusion that the mortgage Trustees should be permitted to exercise their powers of sale under the direction of the court, it is to be hoped that the parties can speedily agree as to the manner in which the property shall be offered for sale, but if they do not agree we will hear them further upon that point before a decree is framed."

Pursuant to this decision a decree was entered on the 14th of October, as follows:

"This cause came on to be heard * * * upon a motion by and on behalf of the said John M. Shedd, Trustee, and also by and on behalf of the said Henry Rawle, Trustee, that the court shall order and decree a sale of all and singular the property, real, personal and mixed, of the Shenango and Allegheny Railroad Company, freed and discharged from all liens and incumbrances whatsoever; and also upon a motion made by and on behalf of the said John M. Shedd, trustee; and also by and on behalf of the said Henry Rawle, Trustee, to the effect that each Trustee shall be authorized and empowered under and in accordance with the terms [82] of his mortgage to proceed and sell all and singular the property, real, personal, and mixed, covered by or included within his said recited mortgage, and upon a motion by and on behalf of both Trustees for a sale of the entire property of the defendant company as incumbered and unable to pay the liens upon it, and so that the proceeds thereof may be distributed among the creditors entitled thereto. Due notice having been given to all parties in interest of these motions, and that the same would be heard, and the same having been already heard, all the parties in interest appearing by counsel and taking part in the argument, and the various papers and proceedings and record in the case of *Young et al.* v. *Shenango & Allegheny V. R. R. Co.*, now pending at No. 17, May Term, 1884, of this court, as well as also all papers, affidavits, and other proceedings in this case and other documents, were produced, heard, and considered by the court in support of the said motions, and the court, after consideration, being of the opinion that it was to the best interest of all parties concerned that the said railroad and all the property of the Shenango and Allegheny Railroad Company should be sold as speedily as possible; and having filed an opinion to that effect, and the parties in interest being unable to agree upon the form of a decree directing said sale, and the court having fixed the 30th day of September, A. D., 1886, for settling the form of a decree, and counsel for all the respective parties having appeared and having been duly heard, and the court having considered the premises, do now order, adjudge and decree as follows".

Then follows a detailed statement of all the property of the company, describing particularly its main line and branches, and also its lands, rolling stock, and other property. There is then a finding of the execution of the two mortgages to Rawle and Devereux, the amount of bonds originally issued thereunder, and a default in the payment of interest such as would entitle the several Trustees to take possession and sell under the powers vested in them respectively, and an adjudication that the Trustees are severally "entitled to proceed and foreclose the said mortgage." It is also found that the mortgages are each valid and existing liens on so much of the property "as was there- [83] by lawfully conveyed to the said respective Trustees, and which thereafter became vested in the said Trustees respectively as after acquired property, according to the terms of said mortgages, or either of them;" that all of the original issue of bonds under the Rawle mortgage was outstanding with interest coupons attached, from October 1, 1884, and under the Devereux, $375,000 and all the interest warrants from their date, but there is no finding of the amount actually due on either of the issues. It is also found that there are $155,849.87 of receiver's certificates outstanding on which interest is payable at the rate of 6 per cent per annum from their respective dates, and that these "together with the costs, charges, and lawful expenses in this cause, and the costs, charges, expenses of the liabilities of the receivership, including the costs in the case of *Young* v. *Shenango & Allegheny V. R. R. Co.* in this court and all just and proper compensation, expenses, and allowances to the said receiver and the Trustees under the said mortgages, and to any of the parties to the said cause, are entitled to be paid out of the proceeds of the * * * sale in the first instance," and in preference to the bondholders.

The decree then proceeds as follows:

(8.) "And this court does further find, adjudge and decree that all the property, real, personal, and mixed, of the said Shenango and Allegheny Railroad Company is subject to the lien of either the said mortgage to the said Henry Rawle, Trustee, or to the said mortgage

to the said John H. Devereux, Trustee, as also to the outstanding receiver's certificates, and that there are conflicting claims in reference to the priority of liens and their extent, and that there are conflicting claims between the said mortgagees and some of the bondholders in reference to the number of bonds legally outstanding and unpaid under the said respective mortgages to the said Henry Rawle, Trustee, and to the said John H. Devereux, Trustee, and, also, that there are conflicting claims in reference to the amounts of money due on the said respective bonds outstanding under the said mortgages which the holders thereof are entitled to receive; and this court also finds that the Shenango and Allegheny Railroad Company is insolvent, and that it would be to the best interests of all parties concerned that the said property, real, personal, and mixed, of the said defendant company should be sold; and it appearing to the said court that such sale by this court of the said property is prayed for under the amended bill filed by the said John M. Shedd, Trustee, and also in the cross bill filed by the said Henry Rawle, Trustee, this court does now, upon motion of the solicitors for the said John M. Shedd, Trustee, and also upon motion of the solicitors of the said Henry Rawle, Trustee, the solicitors for the company and the receiver acquiescing herein, order, adjudge and decree that the said Henry Rawle and John M. Shedd be, and they are hereby, appointed special commissioners by this court to make sale of all and singular the property, real, personal, and mixed, including the franchises of the said Shenango and Allegheny Railroad Company; said sale shall be on the 25th day of January, 1887, at Shenango, the junction of the Shenango and Allegheny Railroad with the Atlantic and Great Western, now New York, Pennsylvania and Ohio Railroad, near Greenville, Mercer County, Pennsylvania, at twelve (12) o'clock noon, and it shall be at public auction, and the sale shall be made to the highest and best bidder, and report thereof made to this court."

[84]

It is then ordered that the whole property be sold as an entirety, at not less than $625,000, and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, etc., and the conclusion is as follows:

(18th) "All disputes and controversies between the two mortgage Trustees, the said Rawle and the said Shedd, or the bondholders under the said two mortgages, touching the extent of the lien of the said mortgages, respectively, or the priority of the lien of the said mortgages, respectively, as well as all questions concerning and touching the amounts due bondholders, respectively, under the said two mortgages, are hereby expressly reserved for future consideration and determination, unaffected by anything in this decree."

[85]

From this decree the intervenors alone have appealed, and that appeal Shedd and Rawle move to dismiss because it was "taken from an interlocutory decree or order of sale and not a final decree." With this motion is also united a motion to affirm under Rule 6, section 5.

The motion to dismiss is overruled, but the motion to affirm is granted. The appeal in its present form brings up for review the single question of the propriety of ordering a sale before the rights of the parties under the several mortgages have been fully ascertained and determined. All parties, including the mortgage Trustees, are satisfied, except these appellants, who have been allowed to intervene *pro interesse suo*, and who represent but a small minority of the mortgage indebtedness. The only substantial issues presented by their answers relate to the extent of the priority of the lien of the Rawle mortgage, and the amount due on that issue of bonds. They do not deny that the property must in the end be sold under the mortgages, and, while insisting that Rawle can only enforce his lien to the extent of the past due interest on that issue of bonds, there is no offer to provide means for the payment of that interest, and there is no pretense that the part of the property covered by his mortgage, whatever it may be, can be sold to advantage otherwise than as an entirety. Neither is it claimed that the property covered by the Devereux mortgage alone can be sold separate from the rest as advantageously as if the whole road and its branches were offered together. The entire opposition to a sale now rests on the claim that it is necessary, in order to protect the rights of these intervenors as lien creditors, that all disputed questions should be settled, or "bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed."

Against this is the fact that both the Trustees agree in the opinion that the interests of their respective beneficiaries will be best subserved by an immediate sale, in which the creditors generally concur. In addition to this, the court finds, and the evidence shows, that the financial condition of the company under the administration of the receiver, is continually growing worse. The receiver's certificates have increased since March 15, 1884, when the first loan was authorized, from $100,000 to nearly $156,000 in October, 1886, and the receiver, in his answers, says, that from his knowledge "of the condition of said railroad company and its property and finances, he verily believes it would be for the best interest of all parties concerned, including the stockholders, bondholders, and creditors, * * * that all its property should be sold as soon as possible, and in such manner as to give the purchasers thereof an unincumbered title thereto." This also was the opinion of the court when Rawle made his application in the suit of Young & Tyler for leave to sell, and which was then denied because the Trustee of the Devereux mortgage did not unite in the application, and the court was satisfied that a fragmentary sale would operate injuriously upon the rights of all who were interested in securing the largest price for the property to be sold.

[86]

Against all this we do not find a word of evidence in the record, so that the only question is whether the law requires that a sale should be postponed against the wishes of the mortgage Trustees and a large majority of the bondholders, simply because these intervenors, representing a minority interest, object. As a rule the trustee of a railroad mortgage represents the bondholders in all legal proceedings

carried on by him affecting his trust, to which they are not actually parties. There is here no evidence to show fraud or unfairness on the part of the Trustees. The company is satisfied with what they are doing, and so are all the bondholders under the Rawle mortgage, and a majority of those under that to Devereux. As was said in *Shaw* v. *R. R. Co.* 100 U. S. 612 [25: 759]: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions [87] of his trust." Here the majority want an immediate sale. In this the Trustees both agree, as does the railroad company itself. There is no evidence whatever of a want of good faith in anyone. The court below, having the practical workings of the receivership under its own eye, did not hesitate to say that "it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale," and we see nothing to the contrary.

Of the power of the court to make such an order in a proper case we have no doubt. The property is in the possession of the court and is depreciating in value by the accumulation of receiver's indebtedness, while the litigation between the parties as to their respective interests in it is going on. There cannot be a doubt that the whole ought to be sold together. If in the end it shall be found that the Rawle mortgage covers only a part, it will be as easy to fix the rule for dividing the proceeds equitably between the two securities after a sale, as before, and there is nothing in the decree as entered to interfere in any way with such a distribution.

Upon the facts as presented to us we are entirely satisfied that the decree of the court below was right, *and it is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[87] H. A. CARPER, *Appt.*,
v.
RICHARD L. FITZGERALD.

(See S. C. Reporter's ed. 87-89.)

Habeas corpus—*what appeals lie to this court under Act of March 3, 1885—judge sitting without the district—decision as judge not decision of the court—Rule 34.*

1. The Act of March 3, 1885, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.

2. The order of a circuit judge, in *habeas corpus* proceedings, that the papers be filed and his order of discharge recorded in the circuit court of another district within which the petitioner is confined, does not make his decision as judge a decision of the court; neither does Rule 34, adopted by this court at the last term, have that effect.

[No. 1841.]

Argued March 18, 1887. Decided March 28, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia. *Dismissed.*

The appellee is a sample merchant, who travels for the house of Austin, Field & Co., of Philadelphia, in the State of Virginia and sells their goods by sample. He tendered the State's tax receivable coupons to the proper officer in payment of his license tax, and demanded his license, but the coupons were refused and the license also. He thereupon proceeded with his business without a license, and was arrested by the state authorities for so doing. He applied to the Hon. H. L. Bond, United States Circuit Judge for the Fourth Circuit, at Baltimore, Maryland, for a writ of *habeas corpus*, upon the ground that he was held in violation of the Constitution of the United States. The Judge at Baltimore ordered the writ to issue from the clerk's office of the Circuit Court, at Richmond, Virginia, to be returnable before himself at Baltimore. The body of the petitioner was produced before him on the day named, when he ordered his discharge; and also ordered "that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court." Thereupon the respondent therein appealed to this court.

Messrs. **R. A. Ayers**, *Atty-Gen. of Virginia*, for appellant.

Messrs. **D. H. Chamberlain, Bradley T. Johnson,** and *William L. Royall*, for appellee.

Mr. Chief Justice **Waite** delivered the opin- [88]
ion of the court.

This was a proceeding before the Circuit Judge for the Fourth Circuit at his Chambers in Baltimore, Maryland, for the discharge of Richard L. Fitzgerald from the custody of H. A. Carper, jailer of Pulaski County, Virginia, under a *mittimus* from John H. Cecil, a justice of the peace of that county. The petition was presented to the judge in Baltimore, who directed the clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of *habeas corpus*, and make it returnable before him at the United States court house in Baltimore. The writ was accordingly issued, under the seal of the court, in the usual form of circuit court writs, and made returnable "before the Honorable Hugh L. Bond, Judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States court house in Baltimore, Maryland." The record shows that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of this order was the following:

"And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court.

"HUGH L. BOND, *Circuit Judge.*" [89]

From this order the jailer was allowed an appeal to this court by the circuit judge, and the case was docketed here as "an appeal from the Circuit Court of the United States for the Eastern District of Virginia." The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under section 752 of the Revised Statutes, before the judge

sitting as a judge, and not as a court. The Act of March 3, 1885, chap. 353, 23 Stat. at L. 437, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.

The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S. 708 [29:4] adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes.

Appeal dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court U. S.

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[102] WILLIAM L. ROYALL, *Plff. in Err.*,

v.

STATE OF VIRGINIA.

(See S. C. Reporter's ed. 102-105.)

Constitutional law—tender of Virginia coupons in payment of license tax—demurrer to plea, effect of.

1. Under the laws of Virginia, an assessment, made by law a condition precedent to obtaining a license for pursuing a profession, is payable in coupons of certain bonds issued by the State.

2. Where an applicant for a license has tendered coupons in payment therefor, he need not resort to a *mandamus* to compel its issue upon its being wrongfully withheld, but may, without a license, pursue the business of his calling, which is not unlawful in itself, and which he has the constitutional right to prosecute.

3. In the case presented, the demurrer to the plea is an admission of record that the coupon tendered was genuine, and bore on its face the contract of the State, making it receivable in payment of the license tax in question. This is held to show a good tender.

[No. 1351.]

Argued March 18, 1887. Decided March 28, 1887.

IN ERROR to the Supreme Court of Appeals of the State of Virginia. *Reversed.*

The plaintiff in error is an attorney at law. On the first day of May, 1886, he tendered the treasurer of Richmond city the State's coupons in payment of his license tax for the ensuing year and demanded his license. The tender was rejected and a license refused. He thereupon proceeded with the practice of his profession without a license. He was prosecuted for this in the Hustings Court of the City of Richmond, convicted and fined. He applied to the court of appeals for a writ of error, which was refused him; whereupon he sued out this writ of error.

Messrs. **D. H. Chamberlain, Bradley T. Johnson** and *William L. Royall*, in person, for plaintiff in error.

Mr. **R. A. Ayers**, *Atty-Gen. of Virginia*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case cannot be distinguished in principle from that of *Royall* v. *Virginia*, 116 U. S. 572 [29: 785]. The demurrer to the plea is an admission of record that the coupon tendered in payment of the license tax was genuine, "and [105] bore on its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due said State." This shows a good tender, which brings this case within the ruling by this court in the other.

The judgment of the Supreme Court of Appeals of the State of Virginia is reversed on the authority of Royall *v.* Virginia, *supra, and the cause remanded for further proceedings, not inconsistent with this opinion and the judgment in that case.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

VESTA LAIDLY, *Appt.* [179]

v.

COLLIS P. HUNTINGTON ET AL.

(S. C. Reporter's ed. 179-182.)

Removal of causes—separable controversy—petition too late, after hearing on demurrer.

1. A bill for assignment of dower, filed by a citizen of the State in which the action is brought, against a corporation of the same State, holding the legal title to the land, and citizens of another State, through whom the corporation immediately holds, does not present a separable controversy to support a removal of the cause.

2. A petition for removal, filed after a demurrer has been heard and sustained, is too late.

[No. 160.]

Argued March 22, 1887. Decided April 4, 1887.

APPEAL from the District Court of the United States for the District of West Virginia. *Reversed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **J. F. Brown**, for appellant.

No counsel appeared for appellees.

Mr. Chief Justice **Waite** delivered the opin- [180] ion of the court:

This is a suit begun by Vesta Laidly, a citizen of West Virginia, the widow of Albert Laidly, deceased, on the 20th of December, 1881, in the Circuit Court of Cabell County, West Virginia, against C. P. Huntington and Elizabeth Huntington his wife, citizens of New York, and the Central Land Company, a West Virginia corporation, for an assignment of dower in certain land in that county conveyed by and for Albert Laidly to C. P. Huntington, and afterwards by Huntington, during the life of Laidly, to the Land Company, in whose possession it was, under that conveyance, when the suit was begun. The prayer of the bill is: 1, for an assignment in money, to be estimated according to the valuation of the land at the time of the alienation, or if that cannot be done, then, 2, in land. Attached to the bill as exhibits are copies of the deeds under which the conveyances were made to Huntington, two of which purport to have been executed by Laidly and his wife, and a third by another person who held title for Laidly. In addition to these exhibits there is a copy of the deed by Huntington and wife which purports to convey all the land to the Land Company.

To this bill a joint demurrer was filed by

Huntington and wife, May 22, 1882, and a separate demurrer by the Land Company. The ground of each demurrer is that the bill is not sufficient in law. On the 26th of the same month of May, these demurrers were argued and overruled by the court, "but without deciding upon the sufficiency of the acknowledgments to the several exhibits filed with the bill." Thereupon Mrs. Laidly moved the court to dismiss the suit as to Huntington and wife, to which they objected. This motion was argued on both sides and submitted, but, before a decision was reached, Huntington and wife presented their petition for the removal of the suit to the District Court of the United States for the District of West Virginia, sitting in Charleston, having circuit court powers, on the ground "that there is a controversy in said [181] suit which is wholly between citizens of different States; namely, between your petitioners, who are defendants in said suit, and the plaintiff." After the presentation of this petition, the suit was docketed in the district court upon an order to that effect made by that court November 1, 1882. On the 8th of November, Mrs. Laidly moved that it be remanded, and this motion was denied November 11. Thereupon the defendants moved for leave to reargue the demurrer, and this motion was granted. On the 10th of May, 1883, the court refused Mrs. Laidly leave to dismiss the suit as to the Huntingtons, overruled the demurrers, and dismissed the bill. From that decree this appeal was taken. The grounds now relied on for reversal are: 1, the refusal to remand; and 2, the overruling of the demurrers and the dismissal of the bill.

The district court was clearly in error in refusing to remand. There is no separable controversy in this suit, and Mrs. Laidly, the plaintiff, was, when the suit was begun, a citizen of West Virginia, and the Land Company, one of the defendants, a West Virginia corporation, and in law a citizen of the same State. As the legal title to the land was in the Land Company at the time of the death of Albert Laidly, and at the time of the commencement of the suit, the Company was an indispensable party. It is difficult to see how Huntington and wife were even proper parties, for according to the bill they had parted with their interest in the land during the life of the husband of Mrs. Laidly, and there is nothing whatever to indicate that when the suit was brought they had any claim whatever to the property. The whole controversy in the case, as we infer from the argument here, is as to the sufficiency of the acknowledgments by Mrs. Laidly of the deeds to Huntington, which she signed and sealed with her husband, to bar her dower. *Thayer* v. *Life Association*, 112 U. S. 717 [28: 864].

The petition was also filed too late, for it was after the case had been heard on a demurrer to the bill because it did not state facts sufficient to entitle the complainant to the relief prayed for, and the demurrer sustained. *Alley* v. *Nott*, 111 U. S. 472 [28: 491].

The decree is reversed on the single ground [182] that the suit should have been remanded to the state court, and, without passing on any of the other questions involved, *the cause is remitted to the District Court*, with instructions to send it back to the state court as a suit which had been improperly removed, and of which the district court had no jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Z. N. ESTES ET AL., *Appts.*, [183]
v.
S. H. GUNTER ET AL.

(See S. C. Reporter's ed. 183-185.)

Jurisdiction—amount in dispute—assignment—preferred creditors—bill against attaching creditors.

This court has jurisdiction of an appeal from a decree dismissing a bill, filed by preferred creditors for an amount in excess of $5,000 under an assignment, to enjoin a sale of the property by attaching creditors and to establish the assignment with its preferences, the property involved exceeding $5,000 in value.

[No. 285.]

Submitted March 28, 1887. Decided April 4, 1887.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

On motion to dismiss. *Overruled.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Edward Mayes** and **H. M. Sullivan**, for appellees, in support of motion.

Mr. **Luke E. Wright**, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss, on the ground that the value in dispute does not exceed $5,000. The record shows this: On the 25th of March, 1882, S. H. Gunter, a merchant doing business at Sardis, Mississippi, being unable to pay his debts in full, made an assignment of his stock of goods on hand, and the debts due him by note and book account, to S. G. Spain, for the benefit of his creditors, but with a preference in favor of Estes & Doan to the amount of $10,000 on a debt due them of $12,000 or over. Other creditors to a much smaller amount in the aggregate were also preferred. The stock of goods was valued at over $12,000, and the notes [184] and accounts were nominally more than $25,000.

A day or two after the assignment Bickham & Moore and three other firms sued out writs of attachment on their respective claims against Gunter, and seized the assigned property. The attachment in favor of Bickham & Moore was first issued for a debt of $3,000, and levied on a part only of the stock.

The other creditors levied on that taken under this prior attachment, and also on the rest. The ground of the attachments was that the assignment had been made to hinder and delay creditors, and was therefore void.

While the property taken under these attachments was in the hands of the sheriff, Estes & Doan, on the 17th of April, brought this suit against Spain, the assignee, the several attaching creditors, and the other preferred creditors, to enjoin a sale of the property under the attachments, to have a receiver appointed to take charge of the property and convert it

into money pending the suit, to have the assignment declared valid with its preferences, and for a payment to Estes & Doan of the $10,000 to which they were entitled according to its terms. To this bill none of the defendants appeared, except the attaching creditors, and they filed a joint answer, in which they set up the fraudulent character of the assignment. Spain, the assignee, was served with process, but he did not appear, and as to him the bill was taken for confessed.

Upon the filing of the bill the injunction prayed for was granted, and a receiver appointed to take charge of the property and convert it into money, the proceeds to abide the event of the suit. From an affidavit of that receiver, filed in support of our jurisdiction, it appears that he has already realized more than $5,300, which has been paid into the registry of the court, or for which he is accountable.

In the progress of the cause Estes & Doan voluntarily dismissed the bill as to all the attaching creditors except Bickham & Moore, and from that time on they and Spain, the assignee, were the only defendants in court. On the 3d of March, 1884, the court, after a hearing of [185] the cause, "being satisfied that complainants are not entitled to the relief sought," dissolved the injunction and dismissed the bill. From the opinion of the court, which has been sent up with the transcript, it appears that this was done because the evidence showed that the assignment was made to hinder and delay creditors, and was, therefore, void. This was, of course, equivalent to a decision that Estes & Doan could not be paid their preferred debt out of the fund in court in accordance with the terms of the assignment. From that decree this appeal was taken.

The suit was brought, not only to defeat the attachment of Bickham & Moore, but to establish the assignment and make it available for the payment of the preference in favor of Estes & Doan to the extent of $10,000, if the assigned property produced that sum. It has produced $5,300, and there is nothing to show that more may not be realized from it hereafter. Spain, the trustee, is a party to the suit, and the effect of the decree is not only to prevent him from paying to Estes & Doan the amount claimed by Bickham & Moore under their attachment, but anything besides. The decree is not that Bickham & Moore be paid their debt, but that nothing be paid to the complainants. The distribution of the fund in court is to be made hereafter as law and justice may require. The effect of what has been done is to defeat the claim which Estes & Doan have set up in their bill, and, so far as now appears, it matters not to them what disposition is made of the assigned property. That can be determined hereafter when the rights of other parties shall be presented in proper form. The case is, therefore, in principle, like *Shields* v. *Thomas*, 58 U. S. 17 How. 3 [15: 93]; *Market Company* v. *Hoffman*, 101 U. S. 112 [25: 782]; *The Connemara*, 103 U. S. 754 [26: 322]; *The Mamie*, 105 U. S. 773 [26: 937]; *Davies* v. *Corbin*, 112 U. S. 36 [28: 627].

The motion to dismiss is overruled.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, *Plff. in Err.*, [182]

v.

CHARLES DUNN, By ELLIS STONE GORMAN, His Guardian *ad litem*.

(See S. C. Reporter's ed. 182.)

Removal of causes—practice—motion to advance.

This court grants a motion to advance a cause in which a state court refused to grant a motion to remove, as within the spirit although not within the letter of Rule 32.

[No. 977.]

Submitted April 1, 1887. Decided April 4, 1887.

IN ERROR to the Supreme Court of the State of Minnesota.

Motion to advance under Rule 32. *Granted.*

This action was brought by defendant in error in a state court of Minnesota. After issue was joined the plaintiff filed a petition for its removal, which the state court refused to grant. The cause was then tried, the trial resulting in a verdict and judgment for the plaintiff. The court below having affirmed this judgment, the defendant sued out this writ of error. The defendant in error now moves to advance the cause under Rule 32, on the ground that the question presented is similar to that which would be presented had the cause been removed to the circuit court and by it remanded, and either of the parties had sued out a writ of error to review the ruling of that court.

Mr. **C. D. O'Brien**, for defendant in error, in support of motion.

No counsel appeared for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case is within the spirit, although not within the letter, of Rule 32. The state court refused to let go its jurisdiction on a petition for removal, and the Supreme Court of the State has affirmed the ruling of the trial court to that effect. The only question for our consideration on the writ of error is whether this decision was right. *The case is advanced*, to be brought on for hearing in the way provided by Rule 32, that is to say, under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error or appeals.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TOWN OF CONCORD, *Plff. in Err.*, [165]

v.

SYLVIA J. ROBINSON.

(See S. C. Reporter's ed. 165-175.)

Municipal bonds—power of Illinois municipalities to issue—statutes—Constitution of 1870.

1. Mere municipal corporations, constituted for the purpose of local police and administration, and having the power of levying taxes to pay all public charges created, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred, or clearly implied from same power expressly given.

2. The Illinois Act of March 7, 1867, authorizing certain municipalities to appropriate such sums of

money as they should deem proper to aid in the construction of the Chicago, Danville and Vincennes Railroad, did not authorize the issue of bonds in payment of an appropriation voted for the purpose specified.

3. The bonds in question, issued in 1871 by plaintiff in error, were not authorized by the Act of February 26, 1869, said Act being applicable only to aids voted and granted prior to its passage.

4. Said bonds were not authorized by the Act of March 24, 1869, and the vote by the electors of the Town on November 20, 1869, in favor of a donation to said road upon certain conditions with which the railroad company did not comply. If under the circumstances, the authorities ever had power to issue the bonds, it was withdrawn before their issue by the Constitution of 1870.

[No. 161.]

Argued March 24, 1887. Decided April 4, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry Decker,** *Lewis H. Bisbee* and *John P. Ahrens,* for plaintiff in error:

The bonds were issued in violation of the conditions on which the electors voted the donation.

The proviso, in the proposition voted upon, was a condition precedent to the donation taking effect.

Northern Bank v. *Porter Township,* 110 U. S. 608 (28: 258); *R. R. Co.* v. *Falconer,* 103 U. S. 821 (26: 471); *Town of Concord* v. *Savings Bank,* 92 U. S. 625 (23: 628).

The Act of February 26, 1869, was in terms confined to appropriations theretofore made, and has been held unconstitutional. *Town of Middleport* v. *Aetna L. Ins. Co.* 82 Ill. 562.

The provisions of the twelfth section of the ninth article of the Constitution of 1870 render the bonds void.

Dill. Mun. Corp. § 228; *Aspinwall* v. *Comrs. Daviess Co.* 63 U. S. 22 How. 364 (16: 296); *Wadsworth* v. *Supervisors,* 102 U. S. 534 (26: 221); *Stoddard* v. *Gilman,* 22 Vt. 568; *Pond* v. *Negus,* 3 Mass. 230; *Stone* v. *Supervisors,* 47 Ill. 256; *Beckwith* v. *English,* 51 Ill. 147.

The Constitution of 1870 was notice to the world that bonds of municipalities dated after July 2, 1870, were void, unless their issue had been authorized by a vote of the electors before that date.

Wright v. *Bishop,* 88 Ill. 302.

Mr. **George A. Sanders,** for defendant in error:

If there was any power to issue the bonds and coupons, even though coupled with conditions precedent, shown to have been complied with by the town officials, whose duty it is to determine this fact, the bonds must be held valid in the hands of a *bona fide* purchaser and owner for value, before maturity, and without notice of any claimed want of power or irregularity in their issue.

Nugent v. *Supervisors,* 86 U. S. 19 Wall. 241 (22: 83); *Supervisors* v. *Schenck,* 72 U. S. 5 Wall. 784 (18: 559); *Gelpcke* v. *Dubuque,* 68 U. S. 1 Wall. 208 (17: 524); *County of Clay* v. *Society for Savings,* 104 U. S. 579 (26: 856); *Commissioners etc.* v. *January,* 94 U. S. 202 (24: 110); *Anderson Co.* v. *Beal,* 113 U. S. 227 (28: 966); *Pendleton Co.* v. *Amy,* 80 U. S. 13 Wall. 305 (20: 580); *Van Hostrop* v. *Madison,* 68 U. S. 1 Wall. 291 (17: 538); *Moran* v. *Miami Co.* 2 Blatchf. 722; *Meyer* v. *Muscatine,* 68 U. S. 1 Wall. 384 (17: 564); *Knox Co.* v. *Aspinwall,* 63 U. S. 21 How. 539 (16: 208); *East Lincoln* v. *Davenport,* 94 U. S. 801 (24:322); *Coloma* v. *Eaves,* 92 U. S. 484 (23: 579); *Town of Venice* v. *Murdock, Id.* 494 (23: 583); *Grand Chute* v. *Winegar,* 82 U. S. 15 Wall. 355 (21: 170); *Lincoln* v. *Iron Co.* 103 U. S. 412 (26: 518).

The supervisor and town clerk executing the bonds and coupons are found by the evidence the duly elected officials of the Town of Concord for that purpose, and their signatures genuine, and the Town is estopped from denying their acts and statements.

Town of Windsor v. *Hallett,* 97 Ill. 204; *Brooklyn* v. *Ins. Co.* 99 U. S. 362 (25: 416); *Marcy* v. *Oswego,* 92 U. S. 638 (23: 748); *People* v. *Holden,* 82 Ill. 93; *People* v. *Town of Harp,* 67 Ill. 62.

The recitals are that they were issued under and by virtue of a law of Illinois. Such recitals import a compliance with the statute, and the Township, according to the uniform decisions of this court, is estopped to assert, as against a *bona fide* holder, that such recitals are untrue.

Bonham v. *Needles,* 103 U. S. 648 (26: 451); *Buchanan* v. *Litchfield,* 102 U. S. 278 (26:138); *Coloma* v. *Eaves, supra.*

A popular election having been held, and a majority of votes cast in favor of the application, it may be conceded that payment of the appropriation could lawfully have been made in town bonds instead of money, if the donation itself was authorized.

Town of Concord v. *Savings Bank,* 92 U. S. 629 (23: 630); *Fairfield* v. *County of Gallatin,* 100 U. S. 47 (25: 544); *County of Clay* v. *Society for Savings, supra.*

The bonds, as far as the power is concerned, may have been issued under either of the Acts of March 7, 1869, of March 24, 1869, or February 6, 1869, as all gave power, and were in existence when the vote was taken, the bonds executed and delivered. The recital of the Act of March 7, 1867, does not limit or bind the purchaser or holder to that Act alone for the power to issue the bonds. It is sufficient for a *bona fide* holder that the power existed, and both courts and purchasers may look beyond the recitals for the power to issue the bonds.

Commissioners v. *January,* 94 U. S. 204 (24: 111); *Anderson Co.* v. *Beal, supra; Burr* v. *Chariton County,* 2 McCrary, 603; *Town of Keithsburg* v. *Frick,* 84 Ill. 405.

Mr. Justice **Harlan** delivered the opinion of the court: [166]

This is an action upon negotiable coupon bonds signed by the supervisor and clerk of the Town of Concord, a municipal corporation existing under the township organization law of Illinois. They were executed in 1871. Each bond purports, upon its face, to have been "issued under and by virtue of a law of the State of Illinois to authorize cities, towns or townships within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad," and pledges the faith of the Township for the payment of the principal and interest. The Act here referred to was passed March 7,

1867. 1 Pri. Laws, Ill. 1867, p. 842. It authorizes all incorporated towns and cities, and towns acting under the township organization law, within certain territorial limits (which includes the Town of Concord), to appropriate such sums of money as they deem proper to the Chicago, Danville and Vincennes Railroad Company to aid in the construction of its road, "to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town, or township, respectively;" provided, the appropriation is first sustained at the polls by a majority of the electors of the municipality. The Act authorized and *required* the authorities of said townships, towns or cities, respectively, "to levy and collect a tax, and make such provisions as may be necessary and proper for the prompt payment" of the appropriation. It neither expressly nor by implication invested the municipal corporations, embraced by its provisions, with the power to issue commercial paper in payment of an appropriation so voted. We [167] held in *Claiborne County* v. *Brooks*, 111 U. S. 400, 406 [28: 470, 472]—which was decided after the judgment below was rendered—that "mere political bodies, constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to pay all public charges created, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some power expressly given which cannot be fairly exercised without it." No such implication arises from the grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment. *Wells* v. *Supervisors*, 102 U. S. 625, 631-2 [26: 122, 124]; *Ogden* v. *County of Daviess*, Id. 634, 639 [26: 263, 265]. The provision in the Act of 1867 that the money should be paid as soon as the road was located and constructed through the city, town, or township voting the appropriation, is inconsistent with the idea that such appropriation could be met, in the first instance, by negotiable bonds which might pass into the hands of *bona fide* holders for value, and become binding, whether the road was or not so located or constructed.

The clause requiring such provisions to be made as are necessary and proper for the prompt payment of the appropriation has reference only to the collection and application of taxes levied to meet the appropriation.

For these reasons the court erred in holding that the validity of the bonds was sustained by the Act of March 7, 1867.

The suggestion that the bonds were authorized by the Act of February 26, 1869, 3 Pri. Laws Ill. 1869, p. 355, entitled "An Act to Legalize Certain Aids Heretofore Voted and Granted to Aid in the Construction of the Chicago, Danville and Vincennes Railroad," is without force. That Act, by its very terms, has reference only to aids voted and granted prior to its passage. The aid in the present case was voted subsequently.

3. Nor, in our judgment, can the bonds be sustained as valid obligations of the Town by the provisions of the Act of March 24, 1869, 3 Pri. [168] Laws Ill. 1869, p. 356, entitled "An Act to Enable Towns, Townships, Cities or Counties along the Line of the Chicago, Danville and Vincennes Railroad to Contribute Towards the Construction of Said Railroad." The first section of that Act authorizes the several *counties* through which the road shall pass, by action of the board of supervisors, or by action of the county court in counties not acting under township organization, to make appropriations or loan their credit in such sums and upon such terms and conditions as they deem proper, to aid in the construction of such road; provided, the appropriation is first voted by the electors. The second section provides that "the legal voters of any town, township or city along the line of said railroad, whether said railroad shall run into or through said town, township or city, or not, may, by a majority of the legal voters voting at any election held for the purpose, make appropriations or donations to aid in the construction of said railroad, and the proper authorities *shall levy and collect taxes*, in the manner that other taxes are levied and collected, to promptly meet any obligations assumed under and by virtue of this Act."

The fourth section provides that "the authorities of any township, town or city—such township, town or city having voted to contribute aid in the construction of said railroad—may borrow money to promptly meet such contribution, and issue bonds of such township, town or city, * * * and shall have power to levy and collect such taxes as may be necessary to pay accruing interest or pay the principal sum." This last section, it is contended, gave the supervisor and town clerk of Concord authority to issue negotiable bonds in payment of the appropriation or contribution voted by the Township of Concord. In this view we do not concur.

The Constitution of Illinois adopted in 1870 provides that "No county, city, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions or donations, *Chicago & Iowa R.* [169] *R. Co.* v. *Pinckney*, 74 Ill. 277; *Fairfield* v. *County of Gallatin*, 100 U. S. 50 [25: 545], where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." The corporate authorities of Concord—the electors of the Township—voted November 20, 1869, in favor of levying a tax for the purpose of raising the sum of $25,000 in two years, "to be donated to the Vincennes, Danville and Chicago Railroad Company (meaning the Chicago, Danville and Vincennes Railroad Company), provided said company run said railroad through the Villages of Concord and Sheldon." The road was never constructed into or through either of said villages. It did not touch either township; nor did the electors of Concord Township ever vote upon the subject of issuing bonds in payment of the donation so voted. If, under these circumstances, the authorities of

that Township ever had power, under the Act of March 24, 1869, to issue bonds to meet that donation, that power was withdrawn by the Constitution of 1870 before the bonds in suit were issued. The section of that instrument relating to municipal subscriptions to railroad corporations went into operation July 2, 1870. *Louisville* v. *Savings Bank*, 104 U. S. 469 [26: 775]; *Schall* v. *Bowman*, 62 Ill. 321. Since that day no municipal corporation of Illinois has possessed authority to subscribe to the stock of a railroad or private corporation, or to make donations to or loan its credit to them, except that a subscription or donation, lawfully voted by the people before the adoption of that section, could be completed upon the terms and conditions approved by the electors. There is no saving of the right of such corporation to loan their credit to railroad corporations, where such loan of credit was not embraced in a vote previously taken, under existing laws, and which was favorable to a subscription of stock or a donation. The Township of Concord voted a donation merely, to be met by taxation within the period of two years, and to be paid if the railroad was constructed through the Villages of Concord and Sheldon, and not a donation to be met by interest bearing bonds covering a period of ten years. Some question is made as to whether the Township did not, by the vote at the special election of June 30, 1870, lawfully rescind the vote of November 20, 1869. Upon that question we express no opinion; and it may be assumed, for the purposes of this case, that the election of [170] June 30, 1870, did not affect the legal right of the railroad company to claim the donation voted November 20, 1869, upon the terms and conditions annexed thereto by the electors. But that is the utmost the company could have claimed. It certainly could not, prior to the adoption of the Constitution of 1870, have demanded, as of right, that bonds be issued; for the people did not vote for issuing bonds, and the Act of March 24, 1869, did not make it imperative upon the township authorities to issue bonds to meet a donation. It only declared that they "*may* borrow money * * * and issue bonds," and, in that way, pay the contribution which had been voted. The Constitution took away all power to impose upon the township any greater burdens than the people had by vote lawfully assumed under the existing statutes. These bonds were issued in 1871. Purchasers were bound to know that neither the Act of 1867, under which they were issued, nor the Act of February 26, 1869, conferred authority to issue them. If they purchased them in the belief that the recital in the bonds of the Act of 1867 was a mere mistake, and that the Act of March 24, 1869 gave the requisite authority, they were informed by the latter Act that the township authorities were not obliged to issue them, and, by the Constitution of 1870, that the power to do so was taken away. They were bound to know that the power of the Township, after July 2, 1870, was restricted by the Constitution to a completion of such subscription or donation as had been lawfully voted before that date; if not upon the precise terms and conditions attached thereto by the vote of the people, upon such terms as did not increase the burden. The bonds contain no recital that they are issued pursuant to a vote of the people had before the adoption of the Constitution of 1870, and there is, consequently, no pretense to say that the Township is estopped to deny the authority of its supervisor and clerk to execute them. *Orne* v. *Oxford*, 119 U. S. 215 [*ante*, 388].

If it be suggested that the railroad company [171] acquired a right, by the vote of November 20, 1869, which the Constitution of 1870 could not affect, the answer is that the company, in its acceptance, June 20, 1870, of the offer of township aid, stated that it would construct the road pursuant "to the terms and conditions voted by said town," which did not include the issuing of negotiable bonds. Besides, the Constitution saved whatever rights were acquired by the company under that vote; for, it left untouched the authority of the Township to complete the donation to the company according to the terms upon which it was voted. It only withdrew from the Township the power to make new subscriptions or donations, or to loan its credit to a railroad or private corporation, a power which the Township had not agreed, prior to July 2, 1870, by vote or otherwise, to exert in behalf of the railroad company. In the interpretation we have placed upon the foregoing section of the State Constitution, we are sustained by the judgment of the Supreme Court of Illinois in *Middleport* v. *Ætna Life Ins. Co.* 82 Ill. 568. See also *Aspinwall* v. *Comrs. of Daviess Co.* 63 U. S. 22 How. 364 [16: 296]; *Wadsworth* v. *Supervisors*, 102 U. S. 534 [26: 221].

Upon the whole case, and without suggesting other grounds upon which the conclusion we have reached may rest, we are of opinion that the bonds in suit are not valid obligations of the Town, notwithstanding the plaintiff purchased them before maturity, without notice of any defense thereto.

The judgment is reversed, with directions to enter a judgment, on the special finding of facts, for the defendant; it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES C. FARGO, As President of the [230]
MERCHANTS DISPATCH TRANSPORTATION COMPANY, *Plff. in Err.*,
v.
WILLIAM C. STEVENS, As Auditor-General of The STATE OF MICHIGAN.

(See S. C. "*Fargo* v. *Michigan*," Reporter's ed. 230-247.)

Constitutional law—interstate commerce—tax on gross receipts of railroads engaged in, void.

*1. A state statute which levies a tax upon the gross receipts of railroads for the carriage of freights and passengers, into, out of, or through the State, is a tax upon commerce among the States, and therefore void.

2. While a State may tax the money actually within the State, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage specifically is a tax upon the commerce out of which it arises; and, if that be interstate commerce, it is void under the Constitution.

*Head notes by *Mr. Justice* MILLER.

3. The States cannot be permitted under the guise of a tax upon business transacted within their borders, to impose a burden upon commerce among the States, when the business so taxed is itself interstate commerce.

[No. 842.]

Submitted Dec. 9, 1886. Decided April 4, 1887.

IN ERROR to the Supreme Court of the State of Michigan. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Ashley Pond,** for plaintiff in error:

Taxation by the State of Michigan, of an association organized and domiciled in the State of New York, based upon the estimated gross earnings of its cars within the State of Michigan, while engaged solely in traffic which crosses the state line, such earnings being also received and possessed by such association in the State of New York, operates as a regulation of commerce, is extraterritorial and void.

It is respectfully submitted that the recent cases of *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196, and *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 158, 785), and the principle of *Wabash etc. R. R. Co.* v. *Illinois*, decided October 25, 1886 (*ante*, 244), are decisive of the case at bar.

Interstate communication cannot be restricted; and the terms upon which commerce may be engaged in cannot be prescribed by state authority.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Henderson* v. *Mayor*, 92 U. S. 259 (23: 543); *Head Money Cases*, 112 U. S. 580 (28: 798).

The tax cannot be sustained as a tax upon the property of the company within the State. The company has no property taxable within the State. Its cars are within the State only in transit while engaged in interstate transportation or commerce. They cannot be there taxed as property, being owned in New York.

Hays v. *Pacific Mail Steamship Co.* 58 U. S. 17 How. 596 (15: 254).

The tax cannot be sustained as a tax upon the business of the company, for that business is not local but is interstate, and is wholly beyond state regulation.

The cases of *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365 (27: 419), and *Gloucester Ferry Co.* v. *Pa.*, *supra* illustrate the difference between a valid tax upon the property of a domestic corporation engaged in interstate commerce, and an invalid tax upon the business of a foreign corporation engaged solely in interstate commerce.

See also *Moran* v. *New Orleans*, 112 U. S. 69 (28: 653).

The tax cannot be sustained as an exercise of the restrictive power of the State over foreign corporations; for under that power there can be no regulation of commerce by the State.

The Supreme Court of Michigan fails to distinguish this case from that of *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21: 164), in which a tax on the gross receipts of a Pennsylvania company, which had been actually garnered into its treasury in that State, was in question.

The court also specifically declares the tax to be one upon business done in the State, and deems it within the purview of *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479 (21: 470), without distinguishing that the license in that case was of a business carried on in the City of Mobile, which was entirely local in its nature.

Mr. **Edward Bacon** with *Mr. Moses Taggart, Atty-Gen. of Michigan*, for defendant in error:

There are, in the different States of the Union, two well known systems of railroad taxation: one, such as that used in Tennessee, according to a valuation (see *State R. R. Tax Cases*, 92 U. S. 601, 603 (23: 669); the other, such as that used in Michigan, according to gross receipts, a small percentage thereof being taken by the State annually as specific taxes in lieu of all other taxation.

Howell's Statutes of Michigan, chap. 90, entitled *Commissioner of Railroads*, § 1, being § 3291 of said statutes; *State Treasurer* v. *Auditor-Gen.* 46 Mich. 231, 232; *Chicago etc. R. Co.* v. *Auditor-Gen.* 53 Mich. 79. See also *State R. R. Tax Cases*, 92 U. S. 611 (23: 666).

Is it true that the Merchants Dispatch Transportation Company did not carry on, in the State of Michigan, any business liable to state taxation?

Osborne v. *Mobile*, 83 U. S. 16 Wall. 479 (21: 470); *Telegraph Co.* v. *Texas*, 105 U. S. 464 (26: 1068).

The laws of New York, under which the bill states that the complainant was organized and was taxed, include statutes of the same force and effect as the Michigan Statute complained of in the bill; and a decision in the complainant's favor, against the Michigan Statute, would entitle it to a decision in its favor against the New York Statute, so far as interstate commerce is concerned.

The Court of Appeals of the State of New York has declared the validity of these statutes.

People v. *Home Ins. Co.* 92 N. Y. 346; *People* v. *Equitable Trust Co.* 96 N. Y. 394-396; *People* v. *Gold etc. Tel. Co.* 98 N. Y. 73.

The Act No. 152 of the Laws of Michigan for 1883 (also New York Statutes and similar statutes of other States), was enacted in reliance upon principles recognized by the decision of this court.

Osborne v. *Mobile*, *supra*.

The complainant has been claiming and exercising extensively, in Michigan, franchises granted by the laws of New York.

No good reason can be shown why the State which creates important corporate franchises for commercial corporations should have a right to tax the exercise thereof, while at the same time another State, wherein the same franchises are assumed and exercised (to a greater extent perhaps, and with more profit than elsewhere) should be forever powerless to tax such franchises or business carried on in the exercise thereof.

Baltimore etc. R. R. Co. v. *Koontz*, 104 U. S. 11 (26: 644); *Stone* v. *Ill. Cent. R. R. Co.* 116 U. S. 352 (29: 651); *Canada S. R. R. Co.* v. *Gebhard*, 109 U. S. 537 (27: 1023); *State Tax on R. Gross Receipts*, 82 U. S. 15 Wall. 296 (21: 168); *Minot* v. *Philadelphia etc. R. R. Co.* 85 U. S. 18 Wall. 231 (21: 896); *St. Clair* v. *Cox*, 106 U. S. 357 (27: 225); *Diamond Match Co.* v. *Powers*, 51 Mich. 148; *Talcott* v. *McCormick Harvesting Machine*

Co. 51 Mich. 7; *Coe* v. *Errol*, 116 U. S. 524 (29: 717); *Telegraph Co.* v. *Texas*, 105 U. S. 464-5 and *Relfe* v. *Rundle*, 103 U. S. 225-6 (26: 1068; 339); *Baltimore & O. R. R. Co.* v. *Md.* 88 U. S. 21 Wall. 456 (22: 678).

Gloucester Ferry Co. v. *Pa.* 114 U. S. 196 (29: 158), is relied upon by the plaintiff in error; but the decision of no issue joined in that case can be relevant here. The Gloucester Ferry Company was doing no more business in Pennsylvania than any foreign corporation owning a line of steamships carrying on commerce between European ports and Philadelphia. It merely obtained a lease of a sufficient landing place on the Pennsylvania shore; 114 U. S. 205 (29: 162), and on page 203 this court uses the following language:

"The business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation."

The case of *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785), is distinguishable. In that case the company had no office in the State (Tenn.) through which its cars ran.

A corporation which seeks by its agents to establish a domicil of business in a State other than that of its own creation must take that domicil, subject to the responsibilities and burdens imposed by the laws which it finds in force there.

Atty-Gen. v. *Bay State Min. Co.* 99 Mass. 153; *Ricker* v. *American etc. Co.* 140 Mass. 350; *Carron Iron Co.* v. *McLaren*, 5 H. L. Cas. 416, 449.

The Tennessee Statute imposing the tax in *Pickard* v. *Pullman Southern Car Co. supra*, was objectionable because it purported to make entirely illegal certain interstate commerce, except on payment of the license fee as a condition precedent, and was therefore no better than a statute to collect, at the state line, duties on interstate commerce.

The method of ascertaining taxes measured by gross receipts has been approved by this court and by the Supreme Court of Michigan.

State Tax on Railway Gross Receipts, 82 U. S. 15 Wall. 284 (21: 164); *Delaware R. R. Tax*, 85 U. S. 18 Wall. 206 (21: 883); *Erie R. Co.* v. *Pa.* 88 U. S. 21 Wall. 492 (22: 595); *State Treasurer* v. *Auditor-Gen.* 46 Mich. 231, 232; *Chicago etc. R. Co.* v. *Auditor-Gen.* 53 Mich. 79. In this connection see *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123 (19: 382); *Savings Society* v. *Coite*, 73 U. S. 6 Wall. 594 (18: 897); *Provident Sav. Institution* v. *Mass.* 73 U. S. 6 Wall. 611 (18:907).

Summary. The tax in question is valid for the following reasons:

The tax is on business done in the exercise of corporate franchises, introduced by permission of the State of Michigan.

The tax is on such business done by means of the complainant's permanently established local agents and offices in Michigan, with every facility for carrying on business between places within the State, whenever profitable.

The tax is necessary to the safety of the State's revenue, from railroad companies and express companies.

The tax is upon railroad business so affecting and controlling public interests of the people of the State of Michigan that such business ought not to escape taxation in the State.

The complainant ought not to escape taxation in Michigan, merely because the final receipt of its earnings in Michigan was at its chief office in the City of New York.

The business by which all right to such earnings accrued was completed within the State of Michigan; and according to the ordinary course of such business, any suit to collect such earnings must be brought in Michigan, where the contracts therefor were made and fulfilled.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Michigan to bring here for review a decree sustaining a demurrer to the complainant's bill in chancery, and dismissing the bill. The complainant brought suit as President of the Merchants' Dispatch Transportation Company, averring that said company is a joint stock association, organized and existing under the laws of the State of New York, and by the laws of that State authorized to sue in the name of its president. The bill, so far as it presents the questions on which this court can have jurisdiction, charges as follows: [231]

"Second. That during the year ending with the 31st day of December, A. D. 1883, the said Transportation Company was engaged in the business of soliciting and contracting for the transportation of freight required to be carried over connecting lines of railroad in order to reach its destination, and, for the prosecution of its said business, it had agencies located generally throughout the United States and the Dominion of Canada; the said Transportation Company issued through bills of lading for such freight, and caused the same to be carried by the appropriate railroad companies; and, as compensation for its service in the premises, the said Transportation Company was paid by the said railroad companies a definite proportion of the through rate charged and collected by said companies for the carriage of said freights.

"Third. That during the said year the said Transportation Company was possessed of certain freight cars which were used and run by the railroad companies in whose possession they chanced from time to time to be for the transportation, upon their own and connecting lines of railroad, of through freight, principally between the City of New York, in the State of New York, and Boston, in the State of Massachusetts, and Chicago, in the State of Illinois, and other points and commercial centers in the West, Northwest and Southwest, without the said State of Michigan; that said cars were not used for the carriage of freight between points situate within the said State of Michigan, but wholly for the transportation of freight, either passing through the State or originating at points without said State and destined to

points within, or originating at points within said State and destined to points without; that the said several railroad companies thus making use of said cars during the said year paid to the said Transportation Company as compensation therefor a definite sum per mile for the distance traveled by the said cars over their respective lines.

"Fourth. That the said Transportation Company during the said year was not running or interested in any special fast, through, or other stock, coal or refrigerator car freight line, or doing business in or running cars over any of the railroads of said State of Michigan, otherwise than as in the preceding paragraphs stated.

"Fifth. That prior to the first day of April, A. D. 1884, the Commissioner of Railroads of the State of Michigan transmitted to the said Transportation Company certain blank forms of a report to be made to him pursuant to the provisions of an Act of the Legislature of the State of Michigan approved June 5, 1883, entitled 'An Act to Provide for the Taxation of Persons, Copartnerships, Associations, Car-loaning Companies, and Fast Freight Lines Engaged in the Business of Running Cars Over Any of the Railroads of This State, and not Being Exclusively the Property of Any Railroad Company Paying Taxes on Their Gross Receipts,' with the requirement that the said Transportation Company should make up and return said report to the office of said commissioner on or before the first day of April, 1884, under the penalties of said Act; that on or about said first day of April, in compliance with said demand, but protesting that the same was without authority of law, and that said Act was invalid—or if valid, was not applicable to the said Transportation Company—the said Transportation Company made and filed with said commissioner a report, duly verified, setting forth that the gross amount of the receipts of the said Transportation Company for the mileage of said cars during said year 1883, while in use in the transportation of freight between points without said State and passing through said State in transit, estimated and prorated according to the mileage of said cars within said State of Michigan while so in use, was the sum of $95,714.50; and while in the use of transportation of freight from points without to points within said State of Michigan, and from points within to points without said State, estimated and prorated according to the mileage of said cars within the State of Michigan while so in use, was the sum of $28,890.01, making in the aggregate the sum of $124,604.51; that during said year it received no moneys whatever on business done solely within the said State of Michigan, and no moneys which were or could be regarded as earned during said year within the limits of said State of Michigan other than as hereinbefore and in said report set forth.

"Sixth. That by the terms of said Act it is the duty of said Commissioner of Railroads to make and file with the Auditor-General of said State of Michigan, prior to the first day of June each year a computation based upon the report of each person, association, copartnership, or corporation taxable thereunder, of the amount of tax to become due from them respectively, and each such person, association, copartnership or corporation is required on or before the first day of July in such year to pay to the Treasurer of said State of Michigan, upon the statement of the Auditor-General thereof, 2½ per cent upon its gross receipts as computed by the said Commissioner of Railroads and derived from loaning, renting or hiring of cars to any railroad or other corporation, association, copartnership or party. It was also provided in said Act that for the said taxes and interest thereon, and the penalty imposed for delay in the payment thereof, the said State should have a lien upon all the property of the person, association, copartnership, or corporation so taxed, and in default of the payment of said tax by and within the time so prescribed the Auditor-General of said State was authorized to issue his warrant, to the sheriff of any county in said State, commanding him to levy the same, together with 10 per cent for his fees, by distress and sale of any of the property of the corporation or party neglecting or refusing to pay such tax wherever the same may be found within the county or State.

"Seventh. That the said Commissioner of Railroads has computed and determined that the amount of the gross receipts of the said Transportation Company under the said Act is the said sum of $28,890.01, and that there is due from said Transportation Company to the State of Michigan, as a tax thereon, the sum of $722.25, and has transmitted said computation to the said Auditor-General; and your orator shows that unless said tax is paid by the said Transportation Company on or before the first day of July, 1884, it will become the duty of the said Auditor-General under the said Act, and the said Auditor-General threatens that he will proceed to enforce payment of the said tax against said Transportation Company by the seizure and sale of the property of said Transportation Company under the provisions of said Act.

"Eighth. That your orator is advised and so charges, that the said Act as to the said gross receipts of the said Transportation Company, or of any of its receipts or earnings from the use of its cars, within the State of Michigan, and the transaction of its business in the manner aforesaid, is in violation of the Constitution of the United States, and void, and that said Act is inapplicable to the said Transportation Company, and inoperative for further reasons appearing upon its face; and that said Transportation Company is not amenable thereto.

"Ninth. That the chief office of the said Transportation Company for the transaction of corporate business was, during said year, and is in the City of New York, in the State of New York, and that all the moneys earned by it, as set forth in the second and third paragraphs hereof, were paid to it at its said office; that said Company during said year had no funds or property whatsoever within the State of Michigan, except cars in transit and office furniture in the possession of agents; and that during said year the said Transportation Company was subject to taxation and was taxed on account of its property and earnings within and under the laws of the State of New York."

The bill then prays for a subpena against William C. Stevens, Auditor-General of the State of Michigan, and for an injunction to

prevent him from proceeding in the collection of said taxes. To this bill the defendant Stevens demurred, and the Circuit Court for the County of Washtenaw, in which this suit was brought, overruled that demurrer. From this decree the defendant appealed to the Supreme Court of the State, where the judgment of the lower court was reversed, the demurrer sustained, and the bill dismissed. To reverse that decree this writ of error was sued out.

The contention of the plaintiff in error is that the Statute of Michigan, the material parts of which are recited in the bill, is void as a regulation of commerce among the States, which, by the Constitution of the United States, is confided exclusively to Congress. Art. 1, § 8, clause 3. It will be observed that the bill shows that the tax finally assessed by the Auditor of State, against the Transportation Company, was for the $28,890.01 of the gross receipts which the Company had returned to the commissioner as money received for the transportation of freight from points without to points within the State of Michigan, and from points within to points without that State; and that no tax was assessed on the $95,714.50 received for transportation passing entirely through the State to and from other States.

[238] There is nothing in the opinion of the Supreme Court of the State, which is found in the transcript of the record, to explain this discrimination. There is nothing in the Statute of the State on which this tax rests which makes such a distinction; nor is there anything in the commissioner's requirement for a report which suggests it. It must have been, therefore, upon some idea of the authorities of the State that the one was interstate commerce and the other was not, which we are at a loss to comprehend. Freight carried from a point without the State to some point within the State of Michigan as the end of its voyage; and freight carried from some point within that State to other States is as much commerce among the States as that which passes entirely through the State from its point of original shipment to its destination. This is clearly stated and decided in the case of *Phila. & Reading Railroad Co.* v. *Pa.* commonly called the case of *The State Freight Tax*, 82 U. S. 15 Wall. 232 [21: 146], in which it is held that a tax upon freight taken up within the State and carried out of it, or taken up without the State and brought within it, is a burden on interstate commerce, and therefore a violation of the constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several States. And in *Wabash R. Co.* v. *Ill.* 118 U. S. 557 [*ante*, 244], it is held that a statute attempting to regulate the rates of compensation for transportation of freight from New York to Peoria, in the State of Illinois, or from Peoria, to New York, is a regulation of commerce among the States. The same principle is established in *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 [18: 745].

The Statute of the State of Michigan of 1883, under which this tax is imposed, is entitled "An Act to Provide for the Taxation of Persons, Copartnerships, Associations, Carloaning Companies, Corporations, and Fast Freight Lines Engaged in the Business of Running Cars over Any of the Railroads of This State, and Not Being Exclusively the Property of any Railroad Company Paying Taxes on Their Gross Receipts." Sections 1 and 2 require reports to be made to the commissioner of railroads of the gross amount of their receipts for freight earned within the limits of the State from all persons and corporations running railroad cars within the State. The commissioner [239] is by section 4 required to make and file with the Auditor-General, on the first day of June of each year, a computation of the amount of tax which would become due on the first day of July next succeeding from each person, association, or corporation liable to pay such taxes. Each one of these is by section 5 required to pay to the State Treasurer, upon the statement of the Auditor-General, an annual tax of 2¼ per cent upon its gross receipts as computed by the Commissioner of Railroads.

It will thus be seen that the Act imposed a tax upon all the gross receipts of the Merchants Dispatch Transportation Company, a corporation under the laws of the State of New York, and with its principal place of business in that State, on account of goods transported by it in the State of Michigan; and the bill states that the Company carried no freight, the transportation of which was between points exclusively within that State.

The subject of the attempts by the States to impose burdens upon what has come to be known as interstate commerce or traffic, and which is called in the Constitution of the United States "commerce among the States," by statutes which endeavor to regulate the exercise of that commerce, as to the mode by which it shall be conducted, or by the imposition of taxes upon the articles of commerce, or upon the transportation of those articles, has been very much agitated of late years. It has received the attentive consideration of this court in many cases, and especially within the last five years, and has occupied Congress for a time quite as long. The recent Act, approved February 4, 1887, entitled "An Act to Regulate Commerce," passed after many years of effort in that body, is evidence that Congress has at last undertaken a duty imposed upon it by the Constitution of the United States, in the declaration that it shall have power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress has freely exercised this power so far as relates to commerce with foreign Nations and with Indian Tribes, but in regard to commerce among the several States it has, until this Act, refrained from the passage of any very important regulation upon this subject, [240] except perhaps the statutes regulating steamboats and their occupation upon the navigable waters of the country.

With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State Legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing.

Still, we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the Statute of Michigan, as interpreted by its supreme court in the present case, is forbidden as a regulation of commerce among the States, the power to make which is withheld from the State.

The whole question has been so fully considered in these decisions, and the cases themselves so carefully reviewed, that it would be doing little more than repeating the language of the arguments used in them to go over the ground again. The cases of *The State Freight Tax* and *State Tax on Railway Gross Receipts*, which were considered together and decided at the December Term, 1872, and reported in 82 U. S. 15 Wallace, pp. 282 to 328 [21: 146-189], present the points in the case now before us perhaps as clearly as any which have been before this court. A Statute of the State of Pennsylvania imposed upon all the railroad corporations doing business within that State, as well as steamboat companies and others engaged in the carrying trade, a specific tax on each 2,000 pounds of freight carried, graduated according to the articles transported. These were arranged into three classes, on the first of which a tax of two cents per ton was laid, upon the second three cents, and upon the third five cents. The Reading Railroad Company, a party to the suit, in making its report under this statute, divided its freight on which the tax was to be levied into two classes; namely, [241] freight transported between points within the State and freight which either passed from within the State out of it or from without the State into it. The Supreme Court of the State of Pennsylvania decided that all the freight carried, without regard to its destination, was liable to the tax imposed by the statute. This court, however, held that freight carried entirely through the State from without, and the other class of freight brought into the State from without or carried from within to points without, all came under the description of "commerce among the States," within the meaning of the Constitution of the United States; and it held also that freight transported from and to points exclusively within the limits of the State, was internal commerce and not commerce among the States. The taxing law of the State was, therefore, valid as to the latter class of transportation; but with regard to the others it was invalid, because it was interstate commerce, and the State could lay no tax upon it. In that case, which was very thoroughly argued and very fully considered, the case of *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 [18: 745], was cited as showing, in regard to transportation, what was strictly internal commerce of a State and what was interstate commerce. The court said: "It is not at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they *are* carried, is a regulation of carriage. The State may tax its internal commerce; but if an Act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State." [242]

In the case of *The Erie Railway Company* (a corporation of the State of New York) v. *Pennsylvania*, decided at the same time (88 U. S. 21 Wall. 492 [22: 595]), it appeared that the road of that company was constructed for a short distance through a part of the State of Pennsylvania, and that a similar tax was levied upon it for freight carried over its road. This was held to be invalid for the reasons given in the case of the Reading Road.

In the other case of *State Tax on Railway Gross Receipts*, which was also a suit between the Reading Railway Company and the State of Pennsylvania, an Act of the Legislature of that State was relied on which declared that, "In addition to the taxes now provided by law, every railroad, canal and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three fourths of 1 per centum upon the gross receipts of said company; and the said tax shall be paid semi annually upon the first days of July and January, commencing on the first day of July, 1866."

This tax was held to be valid. The grounds upon which it was distinguished from the one in the preceding case upon freight were, that the corporation being a creation of the Legislature of Pennsylvania and holding and enjoying all its franchises under the authority of that State, this was a tax upon the franchises which it derived from the State, and was for that reason within the power of the State, and that, in determining the mode in which the State could tax the franchises which it had conferred, it was not limited to a fixed sum upon the value of them, but it could be graduated by and proportioned to either the value of the privileges granted or the extent or results of their exercise. "Very manifestly," said the court, "this is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised." Another reason given for the distinction is that "The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, [243] has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have

been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. *Brown* v. *Md.* 25 U. S. 12 Wheat. 419 [6: 678].

The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us, is very obvious, and is twofold: First, the corporation which was the subject of that taxation was a Pennsylvania corporation, having the situs of its business within the State which created it and endowed it with its franchises. Upon these franchises thus conferred by the State, it was asserted the State had a right to levy a tax. Second, this tax was levied upon money in the treasury of the corporation, upon property within the limits of the State, which had passed beyond the stage of compensation for freight and had become, like any other property or money, liable to taxation by the State. The case before us has neither of these qualities. The Corporation upon which this tax is levied is not a Corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received for freight carried within the State probably never was within the State, being paid to the Company either at the beginning or the end of its route; and certainly at the time the tax was levied it was neither money nor property of the Corporation within the State of Michigan.

The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has [244] often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign Nations, the constitutional provision cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way.

This is illustrated in the case of *Cook* v. *Pa.* 97 U. S. 566 [24: 1015]. The State of Pennsylvania, by her laws, had laid a tax upon the amount of sales of goods made by auctioneers, and had so modified and amended this class of taxes that in the end it remained a discriminating tax upon goods so sold imported from abroad. This court held that the tax which the auctioneer was required to pay into the treasury was a tax upon the goods sold, and, as this tax was three quarters of 1 per cent upon foreign drugs, glass, earthenware, hides, marble work and dye woods, that it was a tax upon the goods so described for the privilege of selling them at auction. The argument was made that this was a tax exclusively upon the business of the auctioneer, which the State had a right to levy. In that case, as in others, it was claimed that the privilege of being an auctioneer derived from the State by license, was subject to such taxation as the State chose to impose, but the proposition was overruled; and this court held that the tax was a regulation of commerce with foreign Nations, and that the fact that it was a tax upon the business of an auctioneer did not relieve it from the objection arising from the constitutional provision.

The same question arose in the case of *The Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196 [29: 158]. That company was a corporation chartered by the State of New Jersey to run a ferry carrying passengers and freight between the Town of Gloucester, in that State, and the City of Philadelphia, in the State of Pennsylvania. It had no property within the State of Pennsylvania, but it leased a landing place or wharf in that city for its business. The Auditor-General and Treasurer of the State [245] of Pennsylvania assessed a tax upon the capital stock of this corporation, under the laws of that State, which the company refused to pay. Its validity was sustained by the State Supreme Court, and the question was brought to this court by a writ of error. It was insisted that the tax was justified as a tax upon the business of the corporation, which, it was claimed, was largely transacted in the City of Philadelphia. The Supreme Court of the State, in giving its decision, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania within the period for which the taxes were imposed; and it held that it did because it received and landed passengers and freight at its wharf in the City of Philadelphia. The argument was very much urged in this court that the licensing of ferries across navigable rivers, whether dividing two States or otherwise, had always been within the control of the States, and that this, being a mere tax upon the business of that corporation carried on largely within the State of Pennsylvania, was within the power of that State to regulate. But this court held, after an extensive review of the previous cases, that the business of ferrying across a navigable stream between two States was necessarily commerce among the States, and could not be taxed as was attempted in that case.

In the case of *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [29: 785], decided at the last term of the court, it was shown that the Legislature of Tennessee had imposed what it called a privilege tax under the Constitution of that State of $50 per annum upon every sleeping car or coach run or used upon a railroad in that State, not owned by the railroad company so running or using it. This, it will be perceived, is very much like the tax in the case before us, except that it is a specific tax of $50 per annum upon the car instead of a tax upon the gross receipts arising from the use of the car by its owner. In that case, after an exhaustive review of the previous decisions in this class of cases by *Mr. Justice* Blatchford, who delivered the opinion of the court, it was held that, as these cars were not property lo- [246 cated within the State, it was a tax for the privilege of carrying passengers in that class of cars through the State, which was interstate commerce, and for that reason the tax could not be sustained.

Two cases have been decided at the present term of the court, in which these questions have been considered, one of them at least involving the subject now under consideration, namely, that of *Sabine Robbins* v. *Taxing District of Shelby Co. Tenn.* [*ante*, 694]. A Statute of that State declared that "All drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege." Robbins was prosecuted for a violation of this law, and on the trial it appeared that he was a resident and citizen of Cincinnati, Ohio, who transacted the business of drumming in the taxing district of Shelby County, that is, soliciting trade by the use of samples, for the firm by which he was employed, whose place of business was in Cincinnati, and all the members of which were residents and citizens of that city. It was argued in that case, as in the others we have just considered, that the State had a right to tax the business of selling by samples goods to be afterwards delivered, and to impose a tax upon the persons called "drummers" engaged in that business. It was further insisted that, since the license tax applied to persons residing within the State as well as to those who might come from other States to engage in that business, it was not a tax discriminating against other States, or the products of other States, and was valid as a tax upon that class of business done within the State. The whole subject is reconsidered again in this case by *Mr. Justice* Bradley, who delivered the opinion of the court, in which it is held that the business in which Robbins was engaged, namely, that of selling goods by sample, which were in the State of Ohio at the time and were to be delivered in the City of Memphis, Tennessee, constituted interstate commerce, and that, so far as this tax was to be imposed upon Robbins [247] for doing that kind of business, it was a tax upon interstate commerce, and therefore not within the power of the State to enforce.

In the case of *Wabash R. Co.* v. *Ill.* [*supra*,] the question presented related to a statutory regulation of that State as to compensation for carrying freight. It was held by the Supreme Court of Illinois to embrace all contracts for transportation by railroad which came into or went out of the State, as well as that which was wholly within its limits, and although the controversy did not arise in regard to a tax upon interstate commerce, yet the general question was fully considered as to what was interstate commerce and what was commerce exclusively within the State, and how far the former could be thus regulated by a statute of a State. This court held in that case that no statute of a State in regard to the transportation of goods over railroads within its borders which was a part of a continuous voyage to or from points outside of that State, and thus properly interstate commerce, could regulate the compensation to be paid for such transportation; that the carriage of passengers or freight between different points is commerce, and except where that is wholly and exclusively within the limits of a State it is not subject in its material features to be regulated by the State Legislature.

In many other cases, indeed in the three cases last mentioned, the whole subject has been fully examined and considered with all the authorities, and especially decisions of this court relating thereto. The result is so clearly against the Statute of Michigan as applied by its supreme court that we think the judgment of that court cannot stand.

The decree of the Supreme Court of Michigan is reversed, with directions for further proceedings in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MERCANTILE NATIONAL BANK OF THE CITY OF NEW YORK, *Appt.*, [138]

v.

MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, AND GEORGE W. McLEAN, Receiver of Taxes.

(See S. C. Reporter's ed. 138-162.)

National banks—state taxation of shares of stock—the words "other moneyed capital" defined—test of distinction—exemptions of personal property, not similarly situated, immaterial—trust companies—savings bank deposits—municipal bonds—jurisdiction—review of authorities.

1. The words "other moneyed capital," as used in section 5219 R. S., providing that state taxation of national bank shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," do not necessarily embrace shares of stock so held in all corporations whose capital is employed in business carried on for the pecuniary profit of shareholders, although shares in some corporations may be such moneyed capital. The rule and test of the distinction is to be found in the nature of the business in which the corporation is engaged. The Act simply requires that capital invested in national banks shall not be taxed at a greater rate than like property similarly situated.

2. The words "other moneyed capital," as used in said section 5219 R. S., include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money.

3. Upon a bill filed by an association organized as a National Bank in the City of New York, to restrain the collection of taxes assessed upon its stockholders in respect to their shares therein, it is *held*: that the exemption from state taxation of large amounts of personal property, not situated similarly to that invested in national banks, does not entitle national bank shares to similar exemption; that trust companies in New York are not banking institutions; that the mode of taxing such companies, adopted by that State, does not create the inequality alleged by the complainant; that the exemption from state taxation of savings bank deposits does not entitle national bank shares to similar exemption; that the exemption from state taxation of municipal bonds is immaterial; and that the property to be taxed under the rule prescribed for the taxation of national bank shares must be property which, under the law of the State, is the subject of taxation within its jurisdiction.

[No. 1258.]

Argued March 11, 14, 1887. Decided April 4, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case fully appear in the opinion of the court. Compare the following case of *National Newark Banking Company* v. *The Mayor.*

Messrs. **Charles W. Wells,** *Frederick W. Whitridge* and *Willard Brown,* for appellant:

The words "other moneyed capital in the hands of individual citizens" are not confined in their meaning to capital employed in the business of banking, but embrace shares of stock of all corporations, whether they are engaged in manufacturing, railroad or banking business, and also embrace bonds, mortgages, credits and moneys at interest.

See *Hepburn* v. *School Directors,* 90 U. S. 23 Wall. 480 (23: 112); *People* v. *Weaver,* 100 U. S. 539 (25: 705); *Cummings* v. *National Bank,* 101 U. S. 153 (25: 903); *Evansville Bank* v. *Britton,* 105 U. S. 322 (26: 1053); *Boyer* v. *Boyer,* 113 U. S. 689 (28: 1089).

The intent of Congress in constituting this restriction upon the powers of the States to tax shares of national banks, was based upon the necessity of protection, but not protection solely against encroachments by state banking capital. The protection was made to extend as widely as the danger. It is just as much within the power of the States to injure and finally destroy the national bank by discrimination against investment in their shares in favor of investments in shares of railroad and trading corporations, as in favor of investments in banking business. Capital will seek investment in such property as is least burdened and most productive; and if the State may burden at its will the shares of national banks, relieving from like burden the shares in railroad companies, it is manifest that capital seeking investment will take the latter rather than the former, and thereby the requisite national banking capital will not be taken by the investor, and this necessary instrument of the National Government will be destroyed. Should a State say to its citizens, "If you invest $100 in national bank stock, you shall pay as a penalty therefor the sum of $5 into the treasury of the State, but if you will invest it in a share of a railroad company designed to develop the interest of this State, you shall not be required to pay such penalty," there can be no question that such discrimination would be quite as effectual in driving capital out of national banking shares as if the discrimination had been made in favor of the development of a state banking enterprise.

For these reasons this court said in the case of *Boyer* v. *Boyer, supra,* that capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by state authority, as the State establishes for other moneyed capital however invested, whether in state bank shares or otherwise.

Shares of stock of railroad and miscellaneous corporations being "other moneyed capital in the hands of individual citizens" within the meaning of the Act of Congress, the State of New York has exempted such shares from all taxation. This constitutes an exemption of "a very material part relatively of other moneyed capital" and renders void the taxation of national bank shares.

The exemption of shares of trust companies from taxation in the hands of shareholders, of itself constitutes a "material discrimination" against national bank shares.

The exemption of the shares of stock of life insurance companies and their investments in bonds, mortgages and the like, is a "substantial discrimination" against national bank shares.

The exemption of the deposits in savings banks is also a "material discrimination" against shares of national banks.

Messrs. **James C. Carter** and *Thomas Allison,* for appellees.

Mr. Justice **Matthews** delivered the opinion of the court: [139]

The bill in this case was filed by the appellant, an association organized as a National Bank, in the City of New York, the object and prayer of which were to restrain the collection of taxes assessed upon its stockholders in respect to their shares therein, on the ground that the taxes assessed and sought to be collected by the defendants were illegal and void under section 5219 of the Revised Statutes of the United States, as being at a greater rate than those assessed under the laws of New York upon other moneyed capital in the hands of the individual citizens of that State. The assessment in question was made for the year 1885, by the proper officer, acting in pursuance of section 312 of an Act of the Legislature of the State of New York, passed July 1, 1882, entitled "An Act to Revise the Statutes of this State Relating to Banks, Banking and Trust Companies," which reads as follows:

"Sec. 312. The stockholders in every bank or banking association organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or ward or not; but in the assessment of said shares, each stockholder shall be allowed all the deductions and exceptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment and taxation shall not be at a [140] greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. Nothing herein contained shall be held or construed to exempt the real estate of banks or banking associations from either state, county or municipal taxes, but the same shall be subject to state, county, municipal and other taxation to the same ex-

tent and rate, and in the same manner according to its value, as other real estate is taxed. The local authorities charged by law with the assessment of the said shares shall, within ten days after they have completed such assessment, give written notice to each bank or banking association of such assessment of the shares of its respective shareholders, and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this Act."

The hearing in the circuit court was had upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed by and between the parties to the above entitled suit, that, for the purpose of the trial of this cause, the facts hereinafter stated are true, and that the cause be submitted for trial and decree upon such statement alone, together with the pleadings:

"1. That the complainant, on the second Monday of January, A. D. 1885, and for several months prior thereto, had a capital stock of the par value of $1,000,000 and a surplus fund of $200,000; that nearly the whole of said capital and surplus fund was, during that period, invested in bonds of the United States of the par value of $949,000, and of a market value and cost largely exceeding that sum; that its shares of stock were each of the par value of $100 and of the number of 10,000, and were then held by one hundred and forty-two persons and corporations, fifty of whom, owning 1,877 shares, were residents of States other than [141] the State of New York, and the remainder residents of the State of New York.

"2. That, on the second Monday of January, 1885, the proper tax officers of the City of New York, acting under chapter 409 of the Laws of 1882 of the State of New York, did value and assess for taxation the shares of stock of said Bank against the individual shareholders thereof, at the rate of $89 per share, after deducting the proportion of the assessed value of the real estate of said Bank applicable to each share of stock, as by law required, making the total gross valuation of said shares in the hands of the shareholders the sum of $890,000, from which sum the debts of sundry indebted stockholders, amounting to $89,128, were deducted, as by law allowed, leaving the total valuation of said shares against said stockholders upon which taxes were thereafter assessed the sum of $800,872.

"3. That, on the second Monday of January, 1885, the aggregate actual value of the shares of stock of the incorporated moneyed and stock corporations incorporated by the laws of the State of New York deriving an income or profit from their capital or otherwise (not including life insurance companies, trust companies, banks, or banking associations, organized under the authority of this State or of the United States) amounted to the sum of $755,018,892; that 'Exhibit A,' hereto appended and made a part of this agreement, contains a list of the corporations whose shares of capital stock are embraced in said sum of $755,018,892, and also shows the total par value of the shares of capital stock of each of said corporations.

"4. That, at the period aforesaid, the aggregate actual value of the shares of stock of the life insurance companies incorporated under the laws of this State amounted to the sum of $3,540,000, and at the same period the aggregate value of the personal property of said companies, consisting of mortgages, loans with collateral security, state, county, and municipal bonds, and railroad bonds and shares of stock of corporations (but not including the bonds of the United States nor the shares of corporations created by the State of New York), amounted to $195,257,305; all of which is shown in detail [142] in the schedule hereto annexed, marked 'Exhibit B.'

"5. That, at the said period, the aggregate actual value of the shares of the capital stock of the trust companies existing in the State of New York and organized under its laws amounted to $32,018,900, as is shown in detail in the schedule hereto annexed, marked 'Exhibit C.' of which sum the amount of $30,215,900 was of trust companies located in the City of New York.

"6. That, at the same period, the aggregate actual value of the deposits due by the savings banks of this State to depositors was $437,107,501 (not including the surplus accumulated by the said corporations, amounting to $68,669,001).

"7. That the aggregate actual value of the bonds and stocks issued by the City of New York, subject to the provisions of chapter 552 of the Laws of 1880, at the said period, amounted to $13,467,000.

"8. That the aggregate actual value at the same period of the shares of stock of corporations created by States other than the State of New York, owned by the citizens of the State of New York, amounted to at least the sum of $250,000,000.

"9. The assessed valuation of all personal property, after making the deductions allowed by law, in the City of New York (at the said period), as shown by the annual record of the assessed valuation of real and personal estate of the said City for the year 1885, was $202,678,806. This sum included the capital of corporations (after making deductions for investments thereof in real estate, shares of New York corporations, taxable upon their capital stock under the laws of this State, and nontaxable securities), as follows:

Insurance companies	$ 2,146,379
Trust companies	156,506
Miscellaneous companies	29,234,409
Railroad companies	12,339,871
"It also included:	
Shares of national banks	45,046,074
Shares of state banks	15,700,220

"The sum so deducted for the value of the [143] real estate belonging to said trust companies located in the City of New York did not exceed $2,336,572.31.

The assessed value of the real estate in said City for said period is	$1,168,443,137
And in the said State, including the City of New York, is	2,761,978,845
The latter sum including the sum of about	340,000,000

being the assessed value of the real estate located in said State belonging to corporations.

"The 'aggregate amount of the taxable personal estate' within the State of New York, ex-

clusive of said City, after deducting debts due by the owners thereof for the year ending December 31, 1884, as assessed by the assessors and returned to the State Comptroller, is $151,632,369.

"This sum included the capital of corporations (after making the deductions for investments thereof in real estate, shares of New York corporations taxable upon their capital stock under the laws of this State, and nontaxable securities) of the amount of $34,466,612.

The aggregate capital stock, taken at par, of the national banks outside of the City of New York, but within the State of New York, on December 20, 1884, as shown by the report of the Comptroller of the Currency of the United States, was	$36,804,160
And that of state banks, outside of the said City, but within said State, as shown by the report of the bank superintendent of New York, is	8,128,000
Total (outside of New York City)	$44,932,160
The total par value of the shares of national banks in said State, including the City of New York, for the period aforesaid, is	$83,054,160
And of the state banks	32,815,700

"10. That it is the intention of the defendants, unless restrained by injunction, to collect the said tax levied by them against the shareholders of the said complainant upon said shares by the use of all needful legal process. [144]

"11. That any Statutes of the United States or of the State of New York may be cited and relied upon before the said court as if herein fully set forth."

From a decree dismissing the bill the present appeal is prosecuted.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

In the present case no question is raised by the appellant as to the validity of section 312, chapter 409 of the Laws of New York of 1882, considered by itself, nor in reference to the rule of valuation or assessment which it prescribes. No exception is taken to the form of the assessment, nor is the case based in any degree upon the dereliction of the assessing officers in the discharge of their duties, there being no allegation and no proof that they have not performed their whole duty under the statutes of the State.

The proposition which the appellant seeks to establish is that the State of New York, in seeking to tax national bank shares, has not complied with the condition contained in section 5219 of the Revised Statutes, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the [146] hands of individual citizens of such State, "in that, it has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and state bank shares (having a like value of $32,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank." This exemption, it is claimed, is of a "very material part relatively" of the whole, and renders the taxation of national bank shares void.

The exemptions thus referred to are classified as follows:

1. The shares of stock in the hands of the individual shareholders of all incorporated "moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and state or national banks." The value of such shares, it is admitted, amounts to $755,018,892.

2. Trust companies and life insurance companies. The actual value of the shares of stock in trust companies amounts to $32,018,900, and the actual value of the shares in life insurance companies amounts to $3,540,000, which life insurance companies, it is admitted, are the owners of personal property consisting of mortgages, loans, stocks and bonds to the value of $195,257,305.

3. Savings banks and the deposits therein The deposits amount to $437,107,501, and an accumulated surplus to $68,669,001.

4. Certain municipal bonds issued by the City of New York under an Act passed in 1880, of the value of $13,467,000.

5. Shares of stocks in corporations created by States other than New York, in the hands of individual holders, residents of said State, amounting to $250,000,000.

It is argued by the appellant that these exemptions bring the case within the decision of *Boyer* v. *Boyer*, 113 U. S. 689 [28: 1089]. In [147] that case, referring to the legislation of Pennsylvania, it was said: "The burden of county taxation imposed by the latter Act has at all events been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which in its corporate capacity is liable to pay a tax into the state treasury under the Act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles

of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for state purposes when such corporations pay into the state treasury the required tax on such indebtedness."

This enumeration of exempted property, the amounts of which were stated in the bill and admitted by the demurrer, was held to include such a material portion relatively of the moneyed capital in the hands of individual citizens as to make the tax upon the shares of national banks an unfair discrimination against that class of property, but no attempt was made in the opinion of the court to define the meaning of the words "moneyed capital in the hands of individual citizens" as used in the statute, or to enumerate all the various kinds of property or investments that came within its description, or to show that shares of stock in the hands of stockholders of every institution, company, or corporation of a State, having a capital employed for the purpose of earning dividends or profits for its stockholders, were taxable as moneyed capital in the hands of individual citizens.

It is accordingly contended on behalf of the appellees in the present case, 1, that the shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, including trust companies, life insurance companies, and savings banks, are not moneyed capital in the hands of the individual citizen within the meaning of the Act of Congress; 2, that if any of them are, then the corporations themselves are taxed under the laws of New York in such a manner and to such an extent that the shares of [148] stock therein are in fact subject to a tax equal to that which is assessed upon shares of national banks; and 3, that if there are any exceptions, they are immaterial in amount and based upon considerations which exclude them from the operation of the rule of relative taxation intended by the Act of Congress.

In view of the nature of the contention between the parties to this suit, and the extent and value of the interests involved, it becomes necessary to review with care the previous decisions of this court upon the same subject, and to endeavor to state with precision the rule of relative taxation prescribed to the States by Congress on shares of national banks.

The National Banking Act of 1864, 13 Stat. at L. 111, in addition to the restrictions now imposed upon the state taxation of national bank shares, declared "That the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this Act shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." In the re-enactment of this statute in 1868, 15 Stat. at L. 84, this proviso was omitted. The case of *Van Allen* v. *Assessors*, 70 U. S. 3 Wall. 573 [18: 229] was decided under the Act of 1864 as originally enacted. In that case, the taxing law of New York, which was in question, was held to be invalid because it levied no taxes upon shares in state banks at all, the tax being assessed upon the capital of the banks after deducting that portion which was invested in securities of the United States; and it was held that this tax on the capital was not a tax on the shares of the stockholders equivalent to that on the shares in national banks. It was also decided in that case that it was competent for the States, under the permission of Congress, to tax the shares of national bank stock held by individuals, notwithstanding the capital of the bank was invested in bonds of the United States which were not subject to taxation.

It appears, therefore, as the result of the decision in that case, that a tax upon the capital of a state bank, levied upon the value thereof, after deducting such part as was invested in nontaxable government bonds, was less than an equivalent for a tax upon the shares of national banks from which no such deduction was permitted. Accordingly, in the case of *People* [149] v. *Commissioners*, 71 U. S. 4 Wall. 244 [18: 344], the complaint was made on behalf of individual owners of national bank stock taxed in New York, that no deduction was permitted to them from the value of their shares on account of the capital of the bank being invested in nontaxable government bonds, while such deduction was allowed in favor of insurance companies and individuals in the assessment for taxation of the value of their personal property; and it was contended, therefore, that the relators in that case were taxed upon their shares of national bank stock at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. In reference to this supposed inequality the court said: "The answer is that upon a true construction of this clause of the Act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen, which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens. This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that in every well regulated and enlightened State or government, certain descriptions of property, and also certain institutions, such as churches, hospitals, academies, cemeteries, and the like, are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform." The court then proceeded to show that the exclusion, as the subject of taxation, of government securities held by individuals, from their moneyed capital, was by authority of the United States, and hence it [150] would be a contradiction to infer that Congress meant to include the same government securities as a part of that moneyed capital which it required to be taxed by the States at a rate equal to that imposed by the latter upon the shares held by individuals of national bank stock.

The other objection taken to the validity of the tax complained of was, that insurance com

panies created under the laws of the State were authorized to deduct from the amount of their capital and surplus profits, for purposes of taxation, such part as was invested in United States securities. In reference to this the court said: "The answer is that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them."

In *Lionberger* v. *Rouse*, 76 U. S. 9 Wall. 468 [19: 721], it was held that the proviso originally contained in the Act of 1864, and omitted from the Act of 1868, expressly referring to state banks was limited to state banks of issue. The court said p. 474 [724]: "There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation." Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands.

In the case of *Hepburn* v. *School Directors*, 90 U. S. 23 Wall. 480 [23: 112], it was decided to be competent for the State to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. It was a further question in that case whether the exemption from taxation by statute of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" [151] made the taxation of shares in national banks unequal and invalid. This was decided in the negative on the two grounds: 1, that the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and of the debts secured upon it; and 2, because it was partial only, not operating as a discrimination against investments in national bank shares. The court said: "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

The subject was further considered in the case of *Adams* v. *Nashville*, 95 U. S. 19 [24: 369]. One of the questions in that case had reference to an exemption from taxation by state authority of interest-paying bonds issued by the municipal corporation of the City of Nashville, in the hands of individuals. It was held that the exemption did not invalidate the assessment upon the shares of national banks. The court said, p. 22 [370]: "The Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six teacups and saucers of the old statutes), the property of clergymen to some extent, school houses, academies and libraries are generally exempt from taxation. The discretionary power of the Legislatures of the States over all these subjects remains as it was before the Act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

In *People* v. *Weaver*, 100 U. S. 539 [25: 705], it was held that the prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations, and that consequently where the state statute authorized individuals to deduct the amount of debts owing [152] by them from the assessed value of their personal property and moneyed capital subject to taxation, the owners of shares of national banks were entitled to the same deduction. The cases of *Supervisors* v. *Stanley*, 105 U. S. 305 [26: 1044]; *Hills* v. *Exchange Bank*, *Id.* 319 [26: 1052]; *Evansville Bank* v. *Britton*, *Id.* 322 [26: 1053], and *Cummings* v. *National Bank*, 101 U. S. 153 [25: 903], are applications of the same principle.

The rule of decision in *Van Allen* v. *Assessors*, [*supra*], is not inconsistent with that followed in *People* v. *Commissioners* [*supra*]. In the former of these cases the comparison was between taxes levied upon the shares of national banks and taxes levied upon the capital of state banks. In the valuation of the capital of state banks for this taxation, nontaxable securities of the United States were necessarily excluded, while in the valuation of shares of national banks no deduction was permitted on account of the fact that the capital of the national banks was invested in whole or in part in government bonds. The effect of this was of course, to discriminate to a very important extent in favor of investments in state banks, the shares in which *eo nomine* were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against national bank shares taxed without such deduction at a value necessarily and largely based on the value of the government securities in which by law a large part of the capital of the bank was required to be invested. In the case of *People* v. *Commissioners* the comparison was not between the taxation of shareholders in national banks and of shareholders in state banking institutions, but between the taxation of national bank shares and that of personal property held by individuals and insurance companies, from the valuation of which the deduction was permitted of the amount of nontaxable government securities held by them respectively. The general ground of the decision was that the exemption was not an unfriendly discrimination against investments in national banks in favor of other investments of a similar and competing character. It was held that the exemption, under state au- [153] thority, of United States securities, which it was not lawful for the State to tax, could not

be considered an unwarranted exemption in that case. It was also held that the language of the Act of Congress which fixed the rate of taxation upon national bank shares, by reference to that imposed by the State "upon other moneyed capital in the hands of individual citizens," excluded from the comparison moneyed capital in the hands of corporations, unless the corporations were of that character, such as state banks were held to be in the case of *Van Allen* v. *The Assessors*, that shares of stock in them fell within the description of "moneyed capital in the hands of individual citizens." In that way a distinction was established between shares of stock held in banking corporations and those held in insurance companies and other business, trading, manufacturing and miscellaneous corporations, whose business and operations were unlike those of banking institutions.

It follows, as a deduction from these decisions, that "moneyed capital in the hands of individual citizens" does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally, whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery under blank powers of attorney, and to be dealt in by sales at the stock exchange, or used as collaterals for loans, as though they were negotiable security for money. This quality, in a greater or less degree, pertains to all stocks in corporate bodies, the facility of their use in this way being in proportion to the estimated wealth and credit, present or prospective, of the corporation itself. Neither is the difference to be determined by the character of the investments in which, [154] either by law or in fact, the bulk of the capital and the accumulated surplus of the corporation is from time to time invested. It does not follow, because these are invested in such a way as properly to constitute moneyed capital, that the shares of stock in the corporations themselves must necessarily be within the same description. Such is the case of insurance companies, in respect to which it was held, in *People* v. *The Commissioners*, that shares of stock in them were not taxable as "moneyed capital in the hands of individual citizens;" and that the language of the Act of Congress does not include moneyed capital in the hands of corporations. The true test of the distinction, therefore, can only be found in the nature of the business in which the corporation is engaged.

The key to the proper interpretation of the Act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the Government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single [155] and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy.

Applying this rule of construction we are led, in the first place, to consider the meaning of the words "other moneyed capital," as used in the statute. Of course it includes shares in national banks; the use of the word "other," requires that. If bank shares were not moneyed capital, the word "other" in this connection would be without significance. But "moneyed capital" does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the

hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

[156] So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute "moneyed capital." Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

[157] The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank* v. *Britton*, 105 U. S. 322 [*supra*]: "The Act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana Statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way."

This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy.

From this view, it follows that the mode of taxation adopted by the State of New York in reference to its corporations, excluding for the present trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

This is the conclusion reached on similar grounds by the Court of Appeals of New York. [158] In the case of *McMahon* v. *Palmer*, 102 N. Y. 176, that court said: "Our system of laws, with reference to the taxation of incorporated companies and capital invested therein, has been carefully framed with a view of reaching all taxable property and subjecting it to equality of burden, so far as that object is attainable in a matter so complex. In view of the wide variation in the employable value of such investments and the frequent mutations in their conditions it is by no means certain that this object has not been attained with reasonable accuracy. It is quite clear, from even this cursory review of the statutes, that if any discrimination is made by our laws in taxing capital invested, it is not to the prejudice of that employed in banking corporations. Even if this were not the result of the statute, we are of opinion that investments in the shares of companies named do not come within the meaning of that clause in the federal statutes, referring to other moneyed capital in the hands of individuals. That phrase, as generally employed, distinguishes such capital from other personal property, and investments in the various manufacturing and industrial enterprises. And this is the sense in which it is used in our tax laws, as appears by reference to the statutes."

The cases of trust companies and savings banks require separate consideration. Section 312 of chapter 409 of the Act of 1882 is a reenactment of section 8 of chapter 596 of the Laws of 1880, except that in the latter, trust companies were included with banks and banking institutions, so as to subject the stockholders therein to the same rule of assessment and taxation on the value of their shares of stock. The present statute omits them from the cor-

responding section. The consequence is that trust companies are taxable, as other corporations under the Act of 1857, for local purposes, upon the actual value of their capital stock. By chapter 361 of the Laws of 1881, as amended, they are subjected to a franchise tax, in the nature of an income tax, payable to the State for state purposes. It is argued, from this legislation, in reference to the taxation of trust [159] companies, that it discloses an evident intent to discriminate in favor of the latter as between them and banks, including national banks; and it is argued that, considering the nature of the business in which trust companies are engaged, it is a material and unfriendly discrimination in favor of state institutions engaged to some extent in a competing business with that of national banks. Trust companies, however, in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts; to act as agents for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that State.

It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce. They receive money on deposit, it is true, and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress. But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in national banks.

It appears from the tax laws of New York [160] applicable to the subject, as judicially construed by the Court of Appeals of that State, that the capital stock of such a corporation is to be assessed at its actual value. The actual value of the whole capital stock is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole number of shares. *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449; *People* v. *Commissioners of Taxes*, 95 N. Y. 554. From this are to be deducted, of course, the real estate of the corporation otherwise taxed, and the value of such part of the capital stock as is invested in nontaxable property, such as securities of the United States. In addition to this, the corporation, as already stated, pays to the State, as a state tax, a tax upon its franchise based upon its income; the tax on the capital being for local purposes.

It is evident, we think, that taxation in this mode is, at least, equal to that upon the shares of individual stockholders, for if the same property was held for the same uses and taxed by the same rule, in the hands of individuals, as moneyed capital, it would be subject to precisely the same deductions; in addition to which, the individual would be entitled to make a further deduction of any debts he might owe. Upon these grounds, therefore, we are of opinion that this mode of taxing trust companies does not create the inequality which the appellant alleges.

In the case of savings banks, we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (sec. 4, chap. 456, Laws 1857) is as follows: "Deposits in any banks for savings, which are due to the depositors, * * * shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State."

According to the stipulation in this case, the deposits in such banks amount to $437,107,501, with an accumulated surplus of $68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally [161] clear that they are not within the meaning of the Act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen that by previous decisions of this court it has been declared that "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt".—*Hepburn* v. *School Directors*, 23 Wall. 480 [*supra*]—and that "the Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so." *Adams* v. *Nashville*, 95 U. S. 19 [24: 369]. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in

national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.

It is further objected, on similar grounds, to the validity of the assessment complained of in this case, that municipal bonds of the City of New York, to the amount of $13,467,000, are [162] also exempted from taxation. The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation; not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares.

The same considerations apply to what is called an exemption from taxation of shares of stock of corporations created by other States and owned by citizens of New York, which it is agreed amount to at least the sum of $250,000,000. It is not pretended, however, that this exemption is based upon the mere will of the Legislature of the State. The courts of New York hold that they are not the proper subjects of taxation in the State of New York, because they have no *situs* within its territory for that purpose. *Hoyt* v. *Commissioners of Taxes*, 28 N. Y. 224; *People* v. *Commissioners*, 4 Hun, 595. The objection would be equally good if made to the nontaxation of real estate owned by citizens of New York, but not within its limits. Clearly the property to be taxed under the rule prescribed for the taxation of national bank shares must be property which, according to the law of the State, is the subject of taxation within its jurisdiction.

Upon these grounds, substantially the same as those on which the circuit judge proceeded (28 Fed. Rep. 776), we are of opinion that the appellant is not entitled to the relief prayed for.

The decree of the Circuit Court is, therefore, affirmed.

Mr. Justice **Blatchford** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NATIONAL NEWARK BANKING COMPANY, *Appt.*, [163]
v.
MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, AND A. JUDSON CLARK, Receiver of Taxes.

(See S. C. Reporter's ed. 163-165.)

National banks—state taxation of shares of stock—"other moneyed capital"—exemption of personal property, not similarly situated, immaterial—New Jersey Statute, April 11, 1866.

The exemption from state taxation of personal property, not situated similarly to that invested in national banks, does not entitle national bank shares to similar exemption under section 5219 R. S.

[No. 1301.]

Argued March 14, 15, 1887. Decided April 4, 1887.

APPEAL from the Circuit Court of the United States for the District of New Jersey. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

See the preceding case of *The Mercantile National Bank* v. *The Mayor*, *ante*, 895.

Messrs. **Charles W. Wells** and **John W. Taylor**, for appellant.

Messrs. **Joseph Coult** and **John R. Emery**, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the appellant, a National Bank organized under the Act of Congress, doing business in the City of Newark, New Jersey, the object and prayer of which are to enjoin the collection of taxes assessed upon the individual shareholders therein, on the ground that, according to the laws of New Jersey, under which the assessment has been made, the rate of taxation is greater than that assessed upon the moneyed capital in the hands of the individual citizens of the State. This alleged inequality, it is contended, results from certain exemptions authorized by the laws of New Jersey, whereby a material portion of the moneyed capital in the hands of individuals is freed from taxation.

According to the allegations of the bill, these exemptions consist, 1, of the shares of capital stock held by individuals in all private corporations of the State, "except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this State are expressly exempted from taxation, and except mutual life insurance com- [164] panies specially taxed;" which exemptions, it is charged, amount to the sum of $301,485,000; and 2, of the deposits in savings banks, amounting to the sum of $24,017,916.99.

The 15th section of the Act of April 11, 1866, establishing these exemptions, is as follows (Revision of 1877, p. 1156): "That all private corporations of this State, except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this State are expressly exempted from taxation, and except mutual life insurance companies specially taxed, shall be and are hereby required to be respectively as-

assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus; but any real estate which such corporations may lawfully own in any other State than this State, shall not be liable to be estimated in such accumulated surplus, and the persons holding the capital stock of such corporations shall not be assessed therefor; and such corporations as have no capital stock other than those above excepted, shall be assessed for the full amount of their property and valuable assets, without any deductions for debts and liabilities; but depositors in savings banks, taxed by virtue of this section, shall be exempted from taxation on their personal estate to the amount of their deposits; provided, that premium notes held by life insurance companies shall in no case be considered as future premiums, but shall be included in the valuable assets of said company."

Under the statutory provision for the taxation of bank shares in New Jersey, the stock of every bank, national as well as State, is assessed for taxation in the place where the bank is located to all nonresident stockholders thereof, the taxes assessed on which are payable by the bank itself for their account; resident stockholders being taxed on their shares in the townships or wards in which they respectively reside. The rate of taxation is the same as that upon other personal property held by individuals, and is subject to deduction on account of debts due by the owner.

It is not claimed that the assessments complained of in this case are unequal or illegal, unless made so by the exemptions authorized by the 15th section of the Act of April 11, 1866.
165] There is no material difference between the legislation of New Jersey on this subject and that of New York, as considered in the case of *Mercantile National Bank of the City of New York* v. *Mayor, Aldermen and Commonalty of the City of New York, and George W. McLean, Receiver of Taxes*, just decided. This case is, therefore, necessarily governed by the decision in that.

The decree of the Circuit Court is accordingly affirmed.

Mr. Justice **Bradley** and *Mr. Justice* **Blatchford** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

105] ALBERT GRANT, *Appt.*,
v.
PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 105-118.)

Bill by the cestui que trust *to foreclose equity of redemption in property covered by twenty-six trust deeds, not multifarious—parties—plea—depositions—discretion of court—receiver to preserve property, rents and profits—usury—commissions—evidence.*

Upon a bill filed by the *cestui que trust* to foreclose the equity of redemption of the grantor in property covered by twenty-six trust deeds executed to five different sets of trustees, as to all of whom as defendants the bill was taken *pro confesso*, it is *held:* that the bill can be maintained by the *cestui que trust*, no objection being made by the trustees; that it is not multifarious, it being necessary to adjudicate all the claims in one suit; that the General Term of the court below properly remanded the cause to the Special Term for further proceedings in the taking of the testimony after the reversal of a decree of sale on the report of the auditor, without a trial of the issue raised by the pleadings; that the decree of *res judicata* was properly overruled by the court below, the complainant having been merely a party defendant to a former bill against the defendant involving parts of the lots in question, and said bill having been dismissed; that a plea is bad where the answer extends to the whole of the matter covered by it; that the court below exercised a proper discretion in admitting certain depositions and in refusing the appellant further time to take depositions in rebuttal; that it is within the discretion of a court of equity, where the debtor is insolvent and the mortgaged property is insufficient security for the debt and there is danger of waste or deterioration, to take charge of the property by means of a receiver to preserve not only the *corpus*, but the rents and profits, for the satisfaction of the debt; that commissions paid by the complainant to secure the loans, did not make the transactions in question usurious; and that the cross bill filed by the complainant, setting up a certain alleged contract of settlement, is not sustained by the evidence.

[No. 165.]

Argued March 24, 25, 1887. Decided April 4, 1887.

APPEAL from the Supreme Court of the District of Columbia. *Affirmed.*

See case below, 3 MacArthur, 42 and 220.

The history and facts of the case appear in the opinion of the court.

Messrs. **Joseph E. McDonald** and **Henry W. Blair**, for appellant.

Messrs. **M. F. Morris** and **W. F. Mattingly**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court: [106]

This is a suit in equity, brought in the Supreme Court of the District of Columbia, on the 17th of April, 1875, by the Phœnix Mutual Life Insurance Company, a Connecticut corporation, against Albert Grant and others, to enforce certain deeds of trust, twenty-six in number, executed by Grant and his wife to secure sundry sums of money, the plaintiff claiming to be the owner of all the debts secured by the deeds of trust, which cover various lots in square 760, in the City of Washington. The suit applies to lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 16, 17 and 18, all of which but lots 16, 17 and 18 had buildings on them when the suit was brought. The total amount of principal moneys alleged in the bill to be due on the debts secured by the deeds of trust is $312,658.14. The trustees in the several deeds of trust, being five different sets of trustees, two in each set, are made parties defendant, as are certain judgment and mechanics' lien creditors of Grant, and purchasers from him. The bill alleges that Grant is insolvent; that the property is very much deteriorating for the want of necessary repairs to the buildings upon it, which Grant is unable or unwilling to make; [107] and that ten of the buildings are unoccupied. The bill prays for the appointment of a receiver to rent and properly care for 12 of the lots; that the net amounts collected by the receiver be paid over to the plaintiff on account of the indebtedness; that the 14 lots covered by the trust deeds may be sold to pay the in-

debtedness due to the plaintiff; and that the proceeds of the sale be paid to the parties lawfully entitled thereto.

On the 7th of May, 1875, after a hearing, the court made an order appointing a receiver of 10 of the lots, to collect the rents of the rented property, and to lease such as was unrented.

On the 6th of July, 1875, Grant demurred generally to the bill. This demurrer was overruled on the 8th of November, 1875, with leave to answer.

On the 27th of November, 1875, Grant filed an answer denying his indebtedness as to a large part of the amount claimed by the plaintiff, and denying generally the equities of the bill; and with the answer filed four pleas, setting up (1) a want of jurisdiction in the court to decree a sale, on the ground that the only lawful authority to make the sale without the consent of Grant was vested in the several trustees; (2) the nonjoinder of numerous parties named in the plea; (3) the illegality of the indebtedness claimed, because $9,000 of illegal and usurious interest was charged by the plaintiff and paid by Grant on such indebtedness; (4) that all the indebtedness was paid and satisfied before the bringing of the suit.

On the same day, Grant filed a cross bill, making as defendants the parties to the original bill and those named in the second plea, in which he set up that a contract had been made between him and the plaintiff, on the 1st of March, 1873, by the terms of which, among other things, all of his obligations to the plaintiff were to be surrendered to him in consideration of a deed in fee to be made by him to the plaintiff of 11 of the lots. The cross bill prayed for a specific performance of such contract by the plaintiff.

On the 23d of December, 1875, the plaintiff moved to strike out the pleas, and also demurred to the cross bill. On the 15th of March, 1876, the demurrer to the cross bill was sustained, with leave to amend. On the 20th of March, 1876, the plaintiff filed a general replication, joining issue with Grant. On the 6th of May, 1876, the Court in Special Term made an order referring the cause to the auditor of the court to state the account between the plaintiff and Grant, the amount due under the several deeds of trust, the amounts due to the judgment and mechanics' lien creditors referred to in the bill, whether the same are liens upon any of the real estate, the relative priorities of the claims of such creditors and the plaintiff, and the value of the real estate. From this order Grant appealed to the General Term. On the hearing before the auditor he refused to receive evidence on the part of Grant in support of any of the defenses raised by his answer.

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On the 19th of June, 1876, the auditor filed his report, in which he reported upon the several matters referred to him, and found the amount due on the several deeds of trust on the real estate the sale of which the bill prayed for, to be $425,848.88, including interest, and stated the value of the 14 lots and of the buildings upon them to be $200,425. Grant filed exceptions to this report, and on the 11th of December, 1876, the court made a decree overruling the exceptions and confirming the report. The decree directed that the 14 lots be sold by trustees named in the decree, unless Grant should by a day specified pay into court for the plaintiff the sum of $407,117.58. In case of a sale, the proceeds were to be brought into court to abide further order. Grant appealed to the General Term from this decree.

On the 28th of March, 1877, a decree was made by the General Term, reversing the decree of the Special Term of December 11, 1876, setting aside the order of reference to the auditor and the proceedings thereunder, and remanding the cause to the Special Term for further proceedings, to commence with the cause as it stood after the filing of the replication and when application for the reference to the auditor was made, with leave to Grant to move to amend his cross bill and to the plaintiff to apply for such order as it might be advised in regard to its replication. The decision of the General Term, reported in 3 MacArthur, 42, considers the objection raised to the jurisdiction of the court to decree a sale, on the ground that by the trust deeds the sales were to be made by the trustees, and overrules it. It says: "The present case contains many particular features which seem to render the jurisdiction of the court absolutely indispensable in order that a fair sale should be made, and bidders should know beforehand that they could get a valid title under a decree in which the rights of every person having a claim upon the property had been ascertained and settled. From the face of the bill it appears that the property in question has been subdivided into numerous lots. Some of the deeds of trust are liens upon all the lots; others upon some of them only. Payments have been made on account of some of the claims, and none upon others. The aggregate liens exceed the value of the property, and the owner is apparently insolvent. Purchasers from Grant subsequent to the liens are parties to the bill, and in justice to them the securities should be marshaled. The parties in interest are numerous, and the complication of rights is so great that nothing can settle them except a decree in equity." It goes on to hold that the order of reference to the auditor was erroneous in the then condition of the cause, and that the issues raised by Grant ought to have been first tried in the usual way.

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On the 21st of May, 1877, by leave of the Court in Special Term, Grant filed amendments to his cross bill. On the 23d of July, 1877, the plaintiff, by an order of the Special Term, withdrew its replication filed March 20, 1876, and filed a general replication to the answer of Grant, and set down for argument the pleas filed with Grant's answer. On the 11th of September, 1877, Grant filed a supplemental answer, setting up as a bar to the suit a decree made by the Supreme Court of the District of Columbia, in equity, in a suit wherein Aaron Carter, Jr., and others were plaintiffs, and Grant and the Phœnix Mutual Life Insurance Company and others were defendants; and the Company filed an answer to the amended cross bill of Grant.

On the 12th of February, 1878, the Court in General Term, on an application made by Grant at the Special Term and which it ordered to be heard in the first instance by the General

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Term, made an order vacating the receivership and directing the receiver to deliver to Grant possession of 10 of the lots, and to pay into the registry of the court all moneys in his hands derived from rents and profits.

On the 4th of March, 1878, the Court in Special Term made an order overruling all of the pleas filed by Grant. Grant appealed to the General Term from so much of this order as overruled the second, third and fourth pleas.

On the 2d of July, 1879, the General Term affirmed the order of the Special Term overruling the second, third and fourth pleas, and remanded the cause to the Special Term for further proceedings. On the 22d of November, 1879, the plaintiff filed a replication joining issue with Grant on his supplemental answer to the bill.

Thereafter, testimony was taken by both parties on the issues raised. Testimony was taken at Hartford, Connecticut, on the part of the plaintiff, by commission. Grant moved to suppress certain depositions taken under that commission. The motion was granted as to three depositions and overruled as to the others. Complaint is made by Grant that upon the motion to suppress he was not permitted to read certain affidavits, and that he was denied leave to cross examine orally certain witnesses at Hartford, and that he was denied an extension of time in which to take testimony in rebuttal of evidence taken on the part of the plaintiff at Hartford.

On the 9th of February, 1881, the Court in Special Term made an order referring the cause to the Court in General Term for hearing in the first instance.

On the 2d of March, 1882, the cause having been heard by the General Term on the pleadings and proofs, a decree was made by it declaring that Grant is not entitled to any relief under his cross-bill; that the plaintiff is the holder and owner of the several obligations of Grant secured by the deeds of trust of the real estate the sale of which the bill prays for; that Grant has made default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money; that the taxes on the real estate are in arrear for more [111] than $20,000; that the indebtedness of Grant to the plaintiff largely exceeds the value of the real estate; that the plaintiff has no personal security for its debt; and referring the cause to the auditor of the court to state the account between the plaintiff and Grant, the amount due under the deeds of trust, the amounts due to judgment and mechanics' lien creditors, whether the same are liens upon any of the real estate, the relative priorities of the claims of those creditors and the plaintiff, the value of the real estate, the amount of taxes in arrear, and the particulars of any sales for taxes. The decree also appoints a receiver in the cause, to take possession of 12 of the lots and lease them, and enjoins Grant from interfering with the receiver in his possession and control of the property.

The reference was had before the auditor, and on the first of May, 1882, he filed his report, finding that there was due on that date from Grant to the plaintiff on the indebtedness secured by the trust deeds $285,202.09 of principal, and $225,117.98 of interest, making a total of $510,320.07. The report also showed that the amount of taxes and interest thereon, in arrear, upon the real estate, was $48,755.05, and that the value of the 14 lots and the improvements upon them was $137,000. On the 5th of March, 1883, Grant filed exceptions to the auditor's report. The case was brought to a further hearing in the General Term, on its interlocutory decree of March 2, 1882, and on the report of the auditor, and on the exceptions of Grant thereto; and on the 16th of June, 1883, it made a final decree overruling the exceptions, confirming the report, and dismissing the cross-bill of Grant, and decreeing that unless Grant should, by a day specified, pay to the complainant the sum of $510,320.07 with interest on $285,202.09 from May 1, 1882, and the costs of the suit, the 14 lots should be sold by a trustee appointed by the decree, and the proceeds of the sale should be brought into court to abide further order. From that decree Grant has appealed to this court.

The first assignment of error is that the court erred in overruling the demurrer of Grant. The bill seeks to foreclose the equity of redemption of Grant in the property covered by twenty-six trust deeds executed to five different [112] sets of trustees, the plaintiff being the *cestui que trust* in all of them, either originally or by purchase. Some of these deeds cover only one lot, others embrace two or more lots; and there is but one of them which embraces all of the property. All of the trustees are made defendants, and the bill has been duly taken *pro confesso* as to all of them. As to Gallaudet and Paine, trustees in twenty-two of the twenty-six deeds, the bill alleges that they have declined to execute their trusts. The bill also sets forth a number of judgments and mechanics' liens held by parties who are made defendants, none of the mechanics' liens covering the whole property, and a number of purchases of lots from Grant. The objection made is that the bill does not show a right in the plaintiff to maintain the suit; that each trust deed vests in its trustees a legal title to the property covered by it, with power to sell; that the interest of the *cestui que trust* is represented by the trustees, who must enforce the trust; and that unless the bill shows a failure on their part to do so, through incapacity or otherwise, the *cestui que trust* has no standing in court in its own right. The bill alleges that in twelve of the deeds of trust executed January 1, 1872, to Gallaudet and Paine as trustees, the length of notice of the time and place of sale by advertisement is left blank; that this would prevent the trustees from executing such power of sale; but that in a court of equity the deeds would be considered as mortgages. It is urged on the part of Grant that this defective power of sale renders it the more necessary that the trustees, rather than the *cestui que trust*, should act in either seeking a correction of the defect or in enforcing the trust. But we think there is nothing in the objection thus raised. The case is one clearly of equity cognizance, for the reasons above set forth and those contained in the opinion of the General Term, above quoted. No objection is made on the part of any of the trustees to the maintenance of the suit. The bill is taken as confessed as to all of them, and there is no possible prejudice to the defendant

Grant, in the bringing of the bill in its actual shape by the *cestui que trust*

[113] Nor is the bill open to the objection that it is multifarious. The fact that one of the deeds of trust covers the entire property, and that some of the creditors of Grant who were made defendants have liens upon various portions of that property, makes it eminently proper, and in deed indispensable, if a clear title is to be given by a sale, to adjudicate all the claims in one suit.

The second assignment of error is that the General Term erred in its decree of March 28, 1877, in remanding the cause to the Special Term for further proceedings, after it had reversed the decree of the Special Term of December 11, 1876, and especially in then authorizing the plaintiff to apply to the Special Term for such order as it might be advised in regard to its replication. The ground taken is that as, at the time of the hearing which resulted in the decree of the Special Term of December 11, 1876, no testimony had been taken upon any of the issues raised by the pleadings, and as the plaintiff had gone to hearing in that state of the case, and had obtained a decree of sale in the Special Term, that decree was a final decree in its favor on the merits; and that, on the hearing in the General Term, on the appeal of Grant, upon the same record, the General Term, finding the decree of the Special Term to have been erroneous, was bound to enter a decree on the merits in favor of Grant, reversing the decree of the Special Term and dismissing the bill. But we are of opinion that the General Term had power to make its decree of the 28th of March, 1877. The error of the Special Term was in making a decree of sale on the report of the auditor, without a trial of the issues raised by the pleadings. For that error its decree was reversed, and it was proper for the General Term to remand the cause to the Special Term for further proceedings in the taking of testimony on the issues, and with permission to the parties to apply in the Special Term for leave to amend their pleadings. This was, within section 772 of the Revised Statutes of the District of Columbia, a modification of the decree of the Special Term, on an appeal involving the merits of the action. The decree of the General Term reversed that of the Special Term and vacated the order of reference to the

[114] auditor, and all proceedings thereunder, and the further directions in the decree of the General Term were but modifications of the decree of the Special Term.

The third assignment of error is that the court erred in not sustaining Grant's defense of *res adjudicata*, as set up in his supplemental answer of September 11, 1877. There is attached to that answer a transcript of the record in the suit of Carter and others against Grant and others. The bill in that case was filed on the 30th of October, 1872, and was brought by three judgment creditors of Grant, on their own behalf and that of all others similarly situated, who should become parties. The defendants in it were Grant and his wife, the Phœnix Mutual Life Insurance Company, the trustees in the various trust deeds sought to be enforced by that Company, and various creditors of Grant. It set forth the existence of the various deeds of trust mentioned in the bill in this suit, and prayed for the sale of 12 of the lots covered by those deeds of trust, and that the proceeds of the sale, after satisfying all valid prior liens upon the lots, be applied to the payment of the complainants' judgments. An amended and supplemental bill having been filed in the Carter suit, the Phœnix Mutual Life Insurance Company filed an answer, on the 12th of June, 1874, setting up that Grant is indebted to it in the full amount called for by the several deeds of trust held by it; that the amount of said indebtedness is equal to the value of the property; and that it is willing that the property should be sold under the decree of the court and all equities adjusted on the distribution of the fund, claiming, at the same time, that the judgment creditors have no standing in court without having first offered to redeem the incumbrances on the property which are prior in date to the judgments. After a decree by the Special Term in favor of the plaintiffs in the Carter suit, directing a sale of 12 of the lots free from all liens, and that the proceeds be brought into court, and that all equities between the parties to the cause be reserved for consideration on the distribution of the fund, the General Term, on an appeal to it by Grant from the decree, reversed it on the 6th of March, 1875, and dismissed the bill.

We are of opinion that there is nothing in the record of the Carter suit, or in the above [115] recited proceedings therein, or in any other proceedings therein, which operates to sustain the defense of *res adjudicata*. The Phœnix Company was a defendant, and merely a defendant, in the Carter suit, subject to the decree which might be made therein, setting up and maintaining its claims, and expressing its willingness that the property in question should be sold and the equities adjusted on the distribution of the proceeds of sale. The plaintiff's bill being dismissed out of court, there is nothing which can operate as a bar to the bill in the present suit.

The fourth assignment of error is that the court erred in overruling the second, third and fourth pleas to the bill. The ground on which the General Term affirmed the order of the Special Term overruling the pleas is stated in the opinion of the General Term, delivered by *Mr. Justice* Cox (McArthur & Mackey, 117) to have been, that the second, third and fourth pleas, to which alone the appeal related, raised defenses that were covered by the answer of Grant. That answer distinctly sets up the defense of usury, covered by the third plea, and the defense of payment, covered by the fourth plea. The second plea, relating to the want of proper parties, was overruled on the ground that the necessity of making the omitted persons parties was not apparent. We concur in the disposition made, for the reasons thus stated, of these pleas. The defendant has had, under his answer, the benefit of the defenses of usury and payment set up in the third and fourth pleas; and the rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea, is not applicable where the answer extends to the whole of the matter covered by the plea

The fifth assignment of error complains that the court overruled the motion of Grant to suppress certain depositions taken by the plain-

tiff at Hartford, when those depositions had been taken after the time limited for the taking of depositions by the plaintiff, and the witnesses had refused to answer certain cross interrogatories propounded by Grant, and for other irregularities appearing on the motion to suppress the depositions; and the sixth assignment of error complains that the court erred in refusing to allow Grant further time to take depositions in rebuttal of the depositions on the part of the plaintiff. We are unable to see that the court did not exercise a proper discretion in its action in the matters thus complained of.

[116]

The seventh assignment of error is that the court took the property in controversy out of the possession of Grant by the appointment of a receiver before a sale, and thus deprived him of the use of the property and of its rents and profits; and that it erred in the final decree, in finding the equities of the case in favor of the plaintiff and against Grant, and in dismissing the cross bill of Grant, and ordering a sale of the property.

The original order for the appointment of a receiver was made on the 7th of May, 1875. It put into the possession of the receiver ten of the lots, with power to collect the rents of such of them as had been rented and to lease the others. After a lapse of thirty-three months, and on the 12th of February, 1878, the General Term, in which a motion to discharge the receiver was heard in the first instance by order of the Special Term, made an order vacating the receivership. The opinion of the General Term in this matter, reported in 3 MacArthur, 220, shows that the ground taken by the majority of the five judges (two of them dissenting from the decision), in discharging the receivership, was, that it had failed to accomplish its purpose, and that the property was going to destruction without yielding a revenue sufficient to pay the ordinary taxes. The receivership was renewed by the decree of the General Term of March 2, 1882, establishing the rights of the plaintiff and ordering a sale of the twelve lots. The defendant contends that the court had no power, before a sale, to appoint a receiver of the property involved in the litigation, and thus deprive him of its use and of its rents and profits, on the ground that the trust deeds do not embrace the rents and profits of the property. But we are of opinion that the original appointment of a receiver, and the appointment of one made by the decree of the General Term, of March 2, 1882, were proper, and were a reasonable exercise of the discretion of the court, within the principle stated by this court, speaking by *Mr. Justice* Bradley, in *Omaha Hotel Co.* v. *Kountze*, 107 U. S. 378, 395 [27:609, 616], in these words: "Courts of equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the *corpus*, but the rents and profits, for the satisfaction of the debt." The circumstances which, within this rule, justified the exercise of the discretion of the court in appointing a receiver originally, existed in greater force when the receiver was appointed by the decree of March 2, 1882. A point is made that, as the appointment of the receiver made by the interlocutory decree of March 2, 1882, was not expressly continued by the final decree of June 16, 1883, it was superseded; but there is no force in this suggestion.

[117]

In the final decree the court found to be due the whole debt shown on the face of the trust deed of August 26, 1871, to Davis and Downman, trustees, covering fourteen lots, to secure $40,000 due to one Fletcher, and also the whole debt shown on the face of the twelve trust deeds of January 1, 1882, to Gallaudet and Paine, to secure in the aggregate to the plaintiff $81,000. It is claimed by Grant that the trust deed to Davis and Downman, and the several trust deeds to Gallaudet and Paine, were executed to secure loans from the plaintiff; that Fletcher was the agent of the plaintiff in the Davis and Downman trust deed; and that the trust deeds of January 1, 1872, to Gallaudet and Paine, for $81,000, provided for and in effect paid the $40,000 Fletcher indebtedness secured by the Davis and Downman trust deed. We have examined the evidence on this point, and are of opinion that the contention of Grant is not sustained by it. It is not profitable to discuss it.

It is also contended by Grant that the loans received by him from the plaintiff were upon usurious interest to the amount of $9,000, and that thereby the entire interest decreed was forfeited. But we are of opinion that the evidence shows that the commissions paid by Grant upon the loans (in which the usury is alleged to have consisted), were not paid to the plaintiff. The plaintiff made no contract for usurious interest, nor did it take any. *Call* v. *Palmer*, 116 U. S. 98 [29: 559].

[118]

The *gravamen* of the cross bill of Grant is that his debt to the plaintiff was extinguished by reason of a contract of sale entered into by him with it, by which, in consideration of the advances it had made to him, and of the amount due from him to it on the several trust deeds, and certain other considerations, he agreed to convey to it eleven of the lots involved in this litigation. It is sufficient to say that the proofs do not sustain the existence of any such contract. No such contract was ever executed in writing, none was even in part performed by either of the parties, and letters which passed between them subsequently to March 1, 1878 (the alleged date of the contract), show that no such contract was understood by them to exist.

Other minor considerations are urged in the briefs of the appellant, which we have considered, but which it is not deemed important to discuss at length.

We see no error in the final decree of the Court below, and it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALBERT GRANT ET AL., *Appts.*, [118]
v.
PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 118-121.)

Foreclosure—receiver—application to the court for instructions—jurisdiction of the Special

Term, Sup. Ct. of D. C.—it may preserve property after appeal to this court and allowance of a supersedeas—*interlocutory order—appeal from, dismissed for want of jurisdiction.*

1. A receiver appointed by a court of equity, pending foreclosure proceedings, to preserve the *corpus* of the mortgaged property and the rents and profits arising therefrom for the satisfaction of the debt, may apply to the court for directions as to the expenditure of funds in his hands.

2. An order in such proceedings by the Special Term of the Supreme Court of the District of Columbia, referring the cause to the General Term for hearing in the first instance, did not deprive the court in Special Term of its jurisdiction to act in the matter of an application of the receiver for authority to make certain repairs on the property under his care. Nor did the appeal from the final decree of the court below, although perfected by a *supersedeas*, deprive that court of its power to act upon such application of the receiver, its order being strictly confined to the preservation of the property in litigation.

3. An order by the court below in General Term, remanding to the Special Term for hearing in the first instance an application of the receiver for an order on the occupant of one of the houses in question to attorn and pay rent to him, is an interlocutory order from which no appeal lies to this court.

[No. 1201.]

Argued March 25, 1887. Decided April 4, 1887.

APPEAL from the Supreme Court of the District of Columbia. *Affirmed.*

The history and facts of the case appear in the opinion of the court. Case below, 3 McArthur, 42 and 220.

Messrs. **Joseph E. McDonald** and **Henry W. Blair**, in person, for appellants.

Messrs. **M. F. Morris** and **W. F. Mattingly**, for appellee.

[119] *Mr. Justice* **Blatchford** delivered the opinion of the court:

After the making of the final decree of June 16, 1883, by the General Term of the Supreme Court of the District of Columbia, in the case of the Phœnix Mutual Life Insurance Company against Albert Grant and others, the appeal from which decree (taken by Grant) has just been decided, the receiver appointed by the interlocutory decree of March 2, 1882, obtained from the court in Special Term, on the 8th of January, 1886, an order, on notice to Grant, authorizing the receiver to make such necessary repairs to the houses on the lots involved in the litigation as in his judgment are essential to the preservation of the property and to its occupation by tenants, with due regard to economy, and, among other repairs, to put in proper working condition the machinery and apparatus used in supplying the houses with water. Grant appealed to the General Term from this order, and on the 5th of April, 1886, it was affirmed. Grant has appealed from this order of affirmance to this court.

On the 11th of October, 1884, the receiver appointed by the interlocutory decree of the General Term, of March 2, 1882, applied by petition to the Supreme Court of the District of Columbia, in Special Term, for an order requiring Henry W. Blair, not a party to the cause, but who was in the possession and occupation of the house on one of the lots covered by the decree, to attorn and pay rent to the receiver. On a hearing, on notice to Blair and [120] on his appearance, the Special Term directed the application to be heard in the first instance by the General Term; and the General Term, on the 5th of April, 1886, made an order remanding the matter to the court in Special Term, for reference by it to the auditor of the the court, with leave to Blair to show by proof the time when, and the terms and conditions under which, he entered into possession of the property in question, under Grant, the amount of money paid by him to Grant, for what purpose it was paid, and whether such money, or any part thereof, and how much, was expended by Grant in betterments upon any of the property in the custody of the receiver, with leave to the plaintiff, and to the receiver also, to introduce pertinent testimony before the auditor, the auditor to ascertain all facts material to the subject matter of the reference, and report the same, with his conclusions, to the court in Special Term, for its action. From this order Blair and Grant have appealed to this court. The appellants contend, on these two appeals: (1) that the receiver, not being a party to the cause, has no independent standing in court and cannot institute any proceeding on his own motion; (2) that the Special Term of the Supreme Court of the District of Columbia has not, since its order made on the 9th of February, 1881, referring the cause to the court in General Term for hearing in the first instance, had any jurisdiction of the suit; (3) that the General Term has had no jurisdiction of the suit since the perfecting of the appeal to this court from the final decree of June 16, 1883.

We are of opinion that a receiver such as the one in this case, in charge of property such as that in this case, has a right to apply to the court for directions in regard to the expenditure of funds in his hands as receiver.

In regard to the jurisdiction of the Special Term since the order of the 9th of February, 1881, we are of opinion that the making of that order did not deprive the court in Special Term of its jurisdiction to act in the matter covered by the order of the 8th of January, 1886. Besides, the General Term, in its interlocutory decree of March 2, 1882, granted leave "to the receiver to [121] apply to the court, or this court in Special Term, for such instructions and orders as may be proper."

We are also of opinion that the appeal to this court from the final decree of June 16, 1883, even though perfected with a *supersedeas*, did not deprive the court below of its power to adjudicate upon such a matter as that involved in the order of January 8, 1886. There is nothing in this view inconsistent with the general rule that an appeal suspends the power of the court below to proceed further in the cause, by executing the decree. The order of January 8, 1886, was strictly confined to the preservation of the property in litigation.

As to the order of the General Term of April 5, 1886, in the Blair matter, it was clearly merely an interlocutory order, and not a final one, in reference to the matter to which it relates, as it merely directed proceedings in the court in Special Term in reference to the application made in regard to Blair, with a view to a decision upon the application.

The order affirming the order of January 8, 1886, is affirmed; and the appeal from the order of April 5, 1886, in regard to Blair, is dismissed for want of jurisdiction.

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U. S.

[172] MOSES H. KATZENBERGER ET AL., Partners, as KATZENBERGER'S SONS, *Plffs. in Err.*,

v.

CITY OF ABERDEEN, IN THE COUNTY OF MONROE AND STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 172-179.)

Municipal bonds—amendment of charter of City of Aberdeen, Mississippi—construction of—issue of bonds under—curative Act—Constitution of 1869—estoppel.

1. The amendment of 1858 to the charter of the City of Aberdeen, Mississippi, did not authorize the city authorities to make a subscription to the stock of a railroad company, requiring a levy of a tax for its payment, without the approval of such tax by a majority of the legal voters of the City.

2. The recital of matter of law in the bonds does not estop the City from denying that they were lawfully issued.

3. The curative Act of 1872 is inoperative as to the bonds in question, the Constitution of 1869 having withdrawn from the Legislature the power to create a new liability without the assent of two-thirds of the qualified voters of the City.

[No. 155.]

Submitted March 21, 1887. Decided April, 4, 1887.

IN ERROR to the District Court of the United States for the Northern District of Mississippi. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Calvin Perkins** and **Craft & Cooper**, for plaintiffs in error:

It will not be denied that the Act of 1858 gave full power to subscribe for the stock. If it required a vote to complete the contract (which we do not admit), this question cannot be raised here. The recitals in the face of the bonds estop the defendant from raising the question. The law, under which the power to issue the bonds is claimed, is styled "An Act to Amend the Charter of the City of Aberdeen;" and therefore the recital that they are issued under and pursuant to the charter is a direct reference to the Act of 1858.

Burr, Public Securities, 313; *Commissioners* v. *Bolles*, 94 U.S. 104 (24: 46); *Commissioners* v. *January, Id.* 202 (24:110); *County of Warren* v. *Marcy*, 97 U. S. 104 (24: 980); *Sykes* v. *Aberdeen*, 59 Miss. 237; *Lynde* v. *The County*, 83 U. S. 16 Wall. 6 (21:272); *Pendleton Co.* v. *Amy*, 80 U. S. 13 Wall. 305 (20: 580).

The power to borrow money carries with it by implication the power to issue coupon interest-bearing bonds.

Gelpcke v. *Dubuque*, 68 U.S. 1 Wall. 202 (17: 524); *Meyer* v. *Muscatine, Id.* 385 (17: 564); *Mitchell* v. *Burlington*, 71 U. S. 4 Wall. 273 (18: 352).

"A municipal corporation has the implied power to borrow money for the objects authorized by its charter—as building markets, providing fire engines, etc. It is not obliged to wait until the money can be collected by taxation."

Mills v. *Gleason*, 11 Wis. 470; *Bank of Chillicothe* v. *Chillicothe*, 7 Ohio, Part 2, 31.

If there was any defect of power to issue the bonds in our case, the Act of 1872 cures it.

Beloit v. *Morgan*, 74 U. S. 7 Wall. 624 (19: 207); *Thompson* v. *Lee County*, 70 U. S. 3 Wall. 331 (18: 178); *Thompson* v. *Perrine*, 103 U. S. 806 (26: 612); *Louisiana* v. *Taylor*, 105 U. S. 454 (26: 1133); *Johnson Co.* v. *Thayer*, 94 U. S. 631 (24: 133).

"If there exists legislative authority, not in conflict with the State or Federal Constitution, to issue the bonds, and they are duly executed by proper officers, who are invested with authority under the law, with power to decide whether conditions precedent have been performed, and they so declare or recite, the issue of such bonds under such circumstances, and with such recitals, is conclusive as to the facts so stated, and estops the municipality in a suit on the bonds to aver or prove to the contrary."

Cutler v. *Board of Supervisors*, 56 Miss. 123; *Marcy* v. *Oswego*, 92 U. S. 638 (23: 748); *Coloma* v. *Eaves*, 92 U. S. 484 (23: 579); *Commissioners* v. *Nichol*, 161 Ohio St. 260; *Moran* v. *Miami Co.* 67 U. S. 2 Black, 732 (17: 847); *Mercer Co.* v. *Hackett*, 68 U. S. 1 Wall. 83 (17: 548); *Supervisors* v. *Schenck*, 72 U. S. 5 Wall. 784 (18: 559).

When the authority exists, mere irregularities do not affect the title of the *bona fide* holder.

Bissell v. *Jeffersonville*, 65 U. S. 24 How. 287 (16: 664); *Bank* v. *Rome*, 19 N. Y. 20; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 208 (17:526); *Royal British Bank* v. *Turquand*, 5 E. & B. 248 a.

Messrs. **Baxter McFarland** and **E. O. Sykes**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit brought against the City of Aberdeen, on the 14th of September, 1882, to recover the interest from May 1, 1874, to May 1, 1882, on one hundred fifty-six bonds of the City issued to the Memphis, Holly Springs, Okolona and Selma Railroad Company, under date of April 26, 1870. The alleged authority for the issue of the bonds is an amendment to the charter of the City in November, 1858, as follows:

"Sec. 1. *Be it enacted by the Legislature of the State of Mississippi*, That the mayor and selectmen of the City of Aberdeen be, and they are hereby, empowered to contract with the New Orleans, Jackson and Great Northern Railroad Company, or with any other railroad company, and to subscribe in the name, and for the use of the City of Aberdeen as many shares of the capital stock of said company, and upon such terms and conditions as they may stipulate and agree upon, as they shall deem expedient, not exceeding in amount the sum of $100,000. [173]

"Sec. 2. *Be it further enacted*, That the mayor and selectmen of said City of Aberdeen are hereby empowered to levy and collect a tax on all the property within the corporate limits of said City, subject at the time to state or county tax, and upon the annual gross incomes of all persons or corporations residing or doing business in the corporate limits of said City, to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this Act; *Provided*, That before such tax shall be levied the same shall be approved by a majority of the legal voters of said

City to be ascertained by an election held as other elections in said City.

"Sec. 3. *Be it further enacted*, That the said tax shall be levied and collected as other taxes of said City, and the tax collector is hereby required to execute a bond, with good security, to be approved by the said mayor and selectmen conditioned for faithful performance of his duties as such collector, and that he will pay over the moneys collected, as directed by the said mayor and selectmen. And such tax collector shall receive for his services one per centum on the amount collected, and no more.

"Sec. 4. *Be it further enacted*, That the gross amount of the annual income of each and every person and corporation residing or doing business within the corporate limits of said city, shall be ascertained by the said tax collector, who for such purposes, is authorized and required to administer an oath to each person, or his agent, or the proper officer of a corporation, as (to) the amount of his, her or their annual income; and any person willfully swearing falsely as to the amount of such income, shall [174] be deemed guilty of perjury and upon conviction thereof shall be punished as in other cases of perjury.

"Sec. 5. *Be it further enacted*, That this Act shall take effect from and after its passage."

On the 26th of April, 1870, the mayor and selectmen of the City passed the following ordinance.

"Sec. 1. *Be it ordained by the Mayor and Selectmen of the City of Aberdeen, in Council assembled*, That the City of Aberdeen do hereby subscribe to the capital stock of the Memphis, Holly Springs, Okolona and Selma R. R. Company the sum of one hundred thousand dollars, to be paid in bonds of the said City of Aberdeen, each of the denomination of five hundred dollars ($500), maturing twenty years from the first day of May, A. D. 1870, bearing 8 per cent interest per annum, payable semi annually on the first days of May and November of each year; said bonds to be signed by the mayor of the City of Aberdeen and countersigned by the treasurer thereof, with the corporate seal of said City affixed.

"Sec. 2. *Be it further ordained*, That the bonds issued in pursuance of section first of this ordinance have interest coupons attached, signed by the treasurer of said City of Aberdeen, or with his signature lithographed thereto.

"Sec. 3. *Be it further ordained*, That the form of the bonds of the City of Okolona issued to said railroad company be adopted as the form of the bonds issued to said railroad company by the City of Aberdeen, issued in pursuance of the foregoing ordinances, and that the city attorney be instructed to prepare immediately a form for said bonds and have the same lithographed.

"Sec. 4. *Be it further ordained*, That this subscription is upon condition that said Memphis, Holly Springs, Okolona and Selma Railroad shall pass through the City of Aberdeen, Mississippi, and the amount of said subscription be expended in constructing said railroad in and through the County of Monroe, in said State.

[175] "Sec. 5. *Be it further ordained*, That as soon as said bonds are lithographed and signed, as herein directed, the mayor of said City shall hand the same over to the Memphis, Holly Springs, Okolona and Selma Railroad Company, and receive therefore the certificate of stock of said company."

Pursuant to this ordinance the stock was subscribed and bonds issued. The bonds were in the usual form of negotiable coupon bonds, and contained the following recital:

"This bond is issued under and pursuant to the Constitution and laws of the State of Mississippi, the charter of the City of Aberdeen, and ordinances passed by the mayor and selectmen of the City of Aberdeen on the 26th of April, A. D. 1870."

The declaration states, in substance, the agreement for a subscription, as set forth in the ordinance, to be paid in bonds; the issue of bonds in accordance with this agreement; the purchase by the plaintiffs in March, 1874, of those the interest upon which is sued for, except that the "Seven coupons first maturing had at the time of such purchase been detached and paid and were not purchased," and that none of the coupons for interest had been paid since. There is no averment that the levy of a tax to pay the subscription had ever been approved by the legal voters of the City.

A demurrer to the declaration was sustained by the court below, and a judgment rendered thereon in favor of the City. To reverse that judgment this writ of error was brought.

In our opinion, upon the facts stated in the declaration, the City had no authority to issue the bonds. The amendment of the charter, taken as a whole, shows clearly that the Legislature did not intend to allow the City authorities to make a subscription which would bind the taxpayers for its payment by the levy of a tax, until the legal voters had approved of such a tax by a majority vote at an election held as other elections were held. As was said in *Wells* v. *Supervisors*, 102 U. S. 630 [26:124], the policy of Mississippi, "from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation; and in *Hawkins* v. *Carroll County*, 50 Miss. 762, it was expressly declared that 'The grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed.'" In the present case the mayor and selectmen had power to contract with the railroad company and to subscribe to [176] its stock on "such terms and conditions as they may stipulate and agree upon;" but there was no express authority to borrow money to meet the payment nor to issue bonds. The authority to agree on "terms and conditions" does not necessarily imply such a power. It more naturally refers to stipulations about the location of the road and the expenditure of the money subscribed, of the general character of those which were actually made part of this subscription; namely, that the road should pass through Aberdeen, and that the amount of the subscription should be expended in building it in Monroe County. It could give no power to bind the City to levy a tax to pay the subscription before the tax was voted, because section 2 expressly declares that there shall be no tax without a vote. If voted, the city authorities might probably bind the City for its levy and collection. But if not voted,

there was no power to bind the taxpayers in any form for its levy, and that would be the legal effect of a valid negotiable coupon bond given in payment of the subscription, if found in the hands of a *bona fide* holder for value before maturity. If payment could be made without a tax, the mayor and selectmen might subscribe to any extent they deemed expedient. But if the subscription was in any event to be paid by a tax, the tax must be voted before any obligation for its payment could be incurred.

But it is insisted that the City is estopped by the recital in the bonds from denying that they were lawfully issued. The recital is in effect that they were issued "under and pursuant" to law, the charter of the City, and the ordinance of April 26, 1870. As has been seen, neither the charter nor any other law of the State conferred in express terms power on the City to issue these bonds under any condition of facts. The ordinance of the mayor and selectmen directing their issue is not of itself enough. Legislative authority, express or implied, to pass the ordinance must be shown. The recital, therefore, in its present form, is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance to pay the [177] subscription to the stock without any vote of the electors to be taxed therefor. It is in effect nothing more than a recital that bonds issued under such circumstances were "under and pursuant" to law and the charter of the City. Such a recital does not estop the City from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power and make it superior to the laws by which it was created. *Dixon County* v. *Field*, 111 U. S. 92 [28: 368].

It is next contended that the bonds were legalized by section 4 of a curative Act of the Legislature of Mississippi, adopted in 1872 (Acts of 1872, p. 314), which is as follows:

"*Be it further enacted*, That all subscriptions to the capital stock of the Selma, Marion and Memphis Railroad Company, made by any county, city or town in the State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed."

Prior to the passage of this Act the name of the Memphis, Holly Springs, Okolona and Selma Railroad Company had been changed by statute to the Selma, Marion and Memphis Railroad Company.

Before the subscription was actually made by the City a new Constitution of Mississippi went into effect, known as the Constitution of 1869, article XII, section 14 of which is as follows:

"The Legislature shall not authorize any county, city, or town to become a stockholder, or loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, assent thereto."

In *Sykes* v. *Mayor etc. of Columbus*, 55 Miss. 115, it was decided at October Term, 1877, in reference to this same curative Act, that it did not and could not legalize bonds issued before the adoption of the new Constitution that would not be valid if issued after. In the opinion, which was delivered by *Chief Justice* Simrall, it was said, p. 149: "The Act of 1872 is not relied on to waive mere irregularities in the execution of the power—but as conferring *power* by *retrospective* operation. If the bonds [178] are obligatory on the City of Columbus, they become so for the first time by virtue of this statute. The Legislature of 1872 could not by relation put itself back to 1869, and exercise power not denied or restricted by the Constitution of 1832. The measure of its power was the Constitution of December, 1869, and it could not ratify an Act previously done, if at the date it professed to do so it could not confer power in the first instance. It could authorize a municipal loan conditionally. In order to ratify and legalize a loan previously made, it was bound by the constitutional limitation of its power." The doctrine of this case was fully assented to by this court in *Grenada County Supervisors* v. *Brogden*, 112 U. S. 271 [28: 707].

The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the Legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds. In *Grenada County Supervisors* v. *Brogden*, the validating Act was sustained, because the subscription was voted by the required two thirds majority of voters, and, therefore, the Constitution of 1869 did not stand in the way of what was done. Here, however, there has been no vote at all.

It is said that in *Sykes* v. *Mayor, etc. of Columbus*, there was no authority to subscribe at all, and, therefore, that case was different from this. But here there was no power to subscribe for payment in bonds; and in principle the two cases are alike. The question is as to the obligation of the taxpayers to pay the subscription by taxation. Under its original authority the City could not and did not create such an obligation. The Constitution of the State now prevents the creation of any new liability of that character, unless two thirds of the qualified voters of the city have agreed to it. That was [179] not done when the bonds were made, and no provision has been made for getting such an agreement now. The curative Act is consequently inoperative, so far as this subscription is concerned.

Many other questions were discussed in the argument for the plaintiffs in error, but, as they all grow out of the mistaken idea that the original subscription payable in bonds could have been made under the charter as amended in 1858, they need not be specially referred to. Bonds issued without legislative authority cannot be made binding by mere municipal ratification, because there is no more power to ratify than there was to create originally.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[253] EDMUND MENARD, *Plff. in Err.*,
v.
THOMAS GOGGAN.

(See S. C. Reporter's ed. 253, 254.)

Jurisdiction—pleading—residence—citizenship costs—amendment.

1. An averment of residence is not the equivalent of an averment of citizenship, for the purposes of jurisdiction in the courts of the United States.
2. Upon a reversal of a decree for want of jurisdiction in the court below costs are allowed against the complainant, he having failed to put on record the facts necessary to show jurisdiction.
3. When the cause is remanded, if the necessary citizenship in fact existed when the suit was begun, it is for the court below to determine whether the record shall be so amended as to show that fact.

[No. 177.]

Submitted April 1, 1887. Decided April 11, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas. *Reversed.*

The case is sufficiently stated by the court.

Mr. **John W. Butterfield**, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This record does not show that the circuit court had jurisdiction of the suit, which depended alone on the citizenship of the parties. The petition states that Edmund Menard, the plaintiff, "resides in Randolph County, in the State of Illinois," and that the defendants, of whom Thomas Goggan, the defendant in error, was one, "reside in the City of Galveston," in the State of Texas. There is nothing else from which the citizenship of either party can be inferred, and this is not enough. We have so held at the present term in *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 [*ante*, 880], where the authorities are cited; *Halsted* v. *Buster*, *Id.* 341 [*ante*, 462], and *Everhart* v. *Huntsville College*, 120 U. S. 223 [*ante*, 623]. This judgment must, therefore, be reversed on the authority of those cases; and as the fault rests with the plaintiff in error, whose duty it was when bringing the suit to make the jurisdiction appear, the reversal will be at his costs in this court. *Hancock* v. *Holbrook*, 112 U. S. 229 [28: 714]; *Halsted* v. *Buster*, *supra*. If the [254] necessary citizenship actually existed at the time the suit was begun, it will be for the court below to determine, when the case gets back, whether the record shall be amended so as to show that fact, and thus make out the jurisdiction.

The judgment of the Circuit Court is reversed, at the costs of the plaintiff in error, and the cause remanded for further proceedings.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[248] COVINGTON STOCK YARDS COMPANY, *Appt.*,
v.
CHARLES W. KEITH AND EDWARD W. WILSON, as KEITH & WILSON.

(See S. C. Reporter's ed. 248-250.)

Practice—supersedeas.

This court denies a motion for a *supersedeas* to an entire decree, where the *supersedeas* granted by the court below was only to a part thereof, as the circuit justice has power, under section 1007, R. S., to grant, in his discretion, a further stay of execution.

[No. 1347.]

Submitted April 4, 1887. Decided April 11, 1887.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

Motion for *supersedeas*. *Denied.*

On December 22, 1886, a decree was rendered against the appellant on an interpleader between it and the appellees and the receiver of the Kentucky Central Railroad Company, denying the validity of a contract between appellant and said railroad company, which undertook to confer on the former, for a term of ten years yet to run, an exclusive right to maintain a live stock depot on the road of the company in Covington, Kentucky. The decree also provided that appellant should refund to appellees $1209.19, collected from them for the use of appellant's facilities during about seven months preceding. An appeal was granted, and bond fixed and duly executed, the *supersedeas* being limited so as "not to operate as a *supersedeas* so far as concerns any order, decree or judgment directed to the receiver herein affecting the receipt, delivery, or shipment to or by said Keith & Wilson of live stock on or over the line of said railroad and its connections."

The appellant now moves this court to grant a *supersedeas* to the entire decree of the court below.

Messrs. **J. G. Carlisle** and **T. F. Hallam**, for appellant in support of motion.

No counsel appeared for appellees.

Mr. Chief Justice **Waite** delivered the opin- [250]
ion of the court:

The qualified acceptance of the bond given on this appeal shows that the judge who took it considered the security only sufficient for a stay of the execution of that part of the decree appealed from, which was for the payment of money. Under these circumstances the appeal only operates as a *supersedeas* to that extent. As the appeal was taken within sixty days after the rendition of the decree, *Mr. Justice* Mat thews, the Justice of this court assigned to the Sixth Circuit, has power, under section 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made.

For this reason the present motion is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

UNITED STATES *Plff. in Err.*, [254]
v.
E. P. PHILLIPS ET AL.

(See S. C. Reporter's ed. 254.)

Practice—notice of writ of error—citation.

Notice of a writ of error, given in open court at the same term the judgment is rendered, is not the equivalent of the citation required by section 999, R. S.

[No. 182.]

Argued April 4, 1887. Decided April 11, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Texas. *Dismissed.*

Mr. **William A. Maury**, *Assist. Atty-Gen.* for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In this case no citation was ever issued, and the defendants in error do not appear. Notice of a writ of error, given in open court at the same term the judgment is rendered, is not the equivalent of the citation required by section 999 of the Revised Statutes. In this respect writs of error differ from appeals taken in open court.

The writ of error is dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[251] JOSEPH PENN, Assignee of PEOPLE'S BANK OF BELLEVILLE, *Appt.*,
v.
PHILO C. CALHOUN, Trustee, ET AL.

(See S. C. Reporter's ed. 251, 252.)

Railroads—foreclosure of mortgages—intervention of bank.

Upon a petition of intervention filed in a suit for the foreclosure of the mortgages of the Southeastern Railway Company, asking payment from the proceeds of the sale of the mortgaged property of a debt due from the company to the People's Bank of Belleville for money lent, it is *held*: that the bank occupies the position of a general creditor only, the evidence not showing any fraud and deception and the misapplication of current income.

[No. 172.]

Submitted March 30, 1887. Decided April 11, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois. *Affirmed.*

The case is sufficiently stated by the court.

Mr. **Charles Wait Thomas**, for appellant.

No counsel appeared for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from an order dismissing a petition of intervention filed in a suit for the foreclosure of mortgages of the Southeastern Railway Company, asking payment from the proceeds of the sale of the mortgaged property of a debt of $40,000 and interest, due from the company to the People's Bank of Belleville for money lent. The case as presented here places the right of recovery entirely on the following grounds: 1. That the money was lent with the knowledge and consent of the mortgage trustees to pay mortgage interest, and that it was actually used for that purpose, the earnings at the time being insufficient to meet both interest and expenses; 2. That the company was wholly insolvent when the loan was made, which was unknown to the Bank, but known to the trustees, and for this reason the money [252] ought to be restored to the Bank from the proceeds of the sale of the mortgaged property; and 3, That the net earnings for the year during which the loan was made were used to pay interest on the mortgage debt and to make permanent and lasting improvements on the mortgaged property, instead of paying current debts.

The evidence shows that when the Bank took the note which is the basis of the present claim, $80,000 of the bonds of the consolidated mortgage, under which, with an earlier mortgage, the decree of foreclosure was had, were pledged by the company as security; and it fails entirely to satisfy us that any part of the money lent was used directly in the payment of mortgage interest. There is no doubt that the company was heavily in debt when the loan was made, and that it was struggling to maintain its credit, so as to float its consolidated bonds which were then on the market for sale. The money lent was put into the general fund in the treasury of the company, and used like the rest to pay debts which were pressing. We are entirely satisfied that the Bank expected to be paid out of the proceeds of the sales of the bonds, and not from the earnings. The current earnings were used, as it was supposed they would be, to make permanent and lasting improvements, buy additional rolling stock, and keep down the interest on the early mortgages, so as to bolster up the credit of the company and make its consolidated bonds marketable. For its ultimate security the Bank relied on the indorsers of the note and the bonds, which were specially pledged for that purpose. There is not a particle of evidence to show any fraud or deception on the part of the trustees; and neither the current income of the receivership nor that of the company has been employed in a way to deprive the Bank of any of its equitable rights. The Bank is, therefore, not entitled to payment out of the proceeds of the sale of the mortgaged property in preference to the bondholders. It occupies the position of a general creditor only. *Fosdick v. Schall*, 99 U. S. 255 [25: 843].

The decree of the Circuit Court dismissing the petition of intervention is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY S. BARRON, *Plff. in Err.*, [186]
v.
GEORGE W. BURNSIDE, Sheriff of LINN COUNTY, IOWA.

(See S. C. Reporter's ed. 186-200.)

Federal courts—jurisdiction of, not affected by state legislation—Iowa Act of April 6, 1886, requiring foreign corporations to surrender right to remove causes, invalid.

1. The jurisdiction of the federal courts depends upon and is regulated by the laws of the United States, and it cannot be affected by state legislation.

2. A corporation is a citizen of the State by which it is created and in which its principal place of business is situated, so far as its right to sue and be sued in the federal courts is concerned, and within the clause of the Constitution extending the jurisdiction of said courts to controversies between citizens of different States.

3. The Iowa Act of April 6, 1886, seeking to make the right of foreign corporations to transact business in that State dependent upon their surrender of the right to remove causes to the federal courts, is invalid.

[No. 1335.]

Argued March 18, 21, 1887. Decided April 11, 1887.

IN ERROR to the Supreme Court of the State of Iowa. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **W. C. Goudy** and **J. J. Herrick,** for plaintiff in error:

The Statute of 1886, if enforced, will deprive the Chicago and Northwestern Railway Company of its property without due process of law.

The franchise to operate a railroad company is property; and to deprive such a company of the right to use its property is, in effect, to deprive the company of the property itself.

Morawetz, Priv. Corp. 2d ed. § 932; *Memphis & L. R. R. R. Co.* v. *Berry*, 112 U. S. 619 (28: 841); *New Orleans etc. R. R. Co.* v. *Delamore*, 114 U. S. 509 (29: 247).

The right to remove a case coming within the provisions of the Act of Congress is one existing under the Constitution and Laws of the United States, and any Act of a State Legislature which seeks to destroy or impair that right is void.

Home Ins. Co. v. *Morse*, 87 U. S. 20 Wall. 450 (22: 367); *Doyle* v. *Continental Ins. Co.* 94 U. S. 543 (24: 152); *Baltimore & O. R. R. Co.* v. *Cary*, 28 Ohio, 208.

But it is claimed that the *Doyle Case* justifies the Act of legislation now in question, and that the Chicago and Northwestern Railway Company, being a corporation of another State, could be excluded from the State of Iowa, or that any condition could be imposed upon the right to do business in the State.

There is a difference between the Wisconsin and Iowa Statutes. The one collided with no provision of the Constitution; the other did.

It is said in *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 407 (15: 451), that "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may see fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle or maxim of justice which forbids condemnation without opportunity for defense."

The power of the State to exclude a foreign corporation is not denied, that principle having been clearly established by the decision of the Supreme Court of the United States with reference to insurance companies; but the power is not an unlimited one. Whenever it collides with the Constitution of the United States and the laws passed in pursuance thereof, the state legislation is void.

If the intention was to prevent the removal of causes from state to federal courts, then the whole Act must be held to be void.

The parts of this statute are so connected and dependent that they cannot be separated so as to hold one part valid and the other part invalid. The true inquiry is as to the intent of the Legislature; and, that being ascertained, the question as to the validity of the Act will be decided.

Cooley, Const. Lim. 178-215; *Warren* v. *Mayor*, 21 Gray, 84; *State* v. *Commissioners*, 5 Ohio, 497; *Slauson* v. *Racine*, 13 Wis. 444; *Wash* v. *Dousman*, 28 Wis. 541; *Eckhart* v. *State*, 5 W. Va. 515; *Commonwealth* v. *Potts*, 79 Pa. 164.

Messrs. **A. J. Baker,** *Atty-Gen. of Iowa,* and **J. H. Sweeney,** for defendant in error:

A State Legislature possesses no power to prevent those doing business within the territory of the State from resorting to the United States Courts in any or all cases where such right is guaranteed to them by the Constitution of the United States or the laws of Congress enacted in compliance therewith.

But the State may, in the exercise of that absolute sovereignty which resides in it, dictate the terms and conditions under which corporations of other States may come into, or continue to transact business within its jurisdiction, and it "may compel the foreign company to abstain from the federal courts, or cease to do business in the State."

Doyle v. *Continental Ins. Co.* 94 U. S. 542 (24: 152).

This case is decisive of every claim that can be made by the complainants in respect to their inherent or vested right to sue and be sued in the United States Courts. But the complainants say: When we came into the State and purchased our property no such conditions were imposed; this is an additional burden, and the permission to do business in your State when accepted by us became a contract that no such additional burdens would be imposed.

It is hardly necessary to say that this doctrine is not maintained by the adjudicated cases of the States or of this court.

Thorpe v. *R. R. Co.* 27 Vt. 140; *Fuller* v. *R. R. Co.* 31 Iowa, 187; *S. C.* 17 Wall. 560 (21: 710); *C. B. & Q. R. R. Co.* v. *Ia.* 94 U. S. 155 (24: 94); *Peik* v. *C. & N. W. R. R. Co.* 94 U. S. 164 (24:97).

A corporation presupposes a grant of existence and power from a sovereign. The grant of power by a sovereign, by its own inherent force, is operative only within the dominions over which the authority of the sovereign extends. In any other State it must act, if at all, by permission of the sovereign power of such State.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519 (10: 274); *Runyan* v. *Coster*, 39 U. S. 14 Pet. 122 (10: 382); *Drawbridge Co.* v. *Shepherd*, 61 U. S. 20 How. 232 (15: 898); *Fire Association* v. *N. Y.* 119 U. S. 110 (*ante*, 342); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Doyle* v. *Continental Ins. Co.* 94 U. S. 540 (24: 151.)

The Act in question does not amount to a regulation of commerce between the States within the meaning of the Constitution of the United States. It is not every law which indirectly affects commerce that can be construed to amount to the regulation thereof.

State Tax Cases, 82 U. S. 15 Wall. 284 (21: 164); *Peik* v. *C. & N. W. R. R. Co. supra*; *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *The Jas. Gray* v. *The John Fraser*, 62 U. S. 21 How. 184 (16: 106); *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479 (21: 470); *Sherlock* v. *Alling*, 93 U. S. 99 (23: 819); *Pen. Tel. Co.* v. *W. U. Tel. Co.* 96 U. S. 1 (24: 708); *Paul* v. *Virginia*, *supra*; *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299

(13: 996); *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a writ of error brought by Henry S. Barron to review a judgment of the Supreme Court of the State of Iowa, on a trial on a writ of *habeas corpus*, remanding him to the custody of George W. Burnside, Sheriff of Linn County, Iowa, by whom he was held under a warrant for his arrest issued by a justice of the peace of Linn County, October 5, 1886, for "the crime of knowingly transacting a portion of the business of the Chicago and Northwestern Railway Company within the State of Iowa, when such railway company had no valid permit to do business in the State of Iowa, as provided by chapter 76 of the Laws of the 21st General Assembly of the State of Iowa, approved April 6, 1886, and taking effect September 1, 1886."

The statute in question is entitled "An Act Requiring Foreign Corporations to File Their Articles of Incorporation with the Secretary of State, and Imposing Certain Conditions upon such Corporations Transacting Business in This State." The provisions of the Act are as follows:

"Sec. 1. That hereafter any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business organized under the laws of any other State or of any Territory of the United States or of any foreign country desiring to transact its business, or to continue the transaction of its business, in this State, shall be and hereby is required, on and [187] after September [first] A. D. 1886, to file with the Secretary of State a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this Act. And thereupon the Secretary of State shall issue to such corporation a permit in such form as he may prescribe for the general transaction of the business of such corporation. And upon the receipt of such permit such corporation shall be permitted and authorized to conduct and carry on its business in this State; *Provided*, That nothing in this Act contained shall be construed to prevent any foreign corporations from buying, selling, and otherwise dealing in, notes, bonds, mortgages, and other securities, or from enforcing the collection of the same, in the federal courts, in the same manner, and to the same extent, as is now authorized by law.

"Sec. 2. No foreign corporation which has not in good faith complied with the provisions of this Act, and taken out a permit, shall hereafter be authorized to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations, until they have so complied herewith and taken out such permit.

"Sec. 3. Any foreign corporation sued or impleaded in any of the courts of this State upon any contract made or executed in this State or to be performed in this State, or for any act or omission, public or private, arising, originating or happening in the State, who shall remove any such cause from such state court into any of the federal courts held or sitting in this State, for the cause that such corporation is a nonresident of this State or a resident of another State than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is effected; and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner. [188]

"Sec. 4. Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the State of Iowa, by its officers, agents, or otherwise, without having complied with this statute, and taken out and having a valid permit, shall forfeit and pay to the State for each and every day in which such business is transacted and carried on, the sum of one hundred dollars ($100), to be recovered by suit in any court having jurisdiction. And any agent, officer or employé who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for each offense shall be fined, not to exceed one hundred dollars ($100), or imprisoned in the county jail not to exceed thirty days, and pay all costs of prosecution.

"Sec. 5. All Acts and parts of Acts inconsistent with the provisions hereof are hereby repealed; *Provided*, That nothing contained in this Act shall relieve any company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon them or required of them or either of them by the laws now in force."

The information on which the warrant of arrest was issued was as follows:

"State of Iowa, } *ss:*
"Linn County, }

"Before C. W. Burton, Justice of the Peace in and for Rapids Township.

"The State of Iowa, }
v.
"Henry Barron. }

"The defendant is accused of the crime of knowingly transacting a portion of the business of the Chicago & Northwestern Railway [189] Company within the State of Iowa, when such railway company has no valid permit to do business in the State of Iowa, as provided in chapter 76 of the Laws of the 21st General Assembly of said State of Iowa, and taking effect September 1, 1886.

"For that the said defendant, on the 5th day of October, 1886, at the City of Cedar Rapids, in the county and State aforesaid, well knowing the Chicago & Northwestern Railway Company to be a foreign corporation organized under the laws of Illinois, and not a corpora-

tion organized under the laws of Iowa, and well knowing that the said Chicago & Northwestern Railway Company was such foreign corporation for pecuniary profit other than for carrying on mercantile or manufacturing business; to wit, for the operating of a line of railroad, and well knowing that said railway company has failed, neglected and refused to file its articles of incorporation with the Secretary of State of the State of Iowa, and has neglected and refused to request the issuance to such Chicago & Northwestern Railway Company of a permit to transact business in said State of Iowa, and well knowing that said railway company has no permit to do business in said State of Iowa, as required by said chapter 76 of the Laws of Iowa, passed by the 21st General Assembly aforesaid, did knowingly act as a locomotive engineer for the transaction of the business of said Chicago & Northwestern Railway Company within the State of Iowa, by running a locomotive engine, with a passenger train attached thereto, through the Township of Rapids, in the county and State aforesaid, contrary to law and the statute in such case made and provided. J. H. Preston.

"Subscribed and sworn to by J. H. Preston before me, this 5th day of October, A. D. 1886.

[Notarial Seal.] E. C. Preston.

Notary Public in and for Linn County, Iowa."

Barron, having been arrested, applied to the Supreme Court of the State for a writ of *habeas corpus*, by a petition setting forth various facts [190] as showing that his imprisonment was illegal, and praying that his petition might be tried before the supreme court. The writ was issued, a return was made to it by the sheriff, and the case was heard upon an agreed statement of facts, the only material ones, in the view we take of the case, being that the Chicago & Northwestern Railway Company was and is an Illinois corporation, operating railroads in Iowa, and claiming to do so under the authority of statutes of that State, and that Barron, "at the time he was arrested, was in the employment of the Chicago & Northwestern Railway Company, and engaged as an engineer on a locomotive in running a passenger train, which was made up at Chicago, in the State of Illinois, and was destined to Council Bluffs, in Iowa, and that said train was carrying passengers and the United States mails received at different points in the State of Illinois, and destined to points in the State of Iowa and beyond, and also from points in the State of Iowa to other points in the same State," and that he was arrested while he was engaged in controlling the engine on the train while it was running. It was admitted that the company had not complied with the Iowa Statute by taking out the required permit.

On the hearing before the state court it was urged, among other things, that the Statute of Iowa is void as an attempt to interfere with the jurisdiction of the federal courts, as established by the Constitution of the United States and Acts of Congress. The court upheld the validity of the statute.

The statute manifestly applies to the Chicago and Northwestern Railway Company, as an Illinois corporation. The first section provides that a foreign corporation, desiring to continue the transaction of its business in Iowa, is required, on and after September 1, 1886, "to file with the Secretary of State a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State; said application to contain a stipulation that said permit shall be subject to each of the provisions of this Act; and thereupon the Secretary of State shall issue to such corporation a permit in such form as he may prescribe, for the general transaction of the business of such corporation; and, upon the receipt of such per- [196] mit, such corporation shall be permitted and authorized to conduct and carry on its business in this State."

The initial step required is a resolution authorizing the filing of the copy of the articles of incorporation, and authorizing service of process in the manner specified, and requesting the issue of the permit; the application to be accompanied by a stipulation that the permit shall be subject to each of the provisions of the Act. This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable. They are all indissolubly bound up with the application for a permit, which is to be subject to every provision of the Act. The permit cannot be issued unless such a stipulation is given, and the corporation is not to be permitted to carry on its business in the State unless the permit is issued to it and received by it.

Section 3 of the Act provides that if the permit is issued, and the foreign corporation, being thereafter sued in a court of Iowa, upon a contract made or executed in Iowa, or to be performed in Iowa, or for any act or omission, public or private, arising, originating or happening in Iowa, shall remove the suit from the state court into any federal court in Iowa, because the corporation is a nonresident of Iowa, or a resident of a State other than the State of the adverse party, or because of local prejudice against the corporation, that fact shall forfeit the permit and render it void, such forfeiture to be determined from the record of removal, and to date from the filing of the application on which the removal is effected.

Section 4 imposes a penalty of $100 a day on the corporation for carrying on its business in Iowa without having complied with the statute, and having a valid permit, and provides that any agent, officer or employee who shall knowingly act, or transact such business, for the corporation, when it has no valid permit, shall be guilty of a misdemeanor, and for each offense shall be fined not to exceed $100, or be imprisoned in the county jail not to exceed thirty days, and pay all costs of prosecution. [197]

It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in section 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit

from the state court into the federal court, either on the ground of diversity of citizenship, or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit and, with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the federal court.

In view of these considerations, the case falls directly within the decision of this court in *Home Insurance Co.* v. *Morse*, 87 U. S. 20 Wall. 445 [22:365]. In that case, which was twice argued here, a Statute of Wisconsin provided that it should not be lawful for any foreign fire insurance company to transact any business in Wisconsin unless it should first appoint an attorney in that State, on whom process could be served, by filing a written instrument to that effect, containing an agreement that the company would not remove a suit for trial into the federal court. The Home Insurance Company, a New York corporation, filed the appointment of an agent, containing the following clause: "And said company agrees that suits commenced in the State Courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal Courts." A loss having occurred on a policy issued by the company, it was sued in a court of the State. It filed its petition in proper form for the removal of the suit into the federal court. The state court refused to allow the removal, and, after a trial, gave a judgment for the plaintiff, [198] which was affirmed by the Supreme Court of Wisconsin. The company brought the case into this court, which held these propositions: *First*, The agreement made by the company was not one which would bind it, without reference to the statute. *Second*, The agreement acquired no validity from the statute. The general proposition was maintained, that agreements in advance to oust the courts of jurisdiction conferred by law, are illegal and void, and that, while the right to remove a suit might be waived, or its exercise omitted, in each recurring case, a party could not bind himself in advance, by an agreement which might be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case might be presented.

In regard to the second question, the proposition laid down was that the jurisdiction of the federal courts, under article 3, section 2, of the Constitution, depends upon and is regulated by the laws of the United States; that state legislation cannot confer jurisdiction upon the federal courts, nor limit or restrict the authority given to them by Congress in pursuance of the Constitution; and that a corporation is a citizen of the State by which it is created, and in which its principal place of business is situated, so far as its right to sue and be sued in the federal courts is concerned, and within the clause of the Constitution extending the jurisdiction of the federal courts to controversies between citizens of different States. The conclusions of the court were summed up thus: 1, The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the removal statute; 2, The Statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws made in pursuance thereof, and is illegal and void; 3, The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed. For these reasons the judgment of the Supreme Court of Wisconsin was reversed, and it was directed that the prayer of the petition for removal should be granted.

The case of *Doyle* v. *Continental Insurance Co.* 94 U. S. 535 [24:148], is relied on by the [199] defendant in error. In that case this court said that it had carefully reviewed its decision in *Home Insurance Co.* v. *Morse*, and was satisfied with it. In referring to the second conclusion in *Insurance Co.* v. *Morse*, above recited; namely, that the Statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in *Doyle* v. *Continental Insurance Co.*, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the same Statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the federal courts, and had received a license to do business in the State. Afterwards, it removed into the federal court a suit brought against it in a state court of Wisconsin. The state authorities threatening to revoke the license, the company filed a bill in the Circuit Court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse* [*supra*] must be regarded as not in judgment.

In both of the cases referred to, the foreign corporation had made the agreement not to remove into the federal court suits to be brought against it in the state court. In the present case no such agreement has been made; but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the federal court suits brought against it in the state court, as a condition of obtaining a permit, and consequently has not [200] obtained such permit. Its right, equally with any individual citizen, to remove into the federal court, under the laws of the United States,

such suits as are mentioned in the third section of the Iowa Statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits.

As the Iowa Statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.

The question as to the right of a State to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the State, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States. *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404, 407 [15:451, 452]; *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410, 415 [19:972, 973]; *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445, 456 [22: 365, 369]; *St. Clair* v. *Cox*, 106 U. S. 350, 356 [27: 222, 225]; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110, 120 [*ante*, 342, 345].

The judgment of the Supreme Court of Iowa is reversed, and the case is remanded to that court, with an instruction to enter a judgment discharging the plaintiff in error from custody.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[255] CLEVELAND ROLLING MILL COMPANY, *Plff. in Err.*,
v.
CHARLES D. RHODES AND LIZZIE W. BRADLEY, EXRX. of DAVID C. BRADLEY, Deceased.

(See S. C. Reporter's ed. 255-264.)

Sales—contract for sale of pig iron to be manufactured—time of shipment, of the essence of the contract—practice—trial without jury.

1. Where a merchant agrees to sell and ship to the buyer a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement. Where under such an agreement the seller ships part of the iron at the time appointed and the rest from time to time afterwards, the buyer is not bound to accept any part of the iron so shipped.

2. In the case presented, it is *held*: that all the pig iron sold and not shipped before the close of navigation in 1880, was to be made before the opening of navigation in 1881; and that the failure of the seller to have a considerable part of remainder of the iron ready for shipment at the opening of navigation in 1881 justified the buyer in refusing to accept any of the iron shipped in 1881.

3. Where it appears from the facts found by a Circuit Court of the United States, on the trial of a cause without a jury, that its judgment was erroneous, this court may direct such judgment to be entered by that court as its special findings require.

[No. 169.]

Argued March 29, 1887. Decided April 11, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Opinion below, 17 Fed. Rep. 426. *Reversed.*

Statement by *Mr. Justice* **Gray.**

This was an action brought by Rhodes and Bradley, copartners, and citizens of Chicago in the State of Illinois, against the Cleveland Rolling Mill Company, a corporation of the State of Ohio, upon the following agreement in writing, signed by both parties:

"This agreement, made this sixteenth day of February, A. D. 1880, by and between Rhodes & Bradley, of Chicago, Ills., and the Cleveland Rolling Mill Co., of Cleveland, Ohio, witnesseth: That said Rhodes & Bradley have sold to the said Cleveland Rolling Mill Co. the entire product of fourteen thousand (14,000) tons iron ore, to be manufactured into pig iron with charcoal by the Leland Furnace Co., of Leland, Mich., said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to the Cleveland Rolling Mill Co., at Cleveland, Ohio, during the season of navigation of 1880. Such portion of the product of said ores, as is [256] made after the close of navigation of 1880, is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible; said Cleveland Rolling Mill Co. to have the privilege of ordering the iron, which may be made too late for shipment by lake during the season of 1880, through by rail to Cleveland during the winter of 1880 and 1881, they to pay the additional expense of hauling to railroad and freighting through to Cleveland by rail, over and above what it would cost Rhodes & Bradley to ship by lake on the opening of navigation 1881.

"Said Cleveland Rolling Mill Co. agree to receive said iron as rapidly as shipped, and to pay forty-five dollars ($45) per ton (2,240 lbs.) cash for same delivered on rail or vessel at Cleveland, Ohio. The Cleveland Rolling Mill Co. are to have the option of taking a portion of the iron delivered at Chicago, Ills., at the same price and on the same terms and conditions as stated above for delivery in Cleveland, said Cleveland Rolling Mill Co. to furnish a good and suitable dock at which to unload vessels, either at Cleveland or Chicago, and to pay vessels any demurrage which they may be justly entitled to by reason of delay in furnishing a dock at which they can be discharged.

"The iron ore to be furnished at the Leland Iron Co., out of which said iron is to be manufactured, is as follows:

"6000 tons Cleveland mine.
"5000 tons Norway mine.
"1500 tons Rolling Mill mine.
"1500 tons Stephenson mine.

"And whereas, Rhodes & Bradley's contracts with said mining companies are to the effect that in case of accidents or strikes at said mines, resulting in reduced output of ore, said companies are to have the privilege of reducing the amounts due Rhodes & Bradley, as above stated, in same proportion as other sales, the said Cleveland Rolling Mill Co. agree not to hold Rhodes & Bradley responsible for deliv- [25 ery of pig iron beyond the product of such ores as the mining companies deliver them; also, in case of accidents or strikes at said Leland furnace, resulting in the stoppage of said furnace, then Rhodes & Bradley are not to be held responsible for delivery of pig iron under the con-

tract, beyond the responsibility of the Leland Iron Co. to them under the contract between said Leland Iron Co. and Rhodes & Bradley, dated January 14, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, is hereby made a part of this agreement."

Prior to January 14, 1880, the plaintiffs had made agreements in writing with the owners of the four mines for the purchase of the amounts of ore above mentioned, to be delivered by them to the plaintiffs during the season of navigation in 1880. And on January 14, 1880, the plaintiffs made an agreement in writing with the Leland Iron Company, which was the owner and manager of a furnace at Leland in the State of Michigan, by which the plaintiffs agreed to sell to that company the same amounts of those ores respectively, "to be furnished, 1500 tons in May, 1880, navigation permitting, and 2500 tons each month thereafter as nearly as may be, and all to be delivered to vessel before November 1, 1880, and in suitable quantities of each for the mixtures desired by said Rhodes & Bradley;" and also agreed "to purchase the entire product of pig iron of the Leland furnace made from the ores so furnished, at the rate of $40 per ton, cash, delivered over the rail at Chicago, or $40.25, cash, at Cleveland, at the option of said Rhodes & Bradley, they to provide proper docking facilities for prompt unloading of vessels;" and the Leland Iron Company agreed "to manufacture pig iron from said ores as nearly as practicable of the grades which said Rhodes & Bradley shall desire, and to ship same in cargo lots as rapidly as possible after manufacture during season of navigation to said Rhodes & Bradley, to Chicago or Cleveland as aforesaid."

A jury was duly waived by stipulation in writing, and the case was tried by the court, which found specially that all the above contracts were executed and delivered by the parties thereto, and further specially found as follows:

"3. That the plaintiffs, between May 16 and October 18, 1880, delivered to the Leland Iron [258] Company, at Leland, Michigan, 14,168 tons of iron ore, of which 5980 tons were from the Cleveland mine, 4405 tons were from the Norway mine, 1478 tons were from the Rolling Mill mine, and 2305 tons were from the Stephenson mine.

"4. That the ores from the Stephenson mine and the ores from the Norway mine were alike in value and quality, and that Stephenson mine ore was equally as good and identical in quality and value with the ore from the Norway mine.

"5. That the Leland Iron Company proceeded, soon after such ores began to arrive at Leland, with proper diligence to manufacture said ores into pig iron, and ship the same in cargo lots as rapidly as possible after manufacture from Leland to Cleveland, Ohio, and there delivered the same to the defendant, and the defendant accepted and paid for the same; that before the close of navigation for the season of 1880 the Leland Iron Company had so manufactured and delivered to the defendant 3421 tons of said pig iron; that the defendant made no objection to the acceptance of said pig iron on said contract between the plaintiffs and the defendant, on the ground of the quality of said iron, or of undue delay in the execution of said contract.

"6. That the navigation between Leland and Cleveland and Chicago closed in the fall of 1880 about November 15; that the last cargo of iron was shipped from Leland on November 8, and although the Leland Iron Company had enough iron manufactured to have furnished another cargo of 502 tons by November 15, no vessel could be obtained by which to ship it that fall; that after the close of navigation the Leland Iron Company continued the manufacture of said ore into pig iron without unreasonable delay, and that after November 8, 1880, and up to and including February 28, 1881, the Leland Iron Company had made 2100 tons of pig iron from said ore, and by May 7, 1881, had, manufactured and on hand ready for shipment, about 3506 tons; that on May 7, 1881, the Leland Iron Company resumed the shipment of said iron in cargo lots to the defendant at Cleveland, and continued such manufacture and shipment in cargo lots as rapidly as possible, so that the entire product of said ore was manufactured and shipped from Leland by and in- [259] cluding July 2, 1881; all which cargoes arrived at Cleveland in due course, and were there tendered to the defendant, and the defendant refused to accept said pig iron or any part thereof and refused to pay for the same; that if the average daily product of said furnace from November 8, 1880, to May 8, 1881, had been the same as the average daily product from May 18 to November 8, 1880, all said 14,000 tons of ore would have been made into pig iron by about May 10, 1881; but in fact the furnace was shut down for a time, and part of the time the blast was checked, for want of a sufficient supply of charcoal, so that about 1100 tons of said pig iron were made after May 8, 1881.

"7. That in the latter part of the month of February, and again about March 3, 1881, the defendant notified the plaintiffs that it would not accept, under said contract of February 16, 1880, any iron which was made from said ore after December 31, 1880; and that some time during the month of May, 1881, the defendant notified the plaintiffs that it would not accept any more iron from the plaintiffs under said contract.

"8. That the fair market price of said pig iron in the Cities of Cleveland and Chicago during the months of March, April, May, June and July, 1881, was $27 per ton; that the total amount of iron manufactured from said 14,000 tons of iron (ore) and shipped by the Leland Company to the defendant after the opening of navigation in the spring of 1881 was 4579 tons; and that the difference between the market value of $27 per ton and the contract price was $18 per ton, making a total difference on 4579 tons of $82,422."

The court rendered judgment upon the special findings for the plaintiffs in the sum of $82,422, and costs. 17 Fed. Rep. 426. The defendant excepted to the admission of evidence at the trial, to the refusal of the court to make certain special findings requested, and to the judgment for the plaintiffs; and afterwards sued out this writ of error.

Mess. **William E. Cushing** and **George F. Edmunds**, for plaintiff in error:

A statement descriptive of the subject-matter, or of some material incident, such as the time and place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon a failure or nonperformance of which the party aggrieved may repudiate the whole contract.

Behn v. *Burness*, 3 B. & S. 751; *Bowes* v. *Shand*, 2 App. Cas. 455; *Lowber* v. *Bangs*, 69 U. S. 2 Wall. 728 (17: 768); *Davison* v. *Von Lingen*, 113 U. S. 40 (28: 885); *Norrington* v. *Wright*, 115 U. S. 188 (29: 366).

The special findings affirmatively show a breach of the condition that the manufacture of iron should be completed by or before the opening of navigation in the spring of 1881.

The findings show a breach of the condition that the ore should be made into iron as rapidly as possible.

As to the meaning of "as rapidly as possible," see *Hydraulic Engineering Co.* v. *McHaffie*, L. R. 4 Q. B. Div. 670.

Messrs. **Enoch Totten** and *J. M. Flower*, for defendants in error:

The general rule with reference to performance where anything has to be done, as goods to be manufactured or delivered, or the like, and no time is specified in the contract, is that it is the presumption of the law that the thing should be done in a reasonable time. What is a reasonable time is a question of law for the court, which will take into consideration all the facts and circumstances of the case in reaching a determination; and if a manufacturer agrees to make and finish certain goods "as soon as possible," this means within a reasonable time, due regard being had to the manufacturer's means, his engagements and the nature of the article.

2 Pars. Cont. 535, 497, 498; *Atwood* v. *Emory*, 1 C. B. N. S. 110.

Substantial performance is all that is required to satisfy such a contract.

Swain v. *Seamens*, 76 U. S. 9 Wall. 263 (19: 557); *Weinecke* v. *Falk*, 61 Wis. 623; *Woods* v. *Miller*, 55 Iowa, 168.

Upon the facts disclosed in the record, and in view of the authorities cited, it seems clear to us that Rhodes & Bradley must be held to have complied with all of the material terms and conditions of the sale contract, and to have substantially performed their agreement.

[260] *Mr. Justice* **Gray**, after stating the case as above reported, delivered the opinion of the court:

The original defendant duly pleaded, and has earnestly argued, that the plaintiffs did not perform their contract, in respect either to the nature of the thing furnished, or to its quantity, or to the time of delivery. The principal objections, each of which would require consideration if the decision of the case depended upon it, are as follows:

As to the nature of the thing: That the amounts of ore from each of the four mines named, delivered at the furnace and there manufactured into pig iron, differed from the amounts contracted for; the ores from three of the mines being respectively 20 tons, 595 tons and 22 tons less, and the ore from the fourth mine 805 tons more.

As to the quantity: That the plaintiffs tendered to the defendant the product of 14,168 [261] tons of ore, when the contract was for the product of 14,000 tons only.

As to the time of performance: That the pig iron was not made and shipped "as rapidly as possible;" and especially that so much of it as had not been made and shipped before the close of navigation in 1880 was not shipped "on the opening of navigation of 1881, or as near the opening as possible."

We have not found it necessary to consider the objections as to the kind of iron, or how far any such objections were waived by the defendant, or the effect of tendering too much, or yet the objections to the competency of evidence admitted at the trial, or the variance suggested between the declaration and the proof, because we are of opinion that the delay which took place in the making and shipment of so much of the pig iron as had not been made and shipped before the close of navigation in 1880 is fatal to the plaintiffs' right to maintain this action.

In a case decided upon much consideration at the last term, the general rule was stated as follows: "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." *Norrington* v. *Wright*, 115 U. S. 188, 203 [29: 366, 368]. See also *Filley* v. *Pope*, 115 U. S. 213 [29: 372]; *Pope* v. *Porter*, 102 N. Y. 366; *Rommell* v. *Wingate*, 103 Mass. 327.

When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement, by shipping part of that amount at the time appointed and the rest from time to time afterwards; and the [262] buyer is not bound to accept any part of the iron so shipped.

In the case at bar, the plaintiffs were merchants at Chicago, and the defendant was the owner of a rolling mill at Cleveland. By the agreement between them, made in February, 1880, the plaintiffs sell to the defendant "the entire product of fourteen thousand tons iron ore, to be manufactured into pig iron with charcoal" at a certain furnace, "and to be shipped in vessel cargoes as rapidly as possible" to the defendant at Cleveland, "during the season of navigation of 1880," and "such portion of the product of said ores as is made after the close of navigation of 1880, is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible." The plaintiffs thus agree that all of the pig iron contracted for, that is not made and shipped before the close of navigation in 1880, shall be shipped as early in 1881 as navigation shall be

open and vessels can be obtained. This implies that the whole of the ore shall be made into pig iron and ready for shipment as soon as navigation opens in 1881. The implication is confirmed by the further stipulation that the defendant shall have the privilege, upon paying the additional expense of transportation by land, "of ordering the iron, which may be made too late for shipment by lake during the season of 1880, through by rail to Cleveland during the winter of 1880 and 1881." In short, all the pig iron, not shipped before the close of navigation in 1880, is to be made before the opening of navigation in 1881, and to be then shipped as soon as vessels can be obtained, unless the defendant elects to have it previously forwarded by land. The facts, as found by the court, bearing upon the question of the plaintiffs' performance of their agreement in this particular, are as follows: The whole amount of pig iron made from the 14,000 tons of ore was 8,000 tons. Of these 8,421 tons were shipped in 1880, and accepted and paid for by the defendant. At the opening of navigation, early in May, 1881, there were manufactured and on hand ready for shipment only 3,506 tons. The remaining 1,073 tons were made afterwards, and the last cargo was not shipped until nearly two months after navigation opened.

[263] The general statements in the sixth finding that the owner of the furnace, after the close of navigation in 1880, "continued the manufacture of said ore into pig iron without unreasonable delay," and on the opening of navigation in 1881 resumed the shipment of iron to the defendant, "and continued such manufacture and shipment in cargo lots as rapidly as possible," are limited and controlled by the more precise statements in the same finding, that if the average daily product of the furnace had been the same from the close of navigation in 1880 to the opening of navigation in 1881, as it had been during the season of 1880, "all said 14,000 tons of ore would have been made into pig iron by about May 10, 1881; but in fact the furnace was shut down for a time, and part of the time the blast was checked, for want of a sufficient supply of charcoal; so that about 1,100 tons of said pig iron were made after May 8, 1881."

The failure to have on hand a sufficient amount of charcoal to keep the furnace at work is not shown to have been due to "accidents or strikes," which were contingencies contemplated by all parties, and provided for in the contract sued on. But it was a state of things of which the plaintiffs assumed the risk by undertaking that the whole of the ore should be made into pig iron ready to be shipped as soon as possible after the opening of navigation in 1881.

After the contract for 8,000 tons of pig iron had been partly performed on both sides in 1880, by the plaintiffs' having delivered, and the defendant's having accepted and paid for, 8,421 tons of iron, then the thing which, by the terms of so much of the contract as was yet unperformed, the plaintiffs agreed to deliver, and the defendant agreed to take and pay for, was 4,579 tons of pig iron, made and ready for shipment upon the opening of navigation in 1881, and then shipped as rapidly as possible; and the rights and duties of the parties as to the performance of this part of the contract were the same as if it had been the whole contract between them.

The true construction of the contract being that that amount of iron shall be ready to be shipped and be actually shipped as soon as navigation permits, "that is part of the description of the subject-matter of what is sold;" and "the plaintiff who sues upon that contract has [264] not launched his case until he has shown that he has tendered the thing which has been contracted for; and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract." *Lord* Cairns, in *Bowes* v. *Shand*, 2 App. Cas. 455, 468; *Norrington* v. *Wright*, 115 U. S. 188, 209 [29: 366, 370].

The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice, previously given by the defendant to the plaintiffs, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such. *Dingley* v. *Oler*, 117 U. S. 490, 508 [29: 984, 988].

It conclusively appearing, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it is ordered, in accordance with the precedents of *Fort Scott* v. *Hickman*, 112 U. S. 150 [28: 636], and *Allen* v. *St. Louis Bank*, 120 U. S. 20 [*ante*, 573], that the

Judgment be reversed, and the case remanded to the Circuit Court, with directions to enter judgment for the original defendant.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

TOWN OF BLOOMFIELD, *Plff. in Err.*, [121]
v.
CHARTER OAK NATIONAL BANK OF HARTFORD, CONNECTICUT.

(See S. C. Reporter's ed. 121-128.)

Connecticut towns—powers of town meetings—notice or warning—ratification—action on notes executed by treasurer—want of authority—evidence—estoppel.

1. Towns in Connecticut have those powers only which have been expressly conferred on them by statute, or which are necessary for conducting municipal affairs.

2. A town cannot make a contract, or authorise any officer or agent to make one in its behalf, except by a vote in a town meeting duly notified or warned by a notice specifying the object of the meeting; neither can it ratify an unauthorised act of an officer or agent at such meeting, except by a vote passed pursuant to a previous notice.

3. In an action on notes executed by the treasurer of the defendant Town, it is *held:* that certain evidence tending to show that the Town had made its treasurer its general agent in fact to borrow money, and had at its town meetings and by its affirmative action treated him as authorized to borrow money for the Town, is not proof of original authority, or of subsequent ratification, or of estoppel, to bind the Town.

4. The vote passed at the annual meeting of the Town, purporting to authorise the town treasurer to borrow money for its use, was invalid for want of evidence that it was specified in the warning of the meeting—the statement in the record of the meeting that it was "legally warned" not showing for what purpose it was warned.

[No. 119.]

Argued Jan. 5, 6, 1887. Decided April 4, 1887.

IN ERROR to the Circuit Court of the United States for the District of Connecticut. *Reversed.*

Statement of the case by *Mr. Justice* **Gray:**

[122] This action was brought June 5, 1880, by a national bank against the Town of Bloomfield in the State of Connecticut, upon three promissory notes, dated June 20, June 21, and July 1, 1879, and payable three months after date, for the aggregate sum of $19,488.80, and all alike in form, the first being as follows:

"Hartford, June 20, 1879. $5500.

Three months after date The Town of Bloomfield promise to pay to the order of S. J. Mills fifty-five hundred dollars at Charter Oak National Bank. Value received.

"S. J. MILLS, Treasurer."

The answer denied that the defendant made the notes, or that Mills, as its treasurer, had authority to make them in its behalf.

A trial by jury was had, resulting in a verdict for the plaintiff in the full amount of the notes and interest; and a bill of exceptions was tendered by the defendant and allowed by the court, so much of which as is material to be stated was as follows:

The Town of Bloomfield was incorporated in the usual manner of Connecticut towns, by a resolve of the Legislature of Connecticut, in May, 1835, by which the inhabitants of the [123] Town and their successors forever residing therein "shall have and enjoy all the powers, privileges and immunities which are enjoyed by other towns in this State."

It was admitted that Mills was elected treasurer of the Town on October 5, 1868, and was re-elected annually and acted as treasurer until July 16, 1879, when he resigned; and that he made and signed the notes in suit, and indorsed them to the plaintiff.

The defendant objected to the admission of the notes in evidence, because the plaintiff had shown no authority from the defendant to Mills to borrow money or execute notes. But the court, against the defendant's objection and exception, admitted the notes, "subject to the duty of the plaintiff to prove such authority."

The plaintiff then offered in evidence a copy, certified by the town clerk February 16, 1877, of the record of this vote of the Town:

"At an annual town meeting, legally warned and held at the usual place, October 5, 1868; S. J. Mills, moderator; H. W. Rowley, assistant town clerk; Voted, that hereafter the town treasurer be authorized and empowered to borrow money for the use of the Town."

The defendant objected to the admission of this vote, because the plaintiff offered no evidence that the warning of that meeting specified any such object as was contained in the vote. It was admitted that the warning had not been recorded by the town clerk, and was not on file in his office.

The court overruled the objection, and admitted the vote in evidence, "not as showing a legal or valid vote of the Town, but subject to the duty on the part of the plaintiff to prove that the Town at its meetings, by its affirmative acts and conduct, had assented to and treated as authoritative the power of the treasurer under said vote to borrow money for the use of said Town; or for the purpose of establishing that by the course of conduct of the Town in its town meeting it had practically established the authority of the treasurer under said vote; and of establishing an estoppel *in pais* against the power of the Town to treat as invalid a vote the validity of which had been affirmatively declared by its acts, if it should [124] appear that the defendant had intentionally caused the plaintiff to believe in a state of facts which it now claims not to exist, and induced it to act on such belief." To this ruling the defendant excepted.

The plaintiff thereupon, "for the purpose of proving that the Town had made the said Mills its general agent in fact to borrow money, and had at its town meetings, and by its affirmative acts in said meetings, treated the treasurer as authorized under said vote to borrow money for the Town," offered the following evidence:

1. Forty four notes, for the aggregate sum of more than $64,000, made by Mills as treasurer in behalf of the Town to sundry persons, other than the plaintiff, and mostly citizens of Bloomfield, between the times of the passage of that vote and of his resignation, all of which bore indorsements of payments of interest, and had been paid and taken up.

2. Copies of the annual printed reports made by the selectmen of the Town, together with the treasurer's annual reports, to the annual town meetings from 1869 to 1878 inclusive; and the records of the town meetings, showing the action of the Town thereon.

The reports of those officers in 1869 showed sums paid for "interest on town notes" to sundry individuals named, $1507, and to two of them for "town notes taken up," $1646.58; "indebtedness of Town by notes, $27,100;" and "amount received on town notes, $6559.88." The reports in the subsequent years showed similar items, varying in amount, and the "indebtedness of the Town by notes" gradually increasing to $48,416.28. It was admitted that the sums paid for interest included the payments of interest on the forty-four notes aforesaid.

The records of the town meetings showed that at an adjournment of the annual meeting of 1868 it was "Voted, that the selectmen be directed to have the report of items of account printed yearly, 500 copies;" that at the annual meeting in 1869, the reports of the selectmen and treasurer were "read and accepted;" that in 1870, "the reports of selectmen and town treasurer, being in printed form, were not called for;" and that there was no record of any action of the Town at the subsequent meetings [125] with reference to such reports. But it was admitted that the printed reports were in fact distributed to all who attended those meetings.

3. A vote of the Town, passed at a special meeting, duly warned, and held May 29, 1880, authorizing the selectmen to make and deliver notes in the name and behalf of the Town to take up and cancel "certain memoranda of indebtedness, signed by the selectmen or other officers of said Town, and all bearing date July 1, 1879," for money lent to the Town and unpaid. Also, evidence that, in pursuance of this vote, the selectmen took up twenty notes, some signed by Mills as treasurer, and others both by him as treasurer and by the selectmen, amounting in all to $45,184, and given by him

in their presence on July 1, 1879, to various persons, in renewal of or substitution for notes which he had previously given to them; and that these notes were afterwards taken up and paid by the selectmen.

The defendant objected to all this evidence as irrelevant and immaterial; but the court admitted it, for the reasons above stated, and the defendant excepted to its admission.

The bill of exceptions proceeded as follows:

"The plaintiff's account with Mills as such treasurer commenced in March, 1871, and continued until July, 1879. The first note which he procured to be discounted as such treasurer was discounted on March 24, 1871, and thereafter he continuously obtained discounts and renewals of old notes until the date of the last note, when the three notes in suit were outstanding. The aggregate of his account was over $250,000.

"In this account, he deposited moneys of the Town, and, without the knowledge of the plaintiff, small amounts of his own, and checked out from said account, both for the use of the Town and, without the knowledge of the plaintiff, small amounts for himself.

"The plaintiff offered evidence and attempted to trace each note in suit, so as to show that nearly the whole amount of the proceeds of [126] said notes went to the use of the Town, and that nearly all of the checks drawn against said proceeds were given to inhabitants of the Town in payment of town orders given by the selectmen. But no evidence was offered to show that the Town, in its town meeting assembled, knew that Mills kept his bank account with the plaintiff, or that he was borrowing the money represented by these notes, or those of which these were renewals, of the plaintiff.

"The plaintiff disclaimed any advantage by virtue of being indorsee of the notes rather than payee, and did not claim that it stood on that account in any other relation to the defendant than if it had been the payee.

"The plaintiff also offered evidence which the defendant claimed showed that at the time when the plaintiff first obtained a copy of said vote of October 5, 1868, from the town clerk of said Town; viz., on February 22, 1877, all the moneys represented by the notes in suit had been advanced to said Mills, treasurer, except the sum of $1,500, and the notes in suit, except so far as said $1,500 was concerned, were renewals of notes made before said date, and before the plaintiff knew of said vote from the record itself. The plaintiff denied the validity of said claim.

"It sufficiently appeared from the evidence in the case that the plaintiff supposed or thought that Mills was authorized to borrow money for the use of the Town and give its notes therefor, from the commencement of the account of the plaintiff with Mills as such treasurer.

"There was no other evidence in regard to any affirmative acts of the Town in its town meetings assembled, which would constitute an agency in Mills, or raise an estoppel against the Town, other than those which are hereinbefore contained; and this comprised all the evidence in the case in regard to estoppel, ratification, or agency, the court having confined the plaintiff in its testimony to acts of the Town in town meetings, and excluded any acts or knowledge of the selectmen."

The plaintiff thereupon rested its case; and the defendant again objected to the admission in evidence of the notes sued on, and the vote of October, 1868, on the grounds above stated; also on the grounds "that no sufficient evidence [127] had been offered to prove a ratification by the Town of the said vote, or to establish any estoppel against the Town which would prevent it from setting up the invalidity of said vote, or in connection with said vote to prove a general authority given by the Town to Mills to borrow money for the Town and give notes therefor, sufficient to make the Town liable on the notes in question;" "that the Town, as a municipal corporation, had no inherent power to borrow money or give notes therefor, nor had any special authority therefor been proved; that even if it had such power, it could only exercise it by a vote specifying objects for borrowing money, which were within the duties of the Town to perform, and limiting the amount so to be borrowed; and that even if the Town had such power, it could not delegate to its treasurer power to borrow money, unlimited either in object or in amount;" "that by proper construction of said vote, it did not authorize any person who might thereafter be treasurer to borrow any sum of money which he might think fit, and make the Town liable therefor, and did not authorize Mills to borrow the money and give the notes in question;" and "that even if the Town had given authority to Mills to borrow, it had not given him power to give negotiable promissory notes like those in suit for the money so borrowed."

But the court overruled the objections, and admitted the notes and the vote in evidence; and to this ruling the defendant excepted.

The defendant then introduced evidence tending to show that the warning of the town meeting of October 5, 1868, did not, in fact, contain any notice that the matter of authorizing the treasurer to borrow money would come before the meeting; and also evidence tending to show that Mills, during all the time from 1869 to 1879, was largely in default to the Town, having embezzled large sums of money belonging to the Town, in addition to the sums obtained by him from the plaintiff, and that the moneys obtained by him from the plaintiff were not used to pay debts of the Town, or, if so used in part, only to pay debts for the payment of which the Town had furnished him sufficient money, which he had embezzled as aforesaid, [128] and so were in fact obtained and used by him for his own purposes, to cover such embezzlement.

The defendant also put in sundry votes passed by the Town in 1862, 1863 and 1864, authorizing the selectmen to borrow money to pay bounties to soldiers, and to give orders on the town treasurer or notes of the Town therefor, which votes had been ratified and confirmed by the Legislature of Connecticut before the town meeting of October 5, 1868, as well as evidence that at the meeting of May 29, 1880, and before the passing of the vote above mentioned, one of the selectmen read to the meeting a list of the notes signed by Mills as treasurer, either alone or with other officers of

the Town, which contained no notes given by Mills to the plaintiff.

Before the charge to the jury, the defendant renewed its objections by requests for instructions, which the court refused to give.

The court instructed the jury that in the absence of all testimony there was no presumption that the warning of the town meeting of October 5, 1868, specified the subject of giving authority to borrow money; and that the vote of that meeting, "standing alone, did not give general authority to borrow money and to act as general agent in that regard;" but submitted the evidence in the case to the jury as sufficient to authorize them to find that the defendant, by continuous and affirmative action and conduct in its town meetings, knowing that its treasurer had generally and freely borrowed money and given notes under that vote, had made him in fact its general agent for that purpose, had held him out to the plaintiff as such, and had ratified his acts, and was estopped to deny their validity.

The defendant excepted to the refusal to instruct as requested, and to the instructions given, and sued out this writ of error.

Messrs. **C. E. Perkins** and *A. F. Eggleston*, for plaintiff in error:

It has always been held by the courts of Connecticut that votes on subjects not mentioned in the warning were absolutely void, and not admissible in evidence; and, moreover, that before any vote of a town meeting would be received in evidence, the person presenting it must show affirmatively that the warning did in fact contain such a notice as authorized such vote to be passed. It was a condition precedent to the power of the meeting to pass the vote; and without it a vote of any town meeting on a subject not specified in the warning, however regularly called or met for the consideration of other matters, was no more than a vote of so many men met for a clam bake.

Hayden v. *Noyes*, 5 Conn. 391; *Willard* v. *Killingworth*, 8 Conn. 247; *Baldwin* v. *North Branford*, 32 Conn. 54; *State* v *Taff*, 37 Conn. 399.

There was no estoppel upon the Town which would prevent it from denying the authority of Mills.

The most essential element of estoppel is that a person has acted upon his knowledge of the words or acts of another, in reliance upon their truth; and so here to make the acts of the subsequent town meetings an estoppel, it is necessary that the Bank should have known of them, and acted in reliance upon them, in loaning the money in question.

Bank v. *Shailor*, 20 Conn. 21.

A municipal organization cannot be estopped from setting up a fundamental want of power to do an act.

Marsh v. *Fulton Co.* 77 U. S. 10 Wall. 683 (19: 1042); *Parkersburg* v. *Brown*, 106 U. S. 501 (27: 244).

A person dealing with such a body is bound to know its powers, and to learn whether the necessary conditions precedent to authorize its acts have been performed.

Scovill v. *Thayer*, 105 U. S. 151 (26: 972); *Hannibal* v. *Fauntleroy*, 105 U. S. 418 (26: 1105).

Ratification requires a knowledge of the acts done which are to be ratified.

Bennecke v. *Ins. Co.* 105 U. S. 360 (26: 992).

A town, by its acts, cannot ratify and confirm a vote which was utterly void for want of notice in the warning of the meeting when it was passed.

American Tube Works v. *Boston Machine Co.* 139 Mass. 5, 11; *Scovill* v. *Thayer*, *supra*; Field, in *Marsh* v. *Fulton Co.* 77 U. S. 10 Wall. 678 (19: 1040); *Davies Co.* v. *Dickinson*, 117 U. S. 665 (29: 1030); *Hayes* v. *Holly Springs*, 114 U. S. 126 (29: 83); *Norton* v. *Shelby Co.* 118 U. S. 451 (*ante*, 178).

"Towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to discharge their duties and carry into effect the objects and purposes of their creation."

Booth v *Woodbury*, 32 Conn. 118; *New London* v. *Brainard*, 22 Conn. 552; *Higley* v *Bunce*, 10 Conn. 442; *Hayden* v. *Noyes*, 5 Conn. 391; *State* v. *Fyler*, 48 Conn. 158.

Mr. **Alvan P. Hyde**, for defendant in error:

The vote having been spread on the public records of the Town and suffered to remain, and the plaintiff having acted on the faith of its being a valid vote, the burden of proof rested on the defendants to show that the vote was invalid under the warning.

In *Hayden* v. *Noyes*, 5 Conn. 391, no question as to the burden of proof arose. The warning was in evidence, and its construction only before the court; while in our case, the plaintiff having acted on the faith of the validity of the vote which the Town had caused to be spread upon its public records, it would seem that if the Town would repudiate the vote it should furnish the evidence, which was entirely in its control of its invalidity.

Brunswick v. *McKean*, 4 Greenl. 508.

Protection ought to be given to a party who has contracted with and advanced his money to the town on the faith of its own records.

Isbell v. *New York & N. H. R. R. Co.* 25 Conn. 556.

The vote spread on the records was not only *prima facie* evidence of the authority of Mills to act, but conclusive evidence in favor of the plaintiffs, who acted on the faith of its being a valid vote.

N. H. M. & W. R. R. Co. v. *Chatham*, 42 Conn. 465.

Mr. Justice **Gray**, after stating the case as above reported, delivered the opinion of the court: [128

We have not found it necessary to consider how far a town in Connecticut has the power to give promissory notes, because in our opinion the evidence in this case is incompetent to prove that this Town ever authorized its treasurer to make the notes in suit, or did any act which made them binding on the Town.

Towns in Connecticut, as in the other New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the Legislature, from time to time, at its discretion, for political

purposes and the convenient administration of government; they have those powers only, which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of a town are members of the *quasi* corporation. 1 Swift's System, 116, 117; *Granby* v. *Thurston*, 28 Conn. 416; *Webster* v. *Harwinton*, 32 Conn. 131; Dill. Mun. Corp. §§ 28-30.

In Connecticut, as in Massachusetts and Maine, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town. *Atwater* v. *Woodbridge*, 6 Conn. 223, 228; *McLoud* v. *Selby*, 10 Conn. 390; *Beardsley* v. *Smith*, 16 Conn. 368; 5 Dane, Abr. 158; *Chase* v. *Merrimack Bank*, 19 Pick. 564, 569; *Gaskill* v. *Dudley*, 6 Met. 546; *Adams* v. *Wiscasset Bank*, 1 Greenl. 361; *Fernald* v. *Lewis*, 6 Greenl. 264. See also *Hopkins* v. *Elmore*, 49 Vt. 176; Rev. Stat. N. H. 1878, chap. 239, § 8.

A town cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned; and the notice or warning must specify the matter to be acted on, in order that all the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect, and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town, without [130] proving a sufficient notice or warning of the meeting at which the vote was passed. *Reynolds* v. *New Salem*, 6 Met. 340; *Stoughton School Dist.* v. *Atherton*, 12 Met. 105; *Moor* v. *Newfield*, 4 Greenl. 44; Dill. Mun. Corp. §§ 266-268.

Upon this point the statutes and decisions of Connecticut are perfectly clear.

The statutes require the annual town meetings to be held in October, November or December, and permit special meetings to be convened when the selectmen deem it necessary, or on the application of twenty inhabitants qualified to vote in town meetings; and provide for notifying or warning both annual and special meetings as follows: "When town meetings are to be held, a notification, either written or printed, specifying the objects for which they are to be held, signed by the selectmen, or a majority of them, set upon the sign post or sign posts in the towns, at least five days inclusively before the meeting is to be held, shall be sufficient notice to the inhabitants to attend such meeting." Rev. Stat. 1866, tit. 7, §§ 19, 21; 1821, tit. 103, § 2. They also provide that "The warning of every meeting of any borough, city, ecclesiastical society, school society, school district, or other public community, shall specify the objects for which such meeting is to be held." Rev. Stat. 1866, tit. 7, § 232.

Whenever a town meeting is warned agreeably to the provision above quoted, the statutes, with a view to preserving the best evidence of the contents of the notice or warning, make it the duty of the selectmen to cause a copy or duplicate thereof to be left with the town clerk before the meeting, and the duty of the clerk to record it. Rev. Stat. 1866, title 7, § 19. But these duties are imposed on the selectmen and the clerk as public officers, not as agents of the town. They are not made duties of the inhabitants of the town in their corporate capacity, but official duties of those charged with their performance. The neglect of the officers to file or to record a sufficient notice of a town meeting is theirs only, and not the neglect of [131] the town. So far as the town is concerned, the utmost effect of an omission to record the notice is to authorize its contents to be proved by other evidence. *Brunswick First Parish* v. *McKean*, 4 Greenl. 508.

The annual election of town officers, or any other act which the statutes require to be done by the inhabitants at each annual meeting, might perhaps be sufficiently proved by the record of what was done at the meeting, without proving a special notice of it in the warning. *Thayer* v. *Stearns*, 1 Pick. 109; *Gilmore* v. *Holt*, 4 Pick. 258. But, with those exceptions, such a notice is a necessary prerequisite to the validity of any act of the town, either at the annual meeting or at a special meeting.

The statutes, for instance, provide that "The inhabitants of the respective towns, in legal meetings assembled, shall have power" to make certain by-laws for the welfare of the towns. Rev. Stat. 1866, tit. 7, § 31; 1821, tit. 103, § 6. But it has always been held that no by-law, though passed at an annual meeting, is valid, without a previous notice thereof in the warning.

In the leading case, decided in 1824, of *Hayden* v. *Noyes*, 5 Conn. 391, where the annual meeting of a town was warned to choose town officers, "and to do any other business then thought proper by said meeting," the supreme court of errors decided that by-laws passed at that meeting, to regulate the shell fishery of the town, were void; and *Chief Justice* Hosmer, delivering judgment, said:

"By the act concerning towns, the mode of warning town meetings is specially prescribed. There is to be a notification in writing, 'specifying the objects for which they are to be held,' signed by the selectmen, and set upon the public sign post or posts in the town, at least five days before the meeting. A meeting not warned agreeably to the mode designated is no legal congregation of the town; and its acts in that capacity are void. If the object be to regulate the clam and oyster fisheries, that object must be specified in the warning, in an intelligible manner. A notification to assemble a town meeting for a lawful purpose, duly specified, and to *do other town business*, is, except as to the [132] specification, as entirely exceptionable as if the town were warned to meet and do any business they should think proper. It is the purpose of the law, not to prescribe a frivolous form, but to give substantial information. If the object of the meeting is specified, it will present a motive to the inhabitants to be present, and they will leave business, even if it be pressing, provided they feel an interest in the subject to be determined. On the other hand, if the subject is unimportant, and any of the inhabitants should feel no concern in the result, they may with safety pursue their ordinary business; and this certainly is matter of convenience." "The warning, in the case before us, neither conforms to the words nor

spirit of the law, and, if sanctioned, would repeal the statute." 5 Conn. 395, 396.

In a similar case in 1830, that decision was followed, and it was adjudged, reversing the judgment of a lower court, that it was incumbent on the party offering the vote of the town in evidence, and seeking to avail himself of it, to prove that the meeting was duly warned, although the vote purported on its face to have been passed by the town "in legal meeting assembled;" and the court said: "The borough and the town are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the Legislature of the State; but their authority is delegated; and their powers, therefore, must be strictly pursued. *Within* the limits of their charter, their acts are valid; *without* it, they are void. It having been established, in the case of *Hayden* v. *Noyes*, above cited, that to render an act of a town, precisely of this character, valid, it must appear that the meeting of the town had been specially warned for that purpose; and this not appearing on the doings of the town, in this case, nor from any proof *aliunde* to establish the fact, the judgment is erroneous. Perhaps it should appear on the face of the proceedings; but, at least, he who seeks to enforce the act should prove such warning to have been given." *Willard* v. *Killingworth*, 8 Conn. 247, 254.

There is nothing in the later decisions of that court, which tends to shake the rules thus established.

[133] In *Brownell* v. *Palmer*, 22 Conn. 107, the vote of the town, which was presumed to be valid, without proof of the warning, was a vote passed at an annual meeting twenty-five years before, accepting a discontinuance in due form, by the selectmen, of an ancient highway which was proved to have been disused ever since some time before that vote, and which there was strong ground therefore for presuming to have been discontinued. See *Avery* v. *Stewart*, 1 Cush. 496; *Fletcher* v. *Fuller*, 120 U. S. 534 [*ante*, 759]. In the case of a recent vote, the rule is otherwise. For instance, in *State* v. *Taff*, 37 Conn. 392, a vote of a town, fifteen years before, accepting the laying out of a highway by the selectmen, was held insufficient for want of any proof of the warning; and the highway was established upon the independent ground of dedication.

In *Isbell* v. *New York & N. H. R. R.* 25 Conn. 556, the town clerk's record of the meeting at which the by-law in question was passed recited that the meeting was "legally warned and held for the purpose of making a by-law" upon the particular subject; and the case was thus reconciled with that of *Willard* v. *Killingworth*, above cited. The record made by the clerk in the performance of his legal duty was sufficient, and perhaps conclusive, evidence of the fact recorded. *Thayer* v. *Stearns*, 1 Pick. 109.

In *Society for Savings* v. *New London*, 29 Conn. 174, the sufficiency of the warning was not questioned.

In *Baldwin* v. *North Branford*, 32 Conn. 47, a vote passed upon an insufficient warning, and therefore invalid, was upheld because it had been ratified by the town at a subsequent meeting duly warned and held under a confirmatory Act of the Legislature.

The two remaining Connecticut cases, cited at the bar, were suits to compel towns to guaranty the bonds of a railroad corporation, in accordance with votes passed under authority conferred by statute.

In the one, the vote was passed at a meeting duly warned and held; and the decision was that the vote as recorded by the town, taken in connection with the warning, which was also recorded, appeared to have been taken by ballot, as required by law, and that the town was estopped to show, by an amendment of the [134] record, made after the railroad corporation and its contractors had acted upon the vote for three years, that the vote was not so taken. *New Haven, M. & W. R. R. Co.* v. *Chatham*, 42 Conn. 465. The case is an exceptional one, depending on its peculiar circumstances. Dill. Mun. Corp. § 164, note.

But in the other case, in which the warning, as recorded, showed that it had been posted less than the requisite number of days before the meeting at which the town voted to guaranty the bonds on certain conditions, it was adjudged that the vote was invalid; and that the town was not estopped to prove the defect in the warning, and the consequent invalidity of the vote by a recital in the record that the vote was passed at a meeting "legally warned and held," or by subsequent proceedings, after the railroad corporation had substantially complied with those conditions, by which the town, under a warning to determine what disposition should be made of the bonds of the railroad corporation held by the town, and to pay interest on its bonds, and to take such action as to secure the completion of the railroad, voted to let the conditions of the former vote remain as they were. The court said: "The assembled voters are without power to act for or bind the town, unless they have been called together in the statutory way and at the statutory time;" and also, after observing that "every voter who read the call" for the second meeting "might safely absent himself from the meeting in the certainty that under the call it could not impose the burden of a guaranty upon the town," added, "We cannot order the town to guaranty any bonds, unless it is made clear that at a lawful meeting, so called as to give the voters full knowledge of its purpose, they have assumed the burden; it is not to be placed upon them by inference." *Brooklyn Trust Co.* v. *Hebron*, 51 Conn. 22, 29, 30.

It follows that the vote passed at the annual meeting of the Town of Bloomfield in 1868, purporting to authorize the town treasurer to borrow money for the use of the Town, was invalid, for want of any evidence that the subject was specified in the warning. The statement in the record of the meeting, that it was "legal [135] ly warned," shows only that it had been duly warned for some purposes, not for what purposes.

The circuit court ruled that this vote did not of itself authorize the treasurer to borrow money; but submitted the vote, with the other evidence in the case, to the jury, as sufficient to authorize them to find either that the Town had made him its general agent to borrow money, or that it had ratified his acts, or that it was estopped to deny their validity.

That evidence consisted only: 1. Of forty-four notes made by the treasurer to sundry in-

dividuals after the passage of that vote; 2. Of the reports made in print by the selectmen and treasurer to the annual meetings of the Town from 1869 to 1878 inclusive, showing various sums received or paid "on town notes," and a gradually increasing "indebtedness of the Town by notes;" and the records of those meetings, showing that in 1869 such reports "were read and accepted," and that in after years no action on them was taken by the Town; 3. Of a vote passed by the Town in 1880, authorizing the selectmen to make notes in behalf of the Town to take up and cancel certain memoranda of indebtedness, made by officers of the Town, dated July 1, 1879, for money lent to the Town by various persons; and the acts of the selectmen pursuant to that vote.

Any ratification of an act previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. *Owings* v. *Hull*, 34 U. S. 9 Pet. 607 [9:246]; *Bennecke* v. *Insurance Co.*, 105 U. S. 355 [26: 990]. And no estoppel *in pais* can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon. *Burgess* v. *Seligman*, 107 U. S. 20 [27:359]; *Scovill* v. *Thayer*, 105 U. S. 143 [26:968]; *Brant* v. *Virginia C. & I. Co.* 93 U. S. 326 [23: 927].

The vote of those who attend a town meeting being of no validity against the town or its inhabitants, unless the object of the vote is set forth in the notice or warning of the meeting, the town can no more ratify an act afterwards, than authorize it beforehand, except by vote passed pursuant to a previous notice specifying the object. Without the indispensable prerequisite of such a notice, those present at a town meeting have no greater power to bind the town indirectly by ratification or estoppel than they have to bind it directly by an original vote. *Marsh* v. *Fulton Co.* 77 U. S. 10 Wall. 676 [19:1040]; *Daviess County* v. *Dickinson*, 117 U. S. 657 [29:1026]; *Norton* v. *Shelby County*, 118 U. S. 425 [*ante*, 178]; *Pratt* v. *Swanton*, 15 Vt. 147; *Lander* v. *Smithfield School Dist.* 33 Me. 239; *American Tube Works* v. *Boston Machine Co.* 139 Mass. 5. [136]

By the Statutes of Connecticut, it is made the duty of the selectmen to superintend the concerns of the town, to adjust and settle all claims against it, and to draw orders on the treasurer for their payment; to keep a true and regular account of all the expenditures of the town, and to exhibit the same at the annual meeting; and it is the duty of the treasurer to receive all the money belonging to the town for taxes, fines, forfeitures, debts or otherwise, and to make an annual statement of the receipts of money into the treasury, and the expenditures, which shall be adjusted by the selectmen, and laid before the town at the annual meeting. Rev. Stat. 1866, tit. 7, §§ 45, 67; 1821, tit. 103, § 8, tit. 105, § 20. But neither the selectmen nor the treasurer have any general power to make contracts, to borrow money, or to incur new debts, in behalf of the town, except for particular objects having no relation to this case. *Sharon* v. *Salisbury*, 29 Conn. 113; *Ladd* v. *Franklin*, 37 Conn. 58; *Goff* v. *Rehoboth*, 12 Met. 26.

The reports made by the selectmen and the treasurer to the annual meetings, in performance of the duties imposed upon those officers by statute, were not, unless expressly approved or acted on by the Town at a meeting duly held upon sufficient warning, evidence to charge the Town with liability for debts which those officers had no authority to contract. The only reports of the selectmen and treasurer upon which the Town took any action were those of 1869. The acceptance by the Town of those reports might be a ratification of the debts and payments therein stated, but could have no further effect. *Burlington* v. *New Haven & N. Co.* 26 Conn. 51; *Benoit* v. *Conway*, 10 Allen, 528; *Dickinson* v. *Conway*, 12 Allen, 487; *Arlington* v. *Pierce*, 122 Mass. 270; *Bean* v. *Hyde Park*, 143 Mass 245. In *Kinsley* v. *Norris*, 60 N. H. 131, cited for the plaintiff, the town, under an appropriate article in the warrant, had voted not only to accept the report of the doings of an agent, but also to give him additional powers. [137]

There is nothing in the case at bar which tends to show that any of the promissory notes to individuals, offered in evidence, or of the notes mentioned in the annual reports of the selectmen and treasuner accepted by the Town in 1869, or in the vote of the Town in 1880, were held by the plaintiff. The bill of exceptions explicitly states that no evidence was offered that the Town in town meeting assembled knew that its treasurer kept his bank account with the plaintiff, or was borrowing of the plaintiff the money represented by the notes in suit, or by notes of which these were renewals; and also states that the plaintiff disclaimed any advantage by virtue of being the indorsee, instead of being the payee, of the notes in suit.

The bill of exceptions does state that it appeared by the evidence that the plaintiff, from the beginning of its account with Mills as treasurer, "supposed or thought that Mills was authorized to borrow money for the use of the Town and give its notes therefor." But it contains nothing tending to show that the supposition was based upon anything but false representations of the treasurer, which would not bind the Town. *Railroad Bank* v. *Lowell*, 109 Mass. 214; *Agawam Nat. Bank* v. *South Hadley*, 128 Mass. 503. Nor was there any evidence that the plaintiff, at the time of lending money to the treasurer, knew of any acts of the Town or of the selectmen since the vote of 1868; and the vote of 1880, and the acts of the selectmen under it, took place after the notes in suit had been made and delivered to the plaintiff, and therefore could not have influenced it in taking them.

Upon the whole case, there was no proof of original authority, or of subsequent ratification, or of estoppel, to bind the defendant Town; none of original authority, for want of any vote passed pursuant to due notice in the warning; none of ratification, for the same reason, as well as because it was not shown that the acts proved were done with intent to ratify the acts of the treasurer in issuing the notes sued on, or with knowledge of all the material facts attending their issue; none of estoppel because there was no evidence of any acts of the Town, which the plaintiff had a legal right to rely upon, or did in fact rely upon, in taking these notes. The jury having been instructed otherwise, the *judgment must be reversed, and the case re-* [138]

manded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[383] WILLIAM M. FISHER ET AL., *Plfs. in Err.*,

v.

EZRA KELSEY AND HENRY A. LANMAN, EXTS. of WILLIAM KELSEY, Deceased, ET AL.

(See S. C. Reporter's ed. 383-387.)

Liability of innkeepers for loss of merchandise for sale or sample belonging to guest—Missouri Act—strictly construed—written notice.

1. If a guest applies for a room in an inn for a purpose of business distinct from his accommodation as a guest, the particular responsibility of the innkeeper does not extend to goods lost or stolen from that room.

2. Under the Missouri Act of April 1, 1872, an innkeeper in that State is not liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, or unless such loss shall be caused by fire intentionally produced by the innkeeper or his servants, or by the theft of himself or servants. Express knowledge that a guest has such merchandise in his possession is not sufficient to charge the innkeeper, in the absence of the written notice required by the statute.

[No. 178.]

Argued and submitted March 30, 1887. Decided April 11, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. Opinion below, 16 Fed. Rep. 71. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. Chester H. Krum, for plaintiffs in error:

Prevailing authorities make innkeepers insurers of the property committed to their care, against anything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property.

Such being the state of the law, in the absence of the statute upon which they rely, the record clearly establishes a liability on the part of the defendants in error.

No objection to the reception of the goods having been made by the proprietors, it is not material whether the goods lost were baggage, within the legal meaning of the term, or whether they were only merchandise. By suffering them to remain in the hotel, after knowledge of their nature, the proprietor comes within the rule of *Hannibal R. R.* v. *Swift*, 79 U. S. 12 Wall. 262 (20: 423).

Had there been no statute covering the case it would have been allowed to go to the jury.

There is nothing in the situation under the statute which renders inapplicable general doctrines with reference to waiver.

Had the statute defined the meaning of the term "baggage," and provided that an innkeeper should not be liable for loss of property other than such baggage, surely an innkeeper, who knowingly received a guest with property other than baggage, would be liable for its loss, unless within common-law exceptions.

Hannibal R. R. v. *Swift, supra.*

The statute is to be construed with reference to the intention of the Legislature. The object of the statute is merely to give notice to an innkeeper as to the nature of the property. Where he has personal knowledge the purpose of the statute is satisfied.

Purvis v. *Coleman*, 21 N. Y. 111.

A party may waive a right created in his favor by statute.

Messrs. **John W. Noble, H. Orrick** and **W. H. Phillips**, for defendants in error:

The statute was express, demanding written notice; each party acted on knowledge of this statute; and until the plaintiff moved, by giving statutory notice, the conduct of the defendants could not be said to be inconsistent with their right to notice. It may be likened to the conduct of one relying on a verbal contract for the sale of land. No equity arises upon it. A complainant has no reason to rely upon it.

Dunphy v. *Ryan*, 116 U. S. 491 (29:703); Browne, Stat. Frauds, 4th ed. § 115, a.

The statute requires the written notice after entering the inn, without qualification, before the party shall be able to establish such a relation to the proprietors as will put the merchandise for sale or sample at the innkeeper's risk, because it also enacts that the innkeeper shall not be compelled to receive such guest.

The rule is a reasonable one. It was in support of the rule laid down by many authorities. Some of these had held that an innkeeper should be liable only for articles of wearing apparel, and for personal use and convenience, such as travelers ordinarily carry with them.

Giles v. *Fauntleroy*, 13 Md. 126; *Pettigrew* v. *Barnum*, 11 Md. 434; *Trieber* v. *Burrows*, 27 Md. 130; *Sassen* v. *Clark*, 37 Ga. 242; *Jalie* v. *Cardinal*, 35 Wis. 118.

Others had held that if a guest take a room for business, distinct from his accommodation as a guest, the special responsibility did not extend to goods lost or stolen from that room.

Burgess v. *Clements*, 4 Maule & S. 306; *Farnworth* v. *Packwood*, 1 Holt, *N. P.* 209; *S. C.* 1 Starkie, *N. P.* 249; *Carter* v. *Hobbs*, 12 Mich. 57; *Jalie* v. *Cardinal*, 35 Wis. 118; *Myers* v. *Cottrill*, 5 Biss. 465.

The right given to the innkeeper to refuse to receive the guest, if he gave the notice upon entering the inn, was itself destructive of the old rule as held by the stricter authorities; for the obligation of the innkeeper to respond for any injury to or loss of the guest's property depended upon the obligation to receive him.

Mower v. *Fethers*, 61 N. Y. 34; *Ingallsbee* v. *Wood*, 38 N. Y. 577.

Mr. Justice **Harlan** delivered the opinion of the court:

By the General Statutes of Missouri, of 1865, chapter 99, it was provided that—

Sec 1. "No innkeeper in this State, who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry, and articles of gold and silver manufacture, and of the like, and who shall keep a copy of this chapter printed by itself, [384] in large, plain English type, and framed, constantly and conspicuously suspended in the

office, bar room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such articles aforesaid suffered by any guest, unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and to give such guest a receipt therefor.

Sec. 2. "No innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; but innkeepers shall be liable for the losses of their guests caused by the theft or negligence of the innkeeper, or of his servants, anything herein to the contrary notwithstanding."

The last section was amended by an Act approved April 1, 1872, so as to read: "No innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn; nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample. But innkeepers shall be liable for the losses of their guests caused by the theft of such innkeeper, or his servants, anything herein to the contrary notwithstanding."

William M. Fisher, having in his possession, as a traveling salesman for the firm of which he was a member, certain goods, consisting mainly of gold chains, chain trimmings, and necklaces, was received, with his goods, into the Planters' House, in St. Louis—a public inn kept by the defendants in error—and was supplied, at his own request, with a room in which such articles could be exhibited to customers. [385] During his occupancy of the room for that purpose, $12,626.82 in value of the articles were, without his knowledge, taken and carried away, so that they could not be recovered. It does not appear that the loss was attributable to the neglect either of Fisher or of the innkeepers. Although the nature of his business was well known to the defendants, and they were aware that the articles in question were brought into the hotel to be exhibited for sale, in a room to be occupied for that purpose, written notice was not served upon them that Fisher had "such merchandise for sale or sample in his possession after entering the inn." In this action, brought to recover the value of the goods stolen or lost, the court held that such a notice was required, by the Statutes of Missouri, in order to fix liability upon the innkeeper. The jury having been so instructed, there was a verdict and judgment for the defendants.

Although Fisher was received by the defendants into their hotel, as a guest, with knowledge that his trunks contained articles having no connection with his comfort or convenience as a mere traveler or wayfarer, but which, at his request, were to be placed on exhibition or for sale, in a room assigned to him for that purpose, they would not, under the doctrines of the common law, be held to the same degree of care and responsibility, in respect to the safety of such articles, as is required in reference to baggage or other personal property carried by travelers. He was entitled, as a traveler, to a room for lodging; but he could not, of right, demand to be supplied with apartments in which to conduct his business as a salesman or merchant. The defendants, being the owners or managers of the hotel, were at liberty to permit the use by Fisher of one of their rooms for such business purposes; but they would not, for that reason and without other circumstances, be held to have had his goods in their custody, or to have undertaken to well and safely keep them as constituting part of the property which he had with him in his capacity as guest. Kent says that "If a guest applies for a room in an inn, for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend to goods lost or stolen from that room." 2 Kent, 596. See also *Myers* v. [386] *Cottrill*, 5 Biss. 470, Drummond, *J.*; Story, Bailm. § 476; *Burgess* v. *Clements*, 4 Maule & S. 306; Redfield, Carriers & Bailees, 443; Addison, Law Cont. 6th ed. 360.

Such, we think, was the state of the law in Missouri prior to the passage of the Act of 1872. That Act prescribes the conditions upon which an innkeeper in that State may be made liable for the loss of merchandise belonging to a guest, and brought into the hotel only to be exhibited or sold. In view of the large and constantly increasing business transacted by traveling salesmen, the Legislature of Missouri deemed it just to all concerned that their relations with innkeepers, in respect to goods carried by them, should be clearly defined and not left to depend upon mere inference or usage. The statute makes the innkeeper responsible, in every event, for the loss of baggage or other property of the guest by fire intentionally produced by the innkeeper or his servants, or by the theft of himself or servants. But since the innkeeper is not ordinarily bound to the same care for the safety of goods, in the possession of a guest for the purpose merely of being exhibited or sold, as for articles carried by the latter for his comfort or convenience as a traveler, the statute changed the rule so as to make his responsibility the same in both cases; provided, in the former case, the person received as a guest gives written notice that he has merchandise for sale or sample in his possession in the hotel; leaving the innkeeper, upon such notice, to elect whether he will permit the guest to remain in the hotel with such merchandise for sale or sample. Notice in this form, when the guest is permitted to remain in the hotel with merchandise in his possession "for sale or sample," is made by the statute evidence that the innkeeper has assumed responsibility for the safety of such merchandise, to the full extent that he is bound by the settled principles of law for the safety of the baggage or other articles brought by guests into the hotels.

It is suggested that the purpose of the Act of 1872 was to protect innkeepers; and, therefore, actual knowledge that a guest has in his posses- [387]

sion merchandise for sale, or, at least, the consent of the innkeeper to the guest's use of a room in his hotel for such purpose, should be deemed sufficient to fasten upon the innkeeper responsibility for the safety of such merchandise. It seems to us that the statute is equally for the benefit of traveling salesmen. Be this as it may, as the law in regard to the liability of an innkeeper is one of extreme rigor, he should not be held to any responsibility beyond that arising from the relation of innkeeper and guest, unless, at least, the circumstances show that he distinctly agreed to assume such additional responsibility. There is no pretense in this case that the defendants made an express agreement of that character. Nor can such an agreement be implied merely from the knowledge on the part of the innkeeper that a guest has in his possession in the hotel, for exhibition or sale, merchandise for the safe custody of which he is not ordinarily responsible. Such knowledge implies nothing more upon the part of the innkeeper than his assent to the use of his rooms for purposes of that kind.

If, as to such merchandise, it is intended to hold the innkeeper to the strict liability imposed at the common law, in respect to the baggage or other personal property of a guest, the statute indicates the mode in which that intention must be manifested. The guest must give notice of such intention. And as the notice is expressly required to be in writing, no other form of notice can be deemed a compliance with the statute. *Porter* v. *Gilkey*, 57 Mo. 237. With the reasons which induced the Legislature to prescribe a written notice, in order to fix upon the innkeeper responsibility for the safety of merchandise carried by traveling salesmen for sale or sample, we have nothing to do. The law of Missouri is so written, and it is our duty to give it effect according to the fair meaning of the words employed.

It results that the court below did not err in refusing the instruction asked by the plaintiffs, but correctly held that the absence of the written notice required by the Act of 1872 was fatal to their right to recover.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[201] JAMES D. McCONIHAY, Trustee, ET AL., *Appts.*,

v.

THEODORE WRIGHT.

(See S. C. Reporter's ed. 201-215.)

Bill to quiet title—judicial sale of lands of West Virginia corporation—construction of Virginia Statutes—Code of 1849—railroads—abandonment—parties—jurisdiction of United States Courts, independent of state legislation—adequate remedy at law.

1. Upon a bill filed by appellee to quiet his title to a strip of land in West Virginia, which he derived from the Winifrede Mining and Manufacturing Company, a corporation of that State, through a judicial sale, said land having been obtained by the company through judicial proceedings for the purpose of a railroad to connect its mining lands with the Kanawha River, it is *held*: that the complainant, by virtue of the decree of the state court ordering the sale at which he purchased, is vested with whatever title the company had; that the appellants, who are the representatives of the original owner of the land in question, are not proper parties to complain of any irregularity or fraud in connection with the proceedings in the state court, especially as a judgment in favor of the original owner, for the amount awarded him for the land in question, was paid from the proceeds of said sale; that the title of the company had not failed, by force of the statute under which it was acquired, prior to the judicial sale to the complainant; that the provisions of section 20, of the Act of March 11, 1837, relating to forfeiture for abandonment or nonuser, apply only to railroads for the general transaction of persons and property, and were not adopted as part of the charter of said company; that the Virginia Code of 1849, which, although passed before, did not go into operation until after the passage of the charter of said company, operated on said charter when it went into effect and controlled the distribution of the company's assets; and that no forfeiture of the title on the ground of fraud can be enforced except by the State.

2. The jurisdiction of the courts of the United States is independent of state legislation; and it cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts.

3. The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress.

[No. 159.]

Argued March 21, 22, 1887. Decided April 11, 1887.

APPEAL from the District Court of the United States for the District of West Virginia. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **J. F. Brown**, for appellants.

Messrs. **E. B. Knight** and *R. C. McMurtrie*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The complainant in this case, Theodore Wright, the appellee, a citizen of the State of [202] Pennsylvania, filed his bill in equity September 24, 1881, against the appellants, citizens of the State of West Virginia, the object and prayer of which were to quiet his title to certain real estate described therein. The title of the complainant to the premises in controversy is derived from the Winifrede Mining and Manufacturing Company, a corporation of the State of West Virginia. That company was chartered by a special Act of the Legislature of Virginia, February 16, 1850, and made a body politic "for the purpose of exploring, digging, mining, raising, and transporting coal and other minerals and substances, and for manufacturing mineral, vegetable, and other articles in and from the Counties of Kanawha and Boone, and such other counties as may hereafter be created out of parts of said counties."

The third section of its charter is as follows: "That it shall and may be lawful for the said company to erect and construct a slack-water navigation from some convenient point on Kanawha or Coal Rivers, contiguous to their said lands, and along the bed of the said Coal River to the Great Kanawha; *Provided, however*, That nothing in this Act contained shall be so construed as to prevent the said rivers from being and remaining public highways free for the navigation of all the citizens of this Commonwealth; and also to construct such railroad or railroads from any point on their said

lands to the Great Kanawha River, or any other navigable stream in the valley of the Kanawha River and its branches, or to connect with any other railroad or improvement which is now or may hereafter be authorized by the State of Virginia in the said valley of the Kanawha and its branches; and to enable the said company to carry out the provisions in this section contained, they are hereby invested with all the rights, powers, and privileges, and subjected to all the limitations and restrictions, contained in an Act entitled 'An Act Prescribing Certain General Regulations for the Incorporation of Railroad Companies,' passed March 11, 1837, so far as the same are applicable to and not inconsistent with the provisions of this Act."

By the second section of the charter the company was authorized to purchase and hold lands, [203] not exceeding 10,000 acres at any one time, in the said Counties of Kanawha and Boone, or in any new counties that had been or might thereafter be formed and created out of parts of said counties.

In pursuance of the authority given by its charter the Winifrede Mining and Manufacturing Company of Virginia, on the 8th of January, 1858, acquired by deed a title in fee simple to a tract of land containing about 10,000 acres. John McConihay owned land between this tract and the Kanawha River. For the purpose of acquiring a right of way for a railroad, and a depot on the banks of the Kanawha River, in order to transport its coal, the Winifrede Company, by judicial proceedings, appropriated a tract through the lands of McConihay, being a narrow strip four or five miles long, connecting its tract of coal land with the bank of the river. That strip, appropriated in that way and for that purpose, is the subject of the controversy in this suit. A demurrer interposed by the defendants was overruled, and the case was heard finally upon bill, answer, replication and proofs. A decree was rendered in favor of the complainant, from which the defendants prosecute the present appeal.

The first error assigned is that the case is not one of equitable jurisdiction, it being contended that the complainant below had a complete and adequate remedy at law. The bill sufficiently alleges that the complainant is in possession of the premises in controversy, and in this respect is supported by the proofs. The prayer of the bill is that the defendants may be required to assert and declare the rights and title claimed by them in and to the premises, and that in the meantime they may be enjoined "from interfering with or hindering or obstructing your orator, his agents or employés, in any manner in the use and enjoyment of said way and depot until the further order of said court," and for general relief. The contention of the appellants, however, is, that by the Statute of West Virginia the complainant might have maintained an action of ejectment. Reference is [206] made in support of this contention to the West Virginia Code of 1868, chapter 90, to show that an action of ejectment in that State will lie against one claiming title to or interest in land, although not in possession. Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity; and no change in state legislation giving, in like cases, a remedy by action at law, can of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress.

The next assignment of error is that the proof fails to sustain the title set up by the appellee. That title is based upon two judicial sales. The first of these was a sale to Henry A. Cram, in a proceeding commenced in 1860 by the Bank of Virginia and other judgment creditors against the Winifrede Mining and Manufacturing Company, the object of which was to marshal the assets of that corporation and apply them to the payment of its debts. A decree was rendered therein on January 26, 1861, ascertaining the debts of the company and their priority as liens, and ordering a sale of its property for their satisfaction. That decree directed the sale of "that ten thousand acre tract of land belonging to the Winifrede Mining and Manufacturing Company, fully set out and described in the bill and exhibits and other proceedings in this cause, and lying on Kanawha and Coal Rivers and on Field's Creek, in the Counties of Kanawha and Boone, together with all improvements thereon used in the mining, transporting, and shipping of coal, including railroad iron, picks, shovels, cars, engines, and whatever other tools and implements there may be upon the property belonging to said company." [207] The sale to Cram was duly confirmed by the court, and a deed conveying the property made to him by the commissioner. Subsequently, in 1878, Henry A. Cram, the purchaser, filed his bill in equity against Edward A. Bibby and others, in which he alleged that the purchase made by him at the sale under the decree in favor of the Bank of Virginia was made in trust on behalf of himself and others. The object and prayer of his bill were that the trusts arising out of the agreements set forth therein, in pursuance of which the purchase was made, might be administered and carried out under the direction of the court, and an account taken of the expenditures of the complainant, the property sold, and the proceeds divided among the parties in interest. By an amendment, the Winifrede Mining and Manufacturing Company was made a party to the bill; and in a second amendment it was alleged that at the sale made under the decree in the Bank of Virginia case, the railroad track and roadbed leading from the Kanawha River to the ten thousand acre tract, some five miles long, more or less, was sold and should have been conveyed by the commissioner in his deed to the complainant, but by mistake was left out and not embraced in the conveyance. The complainant, therefore, prayed that the Winifrede Min-

ing and Manufacturing Company, and all parties named as defendants in the original bill, be made defendants to the amended bill; and that the court would treat the roadway as a part of the property embraced in the deed to the complainant; adding that it was a coal property, that the road and roadbed and rails cost some $300,000, and that the property was valueless without this roadway, and the court was asked to sell the property, including the roadway, as an entirety. To this amended bill an answer was filed in the name and on behalf of the Winifrede Mining and Manufacturing Company, admitting the allegations of the bill and amendments to be true, and particularly that the property, including the roadbed and the ten thousand acre tract and rails, was sold as an entirety, and as such purchased by Cram, and should have been included in the deed from the commissioner to him as purchaser. In this suit a final decree was passed ordering a sale of the [208] property as prayed for and described. It was declared in that decree that "The legal title to the tract of 10,180 acres of land, more or less, situated on Field's Creek and Big Coal River, West Virginia, and in the bill and amended bills more particularly described, together with the roadbed and right of way from the same to the Kanawha River, including the front property," was vested in the complainant, Henry A. Cram, and the property as thus described was ordered to be sold. At this sale Theodore Wright, the appellee, became the purchaser for the sum of $120,000. This sale was confirmed by the court and a deed ordered to be made, upon payment of the purchase money.

The objection of the appellants, that these proceedings do not vest in Theodore Wright, the appellee, the title which was in the Winifrede Mining and Manufacturing Company to the premises in dispute, cannot be sustained. It could avail the appellants as a defense only by showing that the legal title was still outstanding in the Winifrede Mining and Manufacturing Company, and that as between that company and Wright the latter was wrongfully in possession; but that question has already been adjudged as between the Winifrede Mining and Manufacturing Company and Cram, to whose title Wright succeeds by the decree of the Kanawha Circuit Court, as against which that company can no longer assert any title, either at law or in equity, to the property in controversy. Wright is now vested by virtue of that decree with whatever title the Winifrede Mining and Manufacturing Company had to the premises, as completely as if that title had been conveyed to him by the company by a deed under its corporate seal. It is said, however, by the appellants, that the decree rendered in the suit in which Cram was a complainant was collusive and fraudulent, because it appears upon the face of the record that the Winifrede Mining and Manufacturing Company appeared without process and answered, but not under its corporate seal, by the same counsel who represented Cram. This, however, is not proof of fraud, but only of a consent to do what it appears to have been perfectly [209] proper to do; that is, to make good an imperfect conveyance. Were it otherwise the imputed fraud is not one of which the appellants are the proper party to complain, being strangers to the transaction.

The third assignment of error is that, before the decree in the Cram suit, the title originally acquired by the Winifrede Mining and Manufacturing Company had failed and ceased, and by force of the statute under which it was acquired had reverted to the appellants as heirs at law and assigns of John McConihay. It will be remembered that the charter of the Winifrede Mining and Manufacturing Company, having authorized it to construct a railroad from its lands to the Great Kanawha River, for that purpose invested the company with all the rights, powers, and privileges, and subjected it to all the limitations and restrictions contained in the Act entitled "An Act Prescribing Certain General Regulations for the Incorporation of Railroad Companies," passed March 11, 1837, "so far as the same are applicable to and not inconsistent with the provisions of this Act."

The Act of March 11, 1837, thus referred to, contained provisions in reference to the organization of railroad companies generally, defining the powers of directors, conferring power to condemn land for right of way and depot purposes, and providing for the assessment of damages therefor. In prescribing the mode in which the freeholders appointed to ascertain the damages payable to the proprietor of the lands, by reason of the condemnation thereof for the use of the company, should act, it declares that "They shall consider the proprietor of the land as being the owner of the whole fee simple interest therein, they shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof; and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad for the use of which his land is condemned; *Provided*, That not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the [210] commissioners."

It also provided for rendering judgment in favor of the proprietor for the amount of the damages awarded to him, and said: "And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages were assessed shall be vested in the company, in the same manner as if the proprietor had sold and conveyed it to them."

The 20th section of the Act is as follows: "The works of the company shall be executed with diligence; and if they be not commenced within two years after the passage of the Act of incorporation, and finished within the period which may be therein prescribed, and in case the company at any time after the said road is completed shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to the public, for three successive years, then and in that case also their charter shall be annulled as to the company, and the State of Virginia may take possession of the said railroad and

works, and the title thereto shall be vested in the said State so long as it shall maintain the same in the state and manner required by said charter; otherwise, the lands over which the said road shall pass shall revert to and be vested in the person or persons from whom they were taken by concession or inquisition as aforesaid, or their heirs or assigns."

The 35th section of the same Act provides that "Any part of any charter or Act of incorporation granted agreeably to the provisions of this Act shall be subject to be altered, amended, or modified by any future Legislature as to them shall seem proper; except so much thereof as prescribes the rate of compensation or tolls for transportation; *Provided*, That the rights of property acquired under this Act, or any other Act adopting the provisions of this Act, shall not be taken away or impaired by any future Act of the Legislature."

The contention on the part of the appellants is that by virtue of the 20th section of the Act of March 11, 1837, above quoted, the premises in dispute reverted to them as the heirs and assigns of John McConihay, having been appropriated to the use of the Winifrede Mining and [211] Manufacturing Company under the provisions of that Act, and having been abandoned by the company for more than three successive years for the uses for which the appropriation had taken place, and the State of Virginia not having interposed in its own behalf.

It further appears, however, that in August, 1849, a general code of laws, known as the Code of 1849, was passed by the Legislature of Virginia, to take effect on July 1, 1850. Section 1, chapter 61, of that Code, is as follows: "Every company which is governed by the Act passed on the 7th day of February, 1817, prescribing certain general regulations for the incorporation of turnpike companies, or by the Act passed on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and every company which after the commencement of this Act shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the 57th chapter and in this chapter, so far as they can apply to such company without violating its charter."

By section 11, title 17, of that Act, it is provided, in reference to the damages awarded for compensation to the proprietor for lands taken for the use of corporations, that "Upon such payment the title to that part of the land for which such compensation is allowed shall be absolutely vested in the company, county or town in fee simple." And section 28 is as follows: "When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto."

The proceedings between the Winifrede Mining and Manufacturing Company and John McConihay for the appropriation of the lands in controversy for right of way and depot pur- [212] poses for its railroad took place in 1853, and whatever title he acquired by virtue of those proceedings vested after the Code of 1849 took effect. It is contended on the part of the appellee that the nature and character of that title are determined by that Act, and not by the Act of March 11, 1837; although it is also insisted that if the Act of 1837 remained in force for that purpose, nevertheless there has been no failure of title by reason of its conditions.

In our opinion the case is not governed by the 20th section of the Act of March 11, 1837. The Act to incorporate the Winifrede Mining and Manufacturing Company does not adopt all the provisions of that Act in every particular as a part of its charter, but only "so far as the same are applicable to and not inconsistent with the provisions of this Act." A manifest difference exists between such a road as that constructed under the charter of the Winifrede Mining and Manufacturing Company for the purpose of transporting coal from the mines to a navigable river or other railroad, and such railroads as were within the purview of the Act of March 11, 1837, which were railroads for the general transportation of persons and property between distant points. It is in reference to the latter alone that we think the provisions of section 20 apply; the railroads referred to in that section plainly being such that, in case of abandonment by the company owning the same, the State of Virginia might take possession thereof and maintain them in the state and manner required by the charter of the company. The provisions of that section, in our opinion, are not applicable to the case of such a road as that of the Winifrede Mining and Manufacturing Company.

Were it otherwise, however, we are satisfied that the charter of the Winifrede Mining and Manufacturing Company, in this particular, was altered by the operation of the Code of 1849. Chapter 61 of that Act applies to companies incorporated to construct and carry on works of internal improvement, including railroads. The first section declares that "Every company which is govered by the Act passed [213] on the 7th day of February, 1817, prescribing certain general regulations for the incorporation of turnpike companies, or by the Act passed on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and every company which, after the commencement of this Act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the 57th chapter and in this chapter, so far as they can apply to such company without violating its charter." By the express terms of this section every company previously incorporated, but in existence when that Act went into operation, and which, by the terms of its charter, was governed by the Act of March 11, 1837, thenceforward was to be governed by the provisions contained in the Code. This includes the Winifrede Mining and Manufacturing Company, which, on July 1, 1850, when the Code took effect, was such a corporation. The Code of 1849 contained no such provision as that embraced within the terms of section 20 of the Act of March 11,

1887. On the contrary, it provides, in section 31, that, "If the works of any company be not commenced and completed within the time prescribed by its Act of incorporation, or if after such works be completed the company shall abandon the same, or for three consecutive years cease to use and keep them in good repair, in each of these cases the State may either proceed by *quo warranto* or take possession of the works and property of such company; and, in case of so taking possession, shall keep the same in good repair, and have all the rights and privileges previously vested in the company. But the State shall pay the company for such works and property the full value of the same at the time it takes possession thereof."

The twenty-eighth section of title 17 is as follows: "When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due to it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property, and debts among those entitled thereto."

[214] The appellants rely upon the circumstance that the charter of the Winifrede Mining and Manufacturing Company was passed after the enactment of the Code of 1849, but before it went into operation, as taking it out of the provisions of the Code when it did go into effect; but this circumstance seems to us entirely immaterial. When the Code went into effect on July 1, 1850, the Winifrede Mining and Manufacturing Company was an existing corporation, governed in certain particulars by the Act of March 11, 1887. The Code when it went into effect operated upon this company, and from that time became a part of its charter. The title which it afterwards acquired in 1858 was, therefore, not affected by the provisions of the Act of March 11, 1887, but was held by it in accordance with the provisions of the Code of 1849.

It is argued, however, by the appellants, that by the general principles of the common law, the title of the Winifrede Mining and Manufacturing Company was forfeited by the abandonment of the property, and a cesser of the uses for which only it could have been acquired, so that it reverted to John McConihay and his heirs and assigns. There was, however, no intentional abandonment of the property by the company for the uses for which it was acquired. The company became insolvent, unable to pay its debts, and to carry on its business. Its property was taken in execution by judgment creditors; a bill in equity was filed by them for the purpose of subjecting its assets to the payment of their claims. To that suit John McConihay was a party as a judgment creditor, holding a judgment for the amount of the compensation awarded to him for the premises in controversy. That judgment, among others, was paid out of the proceeds of the sale of the very property which his heirs and assigns now seek to recover. Having thus obtained the benefit of the sale on which the title of the appellee is founded by receiving a portion of its proceeds, it is not open to them to question the effect of that sale as a conveyance of the subsisting title of the Winifrede Mining and Manufacturing Company to the land in controversy. It is sufficient, however, to say that the Code of 1849, which governs the case, expressly devotes the property of the company, [215] including this right of way, to the payment of its debts, and that no forfeiture of the title, on the ground of an abandonment, can be enforced, except by the State, and on payment to the company of the value of the property, of which, in consequence of such abandonment, it takes possession.

We find no error in the decree of the District Court, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES G. FRANCKLYN AND WILLIAM S. HOYT, Committee of Person and Estate of EDWIN HOYT, *Appts.*, [215

v.

AMASA SPRAGUE; WILLIAM SPRAGUE, Individually; FANNY SPRAGUE, Individually and as Admrx. of AMASA SPRAGUE, Deceased; MARY SPRAGUE, Individually and as Admrx. of WILLIAM SPRAGUE, Deceased; THE A. & W. SPRAGUE MANUFACTURING COMPANY, AND ZACHARIAH CHAFEE, Trustee, etc.

(See S. C. Reporter's ed. 215-230.)

Guardian and ward—conveyance of minor's interest in partnership property to corporation—Statute of Rhode Island—debt of partnership to minor becomes debt of corporation—lien—lunacy—power of guardian.

1. Where the guardian of minor heirs conveys, under proper legislative authority, their interest in the property of a partnership to a corporation, which assumes all the debts of the partnership, the business of which it was organized to continue, a debt due the minors from the partnership becomes a general debt of the corporation, and does not continue to be a lien upon the property.

2. The Act of the Legislature of Rhode Island, authorizing such a transfer in the case presented, was as efficacious in relation to the estate of a minor, who was subsequently duly declared to have been of unsound mind from his birth, as it was in relation to the estate of the other children.

3. An ordinary guardian is a sufficient custodian of the person and property of a minor of unsound mind.

[No. 75.]

Argued Dec. 3, 1886. Decided April 11, 1887.

APPEAL from the Circuit Court of the United States for the District of Rhode Island. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **William Allen Butler** and *James McKeen*, for appellants:

The rule for which we contend is the settled rule of equity, which, while it gives due effect to the proprietary right of surviving partners for all purposes of partnership settlements

protects the interest of the deceased partner's heirs and next of kin in respect to his share of the partnership estate as it existed at his death, and, after satisfying creditors of the dissolved firm, follows specific property into the hands of the survivors, and charges it with the decedent's interest as against them and their creditors in new transactions.

Hooley v. *Gieve*, N. Y. Ct. App. 9 Abb. N. C. 8, 26; *West* v. *Skip*, 1 Ves. Jr. 239; *Ex parte Rowlandson*, 2 Ves. & B. 172; *Viner* v. *Cadell*, 3 Esp. 90; *Stocken* v. *Dawson*, 9 Beav. 239; *Flockton* v. *Bunning*, L. R. 8 Ch. App. 324, note.

Where a fund exists and has been ascertained as to value, and is payable out of specific property in the hands of solvent parties to a party entitled to such payment in preference to all other persons, such specific property may be followed into the hands of any person except a *bona fide* purchaser, or a party who has acquired a specific lien by the levy of an execution or attachment.

2 Story, Eq. § 1258; Perry, Trusts, § 829; Hill, Trustees, 222; *Piatt* v. *Oliver*, 3 McLean, 27; *Oliver* v. *Piatt*, 44 U. S. 3 How. 333 (11: 622); *National Bank* v. *Ins. Co.* 104 U. S. 54 (26: 693).

Messrs. **Benj. F. Thurston** and *C. Frank Parkhurst*, for appellees:

Where a contract is made in good faith with a lunatic, for a full and fair consideration, and has been executed without knowledge of the insanity, such contract will be sustained. Such contract cannot be rescinded by the lunatic or his representatives, unless the parties can be placed *in statu quo*.

Gribben v. *Maxwell*, 34 Kan. 8; *Scanlan* v. *Cobb*, 85 Ill. 296; *Ashcraft* v. *DeArmond*, 44 Iowa, 229; *Freed* v. *Brown*, 55 Ind. 310; *Eaton* v. *Eaton*, 37 N. J. L. 108; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Matthiessen* v. *McMahon*, 38 N. J. L. 542; *Elliot* v. *Ince*, 7 DeG. M. & G. 475; *Price* v. *Berrington*, 7 Eng. Law. & Eq. 254; *Niell* v. *Morley*, 9 Ves. 478; *Beavan* v. *McDonnell*, 9 Exch. 309; *Molton* v. *Camroux*, 2 Exch. 486; *Bank* v. *Moore*, 78 Pa. 407; *Young* v. *Stevens*, 48 N. H. 133; *Carr* v. *Holliday*, 5 Ired. Eq. 167; *Beals* v. *See*, 10 Pa. 56; *Dane* v. *Kirkwall*, 8 C. & P. 679; *Mut. L. Ins. Co* v. *Hunt*, 79 N. Y. 541; *Rusk* v. *Fenton*, 14 Bush (Ky.) 490.

The fact that the complainant was a nonresident minor, whose property in Rhode Island was under guardianship, in accordance with the laws of Rhode Island, is nowhere disputed. The validity of the appointment of a guardian under those laws, and the power of such guardian over the disposition of the ward's property in Rhode Island, has been fully settled in the cases of *Hoyt* v. *Sprague* and *Francklyn* v. *Sprague*, 103 U. S. 613-637 (26: 585-595).

[216] *Mr. Justice* **Bradley** delivered the opinion of the court:

All the essential facts on which this case is based are the same as those involved in the cases of *Hoyt* v. *Sprague*, and *Francklyn* v. *Sprague*, reported in 103 U. S. 613 [26: 585]. The evidence used in those cases was imported into this by agreement of the parties, and only one new feature has been added: this is the mental incapacity of the present complainant, Edwin Hoyt, called Edwin Hoyt, Jr., in the former cases. The bill of complaint contains substantially the same statements as the bills in those cases, with the addition of an averment that the complainant, by certain proceedings had in the Supreme Court of New York in April, 1874, commonly called a commission of lunacy, was declared to be of unsound mind, incapable of taking care of himself or his property; that he had been in that condition during all his life; and that said Charles G. Francklyn and William S. Hoyt were appointed the committee of his person and estate. The principal facts out of which the litigation grew are stated in the report referred to; but it is proper to restate such of them here as may have a special bearing upon the questions growing out of the alleged incapacity of the complainant.

The brothers, Amasa and William Sprague the elder, were engaged as manufacturers in Rhode Island under the firm of A. & W. Sprague, for many years prior to December, 1843, when Amasa Sprague died, leaving a widow, Fanny Sprague, two sons, Amasa and William the younger, and two or three daughters. William, the survivor, with the consent of his brother's widow, who became administratrix of his estate, continued the business under the same partnership name, for the joint benefit of himself and his brother's family, until October, 1856, when he died, leaving a widow, Mary Sprague, a son, Byron Sprague, and four grandchildren, being the children of a deceased daughter, Susan S. Hoyt, wife of Edwin Hoyt, of New York. This daughter had died in October, 1853, and her children [217] were Sarah Hoyt, Susan S. Hoyt, born October, 1845, William S. Hoyt, born January 1, 1847, and Edwin Hoyt, the complainant, born July 16, 1849. Shortly prior to the death of William Sprague the elder, he had taken into the firm as partners with him, his son Byron, and his two nephews, Amasa and William Sprague the younger; so that at the death of William Sprague, in October, 1856, these young men were the surviving partners of the firm. By the enterprise of William Sprague, the property of the joint concern had greatly accumulated, being estimated at the time of his death at several millions of dollars. His widow, Mary, took out letters of administration on his estate; and, on the petition of her son-in-law, Edwin Hoyt, she was appointed guardian of the property and estate, in Rhode Island, of each of her grandchildren, who were the children of the said Edwin Hoyt, and all under fourteen years of age. This was done in February, 1857.

The parties then interested in the joint property of A. & W. Sprague were the two families of Amasa and William Sprague the elder in equal parts; that of the former being represented by Fanny Sprague, widow and administratrix, and her two sons Amasa and William (who had purchased the interest of their sisters); and that of the latter being represented by Mary Sprague, widow and administratrix, her son Byron, and her four grandchildren, the Hoyts, whose interests were represented by her as guardian of their property and estate. This made the property divisible into six equal shares: each widow being entitled to one third

of her husband's part, and the two sons of Amasa being each entitled to a third of his interest; Byron Sprague being entitled to one third of his father's interest, and the Hoyt children being entitled to the remaining third. As the factories were in successful operation, and as a division of the property was deemed undesirable, all the parties concerned capable of exercising judgment, including Edwin Hoyt, the father of the four minors, were agreed upon the expediency of continuing the operation of the works as a joint concern for the benefit of all, in proportion to their several interests; and [218] it was so done, the factories and operations being conducted by Amasa and William Sprague the younger, and Byron Sprague. In 1862 Byron Sprague sold out his interest to his cousins Amasa and William for $600,000, which gave to each of the latter a share and a half of the entire six shares.

Soon after this, two charters were obtained from the Legislature of Rhode Island, for the purpose of vesting the property of the concern in corporate bodies, one to be called the A. & W. Sprague Manufacturing Company, and the other the Quidnick Company.

In January, 1868, Mary Sprague, as guardian of the estate of her four minor grandchildren, together with their father, Edwin Hoyt, presented a petition to the Legislature of Rhode Island, representing that they deemed it advisable and expedient that the interests of the said minors should be vested in such corporation or corporations as should be organized under and in accordance with the charters granted as aforesaid, and praying as follows:

"Wherefore, your petitioners pray that whenever any corporation or corporations shall be organized under either or any of the charters aforesaid, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property in any such corporation or corporations, upon the execution by said Mary and Edwin as principals of every such bond or bonds in such penal sum or sums, and with such sureties, as the Court of Probate of Warwick shall require, conditioned for the investment of the amount of the full value of the interests hereinafter prayed to be conveyed in the capital stock of any such corporation or corporations to which such interests shall be conveyed as hereinafter prayed, in the names and for the use and benefit of said minors; and on the delivery of such bond or bonds to said court of probate, the said Mary in her capacity as guardian may make, execute, seal, acknowledge, stamp, and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the title of the said minors in and to said property in any such corporation or corporations; and that any such conveyance [219] or conveyances, so executed, acknowledged, stamped, and delivered, shall be deemed and held as valid and effectual in law and equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, and delivered by said minors after attaining their majority; and as in duty bound will ever pray.

MARY SPRAGUE, *Guardian.*
EDWIN HOYT."

In pursuance of this petition, the Legislature, on the 9th of March, 1868, passed a Resolution, having the effect of a law, by which it was enacted as follows:

"*Voted and resolved,* That the prayer of said petition be, and the same is hereby, granted; and the said Mary Sprague, in her capacity as guardian of the estate of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt, and Wm. S. Hoyt, is hereby authorized and fully empowered, whenever any corporation or corporations shall be organized under either or any of the charters heretofore granted by the General Assembly of this State, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property so held, owned, or managed by the firm of A. & W. Sprague in any such corporation or corporations, to make, execute, seal, acknowledge, stamp and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the right, title and interest of the said minors in and to said property, or any portion thereof, in any such corporation or corporations; and that any such conveyance or conveyances, so executed, acknowledged, stamped and delivered, shall be deemed and held as valid and effectual in law and in equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, stamped and delivered by said minors after attaining their majority; *Provided,* That before the delivery of any such conveyance or conveyances the said Mary shall have executed and delivered to the Court of Probate of Warwick every such bond or bonds with herself in her said capacity and said Edwin Hoyt as principals, in such penal sum or sums and with such [220] sureties as said probate court shall require, conditioned for the investment of the amount of the full value of the interests of said minors which she shall then be about to convey in the capital stock of any such corporation or corporations to which the same shall be conveyed in the names and for the use and benefit of said minors."

This legislative Act was adjudged by this court, in the cases of *Hoyt* and *Francklyn* v. *Sprague,* before mentioned, to be valid and effective to authorize Mary Sprague, as guardian of the estate of the four minors, to convey their interests in the A. & W. Sprague property to the corporations named.

The terms of the Act were duly complied with, and by an agreement executed on the first of April, 1865, by and between all the parties interested in the property, in their various capacities, including Edwin Hoyt, as father of the four minor children, and Mary Sprague, as the guardian of their estate, and as administratrix of her husband's estate, referees were appointed to appraise the entire property and to report the amount of each one's interest therein, with a view to adjust the several shares of capital stock in the corporations to be formed to which each would be entitled. This duty was performed by the referees, who brought the accounts down to the 31st day of March, 1865, and reported that on that day the cash value of the whole property and assets, exclusive of the Quidnick Company property (which was appraised by itself in consequence of outside parties having some interest therein), was

$6,782,906.69, and that the liabilities amounted to $2,871,921.79, leaving the net value of the estate equal to $3,860,984.90. The different interests in this amount they reported to be as follows:

Mary Sprague's individual interest	$624,984 69
Fanny Sprague's interest	625,511 69
William Sprague's interest	978,867 42
Amasa Sprague's interest	978,867 42
Mary Sprague, guardian of children of Susan Hoyt	652,753 68

[221] They then stated the result of the individual accounts of the several parties with the firm, showing what each was indebted thereto, and what was due to each; and, in this connection, the sum of $188,333.33 was credited as due from the firm to Mary Sprague, guardian of the heirs of Susan Hoyt, to equalize the amounts drawn out of the firm by the two Rhode Island families for their family expenses.

The stock of the A. & W. Sprague Manufacturing Company was awarded by the referees to the various parties, according to the value of their respective interests in the property, independently of the amounts due from or to them respectively, which last amounts remained as debts due to or from the Company. When the property was conveyed to the Corporation, as hereinafter mentioned, it was stipulated, as an express condition, that the Corporation was to assume all the liabilities of the firm of A. & W. Sprague. There being found due to Mary Sprague, as administratrix, for a dividend previously made by the firm, the sum of $164,250.26, she elected to take stock for that, instead of the liability of the Company; which increased the total amount of the stock to the sum of $4,025,285.16. This being divided into 10,000 shares, made each share equal in value to $402.52, and gave to Mary Sprague, as guardian of her grandchildren, including their portion of the shares allotted to her as administratrix, 1751 shares, or 439 shares each.

The Quidnick property was valued at $776,065, and divided into 5000 shares, of which 489 shares were allotted to Mary Sprague as guardian of her grandchildren, including their portion of the shares allotted to her as administratrix, being 122 shares to each.

The precise interests of the parties having thus been ascertained, in August, 1865, Mary Sprague, as guardian of the Hoyt children, applied to the Probate Court of Warwick (the proper jurisdiction) for an order to authorize her, in pursuance of the Act of Assembly, to convey to the respective corporations the interest of her wards in the properties of the firm of A. & W. Sprague, and of the Quidnick Company, in exchange for the shares to which they were entitled by the report of the referees. On [222] the 5th of August, 1865, an order was made accordingly; and on the 9th of August, 1865, an instrument was executed by all the parties, including Mary Sprague, as guardian of the Hoyt children, by which, after reciting the powers given to her by the Act of Assembly and the order of the probate court, they conveyed and transferred to the A. & W. Sprague Manufacturing Company all their respective right, title and interest in the entire property of A. & W. Sprague, except the Quidnick property, including all the right, title and interest of said minors, with the following stipulation, to wit: "It being expressly understood that this conveyance is made upon condition that the grantees are to assume the liabilities of said firm of A. & W. Sprague, in accordance with said agreement of reference hereinbefore referred to."

A similar deed of conveyance was made to the Quidnick Company (corporation) for the Quidnick property and assets.

Thereupon, after adjusting the fractional shares, each party was credited, on the stock ledgers of the respective companies, with the shares to which they were severally entitled, the Hoyt children being each credited with 439 shares of the A. & W. Sprague Manufacturing Company, and 122 shares of the Quidnick Company.

In June, 1866, Mary Sprague, as guardian of her said grandchildren, presented to the probate court a petition for the appointment of appraisers, to appraise the property of her wards in her hands, in order that she might return an inventory thereof. Appraisers were accordingly appointed, and performed the duty required of them, and presented inventories and appraisements of each ward's estate, which were sworn to by Mary Sprague, and filed, and approved by the court on the 13th of August, 1866. That of Edwin Hoyt, Jr., with which the others substantially corresponded, was as follows, to wit: [223]

124 shares National Bank of Commerce, $51	$ 6,324 00
1 U. S. 6 per cent bond	108 50
2 N. Y. Prov. & Boston R. R. bonds, $950	1,900 00
439 shares A. & W. Sprague Mf'g Co. stock, 402 52/5	176,707 82
122 shares Quidnick Co. stock	18,935 98
Cash	387 44
	$204,363 74
Dividend due from A. & W. Sprague, as cash, March 31, 1865, with interest from that date	47,083 34
	$251,447 08

Mary Sprague, in her answer states that the bank stock and bonds had been purchased by her, before the organization of the corporations, with moneys drawn by her from time to time, as guardian, from the firm of A. & W. Sprague. The dividend of $47,083.34, "due from A. & W. Sprague, as cash, March 31, 1865," was one fourth of the sum of $188,333.33 allowed to the Hoyt children, as before stated.

At the same time, Mary Sprague presented her account, as guardian, with each of her wards, based on the appraisement, notice of such presentation having been duly published in pursuance of a previous order; and the accounts were severally allowed on the same 13th of August, 1866.

After these proceedings were had, Mary Hoyt resigned her guardianship, which resignation was accepted by the court; and on the application of Edwin Hoyt, the father, stating that it was the desire of his three younger children, Susan S. Hoyt, William S. Hoyt, and Edwin Hoyt, Jr., that William Sprague should be appointed guardian of their estate in Rhode Island (Sarah having become of age), the appointment was made as requested, and William

Sprague, as guardian of the estate of the three younger children, on the 1st of September, 1866, gave the requisite bonds, and filed an inventory in each case, the same as had been presented and filed by Mary Sprague, with the addition of a further dividend made by the corporations on the 1st of September, less amounts [224] paid for the benefit of the wards repectively. The account in the case of Edwin Hoyt, Jr., the complainant in this case, duly verified by appraisers, and by the oath of William Sprague, guardian, was as follows, to wit:

124 shares National Bank of Commerce $51		$ 6,324 00
1 U. S. 6 per cent bond		108 50
2 N. Y., Prov. & Boston R. R. bonds, 950		1,900 00
439 shares A. & W. Sprague M'f'g Co., 402 5 2 7 5		176,707 82
122 shares Quidnick Co., 155 5 1 8		18,935 98
Dividend due from A. & W. Sprague, as cash, March 31, 1865		47,083 34
Dividends due from A. & W. Sprague M'f'g Co., cash, Sept. 1, 1866	$6,585 00	
Less payments by above company	2,979 60	
		3,605 40
Dividends due from Quidnick Co. as cash, Sept. 1, 1866		1,220 00
No real estate.		
		$255,885 04

At this time Edwin Hoyt, Jr., the now complainant, was seventeen years of age, Susan nearly twenty-one, and William S., nineteen.

The record shows various accounts rendered to Susan and William after they became of age, and various amounts paid them. Whether any further sums were advanced on Edwin's account beyond the $2,979.60 charged in the inventory does not appear. He lived with his father in New York, who was a member of the firm of Hoyt, Sprague & Co., a firm intimately connected with the Rhode Island Companies, and may have had no occasion for advances on account of his interest.

In the fall of 1873 the A. & W. Sprague Manufacturing Company became embarrassed and suspended payment, and on the first of November, 1873, the said Company, together with Amasa and William Sprague, and the said Fanny and Mary Sprague, made an assignment to Zachariah Chafee, of all the property, real and personal, of said Company and of the said parties individually, and of the firm of A. [225] & W. Sprague (excepting shares of capital stock in any corporation) in trust for the benefit of such creditors as should accept, in payment of their debts, the notes of the Company payable in three years from January 1, 1874, with interest. Subsequently, on the 6th of April, 1874, a further assignment was made by said A. & W. Sprague and the A. & W Sprague Manufacturing Company, to said Chafee, of all of said property, in trust, first, for the benefit of such creditors as should come in and take said notes in payment of their debts: and secondly, the residue for the benefit of all other creditors of said parties.

In December, 1873, Susan S. Hoyt, who came of age in October, 1866, and who afterwards married Charles G. Francklyn, received from her guardian, William Sprague, the stocks and bonds mentioned in his inventory of her estate before referred to (except the shares in the A. & W. Sprague Manufacturing Company, which were probably deemed worthless); and William S. Hoyt received the stocks and bonds mentioned in the like inventory of his estate. It is also to be inferred from the pleadings and evidence that Edwin Hoyt, Jr., the complainant, at the same time received the stocks and bonds mentioned in the like inventory of his estate. The bill admits that William Sprague, the guardian, delivered to the complainant (Edwin Hoyt, Jr.,) "123 shares in the Quidnick Company, and certain other shares of stock," to which he informed the said Francklyn and William S. Hoyt the said Edwin was entitled. It also appears that, on the 9th of December, 1873, Edwin Hoyt, Jr., by an instrument executed by him, sold and assigned his Quidnick Company stock (122 shares) to said Charles G. Francklyn, for the sum of $34,000; and on the same day executed a power of attorney to his father, Edwin Hoyt, to transfer the same. Both of these instruments were acknowledged by said Edwin Hoyt, Jr., before a commissioner for the State of Rhode Island, in the City of New York. A week previously to this; namely, on the first of December, 1873, William S. Hoyt went to Providence to get the various stocks transferred by the guardian to the parties for whom they were held, but, not finding him there, wrote him the following letter, to wit:

"PROVIDENCE, *Dec.* 1, 1873. [226]

"Hon. WILLIAM SPRAGUE:

"DEAR SIR: I come here to get you to transfer to the respective owners the Quidnick and bank stock which you hold as guardian for my sister, brother, and me; but, as you are absent, I leave with Mr. Greene the power appointing me attorney for my brother and sister, and enclose power appointing Mr. Greene attorney to make the necessary transfer, which please execute, and send to him by return mail.

"Yours Truly, W. S. HOYT."

From these statements and proofs it is not only fairly to be inferred that the complainant actually received the bonds and stocks held for him by his guardian, William Sprague, but that his father and the said Charles G. Francklyn and William S. Hoyt his brother-in-law and brother, who now appear as his committee in this suit, dealt with him as a person capable of transacting business as late as December, 1873.

Indeed, in view of the decision of this court in the cases of *Hoyt* v. *Sprague* and *Francklyn* v. *Sprague*, 103 U. S. 613 [*supra*], the appellant, by his said committee, does not claim, before this court, anything but his one fourth part of the sum of $188,833.33, which was allowed to the Hoyt children by way of compensation for the amounts drawn out of the concern by the Rhode Island families for their family expenses. The contention is (and that is the matter now presented for consideration), that this sum was never converted into the stock of the Corporation, but remained a lien on the partnership property, and followed it as such in the hands of the Corporation with priority over all other claims against it, except the

debts of the firm then due and owing. Can this proposition be maintained? There is no doubt that in 1865, before the property of A. & W. Sprague was conveyed to the Corporation, Mary Sprague, as administratrix of her husband's estate, had a lien on the partnership property (subject to the debts then due) for the whole amount of her interest therein; and it was then in her power, had she thought fit, to have demanded a settlement and distribution of the partnership property according to the [227] several equities of the parties concerned, including the just share of herself and her wards, and, in that share, and as a part of it, the said sum of $188,333.33. But she deemed it more for their advantage (as well as her own) that the property should be kept together, and vested in the corporations proposed to be formed; and in this view she was supported by the opinion and advice of Edwin Hoyt, father of the minors. The Act of the Legislature of March 9, 1863, gave her power to convey all the right, title, and interest of the said minors in and to the property, to the respective corporations. And this she did. By her conveyance, and that of the other interested parties, the entire property and assets of the partnership were conveyed to, and vested in, the corporations, those of A. & W. Sprague in the A. & W. Sprague Manufacturing Company, and those of the Quidnick Company in the Quidnick Corporation, subject, however, to the debts and liabilities of every kind and description. The debts and liabilities of the firm of A. & W. Sprague thereupon became the debts and liabilities of the A. & W. Sprague Manufacturing Company. The property ceased to be partnership property and became consolidated in a unity of interest in the Corporation. The partners ceased to be partners, and became holders of shares in the capital stock of the Company. Their lien as partners ceased when their character of stockholders began. The mutual accounts showed that various sums were due to the several partners from the firm, or from them to the firm. They might have adjusted these individual balances by stock, adding an equivalent in stock to those who had balances of credit, and deducting an equivalent of stock from those whose balances were against them. But they preferred that these balances should stand as debts and credits against or in favor of the Corporation when organized, and they were all disposed of in that way, except one item due to Mary Sprague, as administratrix, for a dividend formerly made by the firm, as before stated(This she preferred to take in stock, and the others consented to it; and she afterwards allotted to her wards their proper share of it. The sum of $188,333.33 which had been credited to Mary Sprague as guardian of her grandchildren, to equalize the [228] sums drawn out by the other parties for family expenses, she preferred to stand as a debt of the Corporation, as it had been a debt of the firm. It was so arranged. The Corporation, by the terms of the transfer of all the property, succeeded to and assumed all the debts and liabilities of the firm, this amongst the rest. This liability was treated exactly like all others, whether due to the partners or to strangers. It was treated as a debt.

Now, can it be justly contended that these debts due to the several partners, when they became the assumed debts of the Corporation, continued to be liens upon the property, as they had been when it was partnership property? We think not. This would have been subversive of the whole plan. The relation of the parties to the property was entirely changed Their lien as partners, as well as their character of partners, was extinguished. A conveyance or release of property by one who has a lien on it, necessarily extinguishes the lien. Mary Sprague, as administratrix and guardian, after conveying to the Corporation all her interest and the interest of her wards in the property, parted with all right in it, and accepted in lieu of it shares for her aliquot part in the body of it, and the assumption and engagement of the Corporation to pay the balance due to her on the accounts. Having conveyed and parted with the property by virtue of an authority conferred by law, her lien upon it was gone; and those who claim through and under her cannot set up any such lien.

It cannot be said that she sacrificed the interests of her wards by retaining the claim as a debt instead of taking stock for it, as she might have done; because a debt always has priorty over capital stock, and is a more favored claim in the law.

The argument that the Corporation, being the creature of the partners, was not a *bona fide* purchaser, and must be considered as having taken the property subject to all partnership equities against it, is not a sound one. The constitution of the Corporation, and the transfer to it of the property, were authorized by law, and were intended to settle and extinguish these equities, and to place the concern on a new footing; and the very parties entitled to equities were the ones who organized the Corporation, [229] and made the conveyance to it. Besides, it is not the Corporation alone which is concerned in the transfer, but the creditors who trusted it after it was formed. They, or at least the great mass of them, certainly stand in the position of *bona fide* claimants against its property and assets. They may not be able to claim any precedency over the former partners having debts due to them, but they stand on an equal footing with them.

With these views as to the effect of the conveyance of the interest of the Hoyt children to the A. & W. Sprague Manufacturing Company, the proceedings taken in 1874 by C. G. Franckly and Wm. S Hoyt, to have the complainant in this case declared to be of unsound mind from his birth, cannot have any effect to change the conclusion which we reached in the former cases. Whether he was of unsound mind or not, Mary Sprague was the lawful guardian of his property and estate in Rhode Island from the time of her first appointment in 1857, when he was seven years old, and continued such. with all the rights and powers of a guardian, until she resigned that charge in 1866; and the Act of the Legislature was just as efficacious in relation to his estate as it was in relation to that of the other children. As long as he was a minor, an ordinary guardian was all the custodian of either his person or estate that was required. It was only after he became of age

and the power and functions of the guardian ceased, that a committee to take charge of his person and estate was needed.

In Shelford on Lunacy it is said: "It seems that a commission of lunacy may issue against an infant; but as the court of chancery has power over infant wards of court and their estates, such a proceeding seems unnecessary during the minority of the ward, except under particular circumstances, when the more ample powers given in lunacy may be required for managing their estates." In Stock on Non Compotes Mentis, it is also said, that "Infancy is not a ground for withholding [a commission of lunacy], except in so far as it renders such a proceeding unnecessary, by subjecting the infant to another protective power of the Chancellor." Both writers refer to a case cited in [230] argument in *Ex parte Hale*, 2 Ves. Sr. 403. In the present case, no word of the complainant's imbecility was ever heard until after the insolvency of the company; and even if it had appeared whilst he was a minor that he was of unsound mind, the legislative Act gave full power to the guardian to dispose of his estate, in the manner she did, and removed all objections on that score.

The decree of the Circuit Court is, therefore, affirmed.

Mr. Justice **Blatchford** did not sit in this case, or take any part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF JOLIET, *Appt.*, *v.* JOSEPH HILLER FOSTER ET AL.

122 US 639

The decree of the court below enjoining the City of Joliet, Illinois, its officers and employés, from interfering with the appellees in completing, maintaining, operating and repairing the system of water works owned by them, is affirmed by a divided court.

[No. 1114.]

Submitted Feb. 7, 1887. Decided March 21, 1887. Rehearing denied April 11, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

The bill in this case was filed by the appellees to perpetually enjoin the appellant, its officers and employés, from interfering with the complainants in maintaining, operating and repairing a system of water works in the City of Joliet, Illinois, to which the complainants derive title as successors of one Jesse W. Starr, Jr., who held under certain contracts with said City. The court below *held* that the complainants by virtue of certain foreclosure proceedings had succeeded to all the rights of said Starr, and the City of Joliet Water Works Company, including all of the rights acquired by said Starr under the original contract and the supplemental contracts with the City of Joliet; that said system of water works was completed in substantial compliance with the requirements of said contracts, except as to the covenants of said Starr concerning the sinking of artesian wells, the construction of a receiving reservoir, and the capacity to throw five streams of water to a height of one hundred feet; that the complainants were entitled to complete and maintain said system of water works in accordance with the provisions of said contracts; that said contracts and the rights of the complainants thereunder were not forfeited by the resolutions of the city council of said City, of December 13, 1881; and that said City was not, under the circumstances of the case, at the date of said resolutions nor at the date of the hearing in said court, entitled to declare or enforce a forfeiture of said contracts or of the rights of the complainants thereunder. The decree enjoined said City, its officers and employés from interfering with the complainants in the enjoyment of their said rights, provided that they should, within a time named, comply with the conditions of said contracts as respects the artesian wells, the receiving reservoir and the capacity of their works to throw five streams of water to a height of one hundred feet. For the opinion of the court below, fully stating the case, see *Foster* v. *City of Joliet*, 27 Fed. Rep. 899.

Messrs. **Thomas Dent** and **Melville W. Fuller**, for appellant.

Mr. **J. L. High**, for appellees.

Mr. Chief Justice **Waite** announced that the decree of the court below is affirmed by a divided court.

Petition for rehearing denied.

THATCHER HEATING COMPANY ET AL., *Appts.*, *v.* JOHN H. BURTIS ET AL. [286]

(See S. C. Reporter's ed. 286-295.)

Patent law—fireplace heaters—claim for combination, void for want of novelty.

The claim for a combination, no matter how or by what means it is or may be effected, in letters patent No. 104376, for improvements in fireplace heaters, is void for want of novelty.

[No. 150.]

Argued April 5, 1887. Decided April 18, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. Opinion below, 12 Fed. Rep. 569. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **B. F. Lee**, for appellants.

Mr. **A. J. Todd**, for appellees.

Mr. Justice **Matthews** delivered the opin- [287] ion of the court:

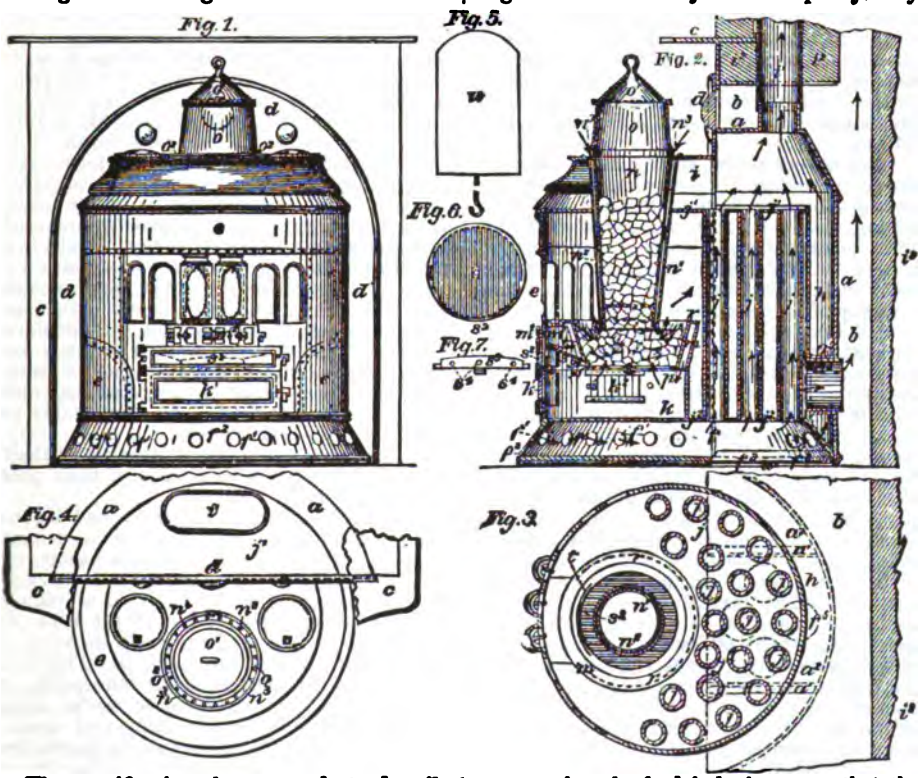
This is a bill in equity filed December 13, 1875, by the appellants, as assignees of John M. Thatcher, to restrain the alleged infringement of letters patent No. 104376, dated June 14, 1870, granted to John M. Thatcher for certain new and useful improvements in fireplace heaters. There was a decree below dismissing the bill, from which the complainants prosecute the present appeal.

The patentee in his specification describes his invention as follows:

"My invention consists, first, of a base burning fireplace stove, in which are combined the following elements, namely: A cylinder or body projecting outward from the mantel or frame,

a fuel magazine or feeder within the said cylinder, and an opening through which the said magazine can be fed from above. The object of this part of my invention is to increase the capacity of the fuel magazine; secondly, of a base burning fireplace stove or heater in which the magazine or feeder is extended to the feed opening of the outer casing, so that there may be no open space across which to project the fuel on feeding the magazine; thirdly, in the combination, with a fireplace stove or heater, of a feeder or magazine projecting above the top of the heater, so as to increase the capacity of the said magazine.

[288] "Figure 1 is a front view of my improved fireplace heater; Fig. 2, a vertical section of the same; Fig. 3, a sectional plan; Fig. 4, a plan view with part of the mantel removed; Fig. 5, a view of the "slicer" or plate to be introduced into the fire pot under the "feeder," for the purpose of holding up the coal which is unconsumed when the clinkers, ashes, etc., in the lower part of the fireplace have to be removed; Fig. 6 is a plan view of the grate, and Fig. 7 an edge view of the grate."



The specification then proceeds to describe in detail the various parts and arrangements of the heater, but as that portion is not material to a determination of the questions arising in the case it is omitted. The specification then proceeds as follows:

"A more minute description of my improved heater than that given above will be unnecessary, as several of the parts described and illustrated in the drawings form the subjects of other patents, and my present improvements relate especially to the top feeding arrangements of a fireplace stove or heater. I will now refer more particularly to these improvements. [289]

"In constructing my improved heater I have so combined three elements or features as to produce an important result. These features are as follows: First, a cylinder or body of the heater projecting outward from the frame or mantel; second, a feeder or fuel magazine within the cylinder; and, thirdly, an opening through which the said magazine can be fed from above.

"While fireplace stoves or heaters with protuberant cylinders and feeders or magazines were known prior to the date of my invention, I am not aware that the above combination of three features above referred to—namely, a top feeding arrangement, a protuberant cylinder permitting such an arrangement, and a magazine within the cylinder—has ever been known or used prior to my invention of the same.

"It has been the practice to so construct base-burning fireplace stoves or heaters that the fuel had to be introduced into the feeder or magazine through a doorway in front; hence the magazine was of a very limited capacity. By so arranging the feed hole, however, that the fuel can be introduced into the magazine from above, the capacity of the magazine is increased—a result which I especially aimed at in adopting the first part of my invention; namely, the above mentioned combination, and in the production of my top-feeding, base-burning fireplace stove.

"The second part of my invention consists in extending the feeder or magazine to the feed hole of fireplace stoves. This not only in-

creases the capacity of the magazine to some extent, but an uninterrupted passage or guide is afforded for the introduction of fuel into the magazine through the opening in the outer casing.

"The capacity of the magazine is still further increased, in the present instance, by carrying the feeder up above the top of the heater, by placing thereon a movable section, *o*, furnished with a cover, o^1, which has to be lifted off when coal has to be introduced into the magazine."

The first and second claims, which are alone involved in this controversy, are as follows:

"1. A base burning, fireplace stove, in which are combined the following elements; namely, a cylinder or body projecting outward from the mantel or frame, a fuel magazine or feeder [290] within the cylinder, and an opening through which the said magazine can be fed from above.

"2. A fireplace stove or heater, in which the magazine is extended to the feed opening of the outer casing."

The case turned in the circuit court on the question of the validity of the patent on the ground of want of novelty in the invention in view of the state of the art at its date. In passing upon this question on final hearing, *Judge* Wallace, in his opinion, stated the grounds of his decree dismissing the bill, as follows:

"It is conceded that these claims are to be construed broadly, so as to cover the combination of a fireplace heater having a body projecting outwards from the mantel or frame, and a furnace like portion in the chimney behind the mantel, with a fuel receptacle within the cylinder of the heater, which will preserve a supply of unignited coal while the heater is in operation, and an opening through which the magazine can be fed from above, the magazine extending to this opening. Inasmuch as the heater was old, and the fuel receptacle with the described opening was old when located within an ordinary coal stove, what Thatcher accomplished was merely the advantageous location of the fuel receptacle within the fireplace heater. As the complainants' expert, Mr. Brevoort, states: 'The problem Thatcher had before him was to place the fuel magazine within the Bibb & Augee heater.'

"It must be conceded that it was not obvious that such a fuel magazine could be advantageously employed in such a heater. Attempts had been made by others to do the same thing without satisfactory result, but Thatcher's organization was a success, and immediately commended itself to the public But Thatcher's broad claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization, but there was none in merely bringing those parts together. They did not perform any new function in the new arrange- [291] ment. The fuel magazine does just the same work in the new structure it did in the ordinary coal stove. All the other parts of the fireplace heater operate precisely as they would if the ordinary fuel pot were used instead of the substituted magazine. The parts do not co-operate to produce a new result. By their aggregation the new structure contains all the advantages which resided before separately in several structures. The new heater is, therefore, a better heater than any which preceded it, but it does not present a patentable combination, irrespective of the means employed to adjust the several parts into efficient relations to each other.

"As, concededly, the claims of the patent are not to be limited to any such combination, they must be held void for want of patentable novelty." 12 Fed. Rep. 569.

On this appeal, counsel for the appellants contest the accuracy of the positions of the circuit court on which its decree is founded, and in opposition thereto contend: First. That it was sufficient to support the patent that Thatcher found out that the fuel magazine was useful in its new situation, and that its use in this new situation was not obvious to those skilled in the art; in other words, that Thatcher having succeeded in making a better fireplace heater than any that had gone before it, by doing something that was not obvious to those skilled in the art, what he did involved invention as distinguished from mere mechanical skill. Second. That as regards fireplace heaters, the fuel magazine did perform a new function, because its use was never before known in such structures. Third. That the parts of the combination stated in the claims did not constitute a mere aggregation, but co-operated to produce a new result. This new result, it is claimed, consisted in securing in fireplace heaters a uniform and steady heat that could be regulated for their own purposes by the occupants of the upper rooms, heated by means of furnace registers, at the same time furnishing heat for the room in which it was situated by means of a heater that did not require frequent attention. The result of the contention on these points as claimed is that the fireplace heater of the patent, containing a magazine extending to the outer casing of the heater, capable of holding a supply of unignited coal, and feeding the same to the fire, was patentable as a new article of manufacture. [292]

Mr. Brevoort, the principal expert on behalf of the appellants, states the case on their part in his testimony as follows:

"The problem which Thatcher had before him was to place the magazine of his patent within the Bibb & Augee fireplace heater, or rather, his invention may be said to have consisted in the conception of the idea of taking out the fuel chamber or pot of the Bibb & Augee device, and substituting therefor a magazine of the kind shown in the Thatcher patent, the execution of which conception, if successful, had for its object to confer upon the fireplace heater the regularity and steadiness of action which alone could be secured by the use of a magazine standing ready always to automatically feed the fire whenever it may become necessary. Now, it was not at all an obvious thing that this large mass of unignited coal could be put within the comparatively limited compass necessary for the ordinary fireplace heater in place of the incandescent coal contained in the pot or fuel chamber of the Bibb & Augee heater, and still leave a heater which would be successful. Indeed, one of the defendants' witnesses in this case placed a magazine in a fireplace heater, tried it, and

abandoned it as useless and as a positive injury, rather than, as future experiments have shown, a great benefit, to the structure. Another witness seems to have introduced a magazine into one of his fireplace heaters at about the date of Thatcher's patent. This witness says that he did not think it was important, but says that had he known anything of its importance he would have got a patent for it. These two witnesses clearly show that the putting of a magazine into a fireplace heater was not obviously a good method of improving the old Bibb & Augee heater, and that even after a magazine had been introduced, that its utility was not manifest without experiment and careful trial, and this testimony is given by men who apparently were thoroughly skilled in the art and had had much and long experience in the fireplace heater business. A consideration of the old Nott structure, if it ever [293] existed, as testified to, would have deterred rather than encouraged anyone from introducing such a fuel receptacle as was there shown into a fireplace heater which was required to heat rooms above and below simultaneously. For the reasons above given I think that it required invention to introduce a magazine extending to the top or outer casing of the stove into a fireplace heater having a protuberant front for heating the room in which the heater stood, and a furnace like back for heating the air for the rooms above. Most assuredly, the parts referred to in the first and second claims of the Thatcher patent coact when in action in the production of the result desired. The protuberant body heats the lower room. The mantel or frame separates one portion of the heater from the other, so that the protuberant body may perform its function while the furnace like back may perform its function. The fuel magazine holds the fuel in readiness to supply the fire which is to heat both back and front alike with steadiness and uniformity, the magazine being fed through a hole in the outer casing directly, thus obviating the opening of any doors into the combustion chamber when the fire is to be fed and the consequent cooling off of the heater by admitting fresh air into the device above the grate. By the bringing together of these parts and their joint action one with the other a fireplace heater is formed having advantages over any heater that went before, and which form of heater has gone so extensively and largely into use that it has practically superseded all other forms, as I am informed."

This statement must be considered in connection with the well established and admitted facts in respect to the prior use of fuel magazines in base burning outstanding stoves, so classified as stoves standing detached in the room to be heated, to distinguish them from fireplace stoves or heaters which are partially enclosed by the chimney-piece. Thatcher makes no claim in his patent for the fuel magazine, as long prior to the date of his application, [294] such a magazine was in common use in what are known as base burning stoves. In construction and in position, with relation both to the burning mass in the pit of the stove and to the outer casing through which it opened, either on the top or at the side of the stove itself, the fuel magazine of the outstanding stove is the same as the fuel magazine when placed in the fireplace heater according to Thatcher's patent. It is admitted that what Thatcher did, and all that he did, was to transfer this well known fuel magazine from its use in an outstanding base burning stove to a fireplace heater, equally well known and in common use as to its arrangement, construction, position, and mode of operation. When this fuel magazine was thus transferred from one kind of stove to another, in its new situation it performed precisely the same function, with respect to the fuel and the fire, as it had always been accustomed to perform in its old place, and the fireplace heater into which it was thus newly placed, so far as the generation and transmission of heat and heated air are concerned, operated precisely as it had habitually done before.

It is true that such a fireplace heater, by reason of the fuel magazine, was a better heater than before, just as the outstanding stove with its similar fuel magazine was a better heater than a similar stove without such a fuel magazine. But the improvement in the fireplace heater was the result merely of the single change produced by the introduction of the fuel magazine, but one element in the combination. The new and improved result in the utility of a fireplace heater cannot be said to be due to anything in the combination of the elements which compose it, in any other sense than that it arises from bringing together old and well known separate elements, which, when thus brought together, operate separately, each in its own old way. There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements, considered in itself.

If, however, to adapt these separate elements to each other, so that they can act together in one organization, required the use of means not within the range of mere mechanical skill, then it would be true that the invention of such means for effecting a mutual arrangement of the parts would be patentable. If, in [295] the present case, owing to the necessary form, size, structure and situation of a fireplace heater as ordinarily made and used, there were ascertained difficulties in uniting such a fuel magazine as Thatcher adopted from its known use in outstanding base burning stoves, and those difficulties were overcome by something more than mere mechanical ingenuity, he might have been entitled to a patent, not for the combination, however made, of the fuel magazine and the fireplace heater, but for the means which he had invented for effecting it. Nothing of that, however, appears in this case. The invention described is not of any such device for effecting the combination; no claim is made of that character. The claim made is for the combination, no matter how or by what means it is, or may be effected.

In this view of the case, it is impossible to distinguish it, so far as the rule of decision is concerned, from the cases of *Hailes* v. *Van Wormer*, 20 Wall. 87 U. S. 353 [22: 241]; *Heald* v. *Rice*, 104 U. S. 737, 754 [26: 910, 916]; *Penn. R. R. Co.* v. *Locomotive etc. Truck Co.* 110 U S. 490 [28: 222]; *Morris* v. *McMillin*, 112 U. S

244 [28: 702]; *Hollister* v. *Benedict Mfg. Co.* 113 U. S. 59 [28: 901]; *Thompson* v. *Boisselier*, 114 U. S. 1 [29: 76]; *Beecher Mfg. Co.* v. *Atwater Mfg. Co.* 114 U. S. 523 [29: 232]; *Gardner* v. *Herz*, 118 U. S. 180 [*ante*, 158].

There is no escape, we think, from the conclusions reached by the Circuit Court. *Its decree is therefore affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[278] UNITED STATES, *Plff.*,
v.
BAPTISTE LE BRIS.

(See S. C. Reporter's ed. 278-280.)

Indian Country—introduction of liquors into Indian Reservation—Revised Statutes—construction of.

1. The Reservation of the Red Lake and Pembina Indians, in Polk County, Minnesota, is Indian country within the meaning of section 2139, R. S., prohibiting trade with the Indians in the Indian country without authority.

2. Sections of a statute which are re-enacted in the Revised Statutes are to be given the same meaning they had in the original, unless a contrary intention is clearly manifested. The repeal of a section which defines a term does not of itself change the meaning of the term when found elsewhere in the original connection, and the section so repealed may be referred to to determine the meaning of the term.

[No. 205.]

Submitted April 7, 1887. Decided April 18, 1887.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Minnesota.

The history and facts of the case appear in the opinion of the court.

Mr. **William A. Maury**, *Assist. Atty-Gen.*, for plaintiff.

No counsel appeared for defendant.

[279] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is an information against Baptiste Le Bris under section 2139 of the Revised Statutes, for introducing spirituous liquors, "from some place and territory outside of the Indian country, into the Indian country; to wit, into that part thereof lying and being in the County of Polk in said district, and being and known as the Red Lake and Pembina Indian Reservation." Le Bris demurred to the information, and the judges holding the circuit court have certified to us that, upon the hearing of the issues of law thus presented, their opinions were opposed upon the following questions:

1. Is the Reservation of the Red Lake and Pembina Indians in Polk County, Minnesota, Indian country, within the meaning of section 2139 of the Revised Statutes of the United States?

2. What is meant by Indian country in the heading of chapter 4, title 28, of the Revised Statutes, and in the sections in that chapter which define crimes committed in Indian country?

3. Does section 5596 of the Revised Statutes repeal and abolish the definition of Indian country found in section 1 of the Trade and Intercourse Act of June 30, 1834, 4 Stat. at L. 729?

4. If it does, are all the provisions of chapter 4, title 28, for punishment of crime in Indian country, nugatory?

5. If the provisions of chapter 4, title 28 of the Revised Statutes are not rendered nugatory by section 5596, to what locality do they apply?

The important inquiry is whether the Red Lake and Pembina Indian Reservation has been "Indian country" within the meaning of section 2139 since the Revised Statutes went [280] into effect. That section is a re-enactment in part of section 20 of the Act of June 30, 1834, chap. 161, 4 Stat. at L. 732, as amended by the Act of March 15, 1864, chap. 33, 13 Stat. at L. 29; and it was decided by this court in *United States* v. *43 Gallons Whisky*, 93 U. S. 188 [23: 846], and 108 U. S. 491 [27: 803], that this Reservation was "Indian country" before the revision of the statutes. At that time section 1 of the Act of June 30, 1834, *supra*, was in force, which defined the Indian country as follows:

"That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this Act, be taken and deemed to be the Indian country."

This section was not re-enacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by section 5596 of the revision; but still we held in *Ex parte Crow Dog*, 109 U. S. 556, 561 [27: 1030, 1032], that it might be referred to for the purpose of determining what was meant by the term "Indian country," when found in sections of the Revised Statutes which were re-enactments of other sections of this statute. That decision was made since this case was heard below, and upon its authority we answer the first question certified in the affirmative. The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. The re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested.

As the answer to the first question in the affirmative necessarily covers all that is material in the others, they need not be further referred to, and it is consequently *ordered that it be certified to the court below that the first question is answered in the affirmative, and that a further answer to the others is deemed unnecessary.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM W. DUGGER ET AL., *Plffs. in Err.*, [286]
v.
HENRY A. TAYLOE.

HOBART C. DUGGER ET AL., *Plffs. in Err.*
v.
SAME.

(See S. C. Reporter's ed. 286.)

Practice—affirmance, for want of prosecution of writs of error

This court affirms the judgments of the court below under section 4 of Rule 21 for want of due

prosecution of the writs of error, there being no assignments of error as required by section 997 R. S., and no appearance of counsel for plaintiffs in error.

[Nos. 207, 208.]

Submitted April 7, 11, 1887. Decided April 18, 1887.

IN ERROR to the Supreme Court of the State of Alabama. *Affirmed.*

These actions were brought in a state court to recover possession of certain tracts of land with damages for their detention. The trials resulted in verdicts and judgments for the defendant; and on appeal these judgments were affirmed by the court below on the authority of the case of *Taylor* v. *Dugger*, 66 Ala. 444; whereupon, the plaintiffs sued out these writs of error.

No counsel appeared for plaintiffs in error.

Mr. **James T. Jones**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are writs of error brought for the review of judgments of the Supreme Court of Alabama. No assignment of errors was returned with the writ in either of the cases, as required by section 997 of the Revised Statutes. No counsel has appeared for the plaintiffs in error, but the cases have both been submitted by the defendant in error on briefs, without any specification of errors by the plaintiffs, as required by Rule 21, section 2. We therefore affirm the judgment in each case, under section 4 of the same rule, for want of a due prosecution of the writs of error.

Affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[404] J. F. D. LANIER, CHARLES LANIER ET AL., Partners as WINSLOW, LANIER & CO., *Appts.*,

v.

JOHN NASH ET AL.

(See S. C. Reporter's ed. 404-410.)

Jurisdiction—transfer of note to cut off defense—parties — transfer by bank—review of evidence—jurisdiction sustained and bona fide *character of transfer denied.*

1. The transfer of a note, not to give jurisdiction to the courts of the United States, but to create an ownership which will cut off an anticipated defense, is not of itself enough to make it proper for such courts to refuse to take jurisdiction, if the transfer is complete and such as to enable the assignee to maintain a suit in his own name.

2. In a proceeding to foreclose a mortgage, it is *held*, upon a review of the evidence, that the facts established thereby show such a transfer of the note secured by the mortgage as to enable the plaintiffs to maintain suit in their own names, but not to entitle them to protection as *bona fide* holders; said note having been transferred by the holder, a bank, with a separate special guaranty of collection and with directions, given both before and after maturity, in respect to the course to be taken for its collection.

[No. 200.]

Argued April 7, 1887. Decided April 18, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Lawrence Maxwell, Jr.**, *Rufus King* and *Samuel J. Thompson*, for appellants.

Messrs. **John Coffey** and *David S. Hounshell*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit for the foreclosure of a mortgage made by John Nash and Ellen Nash, his wife, to Hugh Colville, under date of December 4, 1876, on certain lands in Logan County, Ohio, the separate property of the wife, to secure a note of the husband for $13,000, payable to the order of Colville, in three years from date, with interest at the rate of 8 per cent per annum, payable semi-annually; and the chief controversy on the appeal is as to the amount that is due. In the view we take of the case little else is involved except questions of fact. From the testimony we find that for many years prior to July 4, 1879, the Commercial Bank of Cincinnati was an unincorporated banking association, having its office in Cincinnati, Ohio. John Nash, a manufacturer, doing business in that city, either alone or with [405] others, under the name of John Nash & Co., had long been a customer of the bank, making deposits and getting discounts of his business paper as occasion required.

Some days before December 4, 1876, Nash being in want of $12,000 to settle a debt which he owed for iron, and to meet some other liabilities, applied to Colville, the cashier of the bank, for a loan of that amount on real estate as collateral. Colville, after consultation with the directors, agreed to let him have the money, and he thereupon procured the execution by his wife of the mortgage now in suit, and another on a house and lot she owned in Cincinnati to secure another note of his for $7,000, payable to the order of Colville in three years from date, with interest at the rate of 8 per cent per annum, payable semi-annually. He then took the two notes and mortgages to the bank and placed them as collateral security for his own note for $12,000 at sixty days, which was discounted and placed to his credit in account. At the time this was done it was hoped and expected that Nash would get some one to lend him the money on the mortgages, and thus enable him to take up his note to the bank.

When this arrangement was made, Nash or his firm was indebted to the bank for notes of his customers that had been discounted and not paid at maturity to an amount between $4,000 and $5,000. As the notes which had been discounted were protested and came back, he gave his own notes or those of his firm for the same amount, payable at a future day, which were discounted and the old paper retained as collateral. An effort has been made in this case to show that, at the time the $12,000 was lent, it was agreed that the mortgages should be placed as collateral to the old debt as well as the new; but the preponderance of the evidence is decidedly the other way, and we have no hesitation in finding that no such agreement has been proven.

Nash continued in business until January, 1878, when he failed and made an assignment. In the meantime he had borrowed from the bank another $1,000, which it is conceded was secured by a pledge of the notes and mortgages as collateral. He renewed all his notes to the bank as they became due, until near the time of his failure, paying the interest thereon at each renewal. No payment of interest was ever made, however, on the mortgage notes, and on the 10th of May, 1879, a suit was begun by Colville, who was a citizen of Kentucky, in the Circuit Court of the United States for the Southern District of Ohio, for the foreclosure of that for $7,000, on account of default in the payment of interest. While this suit was pending a corporation was organized under the name of the Commercial Bank of Cincinnati, which became in fact the successor of the old bank by taking its good assets and assuming its liabilities. Among the other assets transferred to the corporation were the debts of Nash and his firm, and their collaterals. In making this transfer Colville indorsed the note for $13,000 in blank, and the note and the mortgage for its security were delivered to the new bank. He also made an assignment of his interest in the suit then pending on the other note and mortgage. The president and cashier of the new bank were different from those of the old bank, but some, if not all, the directors of the new were the same as those in the old.

[406]

On the 30th of August, 1879, a decree *pro confesso* was entered in the suit for the foreclosure of the $7,000 mortgage, under which a sale of the mortgaged property was made, which realized $6,532.72 over and above the costs and expenses, and this amount was paid to the new bank on the 28th of November, 1879.

The note of $13,000 fell due December 7, 1879, and on the 12th of November next before its maturity, it was sent by the president of the new bank to Winslow, Lanier & Co., the plaintiffs in this suit, inclosed in a letter, of which the following is a copy:

[407]

"CINCINNATI, O., *Nov.* 12, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I enclose herewith note of John Nash with mortgage, dated Dec. 4, 1876, at 3 years, with interest at 8 per cent, for $13,000; the first two years' interest paid.

"I will thank you to place this note to the credit of the bank under discount, and oblige,

"Yours, Very Resp'y,

"(Signed) CHAS. B. FOOTE, *Pr's't.*"

Accompanying the note when sent was this guaranty written on a separate piece of paper:

"The Commercial Bank of Cincinnati hereby guarantees collection and payment of the note of John Nash to the order of Hugh Colville, dated Dec. 4, 1876, for $13,000, at 3 years, with interest at 8 per cent annually, and the mortgage securing the same, if purchased by Mess. Winslow, Lanier & Co. The first two years' interest has been paid.

"(Signed) CHAS. B. FOOTE, *Pres't.*"

Winslow, Lanier & Co. were bankers in the City of New York, and had been for many years the correspondents of the old bank in that city, and the new bank continued the same business relations with them on its organization. On the receipt of the note the credit was given for the amount of the note and one year's interest, less the discount until maturity, as requested. Afterwards the president of the Commercial Bank wrote Winslow, Lanier & Co. as follows:

"COMMERCIAL BANK, CINCINNATI, O.,

"*Nov.* 28, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have to ask you to notify John Nash and wife (West Liberty, Logan County, Ohio), immediately by letter that you hold the note and mortgage for $13,000 and int., requesting payment accordingly at maturity.

"In your letter to them please say nothing concerning the first two years' interest, as the sum collected by us from other collections may not prove to be sufficient to pay the entire two years' interest, as it was supposed it would. In case this debt should not be paid at maturity I have further to ask that you do not charge it to our ac., but hold it so that suit can be brought by you if necessary. I enclose a letter to me from our att'ys King, Thompson & Maxwell, which please read and return to me.

"Very Respectfully.

CHAS. B. FOOTE, *Pr's.*"

"CINCINNATI, *Dec.* 3, 1879.

[408]

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have your favor of 1st inst. It was intended that the guaranty of this bank for the collection and payment of the note of Jno. Nash, dated Dec. 4, 1876, at 3 yrs., with 8 per cent interest, should continue in full force until the final collection of the debt. This guaranty is hereby confirmed and continued in full force until the final collection of the note. I enclose confirmation from Mr. Sherlock to the same effect. "Very Resp't.

"(Signed) CHAS. B. FOOTE, *Pres.*"

"COMMERCIAL BANK, CINCINNATI, OHIO,

Dec. 10, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have your favor of 8th inst. inclosing copy of a letter from Mess. Avery & L'Hommedieu, attorneys for John Nash. I shall be obliged if you will reply to Mess. Avery & L'Hommedieu, notifying them that unless the debt is immediately paid or satisfactorily arranged the note and mortgage will be put in suit by you.

"In case suit becomes necessary I will thank you to place the paper in the hands of the Hon. R. P. Ranney, Cleveland, Ohio (unless you prefer other counsel), with instructions [to] bring suit in U. S. Circuit Court to foreclose the mortgage in your name.

"You will please refer Judge Ranney to Mess. King, Thompson & Maxwell, our att'ys, for any information required for the suit.

"Of course we bear all the expenses.

"Very Resp't,

"(Signed) CHAS. B. FOOTE, *Pres.*"

"COMMERCIAL BANK, CINCINNATI, O.,

"*Feb.* 20, 1880.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: Your favor of the 19th inst. is at hand. I will thank you to send the note and mortgage of John Nash to Judge Ranney, of Cleveland, in accordance with the terms of my letter of the 10th of Dec.

"Very Resp't,

"(Signed) CHAS. B. FOOTE, *Pres't.*"

[409] In accordance with these directions the note and mortgage were sent to Mr. Ranney, who began this suit for the foreclosure March 19, 1880. Both Nash and his wife answered the bill, denying that the plaintiffs were the holders and owners of the note, and claiming that if they were they took them subject to all defenses which would have been good against Colville, the payee and mortgagee, and that the amount realized from the sale of the property covered by the $7,000 mortgage should be allowed as a credit on the other.

The circuit court sustained this defense and gave a decree accordingly. From that decree this appeal was taken.

The facts established by the evidence, taken together, show, as we think, that when the suit was begun Winslow, Lanier & Co. had such a title to and interest in the note and mortgage as gave them the right to sue therefor in their own names. They had actually discounted the note and placed the proceeds to the credit of the bank in their general account, and it does not appear that this credit had ever been canceled when the suit was brought. But it is equally apparent that they are not either in law or equity entitled to protection as innocent holders for value against the defenses of Nash and wife to the note and mortgage in the hand of Colville or the old bank. As between the old bank and the new we entertain no doubt that the new bank is to be treated in all respects as the successor of the old, taking the assets that were turned over as they stood and assuming the liabilities. All the knowledge of the old bank as to the rights of the parties to the securities transferred is chargeable in law on the new.

The transfer from the new bank to Winslow, Lanier & Co. shows on its face that it was not made in the usual course of business between a western bank and its New York correspondent. The note, which was originally for three years, and secured by mortgage, had less than thirty days to run, and was payable at the Cincinnati bank. It was not even indorsed by the bank in the usual way, but instead, a formal guaranty of collection and payment, on a separate paper, was sent forward to take effect if the purchase was made. The letter accompanying the papers contained not a word of ex-
[410] planation, and even before the maturity of the note the bank began to give directions in respect to the course to be taken for its collection, accompanied by a request that if payment was not made the note should not be charged back in account, but held "so that suit can be brought by you if necessary." These directions were continued after maturity, and so far as appears always followed, even to the time and manner of commencing suit. Under these circumstances we cannot look on Winslow, Lanier & Co. in any other light than as trustees for the bank, and proceeding for the collection on its account; the avails to be credited when realized.

In this court it was claimed in argument that the transfer was collusive for the purpose of creating a case cognizable by the Circuit Court of the United States, and, therefore, should have been dismissed below under the authority of section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470; but we find no sufficient evidence to justify us in reversing the decree and sending the suit back for a dismissal. The transfer was undoubtedly made for the purpose of putting it in the power of Winslow, Lanier & Co. to bring a suit; but this, for anything that now appears might as well have been begun in a state as in a federal court. The object of the bank seems to have been not to give jurisdiction to the courts of the United States, but to create an ownership which would cut off the anticipated defenses of the mortgagors. That of itself is not enough to make it proper for the courts of the United States to refuse to take jurisdiction if the title made by the transfer is complete, and such as will enable the assignee to maintain a suit in his own name at all. To justify a dismissal it must appear that the object was to create a case cognizable under the Act of 1875.

This disposes of the whole case, and the decree is consequently affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[325]

UNITED STATES, *Appt.*

v.

THE MAXWELL LAND-GRANT COMPANY; DENVER AND RIO GRANDE RAILWAY COMPANY; PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY; AND ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

(See S. C. Reporter's ed. 325-382.)

Public lands—control of, vested in Congress by Constitution—jurisdiction of courts of equity as to patents, or other evidences of title obtained from the United States by fraud or mistake—testimony must be clear, unequivocal and convincing—presumption of regularity—Mexican grant to Beaubien and Miranda—limitation—confirmance by Congress.

*1. It does not satisfactorily appear that the grant of Governor Armijo of 1841 to Beaubien and Miranda, since ascertained to amount to 1,714,764.94 acres, was of that character which, by the decree of the Mexican Congress of 1824, was limited to eleven square leagues of land for each grantee.

2. It does appear that, though the attention of Congress was turned to this question, it confirmed the grant in the Act of June 21, 1860, to the full extent of the boundaries as described in the petition of claimants.

3. In such case the courts have no jurisdiction to limit the grant, as the Constitution, by article IV, section 1, vests the control of the public lands in Congress. *Tameling* v. *U. S. Freehold & E. Co.* 93 U. S. 644 [23: 996].

4. While courts of equity have the power to set aside, cancel, or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct under proper circumstances such mistakes, this can only be done on specific averments of the mistake or the fraud, supported by clear and satisfactory proof.

5. The general doctrine on this subject is that, when in a court of equity it is proposed to set aside, to annul, or correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing; and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.

6. Where the purpose is to annul a patent, a grant, or other formal evidence of title from the United States, the respect due to such an instrument, the presumption that all the preceding

*Head notes by *Mr. Justice* MILLER.

steps required by law had been observed, the importance and necessity of the stability of titles dependent on these official instruments, demand that the effort to set them aside should be successful only when the allegations on which this attempt is made are clearly stated and fully proved.

7. In this case the evidence produces no conviction in the judicial mind of the mistakes or frauds alleged in the bill; and the decree of the circuit court dismissing it is affirmed.

[No. 974.]

Argued March 8, 9, 10, 11, 1887. Decided April 18, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Affirmed.*

The history and facts of the case fully appear in the opinion of the court.

Messrs. **William A. Maury,** *Asst. Atty-Gen.*, and **J. A. Bentley,** *Special Assistant,* for appellant.

Messrs. **Frank Springer** and **Charles E. Gast,** for appellees.

[357] *Mr. Justice* **Miller** delivered the opinion of the court:

The case before us is an appeal from the Circuit Court of the United States for the District of Colorado.

The decree from which this appeal is taken dismissed a bill brought in that court by the United States against the Maxwell Land-Grant Company, the Denver and Rio Grande Railway Company, the Pueblo and Arkansas Valley Railroad Company, and the Atchison, Topeka and Santa Fé Railroad Company. It was brought by the Attorney-General of the United States, and its purpose was to have a decree setting aside and declaring void a patent from the United States granting to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, a tract of land described in a very extensive survey, which is made a part of the patent. It is stated in the brief of the Assistant Attorney-General in this court that the patent conveys 1,714,764$\frac{94}{100}$ acres of land, lying partly in the Territory of New Mexico and partly in the State of Colorado. This patent is dated May 19, 1879, and seems to be regular on its face in every particular. The bill to set this patent aside was filed in the Colorado Circuit Court on August 25, 1882, which was a little over three years after the patent was issued. By virtue of certain mesne conveyances, and other transactions not necessary to be recited here, it may be stated that the title conveyed by the patent to Beaubien and Miranda inured immediately upon its being issued to the benefit of the Maxwell Land-Grant Company, a corporation which has the beneficial interest in the grant, so far as appears in this record; and the contest is mainly if not exclusively between the United States and that Company.

[358] The original bill filed in the case assailed the grant mainly upon the ground that the patent was issued by the Executive Department of the Government upon the false representations of the defendant, the Maxwell Land-Grant Company, and those whose estate the Company has in the land, and of whose fraudulent actings and doings in the premises the Company had notice at the time it acquired the title. This bill recites the original grant of January 10, 1841, by the Republic of Mexico, which it declares was in due form of law, made to Beaubien and Miranda, citizens of said Republic, and it gives the description of the land and its boundaries which is here the subject of controversy. The bill also declares that said grant and the proceedings had in regard thereto were in due form of law and in accordance with the usages and customs of that country, as more fully appeared by reference to the grant and Act of possession, copies of which were annexed thereto, and that it was duly accepted by the grantees, who immediately thereupon entered into possession of the premises, and that they, and those holding under them, have ever since been in the quiet, peaceable, and exclusive possession thereof.

The bill then declares that the Surveyor-General of the Territory of New Mexico, under the Act of 1854, made a report in favor of this grant; that on June 21, 1860, the Congress of the United States confirmed and ratified it as recommended; and that the patent was afterwards issued upon a survey made by order of the Government under the instructions of the Surveyor-General of New Mexico, approved by the Commissioner of the General Land-Office, which patent is made an exhibit to the bill. This original bill then goes on to charge that the survey on which this patent was issued was falsely and fraudulently made, and that the Maxwell Land-Grant Company, and certain parties who made this survey under a contract with the Government, conspired to cheat and defraud the Government of the United States by including a larger amount of land than was intended to be embraced by the original grant of the Republic of Mexico; and it especially charged that about 265,000 acres; to wit, all the lands lying and being in the County of Las Animas, in the State of Colorado, were fraudulently included in this survey, and were of the value of $2,000,000. The main purpose of the bill, and the only specific prayer for relief, is that the survey may be declared void so far as it includes lands within the State of Colorado, though it concludes by praying for general relief. [359]

It is quite obvious that the ground of relief set out in this bill is that the excess of 265,000 acres lying within the present State of Colorado was included within the survey by fraud, and that this fraud should be remedied. No attempt is made in the bill to assail the remainder of the grant or to point out any reason why the patent should not be good for all the lands in New Mexico. After answers had been filed to this bill, and a large amount of testimony taken, there was filed, on the 5th day of December, 1883, an amended bill, which it is now insisted, is substituted for the original bill. In this amended bill, for the first time, it is set up, as a ground for setting aside the patent and survey on which it was made, and having them declared void, that, under the laws of Mexico, at the time it was made, no such grant could exceed eleven square leagues to each individual, and that by virtue of those laws, therefore, the grant to Beaubien and Miranda could not exceed 22 leagues, the equivalent of which is 97,424 acres. The bill then sets out, with something more of particularity, the errors supposed to exist in the survey on which the patent from the United States was based, and the frauds connected with that survey by which the officers of the Government were imposed upon and

induced to issue the patent. Much of the testimony, and perhaps most of it, was taken before this amendment was filed; and it is strongly insisted in the brief of the appellees, that the reason for filing it was that the testimony taken in regard to the frauds; and in regard to the mistake of the officer of the Government in running the boundaries of the grant, had failed to establish such fraud and mistake.

Answers and replications were filed in due time, and a large amount of testimony taken, [360] which, with the pleadings, documents and proceedings of the court, and other public bodies, constitute a printed record of nearly nine hundred pages.

The questions which are presented by this record and which demand our consideration may be divided into three:

First. Do the colonization laws of Mexico, in force at the time the grant was made to Beaubien and Miranda, namely, the decree of the Mexican Congress of August 18, 1824, and the general rules and regulations for the colonization of the Territories of the Republic of Mexico of November 21, 1828, render this grant void, notwithstanding its confirmation by the Congress of the United States?

Second. If the grant be valid, is there such a mistake in the survey on which the patent of the United States was issued as justifies the court in setting aside both patent and survey?

Third. Was there such actual fraud in procuring this survey to be made and the patent to be issued upon it as requires that the patent be set aside and annulled?

As regards the first of these propositions, it is undoubtedly true that the decree of the Mexican Congress of 1824, in regard to grants of the public lands, declared, by article 12, that, "It shall not be permitted to unite, in the same hands with the right of property, more than one league square of land suitable for irrigation, four square leagues in superficies of arable land without the facilities of irrigation, and six square leagues in superficies of grazing land."

It has been repeatedly decided by this court that it was the practice of the Government of Mexico, under that article, to limit its grants of public lands in the Territories to eleven square leagues for each individual.

But article 14 of the same decree speaks of "the contracts which the *empressarios* make with the families which they bring, at their own expense, provided they are not contrary to the laws;" and article 7 of the Rules and Regulations of 1828 speaks of "grants made to *empressarios*, for them to colonize with many families." It is a well known matter of Mexican history that, by reason of there being vast quantities of unoccupied and unprofitable public land, owned by that government in its ter- [361] ritories, contracts were made with individuals called *empressarios*, by which they were given very large bodies of land without any regard at all to the eleven league limitation, in consideration that they should bring emigrants into the country and settle them upon these lands with a view of increasing the population, and securing the protection thus afforded against the wild Indian Tribes on the Mexican borders.

There are many things in the history of this grant to Beaubien and Miranda which would seem to indicate that it was understood by the Mexican authorities to be a grant of the class just described.

In the petition of Beaubien and Miranda to Governor Armijo, on which the grant was founded, dated January 8, 1841, there is a very animated description of the condition of the Territory of New Mexico and its natural advantages, which were undeveloped for want of an industrious population. It also contains a description of the land, by its boundaries, which was granted by the Governor in compliance with this petition, and as this description and its true construction is the foundation of the controversy in this suit with regard to the accuracy of the surveys, it is given here:

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills, and from there running parallel with said River Colorado in a northerly direction to opposite the point of the Uña de Gato, following the same river along the same hills to continue to the east of said Uña de Gato River to the summit of the table land (*mesa*); from whence, turning northwest to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southwardly direction until it intersects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning."

The authoritative grant of Governor Armijo, dated three days later, is in the following language:

"SANTA FÉ, *January* 11, 1841. [362]

"In view of the request of the petitioners, and what they state therein being apparent, this government, in conformity with law, has seen proper to grant and donate to the individuals subscribed the land therein expressed, in order that they make the proper use of it which the law allows. "ARMIJO."

Looking to this question of the nature of the grant, as to whether it was an ordinary grant, it appears by the record that Beaubien made application in April, 1844, to the Governor of the Department, stating that a curate named Martinez was seeking to invade and dispute the rights of the said Beaubien and Miranda in a part of the lands included in their grant. In this petition, remonstrating against a recognition of the claim of Martinez which had been made by the territorial government, he says:

"And not only does the suspension of labor on those lands injure us, for the reason of having incurred heavy expenses, but also a considerable number of families and industrious men, who are willing and ready to settle upon those lands, and to whom we have given lands, a list of which individuals I accompany in order that Your Excellency, seeing their number, may determine what may be proper."

This shows that the grantees were engaged in settling families within the boundaries of their grant.

This matter was referred to the Departmental Assembly, who made a report upon the subject, confirming the grant of the Governor

steps required by law had been observed, the importance and necessity of the stability of titles dependent on these official instruments, demand that the effort to set them aside should be successful only when the allegations on which this attempt is made are clearly stated and fully proved.

7. In this case the evidence produces no conviction in the judicial mind of the mistakes or frauds alleged in the bill; and the decree of the circuit court dismissing it is affirmed.

[No. 974.]

Argued March 8, 9, 10, 11, 1887. Decided April 18, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Affirmed.*

The history and facts of the case fully appear in the opinion of the court.

Messrs. **William A. Maury**, *Asst. Atty-Gen.*, and **J. A. Bentley**, *Special Assistant*, for appellant.

Messrs. **Frank Springer** and **Charles E. Gast**, for appellees.

[357] *Mr. Justice* **Miller** delivered the opinion of the court:

The case before us is an appeal from the Circuit Court of the United States for the District of Colorado.

The decree from which this appeal is taken dismissed a bill brought in that court by the United States against the Maxwell Land-Grant Company, the Denver and Rio Grande Railway Company, the Pueblo and Arkansas Valley Railroad Company, and the Atchison, Topeka and Santa Fé Railroad Company. It was brought by the Attorney-General of the United States, and its purpose was to have a decree setting aside and declaring void a patent from the United States granting to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, a tract of land described in a very extensive survey, which is made a part of the patent. It is stated in the brief of the Assistant Attorney-General in this court that the patent conveys 1,714,764$\frac{94}{100}$ acres of land, lying partly in the Territory of New Mexico and partly in the State of Colorado. This patent is dated May 19, 1879, and seems to be regular on its face in every particular. The bill to set this patent aside was filed in the Colorado Circuit Court on August 25, 1882, which was a little over three years after the patent was issued. By virtue of certain mesne conveyances, and other transactions not necessary to be recited here, it may be stated that the title conveyed by the patent to Beaubien and Miranda inured immediately upon its being issued to the benefit of the Maxwell Land-Grant Company, a corporation which has the beneficial interest in the grant, so far as appears in this record; and the contest is mainly if not exclusively between the United States and that Company.

[358] The original bill filed in the case assailed the grant mainly upon the ground that the patent was issued by the Executive Department of the Government upon the false representations of the defendant, the Maxwell Land-Grant Company, and those whose estate the Company has in the land, and of whose fraudulent actings and doings in the premises the Company had notice at the time it acquired the title. This bill recites the original grant of January 10, 1841, by the Republic of Mexico, which it declares was in due form of law, made to Beaubien and Miranda, citizens of said Republic, and it gives the description of the land and its boundaries which is here the subject of controversy. The bill also declares that said grant and the proceedings had in regard thereto were in due form of law and in accordance with the usages and customs of that country, as more fully appeared by reference to the grant and Act of possession, copies of which were annexed thereto, and that it was duly accepted by the grantees, who immediately thereupon entered into possession of the premises, and that they, and those holding under them, have ever since been in the quiet, peaceable, and exclusive possession thereof.

The bill then declares that the Surveyor-General of the Territory of New Mexico, under the Act of 1854, made a report in favor of this grant; that on June 21, 1860, the Congress of the United States confirmed and ratified it as recommended; and that the patent was afterwards issued upon a survey made by order of the Government under the instructions of the Surveyor-General of New Mexico, approved by the Commissioner of the General Land-Office, which patent is made an exhibit to the bill. This original bill then goes on to charge that the survey on which this patent was issued was falsely and fraudulently made, and that the Maxwell Land-Grant Company, and certain parties who made this survey under a contract with the Government, conspired to cheat and defraud the Government of the United States by including a larger amount of land than was intended to be embraced by the original grant of the Republic of Mexico; and it especially charged that about 265,000 acres; to wit, all the lands lying and being in the County of Las [359] Animas, in the State of Colorado, were fraudulently included in this survey, and were of the value of $2,000,000. The main purpose of the bill, and the only specific prayer for relief, is that the survey may be declared void so far as it includes lands within the State of Colorado, though it concludes by praying for general relief.

It is quite obvious that the ground of relief set out in this bill is that the excess of 265,000 acres lying within the present State of Colorado was included within the survey by fraud, and that this fraud should be remedied. No attempt is made in the bill to assail the remainder of the grant or to point out any reason why the patent should not be good for all the lands in New Mexico. After answers had been filed to this bill, and a large amount of testimony taken, there was filed, on the 5th day of December, 1883, an amended bill, which it is now insisted, is substituted for the original bill. In this amended bill, for the first time, it is set up, as a ground for setting aside the patent and survey on which it was made, and having them declared void, that, under the laws of Mexico, at the time it was made, no such grant could exceed eleven square leagues to each individual, and that by virtue of those laws, therefore, the grant to Beaubien and Miranda could not exceed 22 leagues, the equivalent of which is 97,424 acres. The bill then sets out, with something more of particularity, the errors supposed to exist in the survey on which the patent from the United States was based, and the frauds connected with that survey by which the officers of the Government were imposed upon and

induced to issue the patent. Much of the testimony, and perhaps most of it, was taken before this amendment was filed; and it is strongly insisted in the brief of the appellees, that the reason for filing it was that the testimony taken in regard to the frauds; and in regard to the mistake of the officer of the Government in running the boundaries of the grant, had failed to establish such fraud and mistake.

Answers and replications were filed in due time, and a large amount of testimony taken, [360] which, with the pleadings, documents and proceedings of the court, and other public bodies, constitute a printed record of nearly nine hundred pages.

The questions which are presented by this record and which demand our consideration may be divided into three:

First. Do the colonization laws of Mexico, in force at the time the grant was made to Beaubien and Miranda, namely, the decree of the Mexican Congress of August 18, 1824, and the general rules and regulations for the colonization of the Territories of the Republic of Mexico of November 21, 1828, render this grant void, notwithstanding its confirmation by the Congress of the United States?

Second. If the grant be valid, is there such a mistake in the survey on which the patent of the United States was issued as justifies the court in setting aside both patent and survey?

Third. Was there such actual fraud in procuring this survey to be made and the patent to be issued upon it as requires that the patent be set aside and annulled?

As regards the first of these propositions, it is undoubtedly true that the decree of the Mexican Congress of 1824, in regard to grants of the public lands, declared, by article 12, that, "It shall not be permitted to unite, in the same hands with the right of property, more than one league square of land suitable for irrigation, four square leagues in superficies of arable land without the facilities of irrigation, and six square leagues in superficies of grazing land."

It has been repeatedly decided by this court that it was the practice of the Government of Mexico, under that article, to limit its grants of public lands in the Territories to eleven square leagues for each individual.

But article 14 of the same decree speaks of "the contracts which the *empressarios* make with the families which they bring, at their own expense, provided they are not contrary to the laws;" and article 7 of the Rules and Regulations of 1828 speaks of "grants made to *empressarios*, for them to colonize with many families." It is a well known matter of Mexican history that, by reason of there being vast quantities of unoccupied and unprofitable public land, owned by that government in its ter- [361] ritories, contracts were made with individuals called *empressarios*, by which they were given very large bodies of land without any regard at all to the eleven league limitation, in consideration that they should bring emigrants into the country and settle them upon these lands with a view of increasing the population, and securing the protection thus afforded against the wild Indian Tribes on the Mexican borders.

There are many things in the history of this grant to Beaubien and Miranda which would seem to indicate that it was understood by the Mexican authorities to be a grant of the class just described.

In the petition of Beaubien and Miranda to Governor Armijo, on which the grant was founded, dated January 8, 1841, there is a very animated description of the condition of the Territory of New Mexico and its natural advantages, which were undeveloped for want of an industrious population. It also contains a description of the land, by its boundaries, which was granted by the Governor in compliance with this petition, and as this description and its true construction is the foundation of the controversy in this suit with regard to the accuracy of the surveys, it is given here:

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills, and from there running parallel with said River Colorado in a northerly direction to opposite the point of the Uña de Gato, following the same river along the same hills to continue to the east of said Uña de Gato River to the summit of the table land (*mesa*); from whence, turning northwest to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southwardly direction until it intersects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning."

The authoritative grant of Governor Armijo, dated three days later, is in the following language: [362]

"SANTA FÉ, *January* 11, 1841.

"In view of the request of the petitioners, and what they state therein being apparent, this government, in conformity with law, has seen proper to grant and donate to the individuals subscribed the land therein expressed, in order that they make the proper use of it which the law allows. "ARMIJO."

Looking to this question of the nature of the grant, as to whether it was an ordinary grant, it appears by the record that Beaubien made application in April, 1844, to the Governor of the Department, stating that a curate named Martinez was seeking to invade and dispute the rights of the said Beaubien and Miranda in a part of the lands included in their grant. In this petition, remonstrating against a recognition of the claim of Martinez which had been made by the territorial government, he says:

"And not only does the suspension of labor on those lands injure us, for the reason of having incurred heavy expenses, but also a considerable number of families and industrious men, who are willing and ready to settle upon those lands, and to whom we have given lands, a list of which individuals I accompany in order that Your Excellency, seeing their number, may determine what may be proper."

This shows that the grantees were engaged in settling families within the boundaries of their grant.

This matter was referred to the Departmental Assembly, who made a report upon the subject, confirming the grant of the Governor

States by the Treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States."

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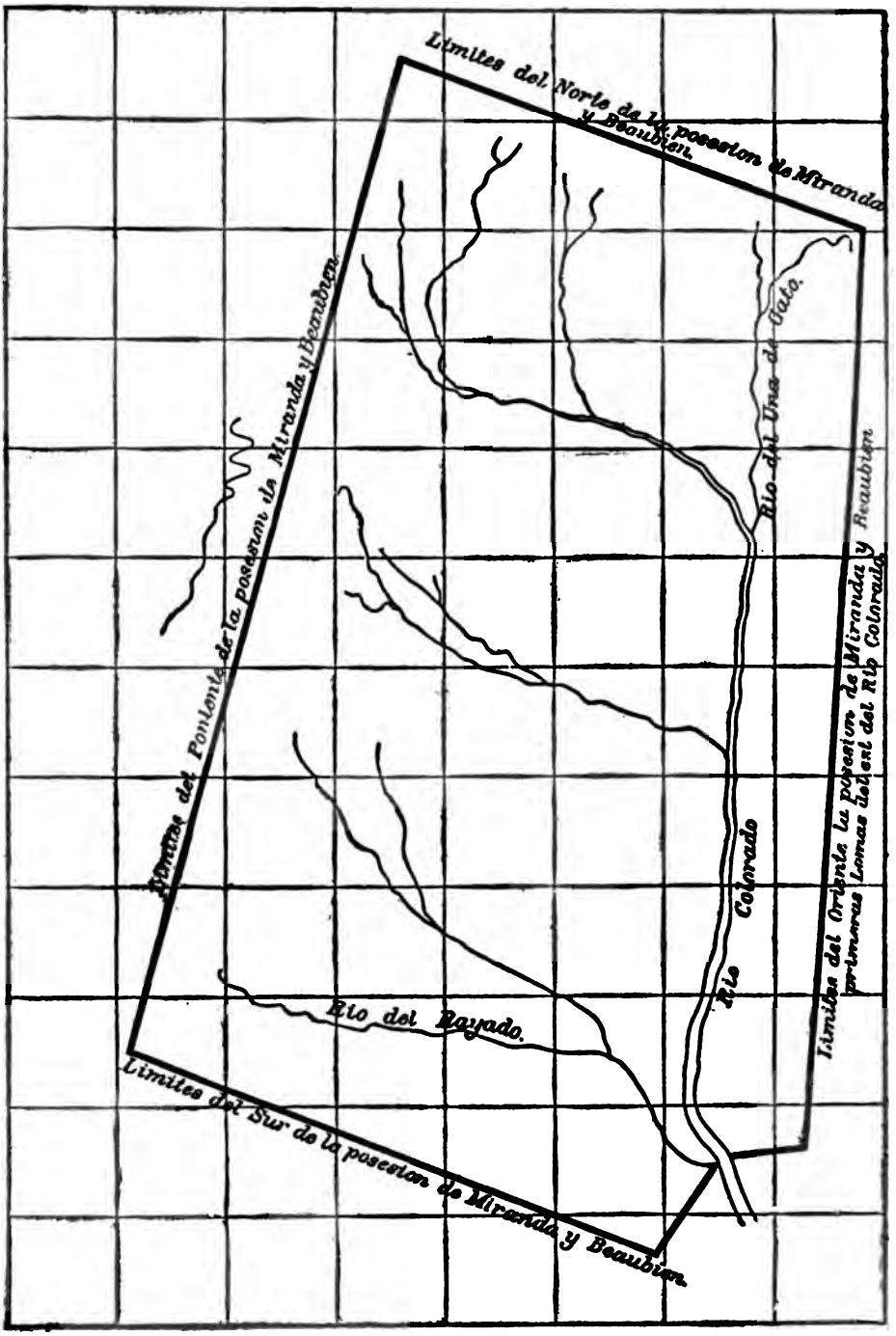

1. Sketch from the Desiño of the Beaubien and Miranda Grant, extended on the lines of the United States surveys.

In the present case the Surveyor-General had before him, not only the original grant of Armijo to Beaubien and Miranda, but he had the record of the juridical possession delivered to the grantees, according to the laws of Mexico on that subject, made by the justice of the peace, Cornelio Vigil, accompanied by a map [369] or diseño, laying down with at least attempted particularity and precision the complete boundaries of this tract of land. So that the Surveyor-General not only had the authority to determine the extent of the grant, as well as its validity, but he had the means of ascertaining it. Upon what argument, therefore, it can be held that the Surveyor-General, with this entire matter before him, and with the means of ascertaining or describing with precision the extent of the grant to these parties, should be held not to have passed upon it, but simply upon the validity of the original transaction with Armijo, is not readily to be perceived. The Surveyor-General was not certainly of the class of officers to whom would have been confided by law the mere question of the legal validity of a grant made by a Mexican governor to a Mexican citizen. Others could do that as well as he when the facts were laid before them. But as his office was a surveying office, and was designed to ascertain the location and the extent of grants by an examination of the maps and surveys, and making new surveys if necessary, a function pre-eminently appurtenant to his office, he must be supposed to have reported upon all that was proper for consideration in its confirmation. And when the Congress of the United States, after a full investigation, and elaborate reports by its committees, confirmed these grants "as recommended for confirmation by the Surveyor-General" of the Territory, we must suppose that it was intended to be a full and complete confirmation, as regards the legal validity, fairness, and honesty of the grant, as well as its extent. This is made the more emphatic by the two or three cases in which the extent and location of the grant are specially limited in the very Act of confirmation, included in the same section and the same sentence.

It is observable that, in the argument of the counsel for the United States in this case, the boundaries of this tract of land are constantly spoken of as outboundaries, within which a smaller quantity of land may be located, as the real grant in this case. This phrase, "outboundary," has its proper use in regard to certain classes of Mexican grants, but it is wholly inapplicable and misleading as referring to the [372] one now under consideration. There were grants made by officers of the Mexican Government which were limited in quantity by the terms of the grant, and which the grantee might locate at any place he chose inside of a much larger quantity of land the limits of which were correctly described as "outboundaries." In such cases the use of the term, as describing the larger and greater tract within which the smaller and more limited quantity might be selected by the grantee, had its just and well-understood meaning. Grants of that class were quite numerous, and sometimes half a dozen grants to different individuals would be made within the same outboundaries, and occasionally there are cases where these smaller portions must include a dwelling or some improvement held by the grantee at the time. The whole of this subject is very well considered and explained by *Justice* Field in the opinion of this court in the case of *Hornsby* v. *U. S.* 77 U. S. 10 Wall. 224 [19: 900]. He says: "As we have had occasion to observe in several instances" [referring to *Higueras* v. *U. S.* 72 U. S. 5 Wall. 828 [18: 469]; *Alviso* v. *U. S.* 75 U. S. 8 Wall. 339 [19: 305]: "grants of the public domain of Mexico, made by Governors of the Department of California, were of three kinds: 1, grants by specific boundaries, where the donee was entitled to the entire tract described; 2, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by outboundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence."

It is entirely clear that the grant to Beaubien and Miranda was a grant of the first class, a grant by specific boundaries, where the donee was entitled to the entire tract described. There is nothing in the language of the grant, nor in the petition, nor in anything connected with it, nor in the act of juridical possession, to indicate that either Governor Armijo or Beaubien and Miranda, or the officer who delivered the juridical possession to them, had any idea or conception that the grantees were not to have all the land within the boundaries established by that juridical possession. Hence the idea of counsel that there were only twenty-two square [373] leagues, or 97,424$\frac{8}{10}$ acres, granted within this great boundary is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger outboundary. While the argument, whether sound or unsound, that the grant could only be upheld for the twenty-two square leagues, may be pressed now against the validity of the grant in excess of that amount, there was evidently no such thought in the minds of the parties when it was made.

It is not inappropriate here to allude to an argument suggested, but not much pressed, by counsel, that, in the petition of Beaubien against the intrusion of the priest Martinez, he speaks of his own grant as being only about fifteen leagues. We think a critical examination of that petition will show that he is speaking of the claim of Martinez and his associates as amounting in all to about fifteen leagues, and not of his own claim under the grant.

We are, therefore, of opinion that the extent of this grant, as confirmed by Congress, is not limited to the twenty-two square leagues, according to the argument of counsel, and that the Act of Congress makes valid the title under the patent of the United States, unless proved to be otherwise, by reason of error or mistake in the survey, or fraud in its procurement.

As regards the survey on which the patent was issued, and which is made a part of the patent, under the seal of the United States and the signature of the President, it is to be observed that the evidence shows that the General Land-Office made every effort to have it accurate. The survey was made by authority of

the commissioner of that office, under the supervision of the Surveyor-General of New Mexico. A survey had been previously made by W. W. Griffin, who was employed by the claimants to make it, because the then Secretary of the Interior had declined to order a survey. This survey was completed during the year 1870, and though purely a private enterprise and unofficial, the plat and field notes were deposited in the General Land-Office by [374] the claimant, presumably for the information of the Government as to the exact location of the exterior lines as claimed by the owners of the grant. The Land-Office having afterwards, under the influence of the decision of the supreme court in *Tameling* v. *U. S. Freehold & E. Co.*, *supra*, determined that it was its duty to ascertain the extent of this grant and to issue a patent for it, was about issuing orders to the Surveyor-General of New Mexico to have this grant surveyed, when it was suggested by the claimants that the commissioner should adopt the survey of Griffin, above referred to. He, however, declined to pursue this course; first, because he did not think it was a proper procedure; and second, because he did not think that the eastern and northern boundaries had been correctly located by the Griffin survey. The Surveyor-General thereupon made a contract for the work with Elkins and Marmon, and the Commissioner of the General Land-Office, in approving this contract, gave his own directions as to how these boundaries should be located, and furnished for the guidance of the surveyors an explanatory diagram. This survey was made in the autumn of 1877. The map or plat of it is a part of the record, together with the proofs taken by the surveyors to establish the calls of the grant. Contests were initiated before the Surveyor-General upon the validity of this survey by parties who were interested against it, and the case was fully heard on testimony, which testimony was filed with the Commissioner of the General Land-Office. He finally approved the survey and the patent was issued in accordance with it on May 19, 1879.

It is attempted in argument here to point out

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2. Boundaries of the Beaubien and Miranda grant, as surveyed and patented.

many errors and mistakes as objections to the accuracy of this survey. There is no reason to doubt that the Surveyor-General and the officers employed by him, and the Commissioner of the General Land-Office, all of whom gave particular attention to this survey, were well informed on the subject. They knew that it was an immense tract of land, that it would be the subject of grave criticism, and they knew [375] more about it and were better capable of forming a judgment of the correctness of that survey than this court can be. We may add that, after all the research, industry, and ability of special counsel for the Government, when the testimony taken in the case to prove these errors, and the record of the juridical possession, have been considered with the best judgment that we can bring to them, we are not satisfied that the survey is in any essential particular incorrect, but, on the whole, we believe that it substantially conforms to the grant originally made by Governor Armijo.

The principal point in dispute to which the argument of counsel has been addressed is that the part of the land included in this survey, north of the present line, which divides the State of Colorado and the Territory of New Mexico, was improperly included within the survey. In other words, it is argued that this northern line of the survey should have been run from the east to the west upon the summits of the Raton Mountains. This range of hills, rather than mountains, seems to project itself as a spur from the great range running north and south which divides the waters that flow east from those which flow west. Running almost due east as you ascend along the foot of this range of hills, on their south side, is the stream called the Colorado River, which seems to spring from the great mountain range before mentioned. The language descriptive of the land in the petition of Beaubien and Miranda, which was granted and donated to them by Governor Armijo, as "therein expressed," is as follows:

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills" (about which there does not seem to be much difficulty), "and from there running parallel with said River Colorado, in a northerly direction to opposite the point of the Uña de Gato, following the same river along the same hills to continue to the east of said Uña de Gato River to the summit of the table land (*mesa*), from whence, turning northwest, to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southwardly direction until it inter- [376] sects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning."

Now, it is this northeastern corner whence the course turns to the northwest which is the great subject of controversy, the line following the summit of the *mesa*, or table land, to the summit of the mountain. This part of the Colorado River is a natural object which could not be mistaken and which it is now claimed is the true course of the line, except that it is asserted that it should have followed the summit of the Raton Mountains, which are just north of it, and running parallel with the river. That range is also a natural object, easily ascertained, and it would seem but reasonable that one or the other of those objects should have been selected by the grantor as descriptive of the place where this northern line should be located. Instead of this, however, it is said to run to the "summit of the table land, from whence turning northwest, to follow along said summit" (which evidently means the summit of the table land), "until it reaches the top of the mountain." The longest line of the survey is from the southeast corner, in a northerly direction, parallel with the Colorado River; and if the line now contended for by appellant was the true east and west line, it need only have been stated in the grant that it should follow the course of that river to its origin, in the same mountain, which separates the waters of the rivers running east and west. But instead of speaking either of that river in its course from west to east, or of the Raton Mountains, as the natural object which constituted the northerly boundary of the grant, it requires the boundary line to leave the Colorado River at the junction of the Uña de Gato River with it, and continuing along a range of hills, "to the east of the Uña de Gato River to the summit of the table land." This is not only a strong indication that the northern boundary was not where it is claimed to be by counsel for appellant, but that it was somewhere else; that it was not a range of hills nor a river already mentioned in the grant, but that it was something else called the "summit, of the table land," north of both of [377] these. And although there is some contrariety of opinion about this "summit of the table land" which is to constitute the northeastern corner of the grant, we are of opinion, upon a consideration of all the evidence before us, that the survey was located as nearly in accordance with the terms of the grant as it is possible now to ascertain them.

Without going into this evidence more minutely, we are content to say that, while in favor of the correctness of this survey, in the points assailed, it is as strong or stronger than that for any other survey which could be made, or which has been suggested by the counsel for the United States, we are very clear that it is not the province of this court to set aside and declare null and void these surveys and patents approved by the officers of the Government whose duty it was to consider them, and who evidently did consider them with great attention, upon the mere possibility or a bare probability that some other survey would more accurately represent the terms of the grant.

The question of fraud in the location of this survey, which is about all the allegation there is of actual fraud in the title of the defendants, is not deserving of much consideration. We are compelled to say that we do not see any satisfactory evidence of an attempt to commit a fraud, and still less of its consummation. As to the principal officers of the Government who were connected with that survey, to wit: the Commissioner of the General Land-Office and the Surveyor-General of the Territory of New Mexico, there is not the slightest evidence that

they were governed by any fraudulent or improper motive in their acts in regard to this survey, or that they displayed any leaning towards the grantees in ascertaining the true boundaries of the grant. Nor is there any serious attack upon the subordinates of those officers, or any of the persons actually engaged in making the survey, in regard to their honesty of purpose or interest in the result. The principal argument of counsel upon this subject is based upon the Griffin survey, already mentioned, which was deposited by the claimants in the office of the Surveyor-General of New Mexico. It is argued, in the first place, that [378] this survey was a very incorrect one, and that it included much more land than was granted by Governor Armijo; secondly, it is insisted that in this respect it was an intentional departure from a correct survey; and thirdly, that it was designed and intended by the claimants to impose this incorrect and fraudulent survey upon the Commissioner of the General Land-Office and have him issue a patent for it.

As regards the first element of this allegation of fraud, the incorrectness of the survey, and that it included more land than the grant authorized, the only minute and careful survey with which it can be compared is the one upon which the patent finally issued, and we must say, with the light we have upon the subject and the time we have been able to bestow upon its consideration, that it is by no means clear that the Griffin survey, in that respect, is not the most correct one. The defendants here are not in a condition to contest the final survey. It is their business and their duty, having accepted the patent upon it, to defend it. But if it were to their interest, or to anybody's interest, to show that the Griffin survey was the more correct one, it seems to us that arguments in its support would not be wanting.

In the second place, as to any intentional fraud on the part of Griffin or his assistants in the running of these boundary lines, there is not the slightest evidence. And lastly, as to the charge that the Maxwell Land-Grant Company knew this survey to be a false one, and that it included much more land than the Company was entitled to, but that they nevertheless endeavored to impose it upon the Commissioner of the General Land-Office as a correct survey, there are two emphatic answers: first, there is no evidence that they believed it to be a false survey, and they only asked, or seemed to ask, that this survey might be adopted, because the Government had not made, and would not then make, one for itself, in order that they might get the patent to which they were entitled; second, the commissioner was not imposed upon. If they attempted a fraudulent imposition, they were not successful; he rejected their survey altogether, caused another one to be made, and pointed out in his instructions to those who [379] executed the final survey the points of departure from that made by Griffin, upon which he insisted. It seems impossible, in the face of these circumstances, to assume that there was anything in the nature of fraud perpetrated in regard to the Griffin survey and its effect upon the final survey.

The great importance of this case, as regards the immense quantity of land involved and its value, reinforced by the circumstance of the number of cases coming before the courts, in which, under the directions of the Attorney-General, attempts are made to set aside the decrees of the courts, the patents issued by the Government, and, in this case, an Act of Congress, seems to call for some remarks as to the nature of the testimony and other circumstances which will justify a court in granting such relief. The cases of this character which have come to the Supreme Court of the United States have been so few in number that but little has been said in regard to the general principles which should govern their decision. There are decisions enough to guide us in cases where a patent or other title derived directly from the Government has been questioned in a collateral proceeding brought to enforce that title or to assert a defense under it; but the distinction between this class of cases, in which all the presumptions are in favor of the validity of the title, and in regard to which a wise policy has forbidden that they should be thus attacked, and those like the present, in which an action is brought in a court of chancery to vacate, to set aside, or to annul the patent itself, or other evidence of title from the United States, is very obvious. In either case, however, the deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demand that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided. *U. S.* v. *Throckmorton*, 98 U. S. 61 [25: 93].

In the case of *United States* v. *Stone*, 69 U. S. 2 Wall. 525 [17: 765], this court said: "A [380] patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial proceeding. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy." This was a chancery proceeding to set aside a patent for land.

In the case of *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485], the court, considering the force and effect to be given to the actions of the officers of the Land Department of the Government, announces the doctrine that their decision, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belong to another, to give proper relief.

These propositions have been repeatedly reaffirmed in this court. *Moore* v. *Robbins*, 96 U.

S. 530 [24: 848]; *Marques* v. *Frisbie*, 101 U.S. 473 [25: 800]; *U. S.* v. *Atherton*, 102 U. S. 372 [26: 213]; *Shepley* v. *Cowan*, 91 U. S. 330 [23: 424].

In the case of *Atlantic Delaine Co.* v. *James*, 94 U.S. 207 [24: 112], *Mr. Justice* Strong, in delivering the opinion of the court, said, in regard to the power of courts of equity to cancel private contracts between individuals: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by [381] them." In Story's Equity Jurisprudence, section 157, it is said that relief will be granted in cases of written instruments only where there is a plain mistake clearly made out by satisfactory proofs. *Chancellor* Kent, in the case of *Lyman* v. *United Ins. Co.* 2 Johns. Ch. 632, which had reference to reforming a policy of insurance, says: "The cases which treat of this head of equity jurisdiction require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court." See also *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290.

We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which [382] commands respect, and that amount of it which produces conviction, shall make such an attempt successful.

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The Constitution declares (article IV, § 1), that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States." At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the Act, which we have already considered, confirming this grant and others.

In regard to the questions concerning the surveys, as to their conformity to the original Mexican grant, and the frauds which are asserted to have had some influence in the making of those surveys, so far from their being established by that satisfactory and conclusive evidence which the rule we have here laid down requires, we are of opinion that if it were an open question, unaffected by the respect due to the official acts of the Government upon such a subject, depending upon the bare preponderance of evidence, there is an utter failure to establish either mistake or fraud.

For these reasons the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

RICHARD R. PARKINSON, *Plf. in Err.*, [281]
v.
UNITED STATES.

(See S. C. Reporter's ed. 281, 282.)

Fifth Amendment — "infamous crime" — indictment—information—practice.

A prosecution for a crime, which is punishable by imprisonment in the penitentiary "for a period longer than one year," must be by indictment, and not by information, the crime being "infamous" within the Fifth Amendment.

[No. 227.]

Submitted April 15, 1887. Decided April 18, 1887.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Nevada. *Reversed, Remanded.*

The case is sufficiently stated by the court.

No counsel appeared for plaintiff in error.

Mr. **William A. Maury**, *Assist. Atty-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case comes here on a certificate by the Judges of the Circuit Court of the United States for the District of Nevada, that they were opposed in opinion on certain questions which arose at the hearing of a writ of error for the

review of the rulings of the district court of the district at the trial of Richard R. Parkinson, on an information by the district attorney, for unlawfully, fraudulently, and feloniously voting at an election for a representative in Congress from Nevada, and for unlawfully, fraudulently, and feloniously registering his name as an elector qualified to vote at such election. The prosecution was under sections 5511 and 5512 of the Revised Statutes, which made the offenses charged punishable by a fine of not more than $500, or by imprisonment not more than three years, or both. As the imprisonment may be "for a period longer than one year," the court can order that it shall be in the penitentiary. Rev. Stat. § 5541. This makes the crime "infamous," within the meaning of the Fifth Amendment of the Constitution of the United States, and the prosecution should
282] have been by indictment and not by information. It was so decided by this court, after this case was certified up by the circuit court, in *Ex parte Wilson*, 114 U. S. 417 [29: 89], and *Mackin* v. *U. S.* 117 U. S. 348 [29: 909]. As the *judgment* of the district court must be *reversed for this cause*, the questions certified have become immaterial, and their determination unnecessary in the final disposition of the case. *We, therefore, remand the case* without answering them.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

282] JOSEPH CHURCH ET AL., *Plffs. in Errs.*,
v.
HELEN M. KELSEY ET AL.

(See S. C. Reporter's ed. 282-284.)

Constitutional law—"due process of law"—equity jurisdiction—obligation of contracts—impairment of—State Constitution, not a contract—jurisdiction.

1. The provision of the Fourteenth Amendment of the Constitution that a State shall not "deprive any person of life, liberty or property, without due process of law" does not prevent a State from giving a court of equity the power to hear and determine a case requiring equitable relief.
2. A State Constitution is not a contract within the meaning of that clause of the Federal Constitution which prohibits the States from passing laws impairing the obligation of contracts.
3. Upon writ of error to a state court, to give this court jurisdiction, it must appear that the question presented was actually presented to and decided by the court below adversely to the plaintiff in error.

[No. 1302.]

Submitted March 28, 1887. Decided April 18, 1887.

IN ERROR to the Supreme Court of the State of Pennsylvania.

On motion to dismiss, with which is united a motion to affirm under Rule 6, sec. 5. *Affirmed.*

Reported below, 4 Cent. Rep. 95, which see.

The case is sufficiently stated by the court.

Mr. **Chapin Brown**, for defendants in error, in support of motion:

It does not appear from the record that this court has jurisdiction in this case. The only claim to any right asserted under the Constitution of the United States is contained in the fifth section of the answer of the defendant below; but no clause of or any reference to any clause or article of the Constitution is set up in the record, and this should have been done. The court is not able to see from the record that any provision of the Constitution of the United States was relied on by the plaintiffs in error, and that the right thus claimed by them was denied.

Maxwell v. *Newbold*, 59 U. S. 18 How. 511 (15: 506); *Lawler* v. *Walker*, 55 U. S. 14 How. 149 (14: 364); *Farney* v. *Towle*, 1 Black, 66 U. S. 350 (17: 216); *Hoyt* v. *Sheldon*, Id. 518 (17: 65); *Bridge Proprs.* v. *Hoboken Co.* 68 U. S. 1 Wall. 116 (17: 571).

The court below did not in this proceeding attempt to try the title to land; that had been settled by previous litigation between the parties in which the plaintiffs were adjudged to own five ninths, and defendants four ninths of the land; but even had it done so, no right of the plaintiffs in error, under the Constitution of the United States, would have been violated or denied. Due process of law, as laid down in the Constitution, is any process instituted by a State, for settlement of disputes where there is a plaintiff, defendant, issue joined, a competent tribunal, and a judgment.

Den v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 272 (15: 372); *Pearson* v. *Yewdall*, 95 U. S. 294 (24: 436); *Edwards* v. *Elliot*, 88 U. S. 21 Wall. 557 (22: 492); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565).

Article VII of the Amendment to the Constitution of the United States, relating to jury trials, applies only to courts of the United States.

Edwards v. *Elliott* and *Pearson* v. *Yewdall*, *supra.*

Mr. **A. Ricketts**, for plaintiffs in error, *contra:*

The title of plaintiffs in error was and is purely legal. The conveyance was made by Letta Griffin to Charlotte Church, but the purcase money was wholly paid by Joseph Church, her husband; whether the title is to be considered in her or him is immaterial; in either case it was simply legal. When she died, whatever title she had descended to her son and heir, subject to the curtesy of her husband. And by the descent thus cast, the title became so vested that it could be devested by a proper action at law.

Gilbert, Tenures, 18; Co. Litt. 267 a, § 385.

This is the law of Pennsylvania.

Hoey v. *Furman*, 1 Pa. 295, 300.

The right to have and enjoy this legal title, unless deprived of it by a regular action at law, is a right which the Supreme Court of Pennsylvania has declared no power in the State could take from them.

North Pa. Coal Co. v. *Snowden*, 42 Pa. 488, 492.

Mr. Chief Justice **Waite** delivered the opinion of the court:

If we understand correctly the questions on which, it is claimed, our jurisdiction in this case rests, they are: 1, That the provision in section 1, article XIV of the Amendments of the Constitution of the United States, that a State shall not "deprive any person of life, liberty, or property without due process of law," prevents the State of Pennsylvania from giving jurisdiction to a court of equity of a suit brought by

[283] the owner of an equitable interest in land to establish his rights against the holder of the legal title because it deprives the holder of the legal title of the right to a trial by jury which he would have in a suit at law; and 2, That, as the Constitution of a State is the "fundamental contract made between the collective body of citizens of the State and each individual citizen," a state statute which violates a State Constitution is a "law impairing the obligation of contracts" within the meaning of that term, as used in article I, section 10, clause 1, of the Constitution of the United States.

It sufficiently appears from the record that the first of these questions was actually presented to and decided by the court below, adversely to the claim of the plaintiffs in error. That is sufficient to give us jurisdiction, but the decision was so clearly right that it is unnecessary to keep the case here for further argument. Certainly the provision of the Constitution referred to cannot have the effect of taking away from the States the power of giving a court of equity jurisdiction in cases requiring equitable relief. It may be true that in Pennsylvania "Equity powers have been doled out to the courts by the Legislature with a sparing hand," but there is nothing in the Constitution of the United States which requires that this should always be so. The suit of which complaint is made in this case was brought to establish a trust in the holder of the legal title, which from time immemorial has been a proper subject of chancery jurisdiction. It is useless to contend that the Constitution of the United States prevents any State from giving a court of equity the power to hear and determine such a case. This has not been doubted in the courts of Pennsylvania, as we understand. *North Pa. Coal Co.* v. *Snowden*, 42 Pa. 488, 492.

We cannot find that the other question was actually presented to the state court for decision. Certainly it cannot be found in the record, in the form it has been stated in the brief of counsel here. But if it had been no argument would be needed to show that the objection was not well taken. A State Constitution is not a contract within the meaning of [284] that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts. It is the fundamental law adopted by the people for their government in a State of the United States; and as such it may be construed and carried into effect by the courts of the State, without review by this court, except in cases where what is done comes, or is supposed to come, in conflict with the Constitution of the United States. Such is not the claim here, the only question under this branch of the case being whether the statute giving jurisdiction to the court of equity in a suit under which the defendants in error claim title is in violation of the Constitution of the State.

The motion to dismiss is overruled, and that to affirm granted.

Affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[284] LOUISIANA NATIONAL BANK, Garnishee, *Plff. in Err.*, and *Appt.*,

v.

MRS. HATTIE L. WHITNEY, Natural Tutrix of W. W. WHITNEY, M. G. WHITNEY and ZULIEME WHITNEY, ET AL.

BOARD OF LIQUIDATION OF THE CITY DEBT, *Appt.*,

v.

SAME.

(See S. C. Reporter's ed. 284, 285.)

Practice—writ of error and appeal—order to pay fund in dispute into registry of the court, not final decree.

An order to pay a fund into the registry of the court, for preservation during the pendency of the litigation as to its ownership, is not a final decree for the purpose of jurisdiction of this court upon writ of error or appeal.

[Nos. 986, 987.]

Submitted April 11, 1887. Decided April 18, 1887.

IN ERROR to and appeals from the Circuit Court of the United States for the Eastern District of Louisiana.

On motion to dismiss. *Granted.*

The case is sufficiently stated by the court.

Messrs. **Thomas J. Semmes,** and **Alfred Goldthwaite,** for defendants in error and appellees, in support of motion.

Mr. **Henry C. Miller,** for plaintiff in error and appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opin- [285] ion of the court:

This is a proceeding begun May 22, 1883, by Mrs. Myra Clark Gaines, then in life, to subject a certain sum of $40,000 on deposit in the Louisiana National Bank to the payment of a judgment in her favor against the City of New Orleans. There is no dispute about the fact that the money in question was on deposit when the proceeding was begun and the Bank served with process, but the Board of Liquidation of the City Debt has made claim to it as part of the fund appropriated by Act No. 133 of 1880 to the payment and liquidation of the bonded debt of the city. Pending the determination of the questions involved, the court, March 15, 1886, ordered the money paid into the registry of the court. From this order the Bank has appealed, and also sued out a writ of error, and the Board of Liquidation has likewise appealed. The representatives of Mrs. Gaines, who were made parties to the proceeding after her death, now move to dismiss both the writ of error and the appeals, because the order to be brought under review is not a final judgment or decree within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error.

We have no hesitation in granting the motion. The court has not adjudicated the rights of the parties concerned. It has only ordered the fund into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. *Forgay* v. *Conrad*, 47 U. S. 6

How. 204 [13:405]; *Grant* v. *Phœnix Ins. Co.* 106 U. S. 481 [27:288]. If in the end it shall be found that the fund belongs to the Board of Liquidation, it can be paid from the registry accordingly, notwithstanding the order that has been made. The money when paid into the registry will be in the hands of the court for the benefit of whomsoever it shall in the end be found to belong.

Both the appeals and the writ of error are dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EUGENE L. SULLIVAN, Collector of Customs, PORT OF SAN FRANCISCO, *Plff. in Err.*,

v.

ALEXANDER BALFOUR, ET AL., Partners as BALFOUR, GUTHRIE & Co.

Grain bags manufactured in the United States—return of, free of duty.

1. Under section 9 of the Act of Congress of February 8, 1875, grain bags, manufactured in the United States, when exported filled with American products, may be returned to the United States free of duty, notwithstanding such bags were manufactured from foreign material, and at the time of exportation the manufacturers were paid a "drawback" for duties on such material.

2. The provision of such section authorizing the return "under such rules and regulations as shall be prescribed by the Secretary of the Treasury," does not authorize that officer to prohibit the return unless duties are paid.

[No. 252.]

Submitted April 21, 1887. Decided April 25, 1887.

IN ERROR to the Circuit Court of the United States for the District of California. *Affirmed.*

This was an action to recover from the plaintiff in error, as Collector of the Port of San Francisco, certain duties paid on certain grain bags exported by defendants in error, filled, and brought back by them empty.

The case is fully reported below in 10 Sawyer, 95, and the syllabi and opinion in the same, 19 Fed. Rep. 578.

Above head notes by Sawyer, *J.*, in the case as reported below.

Mr. **G. A. Jenks**, *Solicitor Gen.*, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** announced the decision as follows:

This judgment is affirmed. Our own views of the case are so well presented by the circuit judge in the court below in his opinion reported in *Balfour* v. *Sullivan*, 10 Sawy. 95; *S. C.* 19 Fed. Rep. 578, that we deem it unnecessary to do more than refer to that opinion for the grounds of this decision.

MINNEAPOLIS AGRICULTURAL AND MECHANICAL ASSOCIATION ET AL., [295]

Appts.,

v.

THOMAS H. CANFIELD.

(See S. C. Reporter's ed. 295-303.)

Bill to establish complainant's equities in stock and property of corporation—former adjudication—defective conveyance—right of complainant to redeem pledge of stock to bank—costs.

Upon a bill filed by the appellee to establish his equities in the capital stock and corporate property of the Minneapolis Agricultural and Mechanical Association as against the claims of the State National Bank, it is *held:* that a former judgment by a state court, to the effect that a conveyance by the directors of said Association was defective to convey the legal title to the complainant, as against the Bank which held the capital stock as a pledge, is conclusive as between the parties and those in privity with them; that the Bank by an agreement to accept Northern Pacific Railroad bonds for its stock did not release said pledge; that the complainant's equity under said judgment consisted in a right to redeem the pledge to the Bank, and that he is entitled to enforce his said right against certain holders from the Bank, who appear from the evidence to be holders with notice of his equity.

[No. 175.]

Argued March 30, 31, 1887. Decided April 18, 1887.

APPEAL from the Circuit Court of the United States for the District of Minnesota. *Modified, Affirmed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Mr. **Eugene M. Wilson**, for appellants.

Messrs. **C. E. Flandrau, George F. Edmunds** and *E. C. Palmer*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court: [297]

The original bill in this case was filed August 14, 1877, by Thomas H. Canfield, a citizen of the State of Vermont, against the Minneapolis Agricultural and Mechanical Association, a corporation created under the laws of the State of Minnesota, and the State National Bank of Minneapolis, a corporation organized under the laws of the United States, at Minneapolis, in the State of Minnesota. Its general purpose was to establish the equities of the complainant in the capital stock and corporate property of the Minneapolis Agricultural and Mechanical Association as against the claims of the State National Bank.

Prior to the filing of this bill, in October, 1873, an equitable action was commenced by the State National Bank and Rufus J. Baldwin, its cashier, in the District Court of the Fourth Judicial District for the County of Hennepin and State of Minnesota, against Canfield, involving, to a certain extent, the matters here in controversy. The proceedings and judgment in that case are relied upon as *res judicata* in the present litigation, and are conclusive so far as the same matters are drawn in question in both suits.

The facts found by the District Court in Minnesota, in the proceeding referred to, are substantially as follows:

That the Minneapolis Agricultural and Mechanical Association in 1871 became a body

corporate under the general laws of the State of Minnesota, for the purpose of promoting the agricultural and mechanical arts by holding fairs and other public exhibitions, with a capital stock of $40,000, divided into 800 shares of $50 each, all of which was paid up, and for which certificates were issued; that the government of said Association was vested in a board of directors of eleven persons, to be elected annually by the stockholders, and continue in office for one year, and until their successors were elected and qualified; that said Corporation became the owner in fee of certain described lands in the County of Hennepin, containing seventy acres, known as the Fair Grounds, on which it erected buildings and structures for the purpose of accommodating [298] the fairs which it proposed to hold, and for the other uses and purposes contemplated by their erection.

That on the 12th day of November, 1872, William S. King had become the owner of all the capital stock of the Association, and was in possession of its real estate, using the same as his own individual property, without interference on the part of the Corporation or its officers, the ordinary and lawful business of the Corporation having been wholly suspended and abandoned; that 200 shares of the stock King had purchased from George A. Brackett on credit, giving his notes for the purchase money, secured by a pledge of the stock itself, which notes and stock, thus pledged, Brackett, on April 8, 1873, transferred and delivered to the State National Bank of Minneapolis to secure the payment of a loan of $10,000 made by the Bank to Brackett; that 100 shares of said stock King had purchased from one Richard J. Mendenhall on credit, giving his promissory notes for the payment of the purchase money, secured by a pledge of the stock, which notes Mendenhall procured to be discounted for his benefit by the State National Bank, transferring to the Bank the stock so pledged as collateral security.

That on July 19, 1873, King delivered to Rufus J. Baldwin the remaining 500 shares of stock as collateral security for his obligation to return to Baldwin certain gas stock of the value of $10,000 borrowed by King from him, and authorized Baldwin also to hold the said stock as additional security for King's notes held by the Bank.

That on August 14, 1873, King agreed in writing to sell to Thomas H. Canfield, the complainant, the property known as the "Fair Grounds," in Minneapolis, excepting five acres subscribed to the stock of the Minneapolis Harvester Company, for the sum of $65,000, payable in 7-30 gold bonds of the Northern Pacific Railroad Company at the rate of ninety cents on the dollar, and the remainder in notes of Canfield, payable in equal installments of one, two, and three years from date, with interest at the rate of 10 per cent per annum, King agreeing to procure abstracts of title complete and perfect the same, and execute a [299] warranty deed at as early a day as possible; and it was then and there verbally agreed between King and Canfield that King would transfer all the capital stock of the Minneapolis Agricultural and Mechanical Association to Canfield, and also procure a deed of said property from said Corporation to Canfield; that Canfield at the time of executing said agreement knew that the legal title to the property was in the Corporation, but had no knowledge that the State National Bank of Minneapolis, or Baldwin, or anyone else except King, had any interest in or claim to its capital stock.

That King informed Baldwin of his agreement to sell the fair grounds property to Canfield and its terms, and it was thereupon agreed between King and Baldwin, acting for himself and the Bank, that the Bank should take $36,000 par value of said Northern Pacific Railroad bonds to be paid to King by Canfield in exchange for the 800 shares of stock of the Minneapolis Agricultural and Mechanical Association held by the Bank, the said stock to be sent to the National Park Bank in the City of New York, to be delivered to Canfield upon his delivering at said Bank to the order of Baldwin the Northern Pacific Railroad bonds to the amount of $36,000 par value, in exchange therefor.

That in pursuance of said agreement, King executed and delivered to Baldwin an order in writing on Canfield for the delivery of said bonds, which was indorsed by Baldwin, directing the delivery to the National Park Bank, and, on August 22, 1873, Baldwin sent the certificates for 800 shares of the stock, together with these orders to the National Park Bank, with instructions to deliver the stock to Canfield on receipt of the bonds in exchange therefor.

That after the execution of the agreement of August 14, 1873, between King and Canfield, King, in pursuance thereof and for the purpose of carrying out the same, caused a deed to be executed, in the name of the Minneapolis Agricultural and Mechanical Association, for the fair grounds property, by R. J. Mendenhall, Thomas Lowry, W. D. Washburn, C. G. Goodrich, George F. Stevens, William S. King, Levi Butler, W. W. Eastman, W. F. Westfall, Dorilus Morrison, and George A. Brackett, who were all the directors of said Association, but [300] the execution of this deed was never authorized at or by any meeting of said directors, nor was any resolution ever passed by the said board of directors in reference to the execution of the same, or authorizing the seal of the Corporation to be attached thereto, or authorizing the sale or conveyance of said property in any way to said Canfield, the said deed having been executed by said parties separately and at different places, wherever said parties happened to be, at the request of said King or his attorney, for the purpose of enabling King to convey the property to Canfield. It was executed by Stevens at Utica, in the State of New York, by Morrison and Brackett in the City of New York, and by the other signers thereof in Hennepin County, Minnesota.

That said Brackett and said Morrison, at the time of signing said deed, having objected thereto on the ground that the stock was held by the State National Bank of Minneapolis, were informed of the agreement between King and Baldwin, whereby the said stock was to be delivered in exchange for Northern Pacific Railroad bonds, and thereupon executed the said deed.

That, at the time of the execution thereof by

Brackett and Morrison, Canfield was informed by King that the stock of the Association had been left as collateral to secure certain notes at the State National Bank of Minneapolis, and had been sent to the National Park Bank to be taken up by King with Northern Pacific Railroad bonds to be received by him from Canfield under said agreement.

That on September 12, 1873, in the City of New York, King delivered to Canfield the said deed, together with a warranty deed of the same property, duly executed and acknowledged by King, conveying the property in his own name; when and where Canfield delivered to King the said $65,000 in bonds of the Northern Pacific Railroad Company, and executed and delivered to him his notes for $6,500, as required by the terms of the agreement of August 14, 1873, which deeds were, on October 4, 1873, duly recorded in Hennepin County.

[301] That the orders in writing for the delivery of the bonds to the National Park Bank were never presented to Canfield, nor were any of the said bonds deposited at the National Park Bank, nor was the stock of the Association or any part of it ever delivered to Canfield, but was held by the Bank as collateral security for the payment of the notes and the return of the gas stock, as hereinbefore stated.

That King retained for his own use the railroad bonds and Canfield's notes received under the agreement of August 14, 1873, and that Canfield, through inadvertency, did not demand the delivery of the stock of the Association from King at the time of the delivery of said deed by King to him and the transfer of the bonds and notes by him to King, he, Canfield, supposing that the deeds delivered to him conveyed a complete title to the property.

That the Minneapolis Agricultural and Mechanical Association had no corporate property except the said fair grounds, and that shortly after receiving said deeds from King, Canfield conveyed to the Minneapolis Harvester Works Company the five acres excepted out of the said property by the terms of the agreement of August 14, 1873, which said five acres had been previously to the execution of said agreement, subscribed to the stock of said company; and that shortly after receiving his deeds, Canfield took possession of the grounds and of the buildings remaining thereon, and remained in possession thereof at the time of the decree in said suit.

Upon these facts it was adjudged by the District Court of Minnesota that Canfield, by virtue of the deeds referred to, acquired no title to said real estate; that the State National Bank of Minneapolis was the *bona fide* holder of the whole amount of the capital stock as collateral security for the debts due to it, and by reason thereof had a right to have the property of the Corporation applied to its redemption, which right was prior and superior to any claim to or interest in said stock or real estate on the part of Canfield; but that Canfield, subject to the right and interest therein of the said Bank, was the owner in equity of the said stock. Neither King nor the Minneapolis Agricultural and Mechanical Association were parties defendant [302] in that suit, and the relief, therefore, granted by the judgment therein was limited to declaring that the deed purporting to be executed by the Corporation to Canfield was null and void as against the State National Bank of Minneapolis, and to directing that said judgment be recorded in the office of the register of deeds in Hennepin County, so that said deed should not thereafter be a cloud upon the title of said Corporation to said real estate. This judgment was entered on March 17, 1877. An appeal was taken therefrom to the Supreme Court of Minnesota, the decision in which is reported in *Baldwin* v. *Canfield*, 26 Minn. 43.

In that case it was declared by the court that the deed purporting to be made by the Association was not the act and deed of such Association, and therefore did not convey the title to the premises in question to Canfield. The court further said: "The directors took no action as a board with reference to the sale of the premises, or the execution of any deed thereof. So far as in any way binding the Corporation is concerned, their action in executing the deed was a nullity. They could not bind it by their separate and individual action. Hence it follows that the so-called deed is not only ineffectual as a conveyance of real property, but equally so as a contract to convey."

The court also declared as follows: "Upon the facts found and the preceding conclusions of law, the plaintiffs, as holders of the stock, are interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the Corporation. If this is so, they have a right to take legal means to preserve the property, to prevent it from being lost to the Corporation, or its value from being impaired. If such value is practically impaired by a cloud upon the title of the Corporation to real property, they have a right to have the cloud removed. Their ownership of the stock, either general or special, gives them a right to defend it, as in the case of any other property. This right is paramount to any right upon the part of King as the general owner of the stock, or of Canfield as equitable owner of it, for the reason that by the contract of pledge King has subordinated his rights to theirs, while Canfield's right to the stock accrued while the stock was in the plaintiff's hands—while [303] they were holding the certificates which are the evidence of its ownership. The certificates were not delivered to Canfield. This fact bound him to take notice of the rights of the plaintiffs as holders of them in pledge."

It was also held that, subject to the right and interest of the plaintiffs as thus defined, Canfield was in equity the owner of the whole 800 shares of said stock. This judgment was not rendered until May 5, 1879.

In the meantime, and subsequent to the rendition of the judgment in the District Court of the State, on the 10th of July, 1877, the State National Bank gave notice of an intention, on the 25th day of July, 1877, to sell at public auction the 800 shares of the capital stock of the Minneapolis Agricultural and Mechanical Association for the payment of the Brackett notes and the Mendenhall notes made by King.

Said sale having in the meantime been postponed, Canfield filed the original bill in this cause against the Minneapolis Agricultural and Mechanical Association and the State National Bank of Minneapolis, the object and prayer of which were, upon the facts alleged, to assert

his equity as owner of the said 800 shares of stock and in the real estate of the Minneapolis Agricultural and Mechanical Association, and in the meantime to enjoin the intended sale of said stock, which had been adjourned to August 15, 1877. On September 13, 1877, an application for an injunction to restrain the said sale, having been previously made and submitted, was denied; and on September 15, 1877, the said sale, originally advertised for July 25, 1877, adjourned to August 15, 1877, and again adjourned to September 15, 1877, took place, and the 800 shares of capital stock of the Minneapolis Agricultural and Mechanical Association were struck off and sold to one J. M. Knight for the sum of $13,000, that being the highest bid for the same. This sum was the estimated amount due to the Bank for which it held the stock as collateral; the gas stock, or an equivalent, having in the meantime been returned. At the time of the sale, the State National Bank executed to Knight a guaranty of the title to the stock sold.

[304] On December 31, 1877, Knight sold to Dorilus Morrison 720 shares of his stock in consideration of $12,430.42. Morrison assuming and agreeing "to pay the costs, expenses, and charges incurred and to be incurred in or about certain legal proceedings instituted in respect to the said shares of stock, and in respect to the real estate of said Association, in which the State National Bank of Minneapolis and R. J. Baldwin were parties." On February 23, 1878, the Minneapolis Agricultural and Mechanical Association, by its board of directors and officers, executed a deed in fee simple of the seventy acres of land constituting the fair ground property to Dorilus Morrison and James M. Knight, nine tenths thereof to the former and one tenth to the latter. This deed was executed by the authority of the board of directors elected by Morrison and Knight, as sole stockholders, for that purpose. On October 22, 1878, Morrison conveyed by deed in fee simple to Jacob K. Sidle and Robert B. Langdon his undivided nine tenths of the said fair ground property; Morrison also conveyed to Sidle and Langdon his 720 shares of the capital stock of the Minneapolis Agricultural and Mechanical Association and the guaranty of title to the same by the State National Bank of Minneapolis. The deed to Sidle and Langdon on its face is absolute, but the title was held by them in fact in trust for certain persons, as expressed in written declarations of trust given to each of the *cestuis que trustent*. The following is a copy of one of these declarations:

"MINNEAPOLIS, *October* 22, 1878.

"*Whereas*, Divers persons have advanced to us, J. K. Sidle and R. B. Langdon, sums of money amounting to twenty-nine thousand six hundred sixty-eight and $\frac{72}{100}$ dollars, wherewith we are to pay off and liquidate the indebtedness of the Northwestern Mechanical and Agricultural Association as to particular matters, and also to pay off certain incumbrances heretofore resting upon an undivided nine tenths of the fair grounds in the City of Minneapolis, of which sum W. D. Washburn, of said city, has advanced twenty-five hundred dollars; and whereas we have at this date received from [305] Dorilus Morrison and wife a deed of the same undivided nine tenths of the said fair grounds, the title to which is, however, in litigation; we therefore agree that, in case the result of the said litigation shall be to validate our title, we shall, as soon as may be reasonable after one year from the date hereof, sell said land, and from the proceeds of such sale pay the said advances to the persons severally making the same, with interest at the rate of 10 per cent per annum, if the sum realized from such sale shall be sufficient to cover such payment. But if the proceeds of such sale shall not be sufficient to pay such advances and interest in full, then we agree to pay and apply such proceeds in payment of such advances *pro rata* to each person in proportion to the amount of the advance by him made. This is the extent of our obligation in the matter, and if our title to the said land shall fail, then no duty or obligation rests upon us."

The circumstances in which the conveyance to Sidle and Langdon was made are shown in the proof and stated by counsel for the appellants in his brief, as follows:

"In the year 1878 a fair was held in Minneapolis, upon the same land, under the auspices of another organization, known as the Minnesota Agricultural and Mechanical Association. At the same time a rival fair was held at St. Paul. Minneapolis, at a large expense, secured the presence of the most famous racing horses and finest blooded bulls. St. Paul secured the attendance of the President of the United States and staff. The competition was great and costly. As is not unusual, the expenditures exceeded the receipts. The Minneapolis deficiency was $14,000 over and above all receipts and large amounts of private contributions. This was due for labor and material for buildings on the grounds, services in and about the fair, premiums, advertising, railroad freights, and such other like matters, as would occasion the greatest amount of complaint and public reproach if not paid. It was claimed that Morrison was, as the owner of the land, liable for the material and labor bestowed thereon, and liens were threatened to be filed on the same. Meetings were held by the leading citizens, and it was at last agreed that an amount of some $30,000 would be contributed, providing Morrison would convey his nine tenths in- [306] terest in the land and stock to appellants Sidle and Langdon, in trust for the contributors, in consideration of his being paid the money it had cost him and interest, and of having the taxes paid on said land, and of being relieved from the claims against him on account of labor and material so furnished. The amount of purchase money and interest then amounted to some $14,000; taxes due to over $2,000; and the said material and labor for which it was claimed Morrison and the land were liable to some $6,000 more,—in all some $22,000. It was also agreed that the trustees should bear all expense of defending the title against any litigation involving it. According to such agreement, Morrison conveyed the said nine tenths of said land and stock to said Sidle and Langdon, and they executed a written acknowledgment of the trust to each of the contributors. This paper stated the amount of each contribution, and the obligation to sell the land as soon as the title should be cleared from litigation, and pay the amount of advance and 10 per cent interest, if proceeds

were sufficient, and if not to pay *pro rata*. No provision was made as to distribution in case of a surplus. Such was either not contemplated, or forgotten, or, as is very probable, it was hoped that some means might be developed to secure the land for a public fair ground for the city.

"Dorilus Morrison was one of the contributors to this general fund to the amount of $3,000. There were also contributions made by Farnham & Lovejoy, and three railroad companies, aggregating some $6,500, which were met by claims against Morrison and the 'Fair Association.' The remainder was contributed by citizens having no interest in the matter, except the reputation of the city, and among others appellant Langdon contributed $7,000 and appellant Sidle $2,500."

On August 14, 1880, the complainant, on leave, filed his supplemental and amended bill in this case, to which he made as additional parties defendant Knight, Morrison, Baldwin, [307] King, Sidle, Langdon, William D. Washburn, S. W. Farnham, James A. Lovejoy, and George A. Brackett, all citizens of Minnesota. This amended and supplemental bill, in substance, after reciting the original bill, charged that at the time of the pretended sale of the 800 shares of the capital stock of the State National Bank to Knight, the Bank had no rightful lien thereon by way of pledge for any unpaid debt, having in fact released the same by its agreement with King to accept from him $36,000 of the Northern Pacific Railroad bonds in satisfaction thereof. It further charges that the said pretended sale to Knight was no sale at all, but was merely a contrivance for the purpose of converting the title of the Bank as pledgee into an absolute title, in fraud of the complainant, and that consequently Knight, by virtue of said sale, acquired no better title than that previously held by the Bank. It is further claimed that Morrison as assignee of nine tenths of the said stock, and Sidle and Langdon as his assignees, purchased with full notice of all the equities of the complainant, and therefore are not purchasers in good faith. The amended and supplemental bill, therefore, seeks to charge Sidle, Langdon, and Knight as holders of the legal title to the stock and the property represented by it in trust for the benefit of the complainant, and prays for an account and a conveyance.

The cause was heard upon bill, answers, replication, exhibits, and testimony, and a final decree was rendered in favor of the complainant, establishing his equity as the owner of the stock and corporate property of the Minneapolis Agricultural and Mechanical Association, subject to the payment to James M. Knight of the sum of $569.58, and to the payment to Jacob K. Sidle and Robert B. Langdon of the sum of $8,646.55. From that decree this appeal is prosecuted by the defendants below.

It was argued at the bar that Canfield acquired a complete equitable title to the real estate of the Minneapolis Agricultural and Mechanical Association, by virtue of the sale thereof to him by King by the contract in writing of August 14, 1873, and by the deed in pursuance [308] thereof, purporting to be made by the Corporation, dated August 15, 1873. The ground of this contention is that in that negotiation and transaction King rightly represented the Corporation as its agent, and that the deed, if defective to convey the legal title, because not formally authorized by the directors at a meeting of the board, was such as equity would correct and reform so as to carry into effect the intention of the parties.

This view of the question, however, is not now open; the effect of that conveyance, both at law and in equity, having been finally adjudged between Canfield and the State National Bank by the Supreme Court of Minnesota. That judgment, as between those parties and those in privity with them, conclusively establishes, for the purposes of this case, that the deed was void at law, and that the equity of the State National Bank to the stock, and in the land as a pledge for the payment of the debt for which the stock had been hypothecated, was superior to that of Canfield. We must assume therefore, at the outset of our present inquiry, that at the date of the alleged sale of the stock to Knight, Canfield's equity consisted merely in a right to redeem the pledge, unless it had been previously released by the Bank. This, upon the evidence, we find not to be the case. The agreement between the Bank and King, claimed to have that effect, cannot operate as such. It was an agreement merely on the part of the Bank that it would exchange the stock for the agreed amount of Northern Pacific Railroad bonds, to take effect upon mutual deliveries. King was not the agent of the Bank to receive the bonds from Canfield; the title of the Bank to the stock was never relinquished by it.

On the other hand, we adopt the conclusion of the court below as to the nature of the alleged sale of the stock by the Bank to Knight. We are satisfied from the evidence that it was no sale at all; nothing was paid by Knight, and the stock was not delivered to him; it was not in fact a real transaction. The legal title of the stock was shifted from the Bank to Knight, but Knight acquired by the transaction no other or better right than that of the Bank; he still held it subject to Canfield's equitable right to redeem. Neither was Morrison, after the conveyance of nine tenths of the stock to him by Knight, in any better condition. He had full [309] notice of the complainant's equity, and, as we think, of the nature of Knight's title; consequently he and Knight thereafter, each for his own proportion, held the stock, and the real estate of which they had procured a conveyance from the Association, subject to the equity of Canfield. Sidle and Langdon are in the same plight; they took their title with express notice of Canfield's equity, and subject to the consequences of the pending litigation, the burden and expenses of which they agreed to assume. They are entitled to hold the property only on the same conditions attached to it in the hands of Knight and Morrison; they succeeded only to Morrison's title. As against Canfield, the complainant below, however, his equity being the right to redeem the property as against the Bank on the payment of its debt, the same burden rests upon it in favor of the present holders of the title, derived by successive assignments from the Bank. The decree below, as a condition of redemption against Sidle and Langdon, required only the payment by Canfield of

the sum of $8,646.55, which was the amount paid in cash, on November 20, 1878, by Sidle and Langdon, to take up two of the notes given by Morrison for the payment of the purchase money from the Bank; but that amount does not represent the full amount of Morrison's payment. The whole amount paid by Morrison for nine tenths of the stock, the aggregate of three notes given at the purchase, was $12,430.43; and Canfield, in the exercise of his privilege of redemption, should be charged with the full amount due on that account.

To the extent of the difference between that sum and the sum actually charged in the decree appealed from, the decree should be modified. In all other respects it is affirmed, the costs in this court being equally divided. The cause is accordingly remanded to the Circuit Court for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[264] FRANCIS E. HINCKLEY, *Plff. in Errr.*,
v.
PITTSBURGH BESSEMER STEEL COMPANY (Limited).

(See S. C. Reporter's ed. 264-278.)

Sales—breach of contract to manufacture—tender—special findings of court below—measure of damages—profits—secondary evidence—practice.

1. In an action to recover damages for the breach of a written contract for the purchase by the defendant of 6,000 tons of steel rails, on the special findings of the court below, it is *held*: that the failure of the defendant on due notice to furnish drilling directions, together with his request to postpone the delivery of the rails, and also with a notice that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing and tendering them; and that the measure of damages is the profit the plaintiff would have made, less the profit realized on rails made from the material purchased by the plaintiff with which to perform his contract.

2. This court will not reverse a judgment for alleged errors in the admission of evidence, which could not have prejudiced the plaintiff in error.

[No. 188.]

Argued April 5, 1887. Decided April 18, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Opinion below published, 17 Fed Rep. 584. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Thomas S. McClelland**, for plaintiff in error:

The giving of drilling directions, mentioned in the contract, as an option reserved to plaintiff in error, was not a condition precedent to a performance of the contract on the part of the defendant in error; and its failure to manufacture and deliver the goods provided for by the contract was such a breach of the contract by it that it is barred from maintaining this action.

Palm v. *Ohio & M. R. R. Co.* 18 Ill. 217; *Christian County* v. *Overholt*, 18 Ill. 223.

If there is a cause of action against plaintiff in error, the measure of damages should be the difference between the contract price and the market price at the time and place of delivery, and not the difference between the contract price and the cost of manufacturing and delivering the goods, as found by the lower court.

Pollen v. *Leroy*, 30 N. Y. 549; 2 Suth. Dam. 359, and cases cited; *Masterton* v *The Mayor**, 7 Hill, 61; 2 Stark. Ev. 7th Am. ed. 1201; *Boorman* v. *Nash*, 9 Barn. & C. 145; *Story* v. *N. Y. & H. R. R. Co.* 6 N. Y. 85; *Maclean* v. *Dunn*, 4 Bing. 722; *Leigh* v. *Paterson*, 8 Taunt. 540; *Gainsford* v. *Carroll*, 2 Barn. & C. 624.

In an action by a vendee against a vendor for a breach in not delivering the article sold, the measure of damages is the market price at the time of the breach.

Marsh v. *McPherson*, 105 U. S. 709 (26:1189); *Hopkins* v. *Lee*, 19 U. S. 6 Wheat, 109 (5: 218); *Douglass* v. *M'Allister*, 7 U. S. 3 Cranch, 298 (2: 445); *Shepherd* v. *Hampton*, 16 U. S. 3 Wheat. 200 (4:369); *Masterton* v. *The Mayor*, 7 Hill, 74, and cases cited.

The defendant in error was bound, both in law and good morals, to exercise due diligence to protect itself, and thereby inflict the least possible damages on the plaintiff in error, even if the latter was guilty of a breach of his contract.

Shannon v. *Comstock*, 21 Wend. 457; *Heckscher* v. *McCrea*, 24 Wend. 309; *Hamilton* v. *McPherson*, 28 N. Y. 76.

Mr. **John N. Jewett**, for defendant in error:

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Northern District of Illinois, by the Pittsburgh Bessemer Steel Company (Limited), a Pennsylvania corporation, against Francis E. Hinckley, to recover damages for the breach by Hinckley of a written contract for the purchase by him from the Company of 6,000 tons of steel rails. The contract was as follows: [265]

"Memorandum of Sale.

"The Pittsburgh Bessemer Steel Company (Limited) have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn St., Chicago, Ills., and the said Hinckley has purchased and agrees to pay for, six thousand gross tons of first quality steel rails, to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company (Limited), pattern No. 5.

"Said rails are to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed; at least ninety per cent shall be in thirty (30) feet lengths, with not over ten (10) per cent of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet.

"All second quality rails or excess of shorts which may be made, not exceeding five (5) per cent of each month's shipments, to be taken at the usual reduction of ten (10) per cent in price,

* See notes and cases in reference note, and digested citations at close of case, Lawyers' edition. [Ed.]

and to be piled and shipped separately (painted white on both ends), as may be ordered by the inspector.

"Deliveries to begin in May, 1882, in which
266] month one thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1, 1882, until finished—strikes and accidents beyond ordinary control of said Steel Company, and acts of Providence preventing or suspending deliveries, alone excepted, in which case deliveries are to be delayed for a corresponding length of time only.

"Price to be fifty-eight dollars net, per ton of 2,240 pounds of finished steel rails, ex. ship or f. o. b. cars at Chicago, Ills., seller's option.

"Terms of payment, cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed without fault of said Steel Company, payment is to be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate. Rails to be inspected at mill as fast as completed and ready for shipment.

"*In witness whereof*, The said Hinckley has hereto set his hand and seal, and the Pittsburgh Bessemer Steel Company (Limited), by its duly authorized officers, hath signed and affixed its corporate seal, the day and year aforesaid.

"It is further agreed that the Pittsburgh Bessemer Steel Company (Limited) are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made.

"It is understood that the purchaser shall have the right to make one half of the order fifty-six (56) pounds per yard, pattern No. 4 of said Steel Company, notice to be given thirty days before the time for the delivery of the rails.

"Chicago, Ills., Feb. 18, 1882.

"F. E. HINCKLEY.

"C. H. ODELL, *Broker*."

One copy of the contract was signed by Hinckley, and a duplicate of it was signed by the Company.

The defendant pleaded the general issue, and the case was tried by the court on the due waiver of a jury. The court made the following special finding of facts:

267] "1. That the written agreement set out and described in the declaration was duly executed by the plaintiff and defendant in said cause, as alleged in said declaration.

"2. That immediately after the making of said contract and before the time to begin the execution thereof, the plaintiff purchased the requisite amount of material from which to manufacture the six thousand tons of steel rails called for by said contract, and that, after the purchase of said supplies by plaintiff there was a decline in the value thereof, before the time for the delivery of any portion of said rails, and that lower prices for such supplies ruled during the months of May, June, July and August, 1882.

"3. That it appears from the parol proof heard on said trial, aside from the provision in said written contract in regard to drilling directions, that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof, and that each railroad company has its own special rules for drilling, and the drilling of such rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer, in order to fully complete the rails for use.

"4. That, by letters dated April 3, April 20, April 26, and April 28, from plaintiff's agents to defendant, and which letters were duly received by defendant before May, 1882, defendant was requested to furnish drilling directions for the rails to be delivered in May under said contract; and defendant not only neglected to comply with such request and furnish such directions, but defendant also notified plaintiff, in reply to such request, that he, defendant, was not then prepared to receive the rails which were to be delivered under said contract in the month of May.

"Again, about the 15th of June, defendant informed plaintiff that he was becoming discouraged about being able to take the rails.

"That, about June 23, plaintiff notified defendant that it was ready to commence rolling the rails for the July deliveries, as well as to cover the thousand tons specified in the contract for delivery in May, of which plaintiff had postponed delivery at defendant's request,
and asked for drilling directions from the de- [268]
fendant, but defendant wholly neglected to give such drilling directions.

"That, about the 26th of July, defendant, in substance, informed plaintiff's agents that his financial arrangements for money to pay for said rails, pursuant to said contract, had failed, and that he could not take said rails unless plaintiff would sell them to him on six and twelve months' credit, for which the notes of the railroad company for which defendant was acting would be given, which defendant would indorse, and also further secure with first-mortgage bonds, as collateral, at fifty cents on the dollar; but, unless he could secure the rails on such terms, he could not take them; and that plaintiff declined to accept said proposition for the purchase of said rails on credit; and I further find that on the 30th of August, 1882, plaintiff notified defendant that the time for the completion of his contract for the purchase of said rails had expired, and requested defendant to advise it whether he would accept the rails or not. To this request defendant made no reply.

"I further find that while plaintiff did not expressly agree with defendant to postpone the time for the delivery of the rails to be made and delivered under said contract, yet plaintiff did in fact delay the rolling and delivery of the rails to be delivered in May, and that, by reason of the repeated statements of defendant that he was not ready to give drilling directions, not ready to use said rails, and not ready to accept them, plaintiff did postpone rolling said rails, and in fact never rolled any rails to be delivered on said contract, but that plaintiff was at all times during the months of May, July and August ready and able, in all respects, to fulfill said contract and make said rails, and the same would have been ready for delivery, as called for by said contract, if defendant had furnished drilling directions, and had not stated to plaintiff's agents that he was not ready to fur-

nish said drilling directions and not ready to accept said rails.

"I further find that on or about the 15th day of September, 1882, defendant was formally requested to furnish drilling directions and to accept said rails, and that he replied to such request that he should decline to take any rails under said contract, and that he had made arrangements to purchase rails of others at a good deal lower price. [269]

"I therefore find, from the testimony in this case, that defendant, by requesting plaintiff to postpone the delivery of said rails, and by notifying the plaintiff that he was not ready to accept and pay for said rails, excused the plaintiff from the actual manufacture of said rails and a tender thereof to defendant.

"And I further find that defendant's statement to plaintiff, on the 26th of July, that he could not pay cash for said rails, as called for by the contract, and that he wished to buy them on credit, was in fact a notice that he would not be able to pay for said rails if rolled and tendered to him by plaintiff.

"I therefore conclude, and so find, as a matter of fact, from the evidence in the case, that said plaintiff in apt time requested defendant to furnish directions for the drilling of said rails, and that defendant neglected and refused to do so, and that, although plaintiff was ready and able to fully perform said contract and make and deliver said rails to defendant, as required by said contract, defendant refused to accept and pay for said rails.

"5. That plaintiff manufactured and sold to other persons 4,000 tons of steel rails, from the materials so purchased with which to perform said contract with defendant, for which said rails plaintiff received $54.60 per ton, delivered at a port on Lake Huron, and that plaintiff made a profit of $1.60 per ton on said 4,000 tons; that by reason of defendant's refusal to accept said rails, the plaintiff had no employment for its mill for a time, and was obliged to stop its mill for about three weeks in the month of August, 1882.

"6. That it would have cost plaintiff $50 per ton to have manufactured and delivered the rails called for by said contract to defendant, according to the terms of said contract; so that plaintiff's profits, if it had not been prevented from fulfilling said contract by the conduct of defendant, would have been $8 per ton on each ton of rails called for by said contract.

[270] "And, because of said facts, I find that defendant was guilty of a breach of said contract, and that plaintiff hath sustained damage, by reason of such breach, in the sum of $42,400."

On these findings, a judgment was entered for the plaintiff for $42,400 damages, and for costs. 17 Fed. Rep. 584. To review that judgment the defendant has brought this writ of error. After the record was filed in this court, it being discovered that there was an error in computation, in entering the judgment for $42,400 instead of $41,600, the circuit court allowed the plaintiff to remit the difference, $800, and an order was entered accordingly, as of the date of the judgment.

On the special findings the only question open for review is whether the facts found are sufficient to support the judgment. There can be no question that, on those facts, the defendant is liable in damages for a breach of the contract. It is provided in the contract that the rails are "to be drilled as may be directed." The circuit court finds that it appears from the proof, aside from the provision in the written contract in regard to drilling directions, "that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof;" that each railroad has its own special rules for drilling; that the drilling of the rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer, in order to fully complete the rails for use; that, by four letters written in April, 1882, by the agents of the plaintiff to the defendant, and which letters were duly received by the defendant before May, 1882, he was requested to furnish drilling directions for the 1,000 tons of rails to be delivered in May, under the contract; that he neglected to comply with that request, and also notified the plaintiff that he was not then prepared to receive the rails which, by the contract, were to be delivered in May; that, in June, the plaintiff again asked for drilling directions from the defendant, in respect both to the 1,000 tons and to the 2,500 tons to be delivered in July, but the defendant neglected to give such drilling directions; and that, in the latter part of July, he notified the plaintiff, in substance, that he would not perform the contract. The circuit court further [273] finds that, by reason of the repeated statements of the defendant that he was not ready to give drilling directions, not ready to use the rails, and not ready to accept them, the plaintiff postponed the rolling of them, and never rolled any rails to be delivered on the contract, but was at all times during May, July and August, 1882, ready and able to fulfill the contract and make the rails, and the same would have been ready for delivery as called for by the contract, if the defendant had furnished drilling directions and had not stated to the agents of the plaintiff that he was not ready to furnish the drilling directions, and not ready to accept the rails; and that, on or about the 15th of September, 1882, he was formally requested to furnish drilling directions, and to accept the rails, and replied to such request that he should decline to take any rails under the contract, and had made arrangements to purchase rails of others at a lower price. The circuit court also finds that the defendant, by requesting the plaintiff to postpone the delivery of the rails, and by notifying the plaintiff that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing them and tendering them to the defendant. This conclusion is entirely warranted by the facts found; and on those facts the defendant must be held liable in damages. The only other question open on the findings is as to the proper rule of damages.

The circuit court finds that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms; that the profits of the plaintiff, if the conduct of the defendant had not prevented it from fulfilling the contract, would have been $8 per ton on each of the 6,000 tons, being $48,000; and that the plaintiff manufactured and sold to other persons 4,000 tons of rails from the materials purchased by it with which to perform the contract

with the defendant, and received for such rails $54.60 per ton, and made a profit of $1.60 per ton on the 4,000 tons, being a profit, in all, of $6,400. Deducting this $6,400 from the $48,000 leaves $41,600, for which amount the judgment was finally entered.

[274] The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails; and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present. The proposition that after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

It is found by the circuit court that, immediately after the making of the contract and before the time to begin its execution, the plaintiff purchased the requisite amount of material from which to manufacture the 6,000 tons of rails; that after the purchase of such supplies there was a decline in their value before the time arrived for the delivery of any part of the rails; and that lower prices for such supplies ruled during May, June, July and August, 1882. It is also to be inferred, from the price at which the 4,000 tons of rails were sold by the plaintiff, that the market price of rails declined below the price named in the contract; and the reason assigned by the defendant in September, 1882, for not taking any rails under the contract, was that he had made arrangements to purchase rails of others at a lower price. Under these circumstances, the defendant is estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages [275] adopted by the circuit court was the proper one. It was in accordance with the rule laid down by this court in *Phila. W. & B. R. R. Co.* v. *Howard*, 54 U.S. 13 How. 307 [14:157]. In that case a contractor for the building of a railroad sued the company for its breach. On the question of damages this court said, p. 344 [178]: "It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits,' in this instruction, as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations, or states of the market, are referred to, and not the difference between the agreed price or something contracted for and its ascertainable value or cost. See *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61, and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

In *United States* v. *Speed*, 75 U. S. 8 Wall. 77 [19:449], where the defendant agreed to pack a specified number of hogs for the plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, this court, citing with approval *Masterton* v. *Mayor of Brooklyn*, [276] held that the measure of damages was the difference between the cost of doing the work and the price agreed to be paid for it, "making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

These views were again approved by this court in *United States* v. *Behan*, 110 U. S. 338 [28:168].

In the present case the ability of the plaintiff to fulfill the contract at all times is found as a fact by the circuit court, as also the fact that, by reason of the defendant's refusal to accept the rails, the plaintiff was obliged to stop its mill for about three weeks, in August, 1882. The defendant received the benefit of all the mitigation of damages which, upon the facts found, he was entitled to claim, and the benefit of all the profits made by the plaintiff which could properly be regarded as a substitute for the profits it would have received had its contract with the defendant been carried out.

The defendant objects that, within the statement of the rule in *United States* v. *Speed*, there was no deduction made in this case for the time saved, and the care, trouble, risk and responsibility avoided by the plaintiff by not fully executing the contract; but there are no findings of fact which raise any such question. The finding is that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms. Under this finding it must be held that every proper element of cost entered into the $50; and it was for the defendant to have requested findings which would authorize an increase of that sum as cost.

There is a bill of exceptions in the case, on which two questions are raised by the defendant as to the admission of testimony. The contract between the parties was negotiated by C. H. Odell, who signed it as broker, between whom and the defendant the correspondence thereafter, down to and including the first of May, 1882, was carried on, Odell acting for the plaintiff. He made the contract under special instructions, his authority being limited to that of a sales agent. On his examination as a witness [277] at the trial he testified that all of his communications with the plaintiff in regard to the business with the defendant were in writing or by telegram. He also testified, without objection, that he kept the plaintiff fully advised of his correspondence with the defendant concerning the rails. H. P. Smith, the business manager of the plaintiff, was then called as a witness for the plaintiff, and was asked if the plaintiff was advised of the correspondence between Odell and the defendant, which had been read in evidence, and if Odell's actions were approved by the witness as manager of the plaintiff. To this the defendant objected, on the ground that the communications between Odell and the plaintiff consisted of letters and telegrams, which were the only competent evidence of the contents thereof. The court overruled the objection, and the witness stated that the Company was advised of the correspondence and actions of Odell, and fully approved and ratified the same. The defendant excepted to the decision admitting the evidence. We see no objection to the admission of this evidence, independently of the fact that Odell had, without objection testified to substantially the same thing. The defendant, in his correspondence with Odell, all of which is set forth in the bill of exceptions, treated Odell as representing the plaintiff, and cannot now be heard to question his authority to do so, or to demand further evidence of such an authority, or of the adoption by the plaintiff of what Odell was doing, saying and asking on behalf of the plaintiff. The question asked of Smith, as to whether he, as manager of the plaintiff, approved of Odell's actions, and the answer he made, were, therefore, unnecessary, and could not affect the merits of the case.

Smith was further asked to state in detail the elements of the cost of rolling the rails in question. He produced a memorandum showing items taken from the plaintiff's books, which, added together, exhibited the cost, in August, 1882, of manufacturing one ton of such rails as those described in the contract; and, on being asked by the plaintiff's attorney to testify to those items, the court, under the defendant's objection, allowed him to read the items from [278] the memorandum. He further testified, under an objection and exception by the defendant, that the actual cost to the plaintiff of making and delivering the rails in Chicago would have been $48.25; that he stated the elements of such cost from a memorandum prepared by himself, the elements being taken from the books of the plaintiff; that he knew the purchase price of all material which went into the manufacture, because he purchased all of it himself; that the statement was prepared by him from his personal knowledge of the cost; that he called off the items from a pencil memorandum to the book-keeper, who wrote them down; that he (the witness) knew the items to be correctly stated; and that the information as to the items was made up from records running through a series of four or five months, and representing an average as to the cost per ton.

The defendant contends that this evidence was inadmissible, in the absence of an opportunity for him to examine the plaintiff's books, with a view to a cross examination of the witness as to the mode of computation adopted by him, the memorandum being, as contended, the result of the conclusions of the witness from the examination of a large number of entries in the books of the plaintiff.

It is a sufficient answer to this objection that the cost of the rails was not taken by the court at the sum of $48.25, the sum fixed by Smith; but the bill of exceptions shows that the cost was taken at $50 a ton, from the testimony of Richard C. Hannah, another witness; so that, even if the testimony was erroneously admitted (which it is not necessary to decide), the defendant suffered no prejudice from its admission.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

HENRY C. HUISKAMP ET AL., Partners as HUISKAMP BROTHERS, Interpleaders, [310]
Plffs. in Err.,

v.

MOLINE WAGON COMPANY.

(See S. C. Reporter's ed. 310–324.)

Attachment proceedings—fraud—interplea, under Missouri Statute, by preferred creditors—chattel mortgages—evidence—record of trial on plea in abatement as—partnership—payment of individual debt with partnership property—erroneous instructions.

1. Where a debtor in failing circumstances has the right to prefer a creditor, if such creditor has a *bona fide* debt, and takes a mortgage with the intent of securing it, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent and that his intention is to hinder and delay other creditors.

2. Upon the trial in attachment proceedings of an issue raised by an interplea, under the Missouri Statute, by preferred creditors as mortgagees, the record of the proceedings in a trial on a plea in abatement, including a verdict and judgment for the plaintiff, to which proceedings the interpleaders were not parties, is inadmissible as against them.

3. One of two partners, with the consent of the other, may subject partnership property, against which no specific lien exists, to the payment of his individual debt.

4. The fact that a creditor of a partnership, who has acquired no lien, has received no notice of its dissolution, does not affect a *bona fide* transfer of the partnership property in payment of the individual debts of a member of the firm.

5. A *bona fide* transfer of partnership property to a member of the firm or a third person, before the interposition of a court is sought, extinguishes the equities of the partners, and the derivative equities of the creditors therein.

[No. 194.]

Argued April 6, 1887. Decided April 18, 1887.

IN ERROR to the Circuit Court of the United States for the Western Division of the West-

ern District of Missouri. Opinion below published, 14 Fed. Rep. 156. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Mr. **James Hagerman,** for plaintiffs in error:

A debtor in failing circumstances has the right to prefer a creditor; and although the creditor may know that the debtor is insolvent, and that in making the preference he intends to defraud other creditors, yet, if the preferred creditor has a *bona fide* debt and takes the mortgage with the intent to secure himself, and not with the fraudulent purpose of aiding the debtor to defraud other creditors, then the mortgage is upheld.

Shelly v. *Boothe*, 73 Mo. 74; *Forrester* v. *Moore*, 77 Mo. 659; *Colbern* v. *Robinson*, 80 Mo. 546; *Kohn* v. *Clement*, 58 Iowa, 589; *Butler* v. *White*, 25 Minn. 432; Bump, Fraud. Conv. 3d ed. 582.

The right of the partnership creditors to priority of payment springs from and is worked out through the equitable right of the individual partners.

Case v. *Beauregard*, 99 U. S. 119 (25: 370); *Fitzpatrick* v. *Flannagan*, 106 U. S. 648 (27: 211); *McGinty* v. *Flannagan*, Id. 661 (27: 215). See also *Locke* v. *Lewis*, 124 Mass. 1; *Howe* v. *Lawrence*, 9 Cush. 553.

The *bona fides* of the transaction is the only test by which to determine the right of joint creditors to have property, which has been transferred upon dissolution to an individual member of the firm, applied to the payment of the joint debts. If the transfer has been honestly made and for a valuable consideration, the property has thereby become separate estate, wholly free from any claim of the joint creditors.

Collyer, Part. § 174; Story, Part. § 358; *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Rowlandson*, 1 Rose, 416; *Campbell* v. *Mullett*, 2 Swan, Ch. 551; *Allen* v. *Center Valley Co.* 21 Conn. 130; *Ferson* v. *Monroe*, 1 Fost. (N.H.) 462; *Dimon* v. *Hazard*, 32 N. Y. 65; *Bullitt* v. *Chartered Fund*, 26 Pa. 108; *Kelly* v. *Scott*, 49 N. Y. 598.

Messrs. **S. A. Lynde** and *C. M. Osborn*, for defendant in error:

A conveyance or mortgage of partnership property, made by a partner in his individual behalf, to satisfy or secure the payment of his individual debts, is fraudulent and void as to the partnership and its creditors.

Story, Part. § 132; 3 Kent, Com. p. 44; *Rogers* v. *Batchelor*, 37 U. S. 12 Pet. 221 (9: 1063); *Locke* v. *Lewis*, 124 Mass. 1; *Livingston* v. *Roosevelt*, 4 Johns. 251; *Dob* v. *Halsey*, 16 Johns. 34; *Flanagan* v. *Alexander*, 50 Mo. 50; *Ackley* v. *Staehlin*, 56 Mo. 558; *Price* v. *Hunt*, 59 Mo. 258; *Helliker* v. *Francisco*, 65 Mo. 598; *Phelps* v. *McNulty*, 66 Mo. 555; *Johnson* v. *Hersey*, 70 Me. 74; *Cotzhausen* v. *Judd*, 43 Wis. 213; *Hurt* v. *Clarke*, 56 Ala. 19.

If the purchaser has notice that the property is partnership property, or that the partner is acting without authority from the partnership, he will be held to act *mala fide* and in fraud of the partnership.

Story, Part. § 132; 3 Kent, Com. pp. 42, 43; *Donovan* v. *Dymond*, 3 Woods, C. C. 141; *Cotzhausen* v. *Judd*, 43 Wis. 215.

To the validity of a transfer or agreement of dissolution and division of the partnership effects it is an invariable condition that it be *bona fide*, and if not, it is invalid and a nullity, save only in the case of a *bona fide* purchaser for a valuable consideration, without notice of the *mala fides* of the transaction.

Bump. Fraud. Conv. 3d ed. 389; *Case* v. *Beauregard*, 99 U. S. 125 (25: 371); *Howe* v. *Lawrence*, 9 Cush. 555; *Goodbar* v. *Cary*, 16 Fed. Rep. 316; *Wilson* v. *Robertson*, 21 N. Y. 587; *Ransom* v. *VanDeventer*, 41 Barb. 307; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Ex parte Williams*, 11 Ves. 3, 5; *Re Waite*, 1 Lowell, 207.

A secret agreement of dissolution and division or transfer of property among the partners or to some one of them, which is not made public and accompanied by public notice and some open and visible evidence of its existence, is fraudulent, void and a nullity.

Re Tomes, 19 Nat. Bankr. Reg. 37; *Re Macfarland*, 10 Nat. Bankr. Reg. 381; *Flack* v. *Charron*, 29 Md. 312; *Re Sheppard*, 3 Ben. 347; *Re Krueger*, 2 Lowell, 66; *Re Dunkle*, 7 Nat. Bankr. Reg. 107; *Kelly* v. *Scott*, 49 N. Y. 595.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 8th of January, 1880, the Moline Wagon Company, an Illinois corporation, commenced an attachment suit in the Circuit Court of Putnam County, in the State of Missouri, against Jacob Rummel and Edwin R. Cutler, copartners under the name of J. Rummel & Son. The suit was brought under a Statute of Missouri, and claimed an indebtedness of $6,722.61. The ground on which the attachment was issued was that the defendants had "fraudulently conveyed or assigned their property or effects so as to hinder and delay their creditors," and had "fraudulently concealed, removed or disposed of their property or effects so as to hinder or delay their creditors," and were "about fraudulently to convey or assign their property or effects so as to hinder or delay their creditors." Under this attachment the sheriff, on the 9th of January, 1880, seized a quantity of goods in the possession of the firm of Huiskamp Brothers, the proceeds of which are the subject of controversy. These goods were subsequently sold as perishable [311] property, and the proceeds, $5,246.50, were placed in court.

On the 15th of March, 1880, the plaintiff removed the suit into the Circuit Court of the United States for the Western Division of the Western District of Missouri. Prior to the sale of the goods, and on the 8th of May, 1880, Huiskamp Brothers filed in the suit, under the Statute of Missouri, what is called an interplea, claiming to be the owners of the goods attached, and to have been such owners at the date of the levy of the attachment, and demanding a return of the property.

On the 17th of May, 1880, Rummel filed a plea in the nature of a plea in abatement, denying the indebtedness, denying the several frauds alleged, and praying for an abatement of the attachment and a release of the property. After the sale of the property, and on the 17th of May, 1881, Huiskamp Brothers filed an amended interplea, claiming that when the goods were seized the same belonged to them

and were in their possession; that the goods were wrongfully seized; and that the proceeds of their sale in court, amounting to $5,246.50, were their property. The plaintiff answered the amended interplea and denied its allegations. A trial of the interplea was had before the court and a jury in October, 1882, at which a verdict was found that the property attached and the proceeds thereof "were not and are not the property of the interpleaders," on which a judgment was entered for the plaintiff and against the interpleaders, to review which the interpleaders have brought this writ of error.

The mode of procedure by interplea in an attachment suit, where a third party claims the attached property, is authorized by section 449 of the Revised Statutes of Missouri, of 1879, which is as follows: "Any person claiming property, money, effects, or credits attached, may interplead in the cause, verifying the same by affidavit; and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay."

[312] The bill of exceptions contains the following statement as to the proceedings had at the trial:

"The interpleaders, in support of their title to the property in controversy, offered testimony, which was admitted, tending to prove such title, as follows:

"First. A chattel mortgage, made by defendant Jacob Rummel, to the interpleaders, on the stock of merchandise, the proceeds of which are in controversy, dated December 24, 1879, and the notes of said Jacob Rummel to said interpleaders secured thereby, of same date, one for $2,500 and one for $1,500, each due one day after date, and bearing 10 per cent interest from date. Said mortgage was signed and acknowledged in due form, and filed for record in the office of the recorder of deeds of Putnam County, Missouri, on January 1, 1880. Said mortgage provided that the mortgagees might sell the mortgaged property at public sale on ten days' notice.

"Second. That said stock of merchandise was actually transferred and delivered to the interpleaders on January 6, 1880, prior to the seizure of the same under the writ of attachment issued in the case of the plaintiffs against the defendants.

"The interpleaders further offered testimony, which was admitted in evidence, tending to show that they were wholesale dealers in boots and shoes in the City of Keokuk, Lee County, Iowa, and had been for many years; that, prior to January, 1878, the defendants Jacob Rummel and Son were partners engaged in business in the Town of Unionville, Putnam County, Missouri, under the firm name of Rummel & Son, and their business was that of general retail merchandise, including farming implements, wagons, etc.; that, in January, 1878, the said partners dissolved said firm and divided the property and business thereof, and both of said partners informed the interpleaders of such dissolution.

"That, after such dissolution, the said Jacob Rummel continued at the same place the general retail merchandise business, and the defendant Ed. R. Cutler engaged in the business of selling agricultural implements, including wagons; that, after January, 1878, as between themselves, the said Rummel had no interest in the profits or losses of the business carried on by Cutler in the agricultural implement business, and Cutler no interest in the profits or losses of the merchandise business; that the indebtedness for which the stock of merchandise was mortgaged or pledged was for goods sold to Jacob Rummel after the dissolution and division of the business and property of the firm of Rummel & Son; that when the interpleaders took the mortgage, and also when they took possession of the stock of merchandise, they understood that the same belonged to Jacob Rummel, and had been led to so believe from the statements of both Cutler and Rummel; that they took said mortgage and possession of said stock of merchandise in good faith, to secure their debt, and not to hinder, delay or defraud, or to assist in hindering, delaying or defrauding, the creditors of the said Rummel or Rummel & Son; that Rummel made the conveyance and transfer to the interpleaders in good faith, to secure their debt, and not with the fraudulent purpose of hindering, delaying or defrauding his creditors, or those of the firm of Rummel & Son." [313]

Luke Huiskamp, one of the interpleaders, testified to the circumstances under which Huiskamp Brothers took the mortgage and entered into possession of the mortgaged property. His testimony shows that they did so upon the understanding and belief, derived from both Rummel and Cutler, that the property belonged to Rummel and that the only purpose of Huiskamp Brothers was to secure *bona fide* debts due to them, and to certain other creditors, by Rummel.

The bill of exceptions then goes on to state as follows:

"Jacob Rummel, a witness for the interpleaders, on his cross examination, among other things testified that Thomas M. Fee was the attorney of interpleaders, and was present at the time of the taking possession by the interpleaders of the property in controversy, and has been such attorney from that time until the present; that, at the time of the trial of the plea in abatement of Rummel, said Fee was the attorney of Rummel, and was employed by Rummel to assist, and did assist, in the trial of such plea in abatement.

"The plaintiffs offered testimony, which was admitted in evidence, tending to show that the interpleaders took the mortgage on, and possession of, the stock of merchandise in controversy, not in good faith, but to assist the defendant Cutler in hindering, delaying and defrauding his creditors and the creditors of the firm of Rummel & Son; that there was no dissolution of the firm, or division of the firm property, in January, 1878, or afterwards; that Jacob Rummel made the transfer and conveyance to interpleaders with the intent to hinder, delay and defraud his creditors; that plaintiffs were engaged in the manufacture and sale of wagons, and had been for many years, and had, prior to January, 1878, dealt with Rummel & Son, and continued to deal with them, after that time; that they never knew of the dissolution of said firm or division of its property, and there never was any published notice of such dissolution; that the debt on which they brought suit in the attachment proceedings was con- [314]

tracted on their part under the belief that the firm of Rummel & Son was still in existence."

The plaintiff then offered in evidence the affidavit on which the attachment was issued in the main suit against Rummel and Cutler, the plea in abatement of Rummel thereto, and that part of the record in the attachment suit which showed the proceedings on the trial of such plea in abatement, including the verdict and the judgment, the verdict being the finding of the issues for the plaintiff, and the judgment being that the plea in abatement be overruled and the attachment sustained. The interpleaders objected to the introduction of the affidavit, plea in abatement; record entries, verdict and judgment, upon the grounds that they were not parties to the trial and issues on the plea in abatement, "And that the issues tried thereon were entirely separate and distinct from the issues upon trial here; and hence the testimony is irrelevant and immaterial, relating to different parties and different subject matter." The bill of exceptions states that "The court overruled the objections of the interpleaders and admitted said papers for one purpose: to show that the conveyance and transfer of the stock of merchandise in controversy to the interpleaders was fraudulent on the part of Jacob Rummel; to which action of the court, in overruling said objections and admitting said testimony, the interpleaders at the time excepted." [315]

Under the Statute of Missouri writs of attachment are obtained at the time of or after the commencement of the suit, upon an affidavit specifying one or more of the statutory causes of attachment. Sections 438 and 439 of the Revised Statutes of Missouri provide for the filing, by the defendant in the attachment, of a plea, in the nature of a plea in abatement, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out, and for a trial of the issue.

In addition to the ruling as to the proceedings on the plea in abatement, the court, in charging the jury, said: "In the attachment suit between the Moline Wagon Company and Rummel and Cutler, Rummel filed what in law is termed a plea in abatement; that is, he denied the facts alleged in the affidavit made by the Company to obtain the attachment. The law allows attachments to issue and property to be seized in cases only where debtors have dealt, or are about to deal, with their property in an illegal way. The affidavit made by the Moline Wagon Company at the time they sued out their attachment, in appropriate legal language charged that Rummel and Cutler had or were about fraudulently to convey their property so as to hinder and delay their creditors in the collection of their debts. This charge Rummel denied. A trial which was had on this issue resulted in the sustaining of the attachment; that is, the charge made in the affidavit by the Moline Wagon Company, that Rummel had fraudulently conveyed, or was about fraudulently to convey, the property in controversy, to hinder and delay creditors, was true. Cutler, the defendant with Rummel in the attachment suit, did not appear, and thereby confessed the charge of fraud."

The court also said in its charge: "So far as the intent to defraud, hinder, and delay creditors on part of Rummel is concerned, a trial of that issue has been had in this court, with the result brought to your notice by reading from the records. The intention of Rummel in making the mortgage to Huiskamp Brothers was found to have been fraudulent; but this of itself is not sufficient to make the mortgage fraudulent as to Huiskamp Brothers. Huiskamp Brothers may have known, when they accepted the mortgage from Rummel, that he intended to defraud, hinder and delay his creditors by it; yet, if they in no way participated in the fraud of Rummel, did no act to aid or assist him in the illegal act, and intended to secure their debt only, the mortgage as to them is valid, and they are entitled to the benefit of the same; but, on the other hand, if, aside from the securing of their own debt, Huiskamp Brothers, by and through the mortgage, undertook to aid and assist Rummel in his fraudulent purposes to hinder and delay the Moline Wagon Company, or any other creditor, in the collection of their debt, in such case the mortgage is void, and they can claim nothing under it, as against creditors. This is the important question in the case, and you should carefully examine the whole of the testimony bearing upon this point." [316]

The interpleaders excepted to those portions of the charge which referred to the trial of the issues between the plaintiff and Rummel, on the ground that neither the proceedings on Rummel's plea in abatement, nor Cutler's confession of the charge of fraud made in the affidavit, could affect the rights of the interpleaders.

Although the transaction between Rummel and Huiskamp Brothers may have been the subject of the trial on the plea in abatement, we are of opinion that the evidence in question was improperly admitted. In order to invalidate the mortgage of Rummel to Huiskamp Brothers it must have been made with the intent, on the part of Rummel, to hinder and delay his other creditors, and Huiskamp Brothers must have accepted it with the intent of assisting Rummel to hinder and delay his other creditors. A debtor in failing circumstances having the right to prefer a creditor, if the preferred creditor has a *bona fide* debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent and that the debtor's intention is to hinder and delay other creditors. It was necessary, therefore, for the plaintiff, on the trial of the issue with the interpleaders, to make proof of the unlawful intent of Rummel in making the mortgage, irrespective of any intent of Huiskamp Brothers in accepting it. Such proof could not be made as against the interpleaders, in view of what the evidence which they offered tended to show, by proving that the issue as to the intent of Rummel had been tried and found against him in the trial on his plea of abatement. That was an issue to which the interpleaders were not parties, and the record of its trial was wholly inadmissible as against the interpleaders. The bill of exceptions states that the papers were admitted to show "that the conveyance and transfer of the stock of merchandise in controversy to the interpleaders was fraudulent on [320]

the part of Jacob Rummel." The interpleaders were not parties to the proceedings, did not appear in them, did not control them, and cannot be affected by them. For this error there must be a new trial; but, as there were other parts of the charge of the court, and refusals of the court to charge as requested by the interpleaders, which were excepted to, and which we think were erroneous, and which may recur upon a new trial, it seems proper to consider them.

The following portion of the charge of the court was excepted to: "But if no legal dissolution of the partnership took place in January, 1878, or since, and the partners continued to hold the property in controversy as partnership property, bought, sold, and advertised it as firm property, such property remained partnership property, so far as creditors are concerned, who knew nothing of the division and who trusted the firm. Under the view of the case last presented you will have to determine whether there was a dissolution of the partnership. As already stated, it is an undisputed fact that, up to January, 1878, a partnership between Rummel and Cutler did exist; that that partnership dealt in general merchandise, including farming implements, wagons, etc., and that dealings prior to that time were had between the Moline Wagon Company and the firm of Rummel & Son. The Moline Wagon Company had a right to presume that the persons once composing a firm, and who continue doing business under the firm name, are still partners, and that the partnership continues to exist until notice of a dissolution was given. No agreement or understanding between the partners—no division of the property of the firm—can relieve either the firm or the partners of their legal liability as to creditors who extend credit to the firm; nor are creditors who extend credit to the firm bound to regard public rumors, even if they heard them, if the partners continue the partnership name and avail themselves of the partnership credit. You are therefore instructed that the partnership between Rummel and Cutler existing in 1878 continued to exist up to the time of the creation of the debts sued on by the Moline Wagon Company, unless public notice of the dissolution of the partnership was given, or actual notice of such dissolution was brought home to the Moline Wagon Company. If, under this view of the law, you shall find, from the evidence, that plaintiff, the Moline Wagon Company, gave credit to the firm of Rummel & Son, composed of Rummel and Cutler, then the firm and each of the partners are liable for the debt thus contracted. All of the assets of the partnership, both merchandise, notes, and accounts, as well as all wages and property of the partnership which Cutler" [Rummel?] "may have handled in his division of the partnership, as well as all notes and accounts which Cutler may have taken, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership. If you shall find that the partnership once existing between Rummel and Cutler had not been dissolved, and the property in dispute to be partnership property, then Rummel could not take such partnership property and pay an individual debt with it, such as Huiskamp Brothers claim to have, and the mortgage read in evidence, given them, is void as against creditors of the firm."

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In connection with this portion of the charge the interpleaders requested the court to give the following instructions to the jury:

"3. If the jury find, from the evidence, that Rummel and Cutler led Huiskamp Brothers to believe that the goods belonged to Rummel, and they accepted the mortgage and took the goods under such belief, then they are entitled to the same rights, by virtue of the mortgage and their possession, as if the goods actually belonged to Rummel at the time the mortgage was made, and when they took possession of the goods."

"4. If the jury find that, as between Rummel and Cutler, the goods belonged to Rummel at the time he made the mortgage and Huiskamp Brothers took possession of the same, then the interpleaders are entitled to recover, although, as to the plaintiffs in this case, the firm of Rummel & Son was in existence by reason of the fact that the plaintiffs had never been notified of any change of the firm of Rummel & Son. In such case, Rummel & Son would be liable to the plaintiffs, but the plaintiffs would have no lien on the stock of goods, and Huiskamp Brothers could acquire title thereto by a valid mortgage from Rummel."

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"5. There is a difference between the dissolution of a firm and the settlement of the accounts of the partners between themselves and the firm. A partnership may be dissolved and the property divided in part, leaving the settlement of the accounts between the partners to be effected in the future; and, in this case, if the firm of Rummel & Son was dissolved in 1879, and Rummel took the stock of merchandise, with the consent of his copartner, and was to be charged therewith, then from that time, as between Rummel and Cutler, the former would be the owner of the goods, and could make a valid mortgage of the same in his own name."

"7. The test of a partnership, as between the partners, is the sharing of the profits and the losses of the business; and, in this case, if, after January 18, 1878, Cutler was not to share the profits and losses of the store business, but Rummel alone was to have such profits and bear such losses, then, after that time, as between themselves, they were not partners in fact. If they should lead others to believe that they were partners, then they would be liable to whoever acted on such belief and gave them credit. Such creditors would not, however, have a lien on the property belonging to one of the partners, as between themselves, and could not claim the same from a party who, in good faith, for value, took such property from the partner really owning it."

The court refused to give these instructions, and to its action in respect to each the interpleaders excepted.

The substance of the concluding sentence of the portion of the charge last above recited is that, even though the partnership between Rummel and Cutler was not dissolved, and the property continued to be partnership property, it was not in the power of Rummel, even with the consent of Cutler, to take any of such property and pay with it the individual debt of

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Rummel to Huiskamp Brothers, and therefore, the mortgage to them was void, as against the plaintiff. The plaintiff had introduced testimony on the trial tending to show that there was no dissolution of the firm of Rummel & Son, nor any division of the firm property, in January, 1878, or afterwards; and the instruction referred to was based upon the view that the jury might find that the partnership was never dissolved, and its property never divided. But the instruction was contrary to the ruling in the case of *Fitzpatrick* v. *Flannagan*, 106 U. S. 648, 654 [27: 211, 213], where this court, speaking by *Mr. Justice* Matthews, said: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself, in the language of this court in *Case* v. *Beauregard*, 99 U. S. 119, 125 [25:370, 372], 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.'"

It follows, from this view, that, even though the partnership of Rummel & Son was not dissolved, Rummel had the right, with the consent of Cutler, to appropriate the property to the payment of his individual debt to Huiskamp Brothers, because the plaintiff, at the time the mortgage was made by Rummel to Huiskamp Brothers, had no specific lien upon the property, and there was no trust impressed upon it at that time, which could be enforced by the plaintiff. It was only necessary that the disposition of the property should have been *bona fide* on the part of both parties, and without any intent to hinder or delay the plaintiff. *Howe* v. *Lawrence*, 9 Cush. 553, and cases there cited; *Locke* v. *Lewis*, 124 Mass. 1.

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It was also error in the court to refuse to charge, as requested in the fourth prayer of the interpleaders, that if, as between Rummel and Cutler, the goods belonged to Rummel, the interpleaders were entitled to recover, although the plaintiff had not been notified of any change in the firm of Rummel & Son; and error to charge, as it did, the converse of this proposition. The fact of notice or no notice to the plaintiff could not affect the question in issue, so long as the plaintiff had acquired no lien on the goods prior to the mortgage by Rummel to the interpleaders, and that mortgage was made in good faith.

It was also error in the court to refuse to charge, as requested in the fifth prayer of the interpleaders, that "If the firm of Rummel & Son was dissolved in 1879, and Rummel took the stock of merchandise, with the consent of his copartner, and was to be charged therewith, then, from that time, as between Rummel and Cutler, the former would be the owner of the goods, and could make a valid mortgage of the same in his own name." The proposition involved in this request presupposes, of course, that the transaction between Rummel and Cutler was made in good faith, and in that view, the instruction requested was in accordance with the rule laid down by this court in *Case* v. *Beauregard* and approved in *Fitzpatrick* v. *Flannagan*, to the effect, that "If, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end." See also *Howe* v. *Lawrence* and *Locke* v. *Lewis*, above cited.

The judgment of the Circuit Court is reversed, and the case is remanded, with a direction to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

OUACHITA AND MISSISSIPPI RIVER PACKET COMPANY, WILLIAM T. SCOVELL, ET AL., *Appts.*, [444]

v.

CATHERINE M. AIKEN, Admrx. of JOSEPH A. AIKEN, Deceased, JOHN H. MENGE ET AL., Copartners, as JOSEPH A. AIKEN & CO., AND CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 444-450.)

Constitutional law—wharfage—States may regulate—reasonableness of charges, how determined—tonnage charges—application of proceeds—profit to lessee.

1. In the absence of interference by Congress, a State may establish, manage and carry on works and improvements of a local character, though they necessarily more or less affect interstate commerce.
2. Wharfage is subject to local state laws, Congress having passed no Act to regulate it; and by those laws its reasonableness must be determined.
3. Charges for wharfage, graduated by tonnage of vessels using a wharf, are not open to the objection that they are duties on tonnage within the meaning of the Constitution.
4. Where wharfage charges are reasonable, it in no way concerns those who pay them, what application is made of the proceeds. Their appropriation to maintain, extend, light and police the wharves is unobjectionable, although a profit may be realized by lessees from the city which owns them.

[No. 117.]

Argued Jan. 5, 1887. Decided April 25, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. Reported below, 4 Woods, 208. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John H. Kennard** and *William W. Howe*, for appellants.

Messrs. **William S. Benedict**, *George Denégre* and *Thomas L. Bayne*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

The bill in this case was filed in the Circuit Court of the United States by the appellants, for themselves and all others in like interest who should come in and contribute to the expenses of the suit, against Catherine M. Aiken, administratrix of Joseph A. Aiken, and others, residents of New Orleans, doing business under the firm name of Joseph A. Aiken & Co., and against the City of New Orleans. The complainants are owners of steamboats plying between New Orleans and other ports and places on the Mississippi River and its branches in other States than Louisiana; and the burden of their complaint is that the rates of wharfage [445] which they are compelled to pay for their vessels at New Orleans are unreasonable and excessive, are really duties of tonnage, and impeed in violation of the Constitution of the United States. The defendants, Joseph A. Aiken & Co., at the time of filing the bill, were lessees of the public wharves belonging to the City of New Orleans, under a lease from the City made in May, 1881, for the term of five years; and, as such lessees, charged and collected the wharfage complained of. The object of the bill, as shown by its prayer, was to obtain an injunction to prevent the defendants from exacting the excessive charges referred to, the complainants expressing a willingness to pay all reasonable wharfage.

The bill alleges that on the 17th of January, 1875, the council of the City of New Orleans adopted an ordinance, "fixing and regulating charges for wharfage, levee, and other facilities afforded by the City of New Orleans to commerce," by which ordinance, among other matters and things, it was ordained that the wharfage dues on all steamboats shall be fixed as follows: "Not over five days, ten cents per ton, and each day thereafter, five dollars per day; boats arriving and departing more than once a week, five cents per ton each trip; boats lying up for repairs during the summer months to occupy such wharves as may not be required for shipping, for thirty days or under, one dollar per day." The entire ordinance was filed with the bill as an exhibit, showing the rates of wharfage to be charged for vessels of every kind.

The bill then states that on the 17th of May, 1881, the council of the City adopted an ordinance directing the administrator of commerce to advertise for sealed proposals for the sale of the revenues of the wharves and levees for the term of five years, upon certain conditions specified, amongst which were the following; viz., to keep the wharves and levees in good repair; to construct such new wharves as might be necessary, not exceeding the expenditure, in any one year, of $25,000; to light the wharves with electric lights; and to pay the City annually the sum of $40,000, of which $30,000 should be devoted to the maintenance of a harbor police for the protection of commerce, and the remaining $10,000 should be devoted exclusively to the payment of salaries of wharf- [446] ingers, signal officers, and other employees on the levees. The sale was to be adjudicated to the persons who should agree to charge the lowest rates of wharfage. Joseph A. Aiken put in a proposal to take the lease on the conditions specified, at the rates of wharfage named in the Ordinance of 1875, with certain reductions which he agreed to make from time to time; and this proposal was accepted by the council.

The power to construct and maintain levees and wharves, and to prescribe and collect rates of levee dues and wharfage, had been conferred upon the city council by its charter (Act of March 16, 1870, No. 7, § 12); and by the Act of March 13, 1871, it was authorized to lease the wharves, upon adjudication, for any term not to exceed ten years at a time. Laws of 1871, No. 48, § 7.

The point raised by the complainants is that the rates of wharfage proposed by the lessees were necessarily enhanced by the condition requiring them to erect new wharves, to maintain electric lights, and to pay the City $40,000 per annum for the maintenance of a harbor police, and the payment of salaries to wharfingers, etc. They argue, therefore, that the rates agreed to be charged were intended, not merely as compensation for the use of wharves already constructed, but as a tax to raise money for the use of the City, to enable it to do those things the expense of which should be defrayed from its general resources; it being contended that wharfage cannot be charged for the purpose of raising money to build wharves, but only for the use of them when built. The complainants contend that the charges are unreasonable and excessive as wharfage, and therefore unauthorized as such, and, in effect, a direct duty, or burden, upon commerce. They offered a good deal of evidence to show that the rates of wharfage charged are onerous and excessive, and that, without the conditions referred to, the lessees could have offered to take much lower rates; or, at all events, that much lower rates would have been a reasonable and sufficient compensation. On the other hand, the defendant's offered evidence to show that the rates were reasonable, and that, with the same or even higher rates, the city itself, before leasing out its wharves, lost every year a [447] large amount of money in their administration. The court below declared "that the exactions of wharfage are substantially expended for the benefit of those using the wharves, and that the proof does not satisfy us that the rates are exorbitant or excessive." *Ouachita Packet Co.* v. *Aiken*, 4 Woods, 208, 213. We do not think it necessary to scrutinize the evidence very closely. With the circuit court, we see nothing in the purposes for which the lessees were required to expend or pay money, at all foreign to the general object of keeping up and maintaining proper wharves, and providing for the security and convenience of those using them. The case is clearly within the principle of the former decisions of this court, which affirm the right of a State, in the absence of regulation by Congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. We may particularly refer to the recent cases of *Trans. Co.* v. *Parkersburg*, 107 U. S. 691 [27:584]; *Morgan* v. *Louisiana*, 118 U. S. 455 [*ante*, 237]; and *Huse* v. *Glover*, 119 U. S. 543 [*ante*, 487], in which most of the former decisions involving the same principle are cited and referred to. The first

of these was a case of wharfage; the second, one of quarantine; and the third, that of a lock in Illinois River constructed by the State of Illinois in aid of navigation. The same principle was applied and enforced in the cases of *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299 [13:996], on the subject of pilotage; in *Mobile Co.* v. *Kimball*, 102 U. S. 691 [26:238], where a state law provided for the improvement of the river and harbor of Mobile; in the various cases of bridges over navigable rivers which have come before this court, and which are reviewed and approved in *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [27:442]; and in *Turner* v. *Maryland*, Id. 38 [27:370], which related to the inspection of tobacco. The same principle was reaffirmed, with the limitations to which its application is subject, in the recent case of *Robbins* v. *Shelby Co. Taxing Dist.* 120 U. S. 489, 493 [*ante*, 694]. In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the [448] charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign Nations and among the several States, to correct any abuses that may arise, or to assume to itself the regulation of the subject. If, in any case of this character, the courts of the United States can interfere in advance of Congressional legislation, it is (as was said in *Morgan* v. *Louisiana*, *qua supra*), where there is a manifest purpose, "by roundabout means, to invade the dominion of federal authority."

Wharfage, the matter now under consideration, is governed by the local state laws; no Act of Congress has been passed to regulate it. By the state laws it is generally required to be reasonable; and by those laws its reasonableness must be judged. If it does not violate them, as before said, the United States Courts cannot interfere to prevent its exaction. Of course, neither the State, nor any municipal corporation acting under its authority, can lay duties of tonnage; for that is expressly forbidden by the Constitution; but charges for wharfage may be graduated by the tonnage of vessels using a wharf; and that this is not a duty of tonnage, within the meaning of the Constitution, has been distinctly held in several cases; amongst others, in those of *Packet Co.* v. *Keokuk*, 95 U. S. 80 [24:377]; *Packet Co.* v. *St. Louis*, 100 U. S. 423 [25: 688]; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 [26:1169]; and *Trans. Co.* v. *Parkersburg*, 107 U. S. 691 [*supra*.]

The charges in the present case are professedly for wharfage, and we see nothing in the ordinance fixing the rates inconsistent with the idea that they are such. The City, by its charter, had the power to fix the rates of wharfage, and it established those now complained of. We do not see the slightest pretext for calling them anything else than wharfage. The manner in which the receipts are to be appropriated does not change the character of the charges made. In the case of *Huse* v. *Glover*, 119 U. S. 543, 549 [*ante*, 487, 490], it was said: "By the terms tax, impost, duty, mentioned in the ordinance [the Ordinance of 1787], is meant a charge for the use of the government, not compensation for improvements. The fact that if [449] any surplus remains from the tolls, over what is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenue of the State, does not change the character of the toll or impost. In prescribing the rates it would be impossible to state in advance what the tolls would amount to in the aggregate. That would depend upon the extent of business done; that is, the number of vessels and amount of freight which may pass through the locks. Some disposition of the surplus is necessary until its use shall be required, and it may as well be placed in the state treasury, and probably better, than anywhere else." And in the case of *Transportation Co.* v. *Parkersburg*, we said: "It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."

In the present case, however, as already indicated, the appropriation actually made of the receipts, namely, to the objects of keeping the wharves in repair, of gradually extending them as additions may be needed, and of maintaining a police for their protection, and lights for their better enjoyment, is entirely germane to the purpose of wharfage facilities. It is what any prudent proprietor would do; it is what the City itself would do if it managed the wharves on its own account. But even if it were otherwise; if a profit should happen to be realized by the City, or the lessees, beyond the amount of expenditures made, this would not make the charges any the less wharfage. And being wharfage, and nothing else, if the charges are unreasonable, remedy must be sought by invoking the laws of the State, which cannot be done in this suit, inasmuch as the jurisdiction of the court is rested on the supposed unconstitutionality of the charges for wharfage, and not on the citizenship of the parties. If the state laws furnish no remedy (in other [450] words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States Courts, to regulate the matter, and provide a proper remedy. Such an interposition may become necessary; for although the imposition of unreasonable wharfage by a City or a State is always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption.

What measures Congress might adopt for the purpose of preventing abuses in this and like matters, it is not for us to determine. It is possible that a law declaring that wharfage shall be reasonable, and not oppressive, would answer the purpose. It would then be in the power of the federal courts to inquire and determine as to the reasonableness of the charges actually imposed. That no such inquiry, except in the administration of the state law, can be instituted, as the law now stands, is shown in some of the cases to which we have referred. In *Transportation Co.* v. *Parkersburg*, 107 U.S.

691, 699 [27:584, 587], we said: "It is an undoubted rule of universal application, that wharfage for the use of all public wharves must be reasonable. But then the question arises, By what law is this rule established, and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, exorbitant? There can be but one answer to these questions: Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. * * * The courts of the United States do not enforce the common law in municipal matters in the State because it is federal law, but because it is the law of the State."

As the only question determinable in this suit is whether the charges of wharfage complained of were, or were not, contrary to the Constitution or any law of the United States, and as it is clear that they were not, *the decree of the Circuit Court must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[469] LUIGI FILIBERTO ET AL., *Appts.*,
v.
THE BARQUE JOHN H. PEARSON,
HIRAM TAYLOR, Claimant.

(See S. C. "*The John H. Pearson.*" Reporter's ed. 469–474.)

Admiralty—charter-party—"northern passage" for the benefit of the cargo—meaning should be determined by trial court.

Upon a libel filed by the charterers of a barque, chartered to carry a cargo of fruit from Palermo to Boston by the "northern passage" for the benefit of the cargo, it is *held:* that the meaning of the words "northern passage" is either a question of fact or of construction applicable to understood facts, and that the court below should have ascertained from the evidence what passages there were between Gibraltar and Boston which vessels were accustomed to take, and then determined which of them the vessel was allowed by the contract to take as the "northern."

[No. 219.]

Argued April 11, 12, 1887. Decided April 25, 1887.

APPEAL from the Circuit Court of the United States for the District of Massachusetts. *Reversed, Remanded.*

Reported below, 14 Fed. Rep. 749.

The history and facts of the case appear in the opinion of the court.

Mr. **H. W. Putnam,** for appellants.

Mr. **Frederick Dodge,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal in admiralty, and presents the following facts:

The Barque John H. Pearson was chartered to carry a cargo, consisting mostly of oranges, for the libelants, from Palermo, Sicily, to Boston, Massachusetts. The charter-party contained the words "captain engages himself to take the northern passage," inserted at the instance of the libelants, for the benefit of the cargo, and written into the printed blank. The cargo was badly damaged on the voyage, and this suit was brought to recover for the loss. The controversy is as to whether the vessel, in going from Gibraltar to Boston, took "the northern passage."

The court has found that "Shippers of fruit consider it of very great importance for the preservation of the cargo that it be kept in as cold a temperature as possible, short of the freezing point, and have been accustomed for many years to instruct masters to take a northerly course;" [470] and, after setting forth other facts, stated as "conclusions of law" the following:

"1. The term 'northern passage' appears, in view of the testimony of merchants and seamen introduced on both sides, to be a term of art, and is, when taken by itself, without the aid of such testimony, unintelligible.

"The testimony introduced by the libelants tended to show that the phrase meant a passage from Gibraltar to the Great Banks, and thence direct to Boston, keeping as much to the north as possible during the entire passage; that anything between that and the southern passage was the middle passage.

"That introduced by the claimant tended to show that it meant anything north of latitudes 80° to 85° or 86°, or of the southern passage; and that the middle passage was anything between the southern passage and the northern as described by the respective witnesses.

"It was admitted that the southern passage was in the trade winds.

"2. Upon this testimony, the court, thinking that the true meaning of the term is very doubtful, does not consider it material, and does not undertake to decide whether a preponderance of the evidence favors one of the above definitions or another, and rules that the claimant is entitled to the least strict definition, and that, as the course of the barque comes within such definition, there is no deviation."

The libel was dismissed, and from a decree to that effect this appeal was taken. The opinion of the circuit court is reported in 14 Fed. Rep. 749.

As the libelants deemed the agreement to "take the northern passage" of sufficient importance to have a printed form changed, so that it might be incorporated in express words into the charter-party, and this "for the benefit of the cargo," which was perishable, it is evident that the words used had some meaning which indicated clearly to the minds of the contracting parties the direction the vessel was to take on her way from Gibraltar to Boston. It is also evident, from the fact that the vessel was bound to take *the* northern passage, that the parties understood there was more than one passage which vessels were in the habit of taking in making that voyage, according as their bills of lading or their charter-parties required, or the circumstances made desirable. It implies that there were one or more other passages which those engaged in the trade knew by other names or other descriptions. What "the [473] northern passage" as used in this contract means, therefore, is either a question of fact or a question of construction applicable to understood facts.

If it is, as the court below says it appears to be, a term of art, which, taken by itself, without the aid of the testimony, is unintelligible, then its meaning in "the art"—the trade—is

one of the material facts in the case on which the rights of the parties depend; and it should have been found and put into the findings of fact which the circuit court was required by law to make. The statement of the court, now in the record, implies that there is in fact some particular passage between Gibraltar and Boston which those engaged in that trade know as "the northern passage." If there is, then that is the passage the vessel was bound to take, and it was error in the court to decide that its determination, according to the preponderance of the evidence, was immaterial, for the choice of passages was matter of obligation, not of convenience merely.

If in point of fact there is no passage to which the name or description of "the northern" has been given in the trade, then the question becomes one of construction as applied to the known facts of the business. The inquiry is not as to which passage would be the quickest, or even the best, or which another contract would require of another vessel, but which is "the northern passage" within the meaning of this contract. The evident purpose of the libelants was to keep the vessel as far as possible in the coolest of the passages that those engaged in the trade were accustomed to take, because it is found as a fact in the case that a cool temperature is necessary to the preservation of the cargo; and that the coolest water is north of the Gulf Stream, owing to the fact that there is a cold current between it and the American coast, moving in an opposite direction.

Under these circumstances, if the testimony failed to show that any particular passage had acquired in the trade the name of "the northern," it was error to rule that the vessel might voluntarily take any other of the known or accustomed passages than one which would carry it in a northerly direction through the coolest waters and into the coolest temperature. That [474] this was the expectation of the parties is shown by the fact that the stipulation as to the passage was made "for the benefit of the cargo," the preservation of which required that it should be kept "in as cold a temperature as possible, short of the freezing point." The court should have ascertained from the evidence what passages there were between Gibraltar and Boston which vessels were accustomed to take, and then determined which of them this vessel was allowed by its contract to choose as "the northern."

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[525] WILLIAM MILNE, Exr. of WILLIAM M. WILSON, Deceased, *Plff. in Err.*,

v.

ANN MARIA DEEN.

(See S. C. "*Wilson's Executor v. Deen*," Reporter's ed. 525-535.)

Landlord and tenant—abandonment by lessee—reletting—deficiency of rent—fraud—former adjudication—estoppel—practice.

1. A judgment against the lessor in an action on a lease to recover rent, the only issue being "that of fraud in procuring the lease," bars a subsequent action on the same lease.

2. The effect of a former judgment is not dependent upon the correctness of the verdict or finding upon which it was rendered.

3. The fact that a former judgment has been vacated since the trial of the action to which it was a bar is not available in this court to obviate an erroneous ruling at the trial.

[No. 189.]

Argued April 5, 6, 1887. Decided April 25, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Reversed, Remanded.*

The case and the facts appear in the opinion.

Messrs. **Edward C. Perkins** and **John C. Gray**, for plaintiff in error:

The plaintiff in error established a complete defense to the action in the circuit court, by proving that he had recovered judgment in the marine court on an issue as to the validity of the lease.

Cromwell v. *County of Sac*, 94 U. S. 351 (24: 195); *Lumber Co.* v. *Buchtel*, 101 U. S. 638 (25: 1074); *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 621 (19: 205); *Gardner* v. *Buckbee*, 3 Cow. 120; *Bouchaud* v. *Dias*, 3 Den. 243.

The rule has been repeatedly applied where the question determined in the former suit, and sought to be raised again in the new suit, was purely a question of law.

Tioga R. R. Co. v. *Blossburg & C. R. R. Co.* 87 U. S. 20 Wall. 137 (22: 331); *Pray* v. *Hegeman*, 98 N. Y. 351; *Lorillard* v. *Clyde*, 99 N. Y. 196; *Collier* v. *Walters*, L. R. 17 Q. B. Div. 252.

Messrs. **Joseph A. Shoudy** and *Henry T. Wing*, for defendant in error:

Mr. Justice **Field** delivered the opinion of the court:

On the 29th of October, 1873, Ann Maria Deen, the plaintiff in the court below, leased to one Mary C. C. Perry, of New York, by an instrument under seal, the house known as No. 4 East Thirtieth Street of that city, with the furniture therein, for the term of two years and ten months from the first day of November, 1873, at the rent of $450 a month, payable in advance, with a clause of re-entry in case of default in the payment of the rent, or in any of the covenants of the lease.

At the same time, and upon the same paper, the defendant, William M. Wilson, of New York, in consideration of the letting of the premises to the lessee, and of the sum of one dollar paid to him by the lessor, by an instrument under seal, covenanted and agreed with her that if default should be made at any time by the lessee in the payment of the rent, and performance of the covenants contained in the lease, he would pay the rent, or any arrears thereof, and all damages arising from the nonperformance of the covenants.

No rent was paid by the lessee except for the first month, and soon after December 1873, she ceased to occupy the house, and abandoned it. In March, 1874, the lessor gave notice to her that, as she had abandoned the house, and there was danger of the furniture being injured, pos- [526] session would be taken and the premises rented for the remainder of the term; and that the lessor would look to her for any deficiency in the rent and for the expenses of reletting, as well as for all damages that might be sustained by reason of the loss of or injury to the furniture.

In April, 1874, the lessor took possession of the premises, and in November following leased the house, without the furniture, to one Sherman, for two years and five months from December 1, 1874, at $3,600 a year, payable in half-yearly payments, in advance.

For the deficiency of the rent on the original lease, after deducting the amount collected from the new tenant, the present action was brought against the defendant as guarantor for the rent.

To the complaint setting forth the lease, the covenant of guaranty, the new lease, and the deficiency claimed to be due upon the lease, the defendant answered, denying, among other things, the allegations of abandonment of the premises by the lessee, of notice to her of the intention of the lessor to resume possession, and of the amount due; and for a separate defense alleged that in December, 1873, the plaintiff brought an action in the Marine Court of the City of New York against the defendant for the rent of the same premises for that month, and that the defendant recovered judgment therein against the plaintiff in the action, upon the merits thereof, and for costs.

On the trial, to meet the case established by the plaintiff, the defendant, among other things, gave in evidence the judgment book of the marine court, showing a judgment, entered on the 12th of March, 1874, in favor of the defendant William M. Wilson, against the plaintiff Ann Maria Deen, for $55.91 costs; and also the judgment roll in the action containing the summons and complaint, the answer, minutes of the verdict for the defendant, and the judgment in his favor. The complaint was upon the same lease as that upon which this action is brought, and was for rent for the month beginning on the first day of December, 1873. The answer, treating the lease and the covenant upon it as one instrument, set up that "On [527] or about the 29th day of October, 1873, the plaintiff, by false and fraudulent statements, obtained the signature of Mary C. C. Perry and of this defendant to a paper purporting to be a lease of the premises described in the complaint; that the said Mary C. C. Perry and this defendant were both misled by the false representations; and that the said Mary C. C. Perry and this defendant were induced by their belief in the truth of such representations to sign the said paper." It was admitted of record by counsel for the plaintiff that "the only issue tried" in that action in the marine court "was that of fraud in procuring the lease," and that there was no issue as to the payment of the rent or as to the delivery of the lease.

When the evidence was closed and the parties had rested, the defendant moved that the complaint be dismissed, on the ground that the judgment in the marine court was a bar to the action; but the court denied the motion, and the defendant excepted. Afterwards the court directed the jury to find a verdict for the plaintiff for $12,026.89, the full amount claimed, less the rent for the month of December, 1873, which they accordingly did. To this direction an exception was taken.

[532] The conclusion we have reached as to the effect of the judgment of the marine court renders it unnecessary to pass upon, or even to state the other questions raised in the progress of the trial. There is nothing in the record tending to impair the force of that judgment. Notice of appeal from it to the General Term of the court was given, but it does not appear that the appeal was ever prosecuted. The alleged parol stipulation by counsel, that the judgment might be vacated, is not admitted; but, if made, it is not shown to have been acted upon by any entry on the records of the marine court. The proceedings in the suit in the supreme court to cancel the lease and the ruling of the court of appeals therein, that evidence of cotemporaneous or preceding oral stipulations could not be received to control the lease, have no bearing upon the question before us, and the proceedings in the suit are still pending. As the case stands before us, the judgment of the marine court is in no respect impaired, and the defendant can invoke in his behalf whatever it concluded between the parties. The validity of the lease in suit here was involved there. The answer there alleged that, by false and fraudulent representations, the signature of the lessee was obtained to the lease, and that both she and the defendant Wilson were misled by those representations to sign the paper. The parties admitted that the only issue in that action was "that of fraud in procuring the lease." That issue being found by the verdict of the jury in favor of the defendant, the judgment thereon stands as an adjudication between the parties by a court of competent jurisdiction, that the lease was obtained upon false and fraudulent representations of the plaintiff, and, therefore, was of no obligatory force. It determined not merely for that case, but for all cases between the same parties, not only that there was nothing due for the rent claimed for the month of December, 1873, but that the lease itself was procured by fraud, and therefore void.

In *Cromwell* v. *County of Sac*, 94 U. S. 351 [24: 195], we considered at much length the operation of a judgment as a bar against the prosecution of a second action upon the same demand, and as an estoppel upon the question litigated and determined in another action be- [533] tween the same parties upon a different demand, and we held, following in this respect a long series of decisions, that in the former case the judgment, if rendered upon the merits, is an absolute bar to a subsequent action, a finality to the demand in controversy, concluding parties and those in privity with them; and that in the latter case, that is, where the second action between the same parties is upon a different demand, the judgment in the first action operates as an estoppel as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. Of the application of this rule *Gardner* v. *Buckbee**, 8 Cow. 120, furnishes an illustration. There it appeared that two notes had been given upon the sale of a vessel. On examination the vessel proved to be unseaworthy, and the maker of the notes refused to pay them on the ground of fraudulent representations by the vendor. Thereupon an action was brought by the holder upon one of the notes in the Marine Court of the City of New York. The defendant pleaded the general issue, with notice of a total failure of consideration for the notes, on the ground of fraud in the

*See note, Lawyers' edition. [Ed.]

sale of the vessel, and upon that point judgment was rendered in his favor. The holder thereupon brought an action upon the other note in the Court of Common Pleas of the City of New York, and at the trial the defendant offered in evidence in bar of the action the record of the judgment in the marine court, the defense being fraud in the sale of the vessel, and the judgment having been rendered directly upon that issue between the same parties. The court of common pleas decided that the judgment was not a bar, but the Supreme Court of the State reversed the decision, declaring the law to be well settled that a judgment of a court of concurrent jurisdiction directly upon the point is, as a plea or evidence, conclusive between the same parties upon the same matter directly in question in another court, referring to and following the rule laid down by *Chief Justice* De Grey in the celebrated case of the *Duchess of Kingston*. It was urged that [534] the judgment in the marine court did not affirm any particular fact in issue in the common pleas, but was general and indefinite, and that, from the language of the record, it could not be inferred whether the two cases were founded upon the same or a different state of facts; but the court answered that it was true the record merely showed the pleadings and that judgment was rendered for the defendant, but it showed that it was competent on the trial to establish the fraud of the plaintiff; and whether fraud was the point upon which the decision was founded could be proved by extrinsic evidence; and that the admission of such evidence was not inconsistent with the record and did not impugn its verity.

This decision has been frequently cited with approval by this court and the courts of every State. It is everywhere recognized as correctly applying the law as settled in the *Duchess of Kingston's Case*. It is not possible to distinguish it from the one before us. Fraud in procuring the lease, upon which this action is brought, was the point in issue in the action in the marine court between the same parties, and it having been found by the verdict of the jury against the plaintiff, and judgment having been rendered upon that finding, the fact thus established must necessarily defeat any subsequent action upon the same instrument between those parties. The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong. *Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 [18: 550]; *Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25: 1074]; *Tioga R. R. Co.* v. *Blossburg & C. R. R. Co.* 87 U. S. 20 Wall. 137 [22: 331]; *Pray* v. *Hegeman*, 98 N. Y. 351; *Merriam* v. *Whittemore*, 5 Gray, 316.

It is stated in the brief of counsel, and it was repeated on the argument, that the judgment of the marine court has been vacated by the Supreme Court of the State since this case was tried, in an action brought for that purpose. If such be the fact, it cannot be made available in this court to obviate an erroneous ruling at the trial.

During the pendency of the case in this court the defendant below, plaintiff in error here, has died, and the executor of his estate has been substituted as a party in his place.

Judgment of the court below reversed, and cause remanded with direction to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALBANY AND RENSSELAER IRON AND STEEL COMPANY, *Plf. in Err.*, [451
v.
GUSTAF LUNDBERG.

(See S. C. Reporter's ed. 451-457.)

Sales—breach of contract—irrelevant evidence—hearsay—parties, under New York Code.

1. Under the New York Code of Civil Procedure one who enters into a contract in his own name, but describes himself as agent of a third party, may maintain an action thereon in his own name.

2. In an action to recover damages for the refusal of the defendant to accept Swedish pig iron, tendered by the plaintiff under a contract for its sale, the main question of fact contested being whether the iron tendered fulfilled the plaintiff's warranty that it should not contain more than a certain proportion of phosphorus, it is *held*, that certain depositions taken in Sweden are inadmissible, because they contain evidence of the proportion of phosphorus contained in the other iron from the same furnace in previous years without showing identity in quality, and because some of the evidence therein contained is hearsay.

[No. 181.]

Argued April 1, 1887. Decided April 25, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Edwin Countryman** and *Amasa J. Parker*, for plaintiff in error:

An agent who discloses the name and residence of his principal is not liable personally on a contract for the payment of money or the sale or purchase of movable property. The principal is the proper person to bring an action on the contract against the opposite party.

Whitney v. *Wyman*, 101 U. S. 392 (25:1050); *Hitchcock* v. *Buchanan*, 105 U.S. 416 (26:1078); *Metcalf* v. *Williams*, 104 U. S. 93 (26:665); *Post* v. *Pearson*, 108 U. S. 418 (27:774); *Mechanics Bank* v. *Bank of Columbia*, 18 U. S. 5 Wheat. 326 (5:100); *Baldwin* v. *Bank of Newbury*, 68 U. S. 1 Wall. 234 (17:584); *Oelricks* v. *Ford*, 64 U. S. 23 How. 49 (16: 534).

It has always been held in New York that a mere agent, not having any beneficial interest in a contract, cannot maintain an action upon it in his own name. Before he can do so he must prove that he has made advances upon the goods sold or has guaranteed the sale to his principal.

Gunn v. *Cantine*, 10 Johns. 387; *Bayley* v. *Onondaga Co. Ins. Co.* 6 Hill, 476; *White* v. *Choteau*, 10 Barb. 202; *Green* v. *Clarke*, 12 N. Y. 343; *Price* v. *Powell*, 3 N. Y. 322; *Thompson* v. *Fargo*, 49 N. Y. 188.

Mr. **Everett P. Wheeler**, for defendant in error:

The action was properly brought in the name of Gustaf Lundberg.

Whitney v. *Wyman*, 101 U. S. 392 (25: 1050);

Mechanics Bank v. *Bank of Columbia*, 18 U.S. 5 Wheat. 326 (5:100); Story, Agency, § 160 a.

The English cases unquestionably hold that this suit is properly brought, because it is nowhere stated in the body of the contract that it is executed on behalf of the Swedish principals.

Parker v. *Winlow*, 7 Ell. & Bl. 942; *Paice* v. *Walker*, L. R. 5 Exch. 173. See also *De Witt* v. *Walton*, 9 N. Y. 571; *Moss* v. *Livingston*, 4 N. Y. 208.

It would be unreasonable that a merchant who has the right to sell iron, and to receive and give acquittance for its price, should not have the right to sue for the price if it is not paid. The common-law cases on this subject are collected in *Considerant* v. *Brisbane*, 22 N. Y. 389.

A person with whom a contract of this description is made is a trustee of an express trust within the definition of the Code.

Considerant v. *Brisbane*, *supra*; *Cummins* v. *Barkalow*, 1 Abb. Ct. App. Dec. 479; *Rowland* v. *Phalen*, 1 Bosw. 43.

Substantial conformity with the warranty is all that is necessary.

Towerson v. *Aspatria Agricultural Soc.* 27 Law T. Rep. N. S. 276; *Schnitzer* v. *Oriental Print Works*, 114 Mass. 123; *Pope* v. *Filley*, 9 Fed. Rep. 65, 71; *Hargous* v. *Stone*, 5 N.Y. 73, 94; *Waring* v. *Mason*, 18 Wend. 425, 436.

Many cases can be cited which require exact compliance with the terms of a contract. But on examination all these will be found to apply only to those terms which are susceptible of exact determination. No such rule has ever been applied to cases like the present, where the proof on both sides is that the precise percentage of phosphorus is not determinable with greater accuracy than the one ten-thousandth part. In other words, the agreement is that the iron shall be of the quality naturally to be expected from the given analysis; but it does not import a warranty that no variation from this analysis would be disclosed by other analyses; still less that samples from each pig would yield precisely the same result as the analysis mentioned in the contract.

Woodruff v. *Hough*, 91 U. S. 596 (23:382); *Nolan* v. *Whitney*, 88 N. Y. 648; *Chambers* v. *Jaynes*, 4 Pa. 39; *Propr. S. Cong. Meeting House* v. *Hilton*, 11 Gray, 407; *Lathrop* v. *Otis*, 7 Allen, 435; *Hovey* v. *Pitcher*, 13 Mo. 191.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought by Gustaf Lundberg, an alien and a subject of the Kingdom of Sweden and Norway, residing at Boston in the State of Massachusetts, against the Albany and Rensselaer Iron and Steel Company, a corporation of the State of New York, upon two contracts for the sale and purchase of Swedish pig iron, the first of which was as follows:

[452] "N. M. HÖGLUND'S SONS & CO., STOCKHOLM;

"GUSTAF LUNDBERG, SUCCESSOR TO NILS MITANDER:

"38 Kilby Street, Boston, February 10, 1880.

"I, Gustaf Lundberg, agent for N. M. Höglund's Sons & Co. of Stockholm, agree to sell, and we, Albany and Rensselaer Iron and Steel Co., Troy, N. Y., agree to buy, the following Swedish charcoal grey pig iron, viz: 500 tons of brand NBGPH, at a price of forty-eight ($48) dollars, American gold, per ton of 2240 lbs., delivered on wharf at New York, duty paid; said iron to be in accordance with an analysis furnished in Gustaf Lundberg's letter of 6th February. Payment in gold in Boston or New York funds within 30 days from date of ship's entry at custom house. Shipment from Sweden during the season, say May next, or sooner, if possible. The above quantity hereby contracted for to be subject to such reduction as may be necessitated by natural obstacles and unavoidable accidents. The seller not accountable for accidents or delays at sea. Signed in duplicate.

"Accepted, GUSTAF LUNDBERG.

Accepted, ALBANY & RENSSELAER IRON & STEEL CO."

The other contract differed only in being for the sale and purchase of "300 tons of brands SBVE and NBBBK."

The analysis referred to in both contracts showed, in the first brand .03, and in the two other brands .024, of one per cent of phosphorus.

The above amount of iron was made in Sweden, that of the first brand at the Pershytte furnace of the Ramshyttan Iron Works, out of ore from the Pershytte mines, and that of the two other brands at the Svana Iron Works, was bought and shipped from Stockholm by N. M. Höglund's Sons & Co. in May, 1880, arrived at New York, in June, 1880, and was thence taken to the defendant's works at Troy. An analysis there made by the defendant's chemist showed in the three brands respectively .047, .042 and .049, of one per cent of phosphorus. The defendant therefore refused to take the iron, and returned it to the plaintiff, who afterwards sold it for less than the contract price, brought this action to recover the difference, and obtained a verdict and judgment for upwards of $15,000. The defendant [453] sued out this writ of error.

The first question presented by the bill of exceptions is whether this action can be maintained in the name of Lundberg, or should have been brought in the name of his principals, N. M. Höglund's Sons & Co.

The paper upon which each of the contracts in suit is written has at its head, besides the name of that firm, the name of "Gustaf Lundberg, successor to Nils Mitander," followed by the street and number of his office in Boston. The contract itself begins with a promise by him in the first person singular, "I, Gustaf Lundberg, agent for N. M. Höglund's Sons & Co. of Stockholm, agree to sell;" the description added to his name in this clause is the only mention of or reference to that firm in the contract; his promise is not expressed to be made by him as their agent, or in their behalf; and the agreement is signed by him with his own name merely.

There are strong authorities for holding that a contract in such form as this is the personal contract of the agent, upon which he may sue as well as be sued in his own name, at common law. *Kennedy* v. *Gouveia*, 3 Dowl. & R. 508; *Parker* v. *Winlow*, 7 Ell. & Bl. 942; *Dutton*

v. *Marsh*, L. R. 6 Q. B. 361; *Buffum* v. *Chadwick*, 8 Mass. 103; *Packard* v. *Nye*, 2 Metc. 47. In *Gadd* v. *Houghton*, 1 Exch. D. 357, the contract which was held not to bind the agent personally was expressed to be made "on account of" the principals; and in *Oelricks* v. *Ford*, 64 U. S. 23 How. 49 [16: 534], in which the contract which was held to bind the principal more nearly resembled that before us than in any other case in this court, the important element of a signature of the agent's name, without addition, was wanting.

But it is unnecessary to express a definitive opinion upon the question in whose name, independently of any statute regulating the subject, this action should have been brought.

The Code of Civil Procedure of the State of New York contains the following provision:

"Sec. 449. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

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Under this provision, the court of appeals of that State has held that an agent of a corporation, to whom, "as executive agent of the company," a promise is made to pay money, is "a person with whom, or in whose name, a contract is made for the benefit of another," and may therefore sue in his own name on the promise. *Considerant* v. *Brisbane*, 22 N. Y. 389. The rule thus established is applicable to actions at law in the courts of the United States held within the State of New York. Rev. Stat. § 914; *Sawin* v. *Kenny*, 93 U. S. 289 [23: 926]; *Weed Sewing Machine Co.* v. *Wicks*, 3 Dill. 261; *U. S.* v. *Tracy*, 8 Ben. 1.

The case then stands thus: If the agreement to sell is an agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to him personally, and the action on the contract must be brought in his name, even at common law. If, on the other hand, the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an action may be brought in his name. In either view this action is rightly brought.

The clause, in each of the contracts sued on, "said iron to be in accordance with an analysis furnished in Gustaf Lundberg's letter of 6th February," is doubtless a warranty that the iron shall not contain a greater proportion of phosphorus than is specified in that analysis. The question of fact most contested at the trial was whether the iron tendered by the plaintiff to the defendant fulfilled this warranty.

There was evidence tending to show that any excess of phosphorus in pig iron would affect the quality of wrought iron or steel made from it, rendering it more brittle, and could be detected by bending the rods after they had been made; and the court, at the request of the defendant, and with the consent of the plaintiff, instructed the jury as follows: "If the jury find either lot of iron differed as much as one one-hundredth of one per cent in excess of the limit of phosphorus stated in the analysis referred to in the contract, that constituted a breach of the warranty and entitled the defendant to refuse to receive the iron."

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Each party called as witnesses many experts, who had made analyses of the iron in question since its arrival, some of whom testified that the amount of phosphorus in each brand was no greater than in the analysis referred to, and others testified that it was more than two hundredths of one per cent greater, or nearly twice as much.

The plaintiff also introduced several depositions taken in Sweden, so much of which as is material to be stated was as follows:

O. Anderson, the manager and a part owner of the Ramshyttan Iron Works for the last seventeen years, testified that his experience was in the practical part only of the iron manufacture; that he knew the quality, and the percentage of phosphorus, of the iron sold to N. M. Höglund's Sons & Co. in 1880, only from an analysis made by Bernhard Fernguist of pig iron from the same furnace in 1878; that no special analysis was made of the iron sold to the Höglunds, and "no new analysis was made, because no change in the ore was observed;" that other iron was made in the same furnace in 1880, "but all of exactly the same quality;" and further testified: "In the process of manufacture no special tests were made on this pig iron, but I know that this iron is used in the manufacture of Siemens & Martin's steel and iron, and there found to be good."

Fernguist, a professor of chemistry at Orebro, who had made analyses of irons and ores for twenty years, testified to the analysis made by him of pig iron from the Pershytte furnace in 1878, which showed it to contain .028 of one per cent of phosphorus.

Harold Dillner, "an officer in the metallurgic department in the Board of Iron Masters," who in 1880 and for some years before had assisted the owners and manager of the Ramshyttan Iron Works "as technical assistant at Pershytte furnace," being asked his means of knowledge in regard to the percentage of phosphorus in the parcels of iron sold to the Höglunds, and whether he knew of these parcels, or any of them, having been put to any practical test, testified: "We have trustworthy analyses of the ores from Pershytte mines and of pig iron from Pershytte furnace, which verify the always excellent quality of the ore and the pig iron manufactured of it." "It is generally known that the iron is of excellent quality, and I made no special tests."

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A. E. Cassel, manager of the Svana Iron Works in 1879 and 1880, having testified, as to the iron from those works sold to the Höglunds in 1880, that the inspection of its manufacture at the furnaces was conducted "in the same manner as during the preceding years, with the greatest care and attention," and that his means of knowledge as to the percentage of phosphorus in this iron were derived from previous analyses of iron that they manufactured, further

testified: "In the pig iron we made, the percentage of phosphorus is about .022 per cent, and of sulphur, 0.22; and I think that the pig iron in question contained about these quantities." "Complete journal is kept of how much of each kind of ore is used for each day. The quality of the ores has not changed materially during the last five years."

The admission of this testimony in the depositions was duly excepted to, and we are of opinion that it was incompetent. Much of it, and especially Anderson's remark that this iron was found to be good in the manufacture of steel and iron by Siemens & Martin, was mere hearsay. All the statements of the deponents as to the proportion of phosphorus in the iron in question were based on analyses by other persons of pig iron made in previous years, none of which were produced, or their contents proved, with the single exception of Fernguist's analysis of iron from the Pershytte furnace two years before. It is not shown, and [457] cannot be presumed, that a difference of one or two hundredths of one per cent in the amount of phosphorus in pig iron could be detected by observation of the ore, or by inspection of the manufacture of the pig iron. Under these circumstances, evidence of the amount of phosphorus in iron made in previous years was wholly irrelevant to the question of the amount of phosphorus in iron made in 1880; and the general expressions of opinion as to the excellence of the pig iron and the care taken in its manufacture did not render that evidence competent, but rather tended to divert the attention of the jury from the real issue, which was whether the particular iron tendered by the plaintiff to the defendant conformed to the express warranty in the contract between them.

The case differs from that of *Ames* v. *Quimby*, 106 U. S. 342 [27: 100], where, in an action to recover the price of shovel handles sold to the defendant, evidence of the good quality of other like handles sold by the plaintiff at the same time was admitted, accompanied by direct evidence that the latter were of the same kind and quality as the former.

This testimony being irrelevant and incompetent, and manifestly tending to prejudice the defendants with the jury, its admission requires the verdict to be set aside; and it becomes unnecessary to consider the rulings upon other evidence and upon the question of damages.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[457] CHARLES W. BOYNTON, *Plff. in Err.*,

v.

FLOWDEN H. BALL.

(See S. C. Reporter's ed. 457-463.)

Bankruptcy—discharge after entry of judgment in state court—stay of execution.

1. A bankrupt who was discharged after judgment was obtained against him in a state court, in an action pending at the time he instituted the bankruptcy proceedings, is entitled to a perpetual stay of execution on such judgment.

2. Upon petition for a perpetual stay of execution, it is *held:* that the debt under which judgment was rendered is the same debt that it was before; that it was provable in bankruptcy, and that the bankrupt might waive his right under section 5106, R. S., to have the action against him stayed pending the bankruptcy proceedings.

[No. 187.]

Argued April 4, 5, 1887. Decided April 25, 1887.

IN ERROR to the Supreme Court of the State of Illinois. Reported below, 105 Ill. 627. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Leonard Swett** and *Edward R. Swett*, for plaintiff in error.

Mr. **J. A. Crain**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Illinois. The question of federal law, which gives jurisdiction to this court to review the judgment of the state court, arises [463] out of the refusal of that court to give effect to a certificate of discharge in bankruptcy to Boynton, the plaintiff in error.

Ball, the defendant in error, brought suit against Boynton in the Circuit Court of the State of Illinois for Stephenson County, on April 16, 1877. To this Boynton filed his answer April 4, 1878, and judgment was rendered against him on December 9, 1879, for $6,223.99 debt and $5,234.99 damages and costs. Pendthis suit in the state court Boynton, on his own application, was declared a bankrupt April 15, 1878, and received his discharge from all his debts December 23, 1880. An execution on the judgment against Boynton in the state court was issued February 21, 1880, and returned unsatisfied. On March 25, 1881, Boynton filed a petition in the state court asking for a perpetual stay of execution on the judgment rendered in favor of Ball, and filed a certified copy of his discharge in bankruptcy, together with certain affidavits. Ball was served with notice of this motion and appeared and made defense. The motion was overruled by the circuit court, from which ruling Boynton appealed to the Supreme Court of the State, which court affirmed the judgment of the court below with costs. 105 Ill. 627.

The question presented for us to consider is whether the discharge in bankruptcy was, under the circumstances of this case, a discharge from the judgment rendered in the Circuit Court of Stephenson County while the proceedings in bankruptcy were pending. It will be perceived that the suit in the state court was commenced before the proceedings in bankruptcy in which the discharge was finally granted. It will also be perceived that the case lingered in the state court from April 16, 1877, until December 9, 1879, when the final judgment was rendered, a period of over two years, but that the plaintiff in error did not obtain his final discharge in bankruptcy until December 23, 1880, which was more than a year after the judgment was obtained against him in the state court.

In *Dimock* v. *Revere Copper Co.* 117 U. S. 559 [29:994], decided at the last term of this court, a case very similar to this was presented to us [464] for our consideration. Dimock, being sued in the state court of Massachusetts, made defense,

and pending the action was discharged from all his debts under bankruptcy proceedings, receiving his certificate of discharge as a bankrupt a few days before final judgment against him in the state court. Notwithstanding he had this discharge at the time the judgment was rendered against him in the state court, he did not plead it in bar of that action nor bring it in any manner to the attention of the court. He was afterwards sued upon this judgment in the Supreme Court of the State of New York, and there pleaded his discharge in bankruptcy in bar of the action. That court, however, held the certificate of discharge not to be a bar, and rendered judgment against him. This judgment was reversed in the Supreme Court in General Term, and that judgment was in turn reversed by the court of appeals, which restored the judgment of the court in special term. This court, in reviewing that judgment, said that the Superior Court of Massachusetts, in which the first suit was brought, had jurisdiction of the case, which was rendered complete by the service of process and the appearance of the defendant; that nothing that was done in the bankruptcy court had ousted the jurisdiction of that court, which, accordingly, proceeded in due order to judgment; that this judgment having been rendered after the certificate of discharge in bankruptcy, which had not been called to the attention of the court in any manner, nor any stay of proceedings in the state court asked on account of the pendency of the bankruptcy proceedings, the question before the Massachusetts Court for decision at the time it rendered judgment was whether Dimock was then indebted to the Revere Copper Company; and we held that it had jurisdiction and rightfully rendered judgment on this question in favor of that company, notwithstanding the proceedings in the bankruptcy court of which it could not take judicial notice. This decision was supported by references to cases heretofore decided involving similar questions in this court and in the courts of the States.

The principle on which the case was decided was that, while the discharge in bankruptcy would have been a valid defense to the suit if [466] pleaded at or before the time judgment was rendered in the Massachusetts Court, it had in that respect no more sanctity or effect in relieving Dimock of his debt to the company than a payment, or a receipt, or a release, of which he was bound to avail himself by plea or suggestion of some kind as a defense to the action in proper time; that, showing no good reason why he should not have presented that discharge and permitting the judgment to go against him in the Massachusetts Court, without an attempt to avail himself of it there, the judgment of that court was conclusive on the question of his indebtedness at that time to the copper company. That case, so parallel in its circumstances to the one now before us, would be conclusive of the latter if Boynton had had his certificate of discharge, or if the order for it had been made by the bankruptcy court before the judgment in the state court. But as we have already seen, the judgment in the state court was rendered more than a year before the the order of discharge in the bankruptcy court, and Boynton therefore had no opportunity to plead a discharge which had not then been granted, as a defense to that action.

Two propositions are advanced by counsel for defendant in error, in support of the judgment of the Supreme Court of Illinois, as reasons why the certificate obtained so long after the judgment in the state court should not have the effect of a discharge of the debt evidenced by that judgment. The first of these is that the original debt on which the action was brought in the Circuit Court of Stephenson County no longer exists, but that it was merged in the judgment of that court against Boynton, and was therefore not released under the Act of Congress, which declares that all debts provable against the estate of the bankrupt at the time bankruptcy proceedings were initiated shall be satisfied by the order of the court discharging the bankrupt. The argument is that the judgment now existing against Boynton is not the debt that existed at the time bankruptcy proceedings were initiated; that by the change of the character of the debt from an ordinary claim or obligation to a judgment of a court of record it ceased to be the same debt and be- [466] came a new and different debt as of the date of the judgment. Some authorities are cited for this general proposition of a change of the character of the debt by merger into the judgment, and some authorities are also cited by counsel for plaintiff in error to the contrary. See *Judge* Blatchford, *Re Brown*, 5 Ben. 1; *Re Rosey*, 6 Ben. 508.

But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy.

The next proposition is that under section 5106 of the Revised Statutes of the United States it was the duty of Boynton to make application to the state court, before judgment in that court, to have the proceedings there stayed, to await the determination of the court in bankruptcy on the question of his discharge. That section is in the following language:

"No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

This cannot be construed to mean anything more than that where the bankruptcy proceed-

ings are brought to the attention of the court in which a suit is being prosecuted against a bankrupt, that court shall not proceed to final [467] judgment until the question of his discharge shall have been determined. The state court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge. Even the direction that it shall be stayed is coupled with a condition that "there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;" and with the further provision that "If the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due."

These provisions exclude altogether the idea that the state court has lost jurisdiction of the case, even when the bankrupt shall have made application showing the proceedings against him. The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harrassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid *pro rata* with his other debts by the assignee in bankruptcy.

If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do, *Hill* v. [468] *Harding*, 107 U. S. 631 [27: 493], he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution which he asks for now. See *McDougal* v. *Reid*, 5 Ala. 810.

In *Rogers* v. *Western Marine and Fire Ins. Co.* 1 La. Ann. 161, the court, in a similar case, says: "The proposition that Rogers should have pleaded the pendency of the bankrupt proceedings in the original suit, and cannot disturb the execution of the judgment which is final, is untenable. The discharge in bankruptcy was posterior to the rendition of this judgment, and operated with the same force upon the debt after it assumed the form of a judgment as it would have done had the debt remained in its original form of a promissory note."

These and many other decisions under the Bankrupt Law of 1841 are to be found in the brief of the plaintiff in error. The same principle is decided in *Cornell* v. *Dakin*, 38 N. Y. 253, and in several cases in the District and Circuit Courts of the United States. There is a very able review of the subject by *Judge* Hillyer, of the United States District Court of Nevada, in the case of *Stansfield*, reported in 4 Sawy. C. C. 334.

The same thing was held by the Court of Appeals of New York, in *Palmer* v. *Hussey*, 87 New York, 310, which was affirmed in this court on writ of error in *Palmer* v. *Hussey*, 119 U. S. 96 [*ante*, 362].

It follows from these considerations that the Supreme Court of Illinois was in error in failing to give due effect to Boynton's discharge in bankruptcy, *and its judgment is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FLORIDA LAUGHLIN, *Appt.*, [411]
v.
JOSEPH D. MITCHELL.

(See S. C. Reporter's ed. 411-421.)

Parol trust—estoppel by lapse of time—evidence.

Upon a bill filed by a tenant for life, who holds as such from her father, under a lease or deed executed by him and herself and husband twenty-two years prior to the filing of the bill, and also under her father's will, the bill being filed ten years after his death, to enforce an express parol trust alleged to have been created by the father for her benefit thirty-five years before the filing of the bill, it is *held:* that the complainant is estopped by the lease and her action in acknowledging and placing it on record, and permitting it to remain unquestioned for twenty-two years, from setting up the parol trust alleged in the property, and that no ground is shown for setting aside the lease.

[No. 210.]

Argued April 11, 1887. Decided April 25, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi. Opinion below, published 14 Fed. Rep. 888. *Affirmed.*

The history and facts of the case appear in the opinion.

Messrs. **Murray F. Smith** and *Alfred B. Pittman* for appellant:

When there has been any fraud or misrepresentations used to induce one already in possession of land to accept a lease, the lessee is not estopped.

Smith, Land. & Ten. 295; *Gleim* v. *Rise*, 6 Watts, 45.

The distinction is between a case where a lessor was in possession, and a lessee obtained possession under him, and a case where the person in possession did not obtain it from him, who, under some false pretense, obtained the position of lessor. In the first case the lessee cannot object to the title of him who put him into possession; in the latter he will be permitted to prove the imposition. If he does prove it he is

not bound to give up possession, nor is he liable for use and occupation.

Hall v. *Benner*, 1 Pen. & W. 402; *S. C.* 21 Am. Dec. 394.

"A lease doth properly signify a demise or letting of land unto another for a lesser time than he that doth let it hath in it."

Shep. Touch, 266; Plowd. 421-432.

Assuming the above authorities to be law, it would seem to be very clear that a man cannot make a valid lease to another who is in possession of land, when such lessor has no interest, title, possession or right of possession in the premises he lets.

The tenant, under a lease made by such lessor, should never be estopped from disputing his landlord's title. To a tenant so circumstanced, the doctrine of estoppel is totally inapplicable, etc.

Whart. Dig. 365, pl. 405; *Morris' Lessee* v. *Vanderen*, 1 U. S. 1 Dall. 65 (1:38); *Marshall* v. *Sheridan*, 10 Serg. & R. 268; *Hockenbury* v. *Snyder*, 2 Watts & S. 240; *Baskin* v. *Seechrist*, 6 Pa. 168.

It matters not whether the deception practiced originates in voluntary falsehood or in simple mistake, for the immunity it confers springs not so much from the fraud of the usurper, as from the wrong which the deception would otherwise work on the rights of the lessee.

Miller v. *M'Brier*, 14 Serg & R. 382; *Hamilton* v. *Marsden*, 6 Binn. 45; *Thayer* v. *United Brethren*, 20 Pa. 60.

If the lessee was in possession at the time the lease was executed, he may resist recovery by proving that he accepted the lease by mistake.

Jackson v. *Cuerden*, 2 Johns. Cas. 353; Taylor, Land. & Ten. 546, §§ 705, 707.

Courts of equity, although there is no very great evidence of undue influence, will always look with a jealous eye upon donations from a child to a parent, and will set them aside if any advantage has been taken by means of the exercise of parental authority.

Cocking v. *Pratt*, 1 Ves. 401; *Baker* v. *Bradley*, 2 Smale & G. 531; 7 De Gex, M. & G. 597; *Wright* v. *Vanderplank*, 2 Kay & J. 1; 8 De Gex, M. & G. 133; *Potts* v. *Surr*, 34 Beav. 543, 552; *Davies* v. *Davies*, 4 Giff. 417; *King* v. *King*, 3 Jur. N. S. 609, 611; *Chambers* v. *Crabbe*, 34 Beav. 457.

Mr. **A. M. Lea**, for appellee.

This suit is an attempt to enforce an express parol trust in land alleged to have been created thirty-five years before the filing of the bill, and eleven years after the death of the alleged trustee. An essential part of the relief sought is in the cancellation of a solemn instrument, executed by the complainant and the dead trustee, the recitals and covenants of which are at war with the idea of the trust, twenty-two years after its execution.

The lapse of all these years, the death of parties and witnesses, the long continued and complete acquiescence of complainant in her father's disposition of his property by deed and will, during all which period she had a perfect knowledge of every fact charged in the bill, present insuperable barriers to relief in a court of equity.

No tribunal has more steadily set its face against the enforcement of trusts so stale than has this court.

Badger v. *Badger*, 69 U.S. 2 Wall. 92 (17:837); *Hume* v. *Beale*, 84 U. S. 17 Wall. 348 (21:605); *Philippi* v. *Philippe*, 115 U.S. 151 (29:336); *Hall* v. *Law*, 102 U. S. 465 (26:218); *Godden* v. *Kimmell*, 99 U. S. 210 (25:434) *McKnight* v. *Taylor*, 42 U. S. 1 How. 168 (11:88); *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 416 (9:177); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 185 (22:485); *Brown* v. *Co. of Buena Vista*, 95 U. S. 161 (24:423); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6:289); *Harwood* v. *R. R. Co.* 84 U.S. 17 Wall. 78 (21:558).

The parol trust must be clearly proved.

Mercer v. *Starke*, 1 Smedes & M. Ch. 487; *Dillaye* v. *Greenough*, 45 N.Y. 438; *Slocum* v. *Marshall*, 2 Wash. C. C. 397; *Smith* v. *Matthews*, 3 De Gex, F. & J. 139; *Cook* v. *Barr*, 44 N.Y. 156; *Parkhurst* v. *Van Cortland*, 1 Johns. Ch. 237; *Steere* v. *Steere*, 5 Johns. Ch. 1.

Not a witness is produced who claims to have any positive knowledge of the assumption of the trust by Joseph E. Davis save the complainant herself, and she cannot be heard to testify. Appellee moved to exclude her deposition in the court below, first because she was not a competent witness under section 858, Rev. Stat. U. S., and second, for incompetency under section 1602, Rev. Code of Mississippi of 1880. Both statutes excluded her.

Hume v. *Beale*, 84 U. S. 17 Wall. 348 (21:605); *Eslava* v. *Mazange's Admr.* 1 Woods, C. C. 625; *Rushing* v. *Rushing*, 52 Miss. 330; *McCutchen* v. *Rice*, 56 Miss. 459; *Jones* v. *Sherman*, 56 Miss. 559; *Jacks* v. *Bridewell*, 51 Miss. 887.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a bill in equity filed on the 25th of June, 1881, in the Circuit Court of the United States for the Southern District of Mississippi, by Florida Laughlin, the wife of Edmund C. Laughlin, against Joseph D. Mitchell, and also against Jefferson Davis and Joseph H. D. Bowmar as executors of the last will and testament of Joseph E. Davis, deceased. [412]

The allegations of the bill are substantially as follows: The plaintiff is the owner and in possession of a plantation in Warren County, Mississippi, known as "Diamond Bend." She is a daughter of Joseph E. Davis, deceased. The defendant Mitchell is the grandson of Davis. Davis died in 1870, leaving a last will and testament, which was duly admitted to probate in the proper court, in September, 1870. The will was executed on the 18th of March, 1869. Its second and third articles were as follows: "2nd. I give and devise to my daughter, Florida Laughlin, the estate known as the Diamond Place, in said County of Warren, containing about one thousand two hundred acres, for and during her natural life, with full enjoyment of the profits and privileges thereunto, belonging. 3dly. I give and devise to my grandson, Joseph D. Mitchell, the plantation known as the Diamond Place, in the County of Warren, containing about one thousand two hundred acres, now in possession of and occupied by my said daughter, Florida Laughlin, who has a life estate therein, with appurtenances thereunto belonging on the death of my said daughter, Florida Laughlin, to hold and enjoy the same in fee simple; but in case my grandson, J. D. Mitchell, should not survive my daughter, Florida Laughlin, and

should die without issue, I give and devise said Diamond Place to my nephew, Joseph E. Davis, son of Hugh R. Davis, of Wilkinson County, Mississippi." Davis became possessed of the property in question only through the plaintiff and as her trustee, under the following circumstances: on the 7th of June, 1844, the plaintiff was the wife of David Mc Caleb, and she and her husband were then living on the plantation, which had been his property before he married her. There existed a deed of trust of the property, given by Mc Caleb in 1837, the balance of the debt secured by which, amounting to $13,955.80, had been assigned to one Jacobs. In June, 1844, the plaintiff and her husband executed a new deed of trust to Chilton and Searles, as trustees, to secure the payment of said balance to Jacobs, covering the land and sundry slaves and personal property. In May, 1846, the plaintiff and her husband executed another deed of trust, covering the same real and personal property, and some additional slaves, to one McElrath, as trustee, to secure a debt due by the husband to Laughlin, Searles & Co., the debt amounting to $4,201.61 of principal. In addition, Mc Caleb owed other large, pressing debts. The property was then reasonably worth more than $100,000. Chilton and Searles advertised the property for sale under their deed of trust, at public outcry, on the 15th of June, 1846. Before that day, Jonathan Mc Caleb, the uncle of David Mc Caleb, had promised to purchase the property at the sale, to take the title to it in his own name, and to give to David McCaleb time to repay to his uncle such amount as he should advance to make the purchase. Accordingly, the uncle attended the sale, prepared to purchase the property, in trust for the benefit of his nephew. The plaintiff's father had, however, in the meantime, at her solicitation, consented to purchase the property in trust for her, and to hold it so that she and her husband might in time be able to redeem it, the object being to make it secure from the creditors of her husband. On the day of the sale, her father and her husband's uncle being present, it was agreed that the purchase should be made by and in the name of her father, to be held for and sold to her on payment of such sum, with interest, as her father might be required to pay or assume, instead of being bid in by and in the name of her husband's uncle, to be redeemed in like manner by her husband. It was made known at the sale, to all present, that her father was bidding for her, and on that account no bidding was made by any disinterested persons, and, as a result, there was no substantial competition. All of the property, real and personal, was knocked off to her father as the highest bidder, at the sum of $28,531, which was scarcely more than one third of its value. The creditors who were entitled to the proceeds consented that the purchase money should not be required to be paid in cash. The plaintiff was left in the undisturbed possession of the property, without the payment of any money, and her father executed his own note to Jacobs for the principal and interest of the debt to Jacobs, including the expenses of the sale, the intention being that her husband might be able to meet such payment by the proceeds of the crops from the property. On the 15th of June, 1846, a written agreement was executed by Chilton and Searles, as trustees, by Joseph E. Davis, and by Jacobs, which recited the sale under the deed of trust to them, and that Davis had at the sale purchased the slaves and the land for $28,531, and conveyed the property to Davis, subject to the payment of a promissory note which he then gave for the amount of the debt due to Jacobs, the title to all the property to remain in the trustees until the payment of such debt, and then to vest absolutely in Davis; Davis to pay out of the balance of the purchase money the amount due to Laughlin, Searles & Co., under the deed of trust of May 7, 1846, and the remainder of the purchase money to go to David Mc Caleb. After these arrangements, David Mc Caleb continued the cultivation of the crops and exercised dominion over the property in like manner as if the title had been vested in the plaintiff instead of in her father for her use. Her father never, during the lifetime of her husband, exercised any control over the property. No account was kept or demanded as to its rents, issues and profits, and the debts which had been so assumed by her father were considered by him and her husband as her debts, to be paid for by her husband by means of the property. Her husband treated the property as her separate estate, and shipped the crops during his lifetime, and applied the proceeds to the payment of the debts which had been assumed by her father, and of the other incumbrances. David Mc Caleb died in May, 1847, and she shipped the crops of that year, as the crops of the preceding year had been shipped, to agents, to the credit of Diamond Place account, for the Jacobs judgment. In July, 1848, she married Edmund C. Laughlin, her present husband. They continued to live on the plantation, shipping the crops as before, and applying the same, sometimes through their merchants and sometimes by direct payment to her father, to the discharge of said indebtedness. Some years after she had married Laughlin, and after she had paid a large portion of all the incumbrances, and some other indebtedness, she requested her father to make a title to her, and allow her to secure to him any balance for which she might be liable. This request was not complied with by him, but his failure to do so was not accompanied or explained by his advancing any claim of beneficial interest in himself in the property. Her ownership of the property was repeatedly admitted by her father, both orally, and in letters addressed to her and subscribed by him. On more than one occasion he declared to her that he had devised the property to her by his will. Before the year 1858 she had more than repaid to her father all money and debts paid out and assumed by him for her on account of the property. On the 27th of December, 1858 when her father was just beginning to recover from a dangerous illness, and while he was feeble and nervous, he said to the plaintiff, who was then in attendance upon him, that he would like her husband to be sent for (he being then at Diamond Place, several miles away). When her husband arrived, he and the plaintiff were called into the office of her father, and a paper was put into her hands, which he desired her to read aloud. When she had read it, she found it was a lease to be signed

[413] [414] [415]

by her and her husband, and by her father, in which her father leased the Diamond Place, and the slaves so purchased by him, to the plaintiff, for life. The lease, a copy of which is annexed to the bill, was signed by the three parties. It is dated December 27, 1858, and by it Davis, in consideration of natural love and affection and $100, leases to the plaintiff the plantation called Diamond Place, and certain slaves, horses, mules, colts, cattle, sheep and hogs, for the natural life of the plaintiff. There is a covenant by the plaintiff and her husband that they will manage the plantation and slaves in a proper and husbandlike manner, and at the termination of the lease will quietly surrender the plantation and property unto Davis, his heirs, executors, administrators and assigns, "in as good condition as the same now is, natural wear and tear and unavoidable accidents excepted, it being hereby acknowledged that the sole legal and equitable title in and to said plantation and slaves and other property is in the said party of the first part, and the right of property in him." On becoming aware of the contents of the paper she was asked to sign, the plaintiff remonstrated with her father, and reminded him that at the trustees' sale of the property he had promised her that as soon as the debt which he had assumed, or would have [416] to assume, was paid to him, he would make her a fee simple title to the place, and she said to him that, notwithstanding all he had ever paid out on the place had been repaid to him, he now wished her to take only a life estate in what she had thus bought and paid for, to which his only reply was, "I think it best for you." She signed the paper under compulsion, seeing the nervous and excited condition of her father and fearing disastrous consequences to him, in his feeble state of health, if she should any longer oppose him She and her husband afterwards acknowledged the deed or lease, on the 31st of May, 1859. The acknowledgment was extorted from them by threats on the part of Davis, if they did not acknowledge it, to take possession of the place and put an overseer on it, and leave to the plaintiff the bare occupancy of the house and garden, with no other provision. From the time the plaintiff was induced by her father to make such acknowledgment up to the time of his death, she expressed to him on all proper occasions, both in letters and personal interviews, her sense of the injustice which had been done to her. From the time she left her father's house, after executing the deed or lease, she never returned to it. After she had signed the instrument she always supposed that by that act she had finally and hopelessly lost her property, and whatever she has said or done or omitted to do since was under that belief. Prior to January 25, 1869, her father suggested to her husband that he should purchase the property at the price of $60,000 for the bare land and tenements, when the market value thereof was trifling compared with their value in June, 1846, when the same lands with the slaves sold for over $28,000. Joseph E. Davis, the son of Hugh R. Davis, who was the devisee, under the will, of the plantation in case Joseph D. Mitchell should not survive the plaintiff and should die without issue, is dead.

Such being the allegations of the bill, its prayer is, "That the lease or instrument in [417] writing whereby your oratrix conveyed her said property to Joseph E. Davis, or acknowledged that the right thereof was in him, be adjudged void and of no effect as against your oratrix; that the devise of said property in and by said will to the defendant Joseph D. Mitchell be decreed to be void; that the beneficial ownership and title to said property be decreed, as against said Joseph E. Davis, deceased, and his devisees, to be in your oratrix; that an account may be taken of the payments which were made by and for your oratrix in the premises, that it may be ascertained whether or not she has, in fact, paid to said Joseph E. Davis the full amount which she was bound to pay to entitle her to the relief hereby prayed, as she has hereinbefore alleged, your oratrix being willing and hereby offering to pay any balance which may be found against her, on such accounting, to the parties entitled thereto; and that upon the ascertainment that your oratrix has fully paid all such sums as in equity she ought to have paid, or upon her payment thereof now, she may be decreed to have the absolute, indefeasible title of said property, as against said defendant."

The answer of the defendant Mitchell puts in issue all the material allegations of the bill on which the relief it claims is founded. It denies every averment setting up any arrangement, agreement, or understanding made by Joseph E. Davis with David McCaleb, or with Jonathan McCaleb, or with the plaintiff, for the purchase of the property in trust for the plaintiff, and alleges that Joseph E. Davis purchased the property at the sale in his own right, and thereby acquired the full beneficial and legal title thereto, and that he paid the full sum which he agreed to pay by the instrument of June 15, 1846. It alleges that David McCaleb and the plaintiff at all times recognized the ownership of Joseph E. Davis in the property, and were fully cognizant of the fact that, although he purchased the property to save the plaintiff from being turned out of her home, he never contemplated giving her the fee in the property, or any other interest than a life estate, and that he did not keep or demand any account of the rents, issues, and profits of the plantation, because he was content that the plaintiff should enjoy the usufruct [418] of the property during her life, as appears by the lease and by the terms of his will. It denies that any crops were shipped for the account of the indebtedness to Jacobs, and denies that either McCaleb or the plaintiff ever paid to Joseph E. Davis any part of the $28,531 which constituted the purchase money of the property. It denies that the signature of the plaintiff or her husband to the lease, or their subsequent acknowledgment of it, was procured by the compulsion, threats, or other undue influence of her father, and alleges that the lease was intended by him as a provision for her, and as an assurance to her of a home for the remainder of her life.

A replication was filed to this answer and proofs were taken, and the case was heard, an order being entered dismissing the bill as to the executors of Joseph E. Davis.

The deposition of the plaintiff was taken as a witness in her own behalf, and afterwards,

and at the hearing, the defendant made a motion to exclude the deposition, on the ground that she was not a competent witness. The court made a decree dismissing the bill, from which the plaintiff has appealed. In its opinion (14 Fed. Rep. 882) it says: "It is admitted that the testimony of the complainant as to the understanding and agreement between her and her father, relating to the creation of the alleged trust, is incompetent, and cannot be considered."

The circuit court gives the following as a statement of undisputed facts in the case: "In the year 1846, David McCaleb, then the husband of complainant, was the owner of the land described in the bill and the subject of this controversy. He was largely indebted, and before that time had executed a mortgage or trust deed to secure a debt due to one Jacobs, in which complainant joined, conveying to the trustees, Chilton and Searles, this tract of land, with the slaves and personal property thereon. The trustees, having advertised the time and place of sale, proceeded, on the 15th of June, 1846, to offer the same for sale to the highest bidder for cash. There were present at the sale Jonathan McCaleb, an uncle of David McCaleb, who held a large debt against his nephew, and other creditors, or their counsel, who bid more or less for the property sold; but the whole of it was either struck off to Joseph [419] E. Davis, the father of complainant, or the bids were transferred to him, so that he became the purchaser, the aggregate amount of the sales being $28,531. Said Davis, so far as the creditors were concerned, continued to be the owner of the property; but David McCaleb and wife remained in possession of the property as before the sale, up to McCaleb's death, which occurred about one year thereafter. Complainant remained in possession alone up to her intermarriage with E. C. Laughlin, her present husband and complainant, and they have remained in possession ever since. On the 27th of December, 1858, Joseph E. Davis executed a lease or deed conveying said property, real and personal, to complainant, for and during her natural life. This conveyance contained in it an acknowledgment that said Davis was the sole, legal and equitable owner of the property conveyed. After being duly signed by said Davis, by complainant and her husband, it was delivered to complainant, and some five months thereafter it was duly acknowledged by complainant and her husband, and recorded in the proper office. Joseph E. Davis, by his last will and testament, duly probated and admitted to record, devised to the defendant, Joseph D. Mitchell, this land described as 'Diamond Place,' then occupied by complainant, and in which, as declared by the will, she had a life estate."

As to the disputed facts in the case the court held that the trust alleged was not established by the evidence, aside from the testimony of the plaintiff, the view taken by it being that the evidence established that Davis purchased the property with the purpose of letting the plaintiff and her husband remain on the plantation and control it and the property upon it, intending to hold the legal title to all of it and to make himself personally responsible for the expenses of the plantation, the income to be applied to pay those expenses and the personal expenses of his daughter and her husband, and the remainder of it to the payment of the purchase money for which he was personally liable, and intending, when this was done, to convey, or secure by his will, to her, a title to the property, it not very clearly appearing whether this was to be in fee or only for life; that, after the [420] plaintiff's marriage to Laughlin, she and her husband desired to obtain the legal title to the property, the plaintiff all the time recognizing the title to it as being in her father, and that it was incumbered for the payment of the balance of the purchase money to whomsoever it might be due; that this state of things continued until the execution of the lease; that the lease left the plaintiff in possession of the property for life, free from any obligation to pay any part of the debts of the place or the balance of the purchase money due; that the trust alleged was not established by clear and satisfactory evidence; that, even admitting the understanding between the plaintiff and her father at the time of the sale, as alleged in the bill, the demands referred to had not been satisfied at the time the lease was executed; that there was no fraud or deception or undue influence on the part of the plaintiff's father in respect to the execution of the lease by her or her husband; that, eight days after the execution of the lease, he gave her the option of returning it, and in that event proposed to leave her in possession of the house, garden and appurtenances and an income, in place of the provisions of the lease; that, after waiting nearly five months and deliberating upon the proposition, and without any further influence upon the part of her father, so far as the evidence shows, and with ample time to consult counsel and friends, she and her husband, and not Mr. Davis, placed the lease on record in the proper office in Warren County, thus accepting its terms; and that they enjoyed its benefits, with no attempt to revoke it, until the filing of this bill on the 25th of June, 1881, more than twenty-two years after the execution, acknowledgment and recording of the lease, more than twelve years after Davis' will was made, and more than ten years after his death; and that it does not appear that any intimation was given to Davis, after the recording of the lease, of dissatisfaction with its terms, or that he was advised during his lifetime of any intention to assail it. The opinion of the circuit court says; "On the 18th day of March, 1869, Mr. Davis made his last will and testament, by which he devised the remainder interest in this real estate [421] to the defendant. Ten years thus elapsing after the lease was recorded by Mrs. Laughlin before Mr. Davis made his will, he was justified in the belief that he had the right and power to devise this remainder interest to whom he pleased, and for this reason, if there were no other, I am of opinion that complainant is estopped from assailing this lease now, and is not entitled to have the same declared void, and a cloud upon her title. She was fully cognizant of all the facts in relation to her title and in relation to the execution of the instrument, during the lifetime of her father as well as since. To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transac-

The evidence showed conclusively that Dunham was a citizen of the same State with Mrs. Carson; and consequently the suit was properly remanded so far as that ground of removal was concerned.

The fact, if it be a fact, that the assignment of the mortgage to Dunham was colorable only, and made for the purpose of preventing the removal, gives the circuit court no right to take jurisdiction. That was decided in *Provident Sav. etc. Society* v. *Ford*, 114 U. S. 635 [29:261], followed and approved in *Oakley* v. *Goodnow*, 118 U. S. 43 [*ante*, 61].

The important question is, therefore, whether it sufficiently appears that the suit is one "arising under the Constitution or laws of the United States." In *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 203 [24:658], it was decided that, "Before a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts,' in legal and logical form,' such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty, of the United States." When this suit came into the circuit court from the state court, no such case had been made out. As was further said in the case just cited, "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises." All the statements of this petition, which, for the purpose of removal, performs the office of pleading, are mere conclusions of law, not facts from which the conclusions are to be drawn. If the case had stood on the bill and petition for removal alone, there could be no doubt of the propriety of the order to remand on this ground as well as on that of citizenship. [427]

But after the case got into the circuit court, an answer was filed which did state the facts from which, it is claimed, the conclusions of law set out in the petition necessarily followed. The petition, on its face, made a case for removal by reason of the citizenship of the parties; and the suit was properly taken from the state court and entered in the circuit court on that ground, if not on the others. The statute made it the duty of the state court to proceed no further until its jurisdiction had in some way been been restored. Had it proceeded, its judgment could have been reversed, because, on the face of the record, its jurisdiction had been taken away.

The suit was, therefore, rightfully in the circuit court when the record was entered there and when the answer was filed, which, for the purposes of jurisdiction, may fairly be treated as an amendment to the petition for removal, setting forth the facts from which the conclusions there stated were drawn. As an amendment, the answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent, we think, it was proper to amend a petition which, on its face, showed a right to the transfer. Whether this could have been done if the petition, as presented to the state court, had not shown on its face sufficient ground of removal, we do not now decide.

Before considering further this branch of the case it is proper to notice the difference between the provisions of the Act of 1875 for the removal of suits presenting federal questions, and those in section 709 of the Revised Statutes for the review by this court of the decisions of the highest courts of the States. Under the Act of 1875, for the purposes of removal, the suit must be one "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority;" that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction. *Starin* v. *New York City*, 115 U. S. 257 [29:390], and cases there cited. But under section 709 there may be a review by this court of the decisions of the highest courts of the States in suits "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party under such constitution, treaty, statute, commission or authority." For the purposes of a removal the Constitution, or some law or treaty of the United States must be directly involved, while for the purposes of review it will be enough if the right in question comes from a "commission held, or an authority exercised, under the United States." Cases, therefore, relating to the jurisdiction of this court for review are not necessarily controlling in reference to removals. [428]

This distinction was pointed out and acted on in *Provident Sav. etc. Society* v. *Ford*, 114 U. S. 635 [*supra*], where the suit was brought in a state court of New York on a judgment in the Circuit Court of the United States for the Northern District of Ohio, and an attempt was made to remove it under the Act of 1875, on the ground among others that "A suit on a judgment recovered in a United States Court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States;" but it was decided otherwise, p. 642 [264], because a suit on such a judgment is "simply the case of an ordinary right of property sought to be enforced," unless some question is raised "distinctly involving the laws of the United States." "These considerations," it was further said, "show a wide distinction between the case of a suit merely on a judgment of a United States Court and that of a suit by or against a United States corporation." The expressions in the opinions in *Dupasseur* v. *Rochereau*, 88 U.S. 21 Wall. 134 [22:590], and *Crescent City Live Stock etc. Co.* v. *Butchers Union etc. Co.* 120 U.S. 146 [*ante*, 614], relied on by the counsel for the appellants, and which are thought to be in conflict with this, must be read and construed with reference to the facts of those cases, which came here from the courts of States for review under section 709 of the Revised Statutes.

What we have quoted above from *Provident Sav. etc. Society* v. *Ford*, is equally applicable to the case made on this record. The answer sets up as a defense to the suit the decree in *Hyatt* v. *Carson*, and the title acquired by the purchase [429]

under the authority of the sale in *Carson* v. *McBurney*. It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question "distinctly involving the laws of the United States." The suit, therefore, as now presented, is not one arising under the Constitution and laws of the United States, within the meaning of that term as used in the Removal Act of 1875; but if, in deciding the case, the highest court of the State shall fail to give full effect to the authority exercised under the United States, as shown by the judgments and decrees of their courts, relied on to support the title of Mrs. Carson, its decision in that regard may be the subject of review by this court under section 709. The petition for the removal and the answer, taken together, set up and claim in her behalf a right derived from an authority exercised under the United States, but not necessarily under the laws of the United States, within the meaning of that term as used in the Removal Act.

What has been said in reference to the claims under the decrees in the circuit court is equally applicable to the allegation in the answer of the pendency of another suit on the same cause of action in the same court.

The statement in the answer that when the mortgage to Hyatt was made he was a citizen and resident of New York, and the makers of the mortgage citizens of South Carolina, a State whose people were then in rebellion against the United States, is not enough to make a suit arising under the Constitution or laws of the United States. The fact that a mortgage was made in enemy territory to a loyal citizen of the United States does not necessarily imply unlawful intercourse between the parties, contrary to the Proclamation of the President of the date of August 16, 1861, 12 Stat. at L. 1262, under the authority of the Act of July 13, 1861, chap. 3, § 5, 12 Stat. at L. 257. That transactions within Confederate lines affecting loyal citizens outside [430] were not all unlawful was decided in *United States* v. *Quigley*, 103 U. S. 595 [26:524]. To make a case for removal the answer should have set forth the facts which rendered the mortgage void under the Nonintercourse Act and the Proclamation thereunder. There has been no attempt to do this.

The order remanding the case is affirmed.

Mr. Justice **Blatchford** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[430] MILWAUKEE AND NORTHERN RAILWAY COMPANY, *Plff. in Err.*,
v.
BROOKS LOCOMOTIVE WORKS.

(See S. C. Reporter's ed. 430-443.)

Railroads—lease by one company of the road of another—entry by trustees under former mortgage of the lessee—garnishee proceedings against them by judgment creditor of the lessor to reach fund due as compensation for use of said road—rights of trustee under a mortgage on said road, who is also assignee of the lease—trustees did not hold under the lease—amount due, the property of the lessor—recovery against garnishees—defense in garnishee proceedings.

1. On January 4, 1879, the trustees under the mortgage of July 1, 1871, of the Wisconsin Central Railroad Company, took possession of the property of said company and of the road of the Milwaukee and Northern Railway Company, the Wisconsin Company being at that time the lessee of said road under a lease executed after the execution of said mortgage. Said trustees at once notified the Milwaukee Company, and the trustee under a mortgage on said road, who was also trustee under the lease and assignee of the same, that they declined to assume, affirm, or in any way ratify said lease, and that, unless the parties notified should otherwise elect, they would continue to operate said road temporarily, and for such compensation as it might fairly be worth. The receivers continued to operate said road until May 1, 1879, when they accepted a lease of the same from a receiver appointed in a proceeding then pending for the foreclosure of the mortgage thereon. In garnishee proceedings against said trustees, instituted by a judgment creditor of the Milwaukee Company, it is *held:* that the trustees under the mortgage of the Wisconsin Central Company did not take possession of the Milwaukee road under the lease to said company as subtenants or otherwise, and that they were therefore not bound to pay rent to the trustee under said lease; that the rent of said road is only payable to him, if at all, either as trustee or assignee for the purposes and upon the trusts expressed in the lease in the assignment, and only when it is made to appear that such trusts have not been fully paid and satisfied; that the sum due from said trustee as compensation for the use of said road from January 8 to May 1, 1879, was the property of the Milwaukee Company at the commencement of said garnishee proceedings; and that said judgment creditor thereby acquired a lien upon said fund to the extent of the amount due upon its judgment against said Company.

2. A garnishee may represent, in his own defense, the rights of a third party to whom he is in law liable.

[No. 226.]

Argued April 15, 1887. Decided April 25, 1887

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **E. Mariner**, for plaintiff in error.

Messrs. **F. C. Winkler**, *James G. Jenkins* and *Davis, Reiss & Shepard*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The Brooks Locomotive Works on November 30, 1875, recovered a judgment against the Milwaukee and Northern Railway Company for the sum of $15,368.72, with interest and costs, in the Circuit Court of the United States for the Eastern District of Wisconsin. Execution thereon having been returned not satisfied, and the judgment being otherwise unpaid and still in force, on July 7, 1879, the plaintiff below filed what under the laws of Wisconsin [431] regulating the practice in such cases is called an affidavit of garnishment, in which it was alleged that the defendant, the Milwaukee and Northern Railway Company, had not property liable to execution sufficient to satisfy the plaintiff's demand, and that the Wisconsin Central Railroad Company, a corporation of the State of Wisconsin, and Charles L. Colby, Edwin H. Abbot, and John A. Stewart, were indebted to or had property, real or personal,

The evidence showed conclusively that Dunham was a citizen of the same State with Mrs. Carson; and consequently the suit was properly remanded so far as that ground of removal was concerned.

The fact, if it be a fact, that the assignment of the mortgage to Dunham was colorable only, and made for the purpose of preventing the removal, gives the circuit court no right to take jurisdiction. That was decided in *Provident Sav. etc. Society* v. *Ford*, 114 U. S. 635 [29:261], followed and approved in *Oakley* v. *Goodnow*, 118 U. S. 43 [*ante*, 61].

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under the authority of the sale in *Carson* v. *McBurney*. It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question "distinctly involving the laws of the United States." The suit, therefore, as now presented, is not one arising under the Constitution and laws of the United States, within the meaning of that term as used in the Removal Act of 1875; but if, in deciding the case, the highest court of the State shall fail to give full effect to the authority exercised under the United States, as shown by the judgments and decrees of their courts, relied on to support the title of Mrs. Carson, its decision in that regard may be the subject of review by this court under section 709. The petition for the removal and the answer, taken together, set up and claim in her behalf a right derived from an authority exercised under the United States, but not necessarily under the laws of the United States, within the meaning of that term as used in the Removal Act.

What has been said in reference to the claims under the decrees in the circuit court is equally applicable to the allegation in the answer of the pendency of another suit on the same cause of action in the same court.

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The order remanding the case is affirmed.

Mr. Justice **Blatchford** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[430] **MILWAUKEE AND NORTHERN RAILWAY COMPANY,** *Plff. in Err.*,
v.
BROOKS LOCOMOTIVE WORKS.

(See S. C. Reporter's ed. 430-443.)

Railroads—lease by one company of the road of another—entry by trustees under former mortgage of the lessee—garnishee proceedings against them by judgment creditor of the lessor to reach fund due as compensation for use of said road—rights of trustee under a mortgage on said road, who is also assignee of the lease—trustees did not hold under the lease—amount due, the property of the lessor—recovery against garnishees—defense in garnishee proceedings.

1. On January 4, 1879, the trustees under the mortgage of July 1, 1871, of the Wisconsin Central Railroad Company, took possession of the property of said company and of the road of the Milwaukee and Northern Railway Company, the Wisconsin Company being at that time the lessee of said road under a lease executed after the execution of said mortgage. Said trustees at once notified the Milwaukee Company, and the trustee under a mortgage on said road, who was also trustee under the lease and assignee of the same, that they declined to assume, affirm, or in any way ratify said lease, and that, unless the parties notified should otherwise elect, they would continue to operate said road temporarily, and for such compensation as it might fairly be worth. The receivers continued to operate said road until May 1, 1879, when they accepted a lease of the same from a receiver appointed in a proceeding then pending for the foreclosure of the mortgage thereon. In garnishee proceedings against said trustees, instituted by a judgment creditor of the Milwaukee Company, it is *held:* that the trustees under the mortgage of the Wisconsin Central Company did not take possession of the Milwaukee road under the lease to said company as subtenants or otherwise, and that they were therefore not bound to pay rent to the trustee under said lease; that the rent of said road is only payable to him, if at all, either as trustee or assignee for the purposes and upon the trusts expressed in the lease in the assignment, and only when it is made to appear that such trusts have not been fully paid and satisfied; that the sum due from said trustee as compensation for the use of said road from January 3 to May 1, 1879, was the property of the Milwaukee Company at the commencement of said garnishee proceedings; and that said judgment creditor thereby acquired a lien upon said fund to the extent of the amount due upon its judgment against said Company.

2. A garnishee may represent, in his own defense, the rights of a third party to whom he is in law liable.

[No. 226.]

Argued April 15, 1887. Decided April 25, 1887

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **E. Mariner,** for plaintiff in error.

Messrs. **F. C. Winkler,** *James G. Jenkins* and *Davis, Reiss & Shepard,* for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The Brooks Locomotive Works on November 30, 1875, recovered a judgment against the Milwaukee and Northern Railway Company for the sum of $15,368.72, with interest and costs, in the Circuit Court of the United States for the Eastern District of Wisconsin. Execution thereon having been returned not satisfied, and the judgment being otherwise unpaid and still in force, on July 7, 1879, the plaintiff be- [431] low filed what under the laws of Wisconsin regulating the practice in such cases is called an affidavit of garnishment, in which it was alleged that the defendant, the Milwaukee and Northern Railway Company, had not property liable to execution sufficient to satisfy the plaintiff's demand, and that the Wisconsin Central Railroad Company, a corporation of the State of Wisconsin, and Charles L. Colby, Edwin H. Abbot, and John A. Stewart, were indebted to or had property, real or personal,

in their possession or under their control, belonging to the defendant in said execution. Summons was accordingly issued, pursuant to said affidavit, against the garnishees, and served on the Wisconsin Central Railroad Company, C. L. Colby, and Edwin H. Abbot, as well as upon the defendant, the Milwaukee and Northern Railway Company. The defendants filed answers, Edwin H. Abbot answering under oath for himself and John A. Stewart, a citizen of New York, jointly. In this answer Stewart and Abbot set out particularly the circumstances under which they allege that they hold the sum of $28,258.44 as an amount due from them, as trustees for the mortgage bondholders of the Wisconsin Central Railroad Company, for the use and occupation of the railroad of the Milwaukee and Northern Railway Company while operated by them as such trustees; and, being in doubt as to whether the facts stated cast any liability upon them as garnishees, submit the question of their liability to the court. The other garnishees in their answers deny any indebtedness to the Milwaukee and Northern Railway Company while operated by them as such trustees; and, being in doubt as to whether the facts stated cast any liability upon them as garnishees, submit the question of their liability to the court. The other garnishees in their answers deny any indebtedness to the Milwaukee and Northern Railway Company.

The cause, having come on for trial upon these issues, was submitted to the court, the intervention of a jury being duly waived. The findings of fact and conclusions of law are as follows:

"First: That on the 30th day of November, 1875, the plaintiff above named duly recovered a judgment in this court against the Milwaukee and Northern Railway Company, defendant herein, for the sum of $15,368.72, damages and costs; that said judgment is still in full force and wholly unpaid and unsatisfied; that there is now due thereon from said defendant, the [432] Milwaukee and Northern Railway Company, to said plaintiff, the said sum of $15,368.72, with interest at the rate of 7 per cent per annum from the 30th day of November, 1875, amounting at this date to the sum of $28,410.40; and that said judgment was rendered upon certain promissory notes given by said Company to the plaintiff upon the sale of an engine furnished for its railroad on the 6th day of September, 1873; that an *alias* execution was duly issued out of and under the seal of this court to the Marshal of the Eastern District of Wisconsin upon said judgment on the 7th day of July, 1879, and while the same was in the hands of the said marshal, and wholly unsatisfied, and before the return day thereof, to wit, on the 7th day of July, 1879, this action was commenced, by due service of the garnishee affidavit and summons herein, upon the said defendant and upon the garnishees named in the title of this cause.

"Second. That the Wisconsin Central Railroad Company was, at said last named date, and for many years prior thereto had been, and at all times hereinafter mentioned was, a corporation created by and under the laws of the State of Wisconsin, and owned and operated a railroad from Menasha, in the State of Wisconsin, to Ashland, on Lake Superior, in said State; that the defendant, the Milwaukee and Northern Railway Company, was during said times a corporation created by and under the laws of the State of Wisconsin, and owned a certain main line of railway extending from the City of Milwaukee, in the State of Wisconsin, to the City of Green Bay, in said State, and a spur line from Hilbert Junction, on said main line, to Menasha aforesaid; that the said Wisconsin Central Railroad Company, on the first day of July, 1871, mortgaged its line of railway aforesaid to secure certain bonds therein mentioned, which mortgage was in the usual form of railway mortgages, and authorized the trustees, upon default, to take possession of said railway, and that at all times hereinafter mentioned the defendants, John A. Stewart and Edwin H. Abbot, were the trustees under said mortgage.

"Third. That the Milwaukee and Northern Railway Company, prior to the times hereinafter mentioned, had duly mortgaged its said line of railway to secure its bonds, in the usual form of railway mortgages, with authority [433] upon the part of the trustees in said mortgage named to take possession of said railway upon default in the payment of the principal or interest of the bonds thereby secured, and that at the times hereinafter mentioned Jesse Hoyt and A. Warren Greenleaf were the trustees in said mortgage named, a copy of which mortgage is hereto annexed, marked 'Exhibit A.'

"Fourth. That on the 9th day of November 1873, the Milwaukee and Northern Railway Company leased to the Wisconsin Central Railroad Company its line of railway and appurtenances, motive power and rolling stock, railroad materials, and supplies of every description, for the term of 999 years from and after November 30, 1873, a copy of which lease is hereto annexed, marked 'Exhibit B;' that by supplemental agreements to said lease, of which 'Exhibits C. and D,' hereto annexed, are copies, Jesse Hoyt was substituted as trustee in place of the Wisconsin Marine and Fire Insurance Company Bank, and that said lease was, on or about January 8, 1878, by said Milwaukee and Northern Railway Company, assigned to Jesse Hoyt and A. Warren Greenleaf, trustees under said mortgage, of which the Wisconsin Central Railway Company had notice, copies of which assignment and notice are hereto annexed, marked 'Exhibits E and F;' that the Wisconsin Central Railway Company entered into possession of said road under said lease and continued therein until the garnishees herein, Stewart and Abbot, took possession of said railway in January, 1879, and said company paid rent under said lease.

"Fifth. That at the times herein mentioned Jesse Hoyt was the president of the Milwaukee and Northern Railway Company, and Angus Smith was the vice president thereof.

"Sixth. That on the 9th day of January, 1875, a foreclosure of the mortgage made by the Milwaukee and Northern Railway Company was commenced in this court by Jesse Hoyt, surviving trustee, against the Milwaukee and Northern Railway Company and the Wisconsin Central Railroad Company, defendants, but that no receiver was appointed therein until the 28th day of April, 1879; on which day the [434] said court, by consent of the parties to said suit,

made an order annulling such lease and appointing James C. Spencer receiver, who qualified as such receiver on the 5th day of May, 1879, a copy of which order is hereto annexed, marked 'Exhibit G;' and that said trustees had never taken possession of said railroad and property under said mortgage, nor claimed so to do, until the appointment of said receiver.

"Seventh. That on the 12th day of October, 1875, one James Ludington recovered a judgment at law, in the Circuit Court of the State of Wisconsin for the County of Milwaukee, against the Milwaukee and Northern Railway Company, and on the 15th day of November, 1875, caused an execution to be issued thereon, which was returned *nulla bona* on the 18th day of January, 1876, which judgment was rendered upon default and without any appearance of the defendant therein, and the process commencing said action was served only upon Guido Pfister, a director of said Company, and upon no other officer or person.

"Eighth. That on the 17th day of November, 1875, the said James Ludington filed a bill in equity in said Circuit Court for the County of Milwaukee founded upon his said judgment at law, and on the 27th day of December, 1875, obtained a decree therein, directing the sale of the railroad of the Milwaukee and Northern Railway Company thereunder; that on the 4th day of March, 1876, under said decree, the sheriff of the County of Milwaukee sold said railroad to Guido Pfister, and on the 29th day of March, 1876, executed a deed thereof to him, but did not make a report of the sale to the court until January 30, 1880, and said sale was confirmed by the court on the 9th day of February, 1880, and that the sheriff's deed to Guido Pfister was recorded in the office of the register of deeds of the County of Milwaukee on the 26th day of February, 1880, but said Pfister never took or claimed possession under said deed.

"Ninth. On the 4th day of January, 1879, the defendants John A. Stewart and Edwin H. Abbot, as trustees under the mortgage of the Wisconsin Central Railroad Company, said company having theretofore made default under said mortgage, and then being so in default, duly took possession of said Wisconsin Central railroad under the said mortgage, and also took possession of the Milwaukee and Northern railway, and thereupon notified the Milwaukee and Northern Railway Company and Jesse Hoyt, trustee of the mortgage of said [435] Company, and trustee under its said lease to the Wisconsin Central Railroad Company, and as assignee of said lease, of the taking of such possession of the Milwaukee and Northern railway, and notifying that they declined to assume, affirm, or in any way ratify the lease thereof to the Wisconsin Central Railroad Company, and notifying that unless said parties notified should otherwise elect they would continue to operate said Milwaukee and Northern railway temporarily and for such compensation as that service might fairly be worth, and requesting a personal interview to ascertain their wishes and with a view to a more permanent arrangement, and offering to submit to the parties in interest any proposition which could be jointly recommended with reference to the future possession of said railway, of which notice 'Exhibit H,' hereto annexed, is a copy; that the said Milwaukee and Northern Railway Company, or Jesse Hoyt as president or as trustee, or as assignee of said lease, did not, nor did either of them, in any way object to the possession of said railroad by said Stewart and Abbot, or give any attention to said notice until the commencement of negotiations in March, 1879; but said Stewart and Abbot continued to use and operate the Milwaukee and Northern railway without further arrangement or agreement, and without any objection by any of the parties to this proceeding, and with the acquiescence of the Wisconsin Central Railroad Company, but without any assignment of the lease, until the first day of May, 1879, and until the lease from the receiver as hereinafter found; and said Milwaukee and Northern Railway Company and said Jesse Hoyt, shortly before the first day of May, 1879, in the presence and with the concurrence of all others interested, including the Wisconsin Central Railroad Company, had negotiations with them which culminated in an arrangement by [436] which a receiver of the Milwaukee and Northern railway was appointed in the foreclosure suit, as hereinbefore found; that said Stewart and Abbot then entered into a lease with said receiver of said Milwaukee and Northern railway for a certain term commencing on the first day of May, 1879; that on or about the 23d day of July, 1879, after the service of the garnishee affidavit and summons herein, it was arranged and agreed between said Stewart and Abbot, trustees, on the one part, and Jesse Hoyt, as trustee and assignee, upon the other part, that the sum of $28,258.44 was the amount properly payable by the said Stewart and Abbot as trustees to the party lawfully entitled to receive the same out of the moneys received by said trustees from the operation of the Milwaukee and Northern railway from January 3, 1879, to May 1, 1879, and for the use thereof, which amount was a less sum than would have been coming by the terms of the lease to the Wisconsin Central railroad; and that thereupon said Stewart and Abbot paid to said Jesse Hoyt, as such trustee and assignee, the said sum of money upon receiving a bond of indemnity executed by Ephraim Mariner, Guido Pfister, and Angus Smith, indemnifying them against this suit by reason of such payment, copies of which agreement of accounting and bond of indemnity are hereto annexed, marked 'Exhibits I and J.'

"Tenth. That on the 8th day of March, 1880, an order was made in the foreclosure suit of the mortgage of the Milwaukee and Northern Railway Company for the sale of said railroad, which sale took place on the 5th day of June, 1880, and was sold to Ephraim Mariner and Guido Pfister as trustees for the holders of the bonds under said mortgage; that on the 9th day of June the report of said sale was filed, and was confirmed by the court, and that thereafter, on the third day of July, 1880, the final report of the receiver was filed, asking for a discharge, and said report was confirmed on the 5th day of July, 1880.

"Eleventh. That from January 3, 1879, to May 1, 1879, the said Stewart and Abbot were not in possession of or operating said Milwaukee and Northern railway under any lease whatever between them and James C. Spencer as receiver [437] of the Milwaukee and Northern railway, as

claimed in the answer of the principal defendant herein, nor was the indebtedness of said garnishees for the use and occupation of said railroad during said period owing by them to said James C. Spencer, receiver.

"Conclusions of Law.

"The contention in this case being as to who was entitled to the sum of $28,258.44, agreed upon as the fair compensation for the use of the Milwaukee and Northern railway from January 3 to May 1, 1879, we find:

"First. That it did not belong to and cannot be rightfully claimed by the receiver appointed in the foreclosure suit of the mortgage on the Milwaukee and Northern railway, for the reason that he was not qualified as receiver until a subsequent date, and had never reduced the property to possession, and was only receiver of the mortgaged property.

"Second. That said fund did not belong to the Wisconsin Central Railroad Company, because such occupation and operation of the road by Stewart and Abbot, trustees, were with its acquiescence, and it is upon record in this cause as denying all indebtedness to the principal defendant herein, and makes no claim to said fund.

"Third. That said fund did not belong to Jesse Hoyt as trustee under said mortgage, because said trustee had not taken possession of said railroad, and was not entitled to the income thereof; that it did not belong to said Jesse Hoyt as trustee under said lease, or as assignee of said lease, because the occupation and operation of said road by Stewart and Abbot, trustees, was not under said lease, but in defiance thereof and in opposition thereto.

"Fourth. That said sum was, at the time of the garnishee proceedings herein, the property of the Milwaukee and Northern Railway Company, and was liable to be taken and attached for the debts due by said Company; that the plaintiff, by virtue of the garnishee proceedings herein upon Stewart and Abbot, trustees, acquired a lawful claim and lien upon said fund to the extent of the plaintiff's judgment and debt [438] against said Company, and that at the time of said garnishment the said John A. Stewart and Edwin H. Abbot had in their hands belonging to the defendant, the Milwaukee and Northern Railway Company, and were indebted to and owed said Company for the use and occupation by said Stewart and Abbot of the railway of said Company from January 3 to May 1, 1879, the sum of $28,258.44; and that the plaintiff is entitled to judgment against said Stewart and Abbot for the said amount due upon its judgment; to wit, the sum of $23,410.40; that as to the garnishees, the Wisconsin Central Railroad Company and Charles L. Colby, this action should be dismissed.

"Let judgment be entered herein in favor of the plaintiff against John A. Stewart and Edwin H. Abbot for the sum of $23,410.40, with costs to be taxed.

"Dated May 21, 1883.

"JOHN M. HARLAN, *Circuit Justice.*
"CHAS. E. DYER, *Dist. Judge.*"

Judgment having been entered for the plaintiff below, separate writs of error have been prosecuted by the Milwaukee and Northern Railway Company and by Stewart and Abbot.

The main contest in the case is between the plaintiff and Jesse Hoyt. If the fund in the hands of the garnishees, Stewart and Abbot, belongs to the Milwaukee and Northern Railway Company, the plaintiff is entitled to subject it to the payment of his judgment; otherwise not. Hoyt's claim is that Stewart and Abbot, as trustees of the Wisconsin Central Railroad Company, were in possession of the Milwaukee and Northern railway under a lease of that road to the Wisconsin Central Railroad Company, and are indebted to him, as trustee under that lease and as assignee of the lease, for the rent accruing under it, represented by the fund in their hands. The lease was executed on November 8, 1878, and was for the term of 999 years from that date. It stipulated that the Wisconsin Central Railroad Company, the lessee, should pay as rent a certain proportion of the gross earnings received from the demised road, installments of which were to be paid monthly to such trustee as should be, from [439] time to time, jointly selected by the parties, "upon the trust to keep the same until the next installment of interest is due upon the bonds issued by the first party under their first mortgage, and then to apply the same, or so much thereof as shall be necessary, to the payment of said interest, when and as payable, and if any surplus remain after payment of said interest to pay the same to the first party, its successors and assigns, unless said surplus, or some part thereof, is due to the second party for advances, as is hereinafter provided, made to or for the benefit of the first party to pay said interest, and if said surplus, or any part thereof, is so due, then to said second party, as hereinafter provided, so much as is due for said advances and interest."

The Wisconsin Marine and Fire Insurance Company Bank was appointed trustee under the lease. By a supplemental agreement, made June 1, 1875, between the parties, the lease was modified so that the rent reserved for the three years from June 1, 1875, should be 40 per cent of the gross earnings received from the demised premises, and after that, so much as was necessary to pay the interest coupons of the Milwaukee and Northern Railway Company, not to exceed 40 per cent of the gross earnings. Under that modified lease, Jesse Hoyt was appointed temporary trustee, in place of the Wisconsin Marine and Fire Insurance Company Bank, for the period of twelve months, which appointment was continued by a further agreement made October 10, 1876.

On January 7, 1878, the Milwaukee and Northern Railway Company made a written assignment to Jesse Hoyt and A. Warren Greenleaf, trustees of the mortgage given to secure its bonds, of the lease of the Milwaukee and Northern railway to the Wisconsin Central Railroad Company, and of all the covenants therein contained, and of all moneys due or to grow due thereon, upon the same trusts, however, as were expressed in the trust deed executed by the Milwaukee and Northern Railway Company to Hoyt and Greenleaf as security for the first mortgage bonds of said Company. On the following day a written notice, signed by Hoyt and Greenleaf, was served upon the Wis- [440] consin Central Railroad Company of the fact of such assignment, and directing that company

to pay the rent to Jesse Hoyt as theretofore, "such assignment being intended merely as further security for said bonds, and not to disturb the relations of the parties to such lease and modifications." In the meantime, as appears by the sixth finding of facts, Jesse Hoyt, as surviving trustee under the mortgage made by the Milwaukee and Northern Railway Company, had commenced proceedings to foreclose the mortgage, the Wisconsin Central Railroad Company being a defendant thereto, which proceedings were pending when the garnishees, Stewart and Abbot, as trustees under the mortgage of the Wisconsin Central Railroad Company, entered into possession of the property of that company, and also took possession of and operated the Milwaukee and Northern railroad, under the circumstances stated in the ninth finding of facts.

It is now contended, in opposition to the third conclusion of law drawn by the circuit court, that upon the facts found the garnishees, Stewart and Abbot, took possession of the Milwaukee and Northern railway under the lease of that road to the Wisconsin Central Railroad Company, and became bound thereby to pay rent therefor to Hoyt, as trustee under said lease, or as assignee of said lease. Hoyt is not a party to this proceeding, but it is competent for Stewart and Abbot, as garnishees, to represent his rights in their own defense; for, if in law they are liable to Hoyt, they are not liable to the present defendant in error; and in protecting their own interests it is proper for them to assert the right of Hoyt if they are in law liable to him.

There are, however, two answers to the claim put forward on behalf of Hoyt. If the rent of the Milwaukee and Northern railway is payable to him, either as trustee under the lease or as assignee of the lease, it is not due to him in his own right, but merely for the purposes and upon the trusts expressed either in the lease or in the assignment. Those purposes and trusts were to apply the rents to be received by him to the payment of the interest coupons as they became due upon the mortgage bonds of the Milwaukee and Northern Railway Company secured by the mortgage to him; but it nowhere appears in the record that there are any coupons [441] in arrears to which this rent could be applied; and in that event the rent is payable to the Milwaukee and Northern Railway Company as lessor beneficially interested. It in fact appears by the tenth finding that pending this suit, and before its trial, the Milwaukee and Northern railway was sold under the proceedings to foreclose the mortgage of which Hoyt was the surviving trustee, to trustees for the holders of the bonds under that mortgage, which sale has been duly confirmed by the court. It does not, therefore, appear but that at the time of the trial of this case all the bonds, with the interest thereon, of the Milwaukee and Northern Railway Company secured by the mortgage of which Hoyt was trustee, had been fully paid and satisfied. If so, Hoyt had no further interest under the lease, either as trustee or assignee, which entitles him to receive the fund in the hands of the garnishees for any purpose.

In the second place, however, it does not follow as a conclusion of law, from the ninth finding of facts taken in connection with the other facts found, that Stewart and Abbot entered into possession of the railroad of the Milwaukee and Northern Railway Company under a lease of that road to the Wisconsin Central Railroad Company, and thereby became bound to pay the rent reserved therein. They were not as signees of the term of the Wisconsin Central Railroad Company under that lease. They were trustees of the mortgage given by the Wisconsin Central Railroad Company to them to secure its bonds, and entered into possession of its railroad by a title antedating the lease to it by the Milwaukee and Northern Railway Company. They were not, therefore, bound by the terms of that lease, and were under no obligations to undertake its burdens. They were not bound to take possession of the Milwaukee and Northern railway; they did so merely as a matter of convenience to the parties interested in that road, and for their benefit. On doing so they gave explicit notice of the character of their possession. That notice, dated January 11, 1879, was addressed to Jesse Hoyt, as president of the Milwaukee and Northern Railway Company, and surviving trustee under its first mortgage and bonds, and trustee [442] under the lease of its railroad to the Wisconsin Central Railroad Company, and assignee of said lease. In it they say:

"We beg to inform you that on the third day of January current we, trustees under and by virtue of the provisions of the first mortgage of the Wisconsin Central Railroad Company, entered upon and took possession of the property covered by that mortgage, and are now operating the Wisconsin Central railroad.

"We find that the said company was operating the Milwaukee and Northern railway under a lease. We are not sufficiently informed upon the subject to warrant us in assuming any obligation under that lease. We therefore notify you that we decline to assume, affirm, or in any way ratify that lease. We wish, however, not to interfere in any way with the welfare of that railway, and, unless you otherwise elect, will continue for the present to operate the same temporarily for such compensation as that service may be fairly worth, and, as far as is necessary, but not in excess of its earnings, to repair the same as the Wisconsin Central Railroad Company was doing, and also to permit the business of the Wisconsin Central Railroad Company to be done as heretofore over that railway. We suggest that you arrange for an early personal interview with us, at which you will make known to us your wishes, and confer with a view to a more permanent arrangement.

"We are ready to submit to the parties in interest any proposition which yourself and we are jointly able to recommend."

To this notice no answer appears to have been made, and Hoyt's silence under the circumstances may fairly be taken to be an acquiescence in the arrangement proposed by Stewart and Abbot. The proceedings on the part of Hoyt, as trustee under his mortgage, to foreclose that mortgage, were then pending, and the Wisconsin Central Railroad Company was a party to that suit. If Hoyt was not willing to accede to the terms proposed by Stewart and Abbot in that notice, in respect to the nature of their occupation and operation of the Mil-

[443] waukee and Northern railway, it was open to him to apply for the appointment of a receiver, as he subsequently did on May 5, 1879, or otherwise to take possession of the Milwaukee and Northern railway as trustee under the mortgage. The legitimate inference from his conduct is that which was drawn by the court below, which held, as matter of law deduced from the facts found, that the garnishees were not in possession of the Milwaukee and Northern railway under the terms of the lease to the Wisconsin Central Railroad Company, and for the value of its use and occupation were not bound to account to Hoyt. There was neither privity of contract nor privity of estate between Hoyt and them. Their obligation to pay for that use and occupation was to the Company that owned the road.

It is argued by the attorney for the plaintiff in error that there is another alternative by which it may be shown that the garnishees do not owe this fund to the Milwaukee and Northern Railway Company; that is, that Stewart and Abbot entered into possession of the Milwaukee and Northern railway as subtenants thereof under the Wisconsin Central Railroad Company, the lessee, and are bound to pay rent as such to the latter company. But, as we have already seen, Stewart and Abbot entered into possession of the property of the Wisconsin Central Railroad Company itself adversely to it, as trustees under its mortgage, by a title antecedent to the date of the lease. Stewart and Abbot in no sense could be considered as accountable to the Wisconsin Central Railroad Company as tenants.

We find no error in the judgment of the Circuit Court, and it is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[535] HATTIE E. STANLEY, Exrx. etc., *Plff. in Errr.*,

v.

BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

(See S. C. Reporter's ed. 535-552.)

State taxation of national bank shares—uniformity—valuation at par—discrimination—action of assessing officers, judicial and not open to collateral attack—remedies—action at law to recover excess of taxes paid—remedy in equity—practice—trial by court—findings upon questions of fact, conclusive—exclusion of evidence.

1. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law lies for the taxes paid, or for a portion thereof.

2. The action of assessing officers being judicial in character, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some mode pointed out by statute they are conclusive, whatever errors may have been committed in the assessment.

3. Where an overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual but on a large class, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due.

4. Under the Act providing for state taxation of the shares of national banks there must be a uniform rule of appraisement of such shares and other moneyed capital similarly employed, and the same percentage must be charged on the values determined.

5. The uniform assessment of the shares of national and state banks at their par value, although the actual value differs widely, cannot be considered as discriminating against either, both being placed on the same footing.

6. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here in addition to the question, where the findings are special, whether the facts found are sufficient to sustain the judgment rendered.

7. In the case presented the exclusion of evidence as to an alleged defect in the assessment roll is held to have been proper under a certain stipulation of the parties.

[No. 222.]

Argued March 15, 16, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of New York. Reported below, 21 Blatchf. 249. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Matthew Hale**, for plaintiff in error:

The systematic and intentional valuation of other moneyed capital by the taxing officers below its value, while the shares in question are assessed at their full value, or at a greater rate, is a violation of the Act of Congress which prescribes the rule by which they shall be taxed by state authority.

Pelton v. *Nat. Bank*, 101 U. S. 143 (25: 901); *Cummings* v. *Nat. Bank*, Id. 153 (25: 903).

There can be no question that the stock in other banks, state and national, may be considered as "other moneyed capital" in inquiring whether the taxation of the shares of this bank was in violation of section 5219. The rights of the assignors of the plaintiff were none the less violated by an assessment at a greater rate than shares in other national banks, than by such assessment at a greater rate than the shares of state banks, or of any other moneyed capital. Under the restriction in section 5219, the state authorities have no right to discriminate against any national bank. The restriction applies to each and every bank. The only question is whether either a material part of other moneyed capital in the assessment district escapes taxation, or is assessed at a substantially lower rate than the shares of the bank under consideration.

Boyer v *Boyer*, 113 U. S. 689 (28: 1089).

Messrs. **Simon W. Rosendale** and **Wheeler H. Peckham**, for defendant in error:

The plaintiff cannot recover because the tax was not void, but voidable only, upon proof of the indebtedness of the shareholder, and of his demand to reduce his assessment, and in a direct proceeding for that purpose.

Supervisors v. *Stanley*, 105 U. S. 305 (26: 1044).

The assessor had jurisdiction to assess the shares of the plaintiff's assignors as of some value. Having jurisdiction to assess, then their

judgment as to what amount will be proper is a judicial judgment made upon a subject over which they had jurisdiction, and though they may have erred in the determination as to value, such error does not oust them of jurisdiction, and so does not render the assessment void.

Williams v. *Weaver*, 75 N. Y. 30, and cases there cited; *S. C.* 100 U. S. 547 (25: 708).

To recover back the money the assessment must be void, like a void judgment, a nullity; then the assessment may be recovered back.

Bruecher v. *Port Chester*, 101 N. Y. 240, 244.

"There is no case in which it has been determined that one part of the same tax, whether on real or on personal estate, laid for a lawful purpose, may be held legal, and another portion illegal and invalid, so that the latter can be recovered back in an action of assumpsit."

Lincoln v. *Worcester*, 8 Cush. 55, 68.

An assessment or tax which is not wholly void, void in the sense that a judgment rendered by a court upon a subject matter over which it has no jurisdiction is void, cannot be overhauled in a collateral action to recover back money paid under it to the county or town otherwise entitled to receive it.

Swift v. *Poughkeepsie*, 37 N. Y. 511; *Bank of Commonwealth* v. *The Mayor*, 43 N. Y. 184; *R. R. Co.* v. *Supervisors*, 48 N. Y. 93; *Peyser* v. *The Mayor*, 70 N. Y. 497; *Bruecher* v. *Port Chester*, 101 N. Y. 240; *Wilkes* v. *The Mayor*, 79 N. Y. 621.

Mr. Justice **Field** delivered the opinion of
[542] the court:

The Act of Congress, in providing for taxation of the shares of national banks, by authority of the State in which such institutions are situated, imposes two restrictions upon the exercise of the power; namely, that the taxation shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national bank owned by nonresidents of the State shall be taxed in the city or town where it is located. R. S. sec. 5219.

In *People* v. *Weaver*, 100 U. S 539 [25: 705], this court held, with reference to taxation thus authorized, that the prohibition against discrimination has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged, and, therefore, that a Statute of New York which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital in the hands of individuals, was in conflict with the prohibition, although no greater percentage was levied on such valuation. If this were not so, a rule of appraisement, applied to shares of national banks, different from one applied to other moneyed capital, might lead to such varied valuations as to materially affect the amount of taxes levied, although the same percentage should be charged on the valuations. There must be a uniform rule of appraisement of value, and the same percentage charged on the values determined, to meet the requirements of the statute.

This action is founded upon an alleged disregard of this requirement by the assessing officers of the County of Albany, New York. The plaintiff, Edward N. Stanley, is a citizen of Illinois, and claiming to be assignee of certain shareholders of the National Albany Exchange Bank, located at Albany in New York, sues to recover the amount of certain taxes alleged to have been illegally collected from them upon their shares in that bank during [543]
the years from 1874 to 1879, both inclusive, and paid into the treasury of the County of Albany. The original complaint contained several counts, all of which, except the fourth, were substantially the same, except as to the names of the stockholders and the amounts assessed and collected. They alleged the assessment by the board of assessors of the City of Albany of the shares held by the assignors of the plaintiff, acting under color of an Act of the Legislature of New York, passed April 23, 1866, being chapter 761 of the laws of that year, at $100 a share, being the par value thereof, after deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of the banking institution to the whole amount of its capital stock, and the collection of the amount levied, and its payment into the treasury of the County of Albany. They also alleged, upon information and belief, that chapter 761 of the laws of 1866, was in conflict with the laws of the United States, and especially with the provision that taxation by state authority of shares of stock in banking associations shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, for the reason, among others, that the said Act of New York did not permit debts of the owners of the bank stock to be deducted from the value thereof in its assessment, although such deduction of the debts of the owner was at the time, and is still, permitted and required by the laws of New York to be made from the value of every other kind of personal property, and moneyed capital other than bank stock, in assessing the same for the purpose of taxation.

They also alleged, upon information and belief, that the assessment of the shares of stock of the said banking association by the board of assessors was at a greater rate than their assessment upon shares of stock of banks organized under the laws of New York and located in the same ward of the city, and was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. For these reasons the plaintiff alleged that the assessment of the shares of stock, and the levy of the tax thereunder, were illegal and void, [544]
and that the money received therefor was wrongfully collected and paid into the county treasury, and belonged of right to the shareholders, and not to the County.

The fourth count differed from the others in averring that the assignor of the plaintiff named in this count, Chauncey P. Williams, had presented to the board of assessors an affidavit stating that the value of his personal estate, including his bank stock, after deducting his just debts and property invested in the stock of corporations or associations liable to be taxed therefor, and his investments in the obligations of the United States, did not exceed one dollar, and requested the board of assessors to reduce his assessment to that amount, but

that the board had refused to make such reduction; and that thereupon said Williams applied to the Supreme Court of the State for a writ of *mandamus* to compel the assessors to make the reduction; that the supreme court denied the application on the ground that the Act of the Legislature did not permit such reduction, but required the assessment of the bank stock at its full value; that the Court of Appeals of the State, on appeal, affirmed the decision and judgment of the supreme court; that the Supreme Court of the United States reversed the judgment of the court of appeals, and held that the statute, chapter 761 of the laws of the State of 1866, in that it did not permit a reduction for indebtedness from the assessment of bank stock, which by the laws of the State was required to be made from the assessment of every other kind of personal estate and moneyed capital, was in conflict with the laws of the United States.

The answer of the defendant consisted in a specific denial of the several allegations of the complaint, with an averment that the assessments were duly and regularly made by a board of assessors having jurisdiction of the matter. In a supplementary answer the defendant also set up that the assignment of the amounts in suit to the plaintiff was improperly and collusively made for the purpose of giving the court jurisdiction.

The action was twice tried, at both times by the court without the intervention of a jury, by consent of parties.

[545] On the first trial, which took place in October, 1880, the plaintiff recovered the whole amount upon the first ground stated, that the Act of New York, chapter 761 of the Laws of 1866, was in conflict with the Act of Congress, in not permitting in the assessment of the value of the stock of the bank a reduction for the debts of the holder. The second ground of objection to the validity of the assessment, that it was at a greater rate than was assessed on other moneyed capital in the hands of individual citizens, was not considered. The case was then brought to this court for review. After full consideration, we held substantially this: that the Statute of New York was in conflict with the Act of Congress, so far as it did not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the State the owner of all other personal taxable property was allowed to deduct such debts from its value; but that neither the statute nor the assessment under it was for that reason void. If the stockholder had no debts to deduct, the mode of assessment adopted was not invalid as to him; he could not complain of it, nor recover the taxes paid pursuant to it. If he had debts, the assessment without a deduction for them in the estimate of the taxable value of the stock was only voidable. The assessing officers, in making the assessment, were acting within their authority until duly notified of the debts which were to be deducted. In such case, therefore, the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by law to obtain a correction of the over assessment. We therefore decided that for the taxes collected upon the assessment alleged in the fourth count the plaintiff was entitled to judgment; this court having held, in *People* v. *Weaver*, that assessment invalid, for the reason that the assessors had not allowed any deduction for the debts of the stockholder, 100 U. S. 539 [*supra*]; but that for the taxes collected upon the assessments alleged in the other counts, no recovery could be had; the stockholders there mentioned not having produced any evidence that they had presented to the assessors an affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to the assessment of bank shares which was applied to the assessment of other personal property, or any evidence that they owed anything whatever to be deducted, [546] or that they had taken any steps under the laws of New York to correct the over assessment complained of. The judgment of the circuit court was accordingly reversed, and judgment ordered for the plaintiff upon the fourth count, and for the defendants on the other counts. *Supervisors* v. *Stanley*, 105 U. S. 305, 316 [26: 1044,1051].

Subsequently, upon the attention of the court being called to the fact that there was evidence in the case upon the allegation that the assessment of the shares of stock in the national banking association was at a greater rate than was assessed upon shares of stock in banks organized under the laws of New York, and located in the same city, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State, upon which the court below did not pass, the judgment was so far modified as to permit that court, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleadings to present it properly.

When the case was remanded, on application to the circuit court, all the counts except the fourth were amended. The substance of the amendments consisted in allegations that the assessors, by a rule prescribed by themselves, assessed the shares of the National Albany Exchange Bank at such greater rate; that the rule adopted was to assess all shares of stock in state and national banks in the City of Albany at par, without regard to their actual or market value, making the requisite deduction for real estate owned by the banks; that this rule necessarily resulted in imposing upon the shares of the National Albany Exchange Bank a greater rate of taxation than was assessed upon other moneyed capital generally; that there were in the sixth ward of the city, at the time of the assessments, several banks, state and national; and that the actual value of the stock of the banks varied, that of the shares of stock in the National Albany Exchange Bank being considerably less than that of the stock of most of [54 the other banks in the city.

Several of the counts were afterwards abandoned, those remaining applying only to the taxes of the years 1873, 1874, and 1875. The case came on for a second trial in March, 1883, and, after hearing the proofs, the court filed its findings of fact on the issues presented by the pleadings, and gave judgment for the plaintiff on the fourth count, and for the defendants on the other counts. To review this judgment the case is brought to this court on a writ of error.

Several of the assignments of error presented

for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is, "That the plaintiff has failed to establish the allegations in said complaint that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this State." And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which is nothing more than that the court below found against the evidence —a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act of March 3, 1865, 13 Stat. at L. chap. 86, § 4; R. S. § 700.

The same answer will apply to the exceptions [548] taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered—a matter determinable only in the court below.

To recover in this case the plaintiff was required to prove, under the decision when the case was first here, that "the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher, in proportion to their actual value, than other moneyed capital generally."

The court below specially found the negative of this; that the assessors did not, at any of the times in question, habitually or intentionally, or by any rule prescribed by themselves, or by anyone whom they were bound to obey, thus assess the shares of national banks.

The counsel for the plaintiff insists, however, notwithstanding this finding, that the inference of such habitual assessment at a higher rate follows from the findings that within the City of Albany there were nine banks, and that the actual value of the shares in all of them except one exceeded their par value, varying in that respect from 10 to 70 per cent premium, and yet the value of all was assessed at par. The actual value of shares of the National Albany Exchange Bank was 35 per cent above par, and the actual value of the shares of some of the other banks was above and some below that figure. The court found that the method pursued by the assessors was generally satisfactory to the owners of national bank stock in the City of Albany, with the exception of a few stockholders in the National Albany Exchange Bank, and that such method was pursued by the assessors with no purpose or intention of unduly assessing shares of national banks, but simply because it was thought by them to be the most satisfactory one to the owners of such property, and the best in itself. A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value de- [549] pending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing. In *Mercantile Nat. Bank* v. *Mayor etc. of City of New York*, recently decided, this court said: "The main purpose of Congress in fixing limits to state taxation on investments in the shares of national banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring individuals or institutions carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy." 121 U. S. 138 [*ante*, 895].

The method pursued could in no respect be considered as adopted in hostility to the national banks. It must sometimes place the estimated value of their shares below their real value; but such a result is not one of which the holders of national bank shares can complain. It must sometimes lead also to overvaluation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Supervisors*, 45 N. Y. 676–687; *Nat. Bank of Chemung* v. *Elmira*, 53 N. Y. 49–52; *Bruecher* [550] v. *Port Chester*, 101 N. Y 240–244; *Lincoln* v. *Worcester*, 8 Cush. 55–63; *Hicks* v. *Worcester*, 130 Mass. 478; *Balfour* v. *Portland*, 28 Fed. Rep. 738.

In nearly all the States, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required

by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some States is complied with when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or [551] statutory direction, and operates unequally, not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings* v. *National Bank*, 101 U. S. 153 [25: 903]. In that case it appeared that the officers of Lucas County, Ohio, charged with the valuation of property for the purposes of taxation, adopted a settled rule or system, by which real estate was estimated at one third of its true value, ordinary personal property about the same, and moneyed capital at three fifths of its true value. The state board of equalization of bank shares increased the valuation of them to their full value. Upon a bill brought by the Merchants National Bank of Toledo against the treasurer of the county, in which the bank was established, to enjoin him from collecting taxes assessed on the shares of the stockholders, payment of which was demanded of the bank under the law, it was held that the rule or principle of unequal valuation of the different classes of property for taxation adopted by the board of assessment was in conflict with the Constitution of Ohio, which declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all the real and personal property according to its true value in money," and worked manifest injustice to the owners of shares in national banks; and that the bank was, therefore, entitled to the injunction against the collection of the illegal excess, upon payment of the amount of the tax which was equal to that assessed on other property. That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the Constitution of the State; but the same principle must apply when their action in assessing the shares of national banks is in disregard of the Act of Congress. The plaintiff below did not think proper to resort to this method of obtaining relief, which would have given him all he was entitled to, if in fact his shares were assessed at a greater rate than was assessed on other moneyed capital, because of their illegal overvaluation.

It only remains to notice the exceptions taken [552] to the exclusion of the testimony offered, that the law of New York required an oath or certificate to be annexed to the assessment roll substantially different from the oath actually annexed, and the claim that the plaintiff has a right to recover the taxes assessed in 1873 and collected in 1874. The exclusion of the testimony as to the alleged defect in the assessment roll was correct under the stipulation of the parties, that the plaintiff would not claim a right to prove any failure of the assessors to take the proper oath. A defect in the form of the oath annexed, if there be one, could have no bearing upon the question at issue. The claim for the taxes assessed in 1873 is open to similiar objections to those presented against the claim for the taxes of the other years. If the assignors of the plaintiff had any just grounds of complaint to the assessment as excessive they should have pursued the course provided by statute for its correction, or resorted to equity to enjoin the collection of the illegal excess, upon payment or tender of the amount due upon what they conceded to be a just valuation.

It follows that the judgment of the court below must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE B. SNOW ET AL., *Appts.*, [617]
v.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 617-630.)

Patents—construction of, as to combination.

The language of the specification in letters patent No. 127933, for an improvement in steam bell ringers, limits the first claim to a combination in which the piston and piston rod are detached from each other.

[No. 234.]

Argued April 19, 1887. Decided May 2, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of New York. Opinion below published, 18 Fed. Rep. 602. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **James A. Allen**, for appellants.

Mr. **George Payson**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellants, who were complainants below, filed their bill in equity August 7, 1882

against the defendant, to restrain the alleged infringement of letters patent No. 127933, granted to the Buffalo Dental Manufacturing Company, as assignee of George B. Snow, on June 11, 1872, for a new and useful improvement [618] in steam bell ringers; the Buffalo Dental Manufacturing Company being a joint stock association under the laws of the State of New York, of which the appellants were the sole officers, directors, shareholders, associates, and persons in interest. The specifications, with drawings annexed, of this patent are as follows:

"Specification describing certain improvements in Steam Bell-Ringing Apparatus, invented by George B. Snow, of Buffalo, in the County of Erie, State of New York.

"This invention relates to the construction of a steam bell ringer in such a manner as to prevent any apparent leakage, either of water or steam, without resorting to the use of stuffing boxes; and also to cause the admission and release of the steam directly by the motion of the piston, and without the use of any intermediate parts between the piston and valves.

"Referring to the annexed drawing, Figure 1 is an elevation of the device as applied to the bell of a locomotive. Fig. 2 is a vertical section of the steam cylinder on the plane *a b*, on an enlarged scale.

"A is a single acting steam cylinder, connected to the crank B on the bell yoke by the slotted rod C. This rod should be of such a length that the piston G will be forced to the bottom of the cylinder as the crank B passes its lower center, the slot through which the crank pin passes being long enough to allow the crank to pass its upper center freely, notwithstanding the disproportion between the throw of the crank B and the length of stroke of the piston rod D. The piston G is disconnected from its rod D, to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder. The piston should be considerably longer than its length of stroke. The piston rod D passes through a sleeve in the cylinder cover I, which should be long enough to steady it and act as a guide, and is limited in its upward motion by the collar *d*. E is a conical exhaust valve, seating upward against the bottom of the piston G. F is the steam valve, also conical, and seating upward, containing within itself the tail of the ex- [619] haust valve E, such an amount of motion being permitted between the two that the steam valve F will be raised to its seat and the exhaust valve E be opened as the piston approaches the upper end of its stroke. Exhaust passages M *m* are formed in the piston G, which communicate with the holes *m'* in the side of the cylinder by means of annular grooves turned in the side of the piston, the openings *m'* being of such a number and so disposed as to insure a constant communication with the passage M. The thimble H forms an annular space around the cylinder, from which the steam escapes through the passage O. If the piston is closely fitted, it will wear a long time with very little leakage, and what there may be will be caught in the annular grooves in the side of the piston, and passed at once through the exhaust passages *m'*, thus preventing any leakage around the piston rod D. It is advisable to use a packing of a single ring at the lower part of the piston, not so much to avoid leakage as to sustain the piston at the upper end of its stroke by the elasticity of the ring, until it is brought to the bottom of the cylinder by the return swing [620] of the bell.

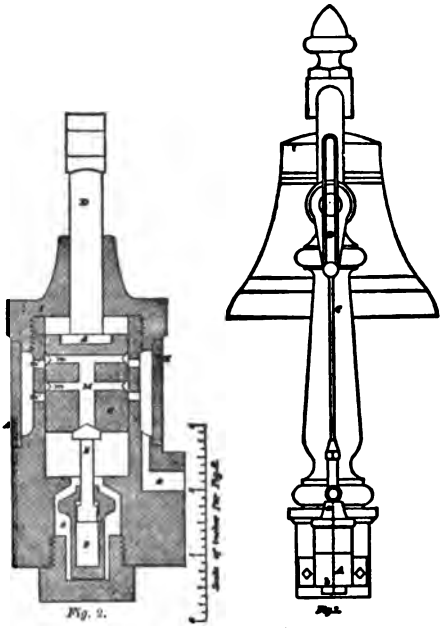


Fig. 2.

"The bell being set in motion, the crank B drives the piston to the bottom of the cylinder, [621] closing the exhaust valve and forcing open the steam valve, admitting steam to the cylinder from the space S. As the piston is driven upward the exhaust valve is carried with it, and as the piston approaches the end of its stroke the steam valve is also raised to its seat, after which the exhaust valve is opened. As the pressure is relieved the exhaust valve drops, leaving the passage M entirely clear during the return stroke, which is made by the momentum of the bell on its return.

"The arrangement of valves shown is not essential, as the exhaust valve may be placed in a cavity in the body of the cylinder opening into the exhaust passage, and both the steam and exhaust valves be closed by the direct impulse of the steam, the openings *m'* being made low enough in the cylinder to allow the piston to pass them at the upper end of the stroke; or, by using a piston in the form of an inverted cup, the steam and exhaust may be worked through openings in the side of the piston and cylinder, the expansion of the steam doing the work. The disadvantage of the first of these plans is that the valves are closed so violently that they soon wear out; of the second, the difficulty of getting rid of water of condensation.

"Having thus fully described my device, I claim as my invention:

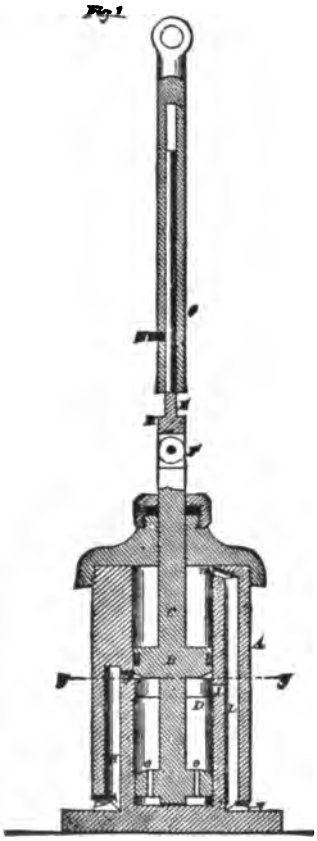
"1. The combination of the cylinder A, piston G, piston rod D, slotted rod C, and crank B, when constructed and operated substantially [622] as described.

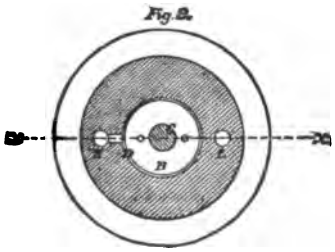
"2. The combination of the valves E and F, both seating upward, with the piston G and passages M *m m'*, for the purpose of admitting

steam to and exhausting it from under the piston G, substantially as described."

The infringment alleged is of the first claim only, and consists in the use by the defendant below of steam bell ringers constructed and operated in conformity to the drawings and specifications of letters patent granted August 25, 1874, No. 154394, to Charles H. Hudson, for a new and useful improvement in steam bell-ringing apparatus. The specifications and illustrative drawings of that patent are as follows:

[623]





"To all whom it may concern:

"Be it known that I, Charles H. Hudson, of the City and County of Dubuque, Iowa, have invented a new and useful Improvement in Steam Bell-Ringing Apparatus, of which the following is a specification:

"This invention relates to steam engines, designed for ringing bells on locomotives and in other places; and consists in the construction and arrangement of parts, as hereinafter described, and specifically indicated in the claim.

"In the accompanying drawings, Figure 1 represents a vertical section of Fig. 2 on the line *x x;* and Fig. 2 is a horizontal section taken on the line *y y*, Fig. 1.

"Similar letters of reference indicate corresponding parts.

"This bell-ringing engine may be worked with either steam or air.

"A is the cylinder; B, the piston. C is the piston rod. D is the valve ring. E is a rod which is hinged to the piston rod at the point F. This rod E slides in the tube G, which is attached to the bell crank. This connection is such that the lower end of the tube G will be at the shoulder H when the bell crank is at the lowest point, and the piston at the bottom of the stroke. The movement of the tube upon the rod E will allow the bell to be turned over and the bell crank to go to its highest point freely, while the piston is at the lowest point.

"I is the exhaust port; J, the inlet port. The valve ring D is so arranged, in regard to the ports, that the movement of the piston to the lowest point moves the valve ring down, and closes the exhaust and opens the inlet port. When the piston moves to the other end of the stroke the ring is moved in the other direction, and the inlet is closed and the exhaust is opened. [624] K is the inlet passage. L is the exhaust passage. *m* is a small opening into the exhaust passage, to allow any steam which may pass the piston to escape. O O are ports or passages in the lower head of the double piston, to permit the steam (or air, if used) to act against the lower head of the cylinder.

"When the bell is in motion, the bell crank will press the tube down on the rod and force the piston to the bottom of the stroke, and thereby close the exhaust and open the inlet port. When the crank has passed the center of the stroke, the steam admitted by the movement of the valve ring presses the piston up and throws up the bell. The tube connection allows the bell crank to move freely upward after the piston has reached the end of the stroke, cut off the steam, and open the exhaust port. The return swing of the bell is followed by the same action of the parts.

"N is a small, set screw in the tube G, the end of which enters a groove, or acts against a flat side of the rod E, to prevent the piston rod from turning. Any other suitable device may be adopted for the purpose.

"I do not claim, broadly, the combination of a valve ring with a piston and cylinder for cutting off admission and escape of steam alternately; but,

"Having thus described my invention, I claim as new and desire to secure by letters patent:

"In combination with the vertical cylinder A, having inlet and exhaust ports K J and I L *m*, the double piston B having openings or passages O O in its lower head, and the valve ring D, arranged below the upper head thereof, as shown and described, to operate as specified."

The question of infringement turns upon the construction to be given to the first claim of the patent sued on, to determine which it is necessary to consider the state of the art at the time

of its date. This is shown by a prior patent issued to Snow, No.11307, dated July 11, 1854, and which had expired before the granting of the patent sued on.

The specifications and accompanying drawings of that patent are as follows:

[625] "*To whom it may concern:*

"Be it known that I, G. B. Snow, of Buffalo, in the County of Erie and State of New York, have invented a new and useful method of employing steam to ring the bells of locomotives, and other bells; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings forming part of this specification, in which

"Fig. 1 is a longitudinal vertical section of the apparatus I employ applied to a bell.

[626] "Fig. 2 is a plan of the same.

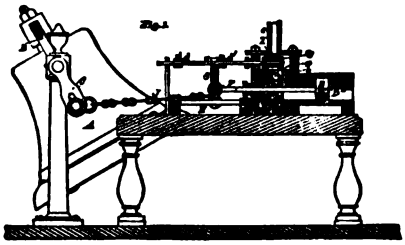
"Similar letters of reference indicate corresponding parts in both Figs.

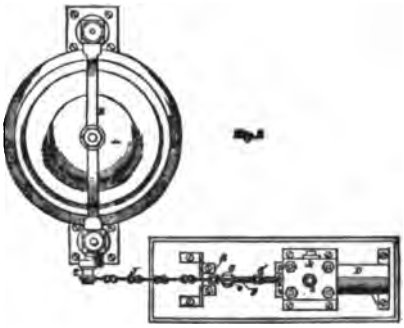
"My invention relates to the application of steam power to the ringing of the bell, and it consists of a novel combination and arrangement of a direct acting engine with the bell in such a manner that the bell, being swung by the engine in one direction, is allowed to swing in the opposite direction by its own gravity and momentum, and is caused thus continuously, automatically, to work with the same freedom [627] (but greater regularity and consequent increased clearness of note) as is obtained by the ordinary manual process of ringing.

"To enable others to make and use my invention I will proceed to describe its construction and operation:

"A in the drawing is the bell, which is suspended by a yoke, B, of the usual kind, furnished with a lever, C, for the purpose of ringing it. D is the steam cylinder, which is placed in a suitable position for its piston E to connect with the yoke, and by its movement to swing the bell. The bore of the cylinder for a locomotive engine would require to be of a diameter about one and a quarter (1¼) inches, and of a length about four and a half (4½) inches. The piston rod F works through a stuffing box at one end of the cylinder, which is closed, and it carries a cross head, G, which works on a fixed guide rod, H. The other end of the cylinder is open to the atmosphere. At the closed end of the cylinder there is a valve box or steam chest, K, which receives a steam pipe, *c*, from the boiler, and has a steam port, *a*, leading to the cylinder and an exhaust port, *b*, leading to the atmosphere. The slide valve I, which this valve box contains has a rod, *e*, passing through a stuffing box and furnished with two tappets, *d d'*, between which it is embraced by a fork on the cross head G. These tappets are adjusted so that the fork shall come in contact with them to open or close the steam port at the proper time, and thus regulate the movement of the piston. The cross head is connected with the lever C of the bell yoke B by a chain, J.

"Fig. 1 of the drawing represents the steam port *a* open, and the steam acting on the piston, which has nearly terminated its stroke, owing to the cross head having come in contact with the tappet *d'* and being about to move the valve to close the steam port and open the exhaust port. As soon as the steam is shut off and the momentum of the bell is spent, the latter will swing back, drawing with it the piston, until the cross head strikes the tappet *d* and moves the valve far enough to open the steam port and close the exhaust port, when the motion of the bell will be again reversed.





"The motion which is thus given to the bell is precisely similar to that produced in ringing by hand, and could not be produced by the direct application of steam power to swing it in [628] both directions, which must produce too positive a motion and could not allow it to swing with the same freedom as when the power is only applied in one direction and the bell is allowed to return under the influence of gravitation alone.

"I do not claim of itself, as new, ringing bells by the application of steam power, as such, in a positive manner, by rigidly connecting the engine with the bell in both directions of the swing of the latter, has before been done; nor do I claim the several devices herein named individually as new; but I do claim as new and useful, and desire to secure by letters patent, the manner herein described of ringing the bell by the application of steam power and the gravity and momentum of the bell combined by means of the direct acting engine attached by chain, or other equivalent mechanical device, to the bell, and arranged, combined, and operating with the bell as specified, and so that the bell is swung in one direction by the engine and then let loose or free to swing back in the opposite direction by its own gravity and momentum, to produce the ring or sound, and the steam alternately admitted to and exhausted from the engine by the action of the engine and movement of the bell combined, substantially as specified, and whereby the same freedom in the swing of the bell to produce a long and clear sound, as is produced by the ordinary manual process, but with greater regularity and consequent increased clearness of note, is automatically obtained, as herein set forth."

On final hearing in the circuit court, the bill

was dismissed for the reasons stated by the circuit judge in his opinion, as follows:

"Although the complainants' patent of June 11, 1872, suggests the principle and the most valuable parts of the combination found in the defendant's steam bell ringer, the plain and explicit language of the specification requires a construction of the first claim which will enable the defendant to escape liability as an infringer. The first claim must be limited to a combination in which the piston and piston rod are detached from each other.

"The patentee doubtless considered that the [629] detachment of the piston and piston rod would assist materially in effecting one of the two expressed objects of his invention; viz., the prevention of leakage of steam. To prevent the escape of steam around the piston rod, he proposed to confine the steam behind the piston instead of introducing it into the cylinder in front of the piston, as was done in his earlier invention. Accordingly, he located the steam passages behind the piston, and adopted a tightly fitting piston; and, in order that the piston might remain tight, he adopted a detached piston rod to relieve the piston from lateral strain. The specification states that 'The piston is disconnected from its rod to prevent any lateral strain being communicated to it, thereby decreasing, to some extent, the wear of the piston in the cylinder;' and further, 'If the piston is closely fitted it will wear a long time with very little leakage, and what there may be will be caught in the annular grooves in the side of the piston and passed at once through the exhaust passages, thus preventing any leakage through the piston rod.' The drawings show a detached piston rod, and all the co-operative devices are conformed and adjusted to a detached rod, such as the long sleeve in the cylinder, to guide it, and the collar on the end of the rod to limit its movements.

"It is impossible to ignore the particular construction of these two parts, which is thus pointed out as material. As the defendant's bell ringer does not contain such a piston or piston rod, infringement is not shown. The bill is therefore dismissed." 18 Fed. Rep. 602.

On this appeal, it is argued, on behalf of the appellants, that this construction of their patent is too narrow: and it is now contended that the detachment of the piston and piston rod is not an essential part of the description and claim of the invention patented. We cannot, however, but agree with the circuit judge, that the language of the specification limits the first claim to a combination in which the piston and piston rod are detached from each other. In describing his invention in the introductory part of the specification, the patentee manifestly divides it into two parts; the first relates "to the construction of a steam bell ringer in such [630] a manner as to prevent any apparent leakage, either of water or steam, without resorting to the use of stuffing boxes;" the second, "to cause the admission and release of the steam directly by the motion of the piston, and without the use of any intermediate parts between the piston and valves." The first claim covers the first part of this invention by "the combination of the cylinder A, piston G, piston rod D, slotted rod C, and crank B, when constructed and operated substantially as described." The second claim—which we need not further consider here, because not involved in the case—covers the second part of the invention.

In the description of the device, with reference to the drawings, the specification says: "The piston G is disconnected from its rod D, to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder."

It is not admissible to adopt the argument made on behalf of the appellants, that this language is to be taken as a mere recommendation by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the piston and piston rod. The arrangement of the valves, as shown in the drawings, he declared not to be essential, and explained how they might be otherwise adjusted, and the comparative advantage and disadvantage of those plans; but no such language is used in reference to the connection between the piston and its rod. And when we compare the device as described in the specifications of the patent sued on with that of the patent of 1854, in which it was necessary to use stuffing boxes, and consider that one of the express objects expected to be accomplished by the improvement contained in the patent of 1872 was to prevent leakage of water or steam without resort to stuffing boxes, the conclusion seems unavoidable that the patentee intended the detachment of the piston from its rod as an essential part of the combination to be covered by the first claim.

The decree of the Circuit Court is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ANDREW N. BRAGG ET AL, Copartners, as A. N. BRAGG & COMPANY, *Appts.*, [478]
v.
ELEAZER T. FITCH ET AL, Copartners, as W. & E. T. FITCH.

(See S. C. Reporter's ed. 478-484.)

Patents—letters patent No. 47764—state of the art—strict construction of claims—infringement.

1. In view of the state of the art the claims of letters patent No. 47764, for an improvement in harness hooks, or snaps—if they cover a patentable invention—must be restricted to the precise form and arrangement described in the specification.
2. Said letters patent are not infringed by the device of the defendants.

[No. 122.]

Argued Jan. 11, 12, 1887. Decided May 2, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. Opinion below published, 16 Fed. Rep. 243. *Reversed, Remanded.*

The case is sufficiently stated by the court.

Mr. **William Edgar Simonds**, for appellants.

Messrs. **John K. Beach** and **John S. Beach**, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit on a patent granted to Charles [479]

B. Bristol, May 16, 1865, for an improvement in harness hooks or snaps; the complainants being assignees of the patent. These hooks are usually attached to the end of a strap or chain for the purpose of fastening it to a ring or staple, as in the case of a tie strap for fastening a horse to a post. The small hook by which a watch chain is fastened to the ring or stem of the watch is an example. It has a movable part called the tongue, which is connected to the shank of the hook by a pivot, and is kept in place against the end of the hook by the pressure of a spring acting between the shank and the tongue. The tongue may be pressed inward, so as to admit the ring or staple, and is thrust back to its place by the action of the spring. In some form or other the implement has long been in use. The patent in question relates to the mode of arranging the spring in the tongue and of attaching both to the shank of the hook. The complainants' expert says: "The invention shown and described in the patent of Bristol is an improvement in that class of snap hooks in which the tongue is pivoted in a recess between two cheeks in the shank. In this recess a coil spring is arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permit the tongue to be depressed to [480] open the hook. In this class of hooks, prior to Bristol, the tongue was cast with a recess upon its under side to form two cheeks corresponding to the cheeks in the shank of the hook. The cheeks on the tongue were drilled corresponding to the hole through the cheeks in the shank, so that a rivet could be inserted through the sides of the shank and both sides of the tongue to form the pivot on which the tongue would turn. The coil of the spring was arranged around the pivot, the two ends bearing, one upon the shank and one upon the hook, as before described."

The principle of this arrangement was exhibited in many different forms. Sometimes the spring merely passed around the pivot without any coil; sometimes a straight spring was so secured to the one part and made to press against the other as to effect the same object. One would hardly suppose that a patentable invention could have been made in relation to this little device. But many patents have been, and probably more will be, granted. The Bristol patent, now sued on, is one of the latest in the series which has been brought to our attention.

The particular contrivance which is claimed as an invention in this patent may be described as follows: Instead of having a separate pivot, or pin, to pass through the cheeks or ears of the hook and tongue for the purpose of connecting them together and holding the coil of the spring, a small projection or fulcrum, to answer the purpose of a pivot, is cast as a part of one of the cheeks of the hook, on its inner side, and the cheeks (being made of malleable cast iron) are spread further apart, and the recess between them is thus wider than they are intended to be when the article is finished. The coil of the spring is placed on the projecting fulcrum. The tongue is made with a recess as usual, but one side of this recess is left open, the other side having the ordinary cheek perforated with a hole to admit the fulcrum pivot. The tongue, thus constructed, is placed in the recess of the hook and slipped over the spring and pivot; and then by means of a vice or press, the outside cheeks of the hook are squeezed together until the fulcrum pivot passes through [481] the hole in the cheek of the tongue, and comes in contact with the opposite cheek of the hook. The patentee, after having described the construction of the several parts, explains the mode of putting them together as follows:

"Having made the parts as before described, I place the spiral spring, Fig. 4, on the projection or pin *n*, Fig. 2, and slip the tongue, Fig. 3, onto the projection or fulcrum pin *n*, so that the spring, Fig. 4, will rest in and be inclosed by the recess *r*, with the two tangential parts *h* and *i* pointing toward the hook *a*. I then place the article in a proper vice or press and close up the cavity between *c* and *d* until the pin *n* comes in contact with the side or ear *c*, Fig. 2, when the whole will appear as represented in Fig. 1 (except the strap A.), and will be ready for use or sale."

The claim of the patent is as follows; namely,

"What I claim as my invention and desire to secure by letters patent, is:

"1. The combination of the tongue *g*, with the spiral spring, Fig. 4, when the spring works on the torsion principle and rests in a recess (as *r*), in the rear end of the tongue, substantially as herein described.

"2. The combination of the fulcrum pin *n* with the tongue *g*, when the pin *n* is cast in one of the ears, and the recess or cavity is fitted to be closed, substantially as herein described."

Only the first claim is relied on in the present suit, as the defendants do not use the fulcrum pivot, cast with the cheek of the hook, but the ordinary pivot inserted in holes in both cheeks.

The defense is threefold; namely, 1. That the supposed invention was described in previous patents; 2. That, in view of the state of the art, the device claimed as new was not a patentable invention; 3. That, upon a proper construction of the patent, the defendants do not infringe it.

Several prior patents were given in evidence which show, if not an entire anticipation of, at least a very near approach to, the invention claimed.

In 1852 a patent was issued to Palmer & Simmons for an improved hook for whiffletrees, embodying the same principle as the snap [482] hook, in which the recess of the tongue, enclosing the spiral spring, having precisely the same object as the recess of the tongue and spring in Bristol's and other snap hooks, had but one cheek, the other side of the recess being open until it was applied to the end of the whiffletree supporting the hook, by which it was closed up when the parts were brought together. The connection of the two was made by a pivot passing entirely through the cheek of the tongue and the coil spring enclosed therein, and into the end of the whiffletree. This pivot had a broad head, which compressed the tongue and kept it in place, in the same manner as is done by the cheek of the hook in Bristol's snap hook.

In 1859 one Daniel H. Hull patented a trace

fastener, which contained a similar device, so far as the arrangement of the tongue and spring are concerned. The tongue, called in the patent the latch, had a recess containing the spring which was open on the inside, opposite to a slight recess in the slotted fastener, which corresponded to the hook in the snap hook. The pivot on which the tongue moved, and which passed through the spiral spring, was of the usual kind, and not cast as part of the fastener or of the latch.

In January, 1864, a patent was granted to one C. S. Abeel for an improvement in safety hooks, in which he dispensed with both the ears of the tongue by the use of one or two straight springs, one end of which was inserted in a slight groove in the recess or chamber of the hook, and the other resting against the tongue either in a groove or against a projection or shoulder.

In December of the same year, a patent was granted to Oliver S. Judd for an improvement in snap hooks, in which the spring was arranged in the recess of the tongue and operated exactly like the spring in Bristol's hook; the only difference between the two being, that in Judd's hook the pivot passed through both the hook and the tongue, and the latter had two cheeks, one on each side of its recess. The arrangement of the spiral spring, with both tangential ends projecting forward towards the hook, was precisely like Bristol's.

[483] These prior patents exhibit every feature of the Bristol snap hook, described in the patent sued on, except the single one of the fulcrum pivot cast as part of the cheek of the hook, and not passing through holes in both ears. This fulcrum is the only novelty shown in the patent; and this is not used by the defendants. The snap hook made by them has the same pivot which is used in Judd's hook, inserted in the same way, and passing through both cheeks of the hook. The only particular in which it differs from Judd's is that the tongue has but one cheek, and only one end of the coiled spring projects forward, towards the hook, resting against the tongue; whilst the other end projects backward, and presses against the side of the recess in the tongue, which is curved around and prolonged sufficiently for this purpose. It differs in two respects from the Bristol snap hook; to wit, in not using the fixed fulcrum cast as part of the cheek, and in not having both tangential ends of the spring projecting forward towards the hook, but having one of the ends projecting backwards and pressing, not against the tongue itself, but against the opposite side of its recess, prolonged sufficiently for the purpose.

It is obvious from the foregoing review of prior patents, that the invention of Bristol, if his snap hook contains a patentable invention, is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specification, and to the purpose indicated therein. As we have seen, with one exception (the solid pivot), all the parts are old, and have been used in combination in other things of the same general character. The use of a recess in the tongue with one of its ears or cheeks removed was to adapt it to the new element referred to; namely, the solid pivot; and although the first claim of the patent is for the tongue thus constructed, in combination with the spiral spring as arranged in connection with it, yet this claim must be construed in reference to the purpose for which the tongue and spring, thus arranged, were intended; namely, for adjustment upon the solid pivot. Without this relative purpose, the combination of the tongue and spring, by itself, would be anticipated by the patent of Palmer and Simmons, and that of Hull. If it has any novelty, it consists in its new application to the snap hook as devised by Bristol; and this was a snap hook provided with the peculiar solid pivot, or fulcrum pin, which is the subject of his second claim, and to which, as we have seen, the form and arrangement of the tongue and spring were specially adapted, and requisite to its beneficial use. This necessary restriction of the first claim renders it clear that it is not infringed by the defendants; for, as before stated, they do not use the solid pivot, but the old and long-used pin, passing through both ears or checks of the tongue and the hook. [484]

The defendants also use a different device from that described by Bristol, in the arrangement of the spiral spring, the two ends of which, instead of pointing towards the hook, point in different directions one towards the hook and pressing against the body of it, and the other in the opposite direction, and pressing against the side of the recess in the tongue, which is prolonged and curved around for that purpose.

On the whole view of the case, we are satisfied that the defendants do not infringe the patent sued on when construed as it must be to give it any validity.

The decision of the Circuit Court must, therefore, be reversed, and the case remanded, with instructions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. FROST ET UX., *Appts.*, [5
v.
MARTIN SPITLEY.

(See S. C. Reporter's ed. 552-558.)

Bill to quiet title—possession and legal title as requisites—Statute of Nebraska—sale on execution of equitable title—payment—jurisdiction of the United States Courts.

1. Under the jurisdiction and practice in equity, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complainant.

2. The Nebraska Statute dispenses with the requisite of possession, but not with that of legal title in the complainant.

3. In the case presented it is held that the complainant's grantor acquired through a certain sale on execution merely the equitable title of the premises in question, and that his subsequent payment of the amount due the holder of the legal title did not devest the latter of said title.

4. Where a local statute gives the remedy by bill in equity to quiet title, without requiring the complainant first to obtain possession, such remedy may be administered in appropriate cases by the courts of the United States.

[No. 235.]

Argued April 19, 20, 1887. Decided May 2, 1887.

APPEAL from the Circuit Court of the United States for the District of Nebraska. Reported below, 5 McCrary, 43. *Reversed, Remanded.*

Statement of the case by *Mr. Justice* **Gray**:

This case, so far as is material to the understanding of the appeal, was a bill in equity by Martin Spitley, a citizen of Illinois, against George W. Frost and wife, citizens of Nebraska, Thomas C. Durant, a citizen of New York, and the Credit Mobilier of America, a corporation of Pennsylvania, alleging that the plaintiff was entitled to two lots of land in the City of Omaha, County of Douglass, and State of Nebraska, under a sale on execution against Frost to one John I. Redick, and a conveyance from Redick to the plaintiff, and praying for a decree quieting the plaintiff's title and ordering a conveyance to him of the legal estate. Frost and wife, by answer and cross bill, denied the validity of the sale on execution, and claimed the land as a homestead. After the completion of the pleadings between Spitley and Frost and wife the case was referred to a master, whose report was confirmed by the circuit court, and a final decree was entered for Spitley on his bill against Frost and wife, their cross bill was dismissed, and they appealed to this court. Durant and the Credit Mobilier were not served with process, the record did not show publication of the notice ordered to them upon either bill, they did not appear in the cause, no decree was rendered against them, and they were not made parties to the appeal.

[553]

The material facts, as appearing by the admissions in the pleadings, the master's report, and the evidence taken in the case, were as follows:

Prior to 1866, the Credit Mobilier, in whose employ Frost was, purchased the land in question, took the title in the name of Durant, its president, and built a house upon it for the use of Frost and his family, under an agreement between the corporation and Frost, by which the title was to be conveyed to him upon a final settlement between them. Frost and his family forthwith took possession of the land, and thenceforth occupied it as a homestead, and were in possession when this bill was filed.

On November 11, 1870, Redick, who was an attorney, and Frost made and signed the following agreement: "In consideration of $2500 as attorney's fees, I agree with Hon. G. W. Frost that I will bring suit and procure, through the courts or otherwise, to him a good title to the premises he, said Frost, now occupies as his residence in the City of Omaha; and in case [of] any settlement or arrangement of the suit, then said Frost is to pay in proportion only; and in case said Frost fails to procure said title at all, then the said attorney is to have a mere nominal fee for his services, to wit, $100."

[554]

Redick accordingly, on April 29, 1871, brought a suit in equity on behalf of Frost against the Credit Mobilier and Durant in the courts of Nebraska, and in that suit, on March 27, 1876, obtained a decree that upon Frost's paying the said defendants within thirty days the sum of $302.71, remaining due from him to them, they should convey the land to him. That sum was not paid within the time fixed, Frost contending that Redick, by the agreement between them, was bound to pay it. On November 11, 1876, said defendants executed a quitclaim deed to Frost, but it was never delivered to him or recorded. Durant afterwards brought an action of ejectment for the land against Frost, which was pending until June 8, 1880, when Redick, having been made a defendant therein on the ground of his having succeeded to Frost's rights in the property under the proceedings stated below, paid that sum with interest, and the action of ejectment was thereupon dismissed.

On June 26, 1877, Redick brought an action at law to recover his fee of $2,500 against Frost in the Circuit Court of the United States for the District of Nebraska, in which, on July 30, 1877, he obtained a writ of attachment, on which this land was attached, and was appraised at $6,000; on March 14, 1878, recovered judgment; and on July 1, 1878, obtained an order of sale as upon execution, on which this land was appraised, "after deducting all prior liens thereon," at $500 the appraisers adding, "The said defendant's only interest in said property, as appears by the records of Douglas County, Neb., being that of occupancy and possession, we appraise the said interest as above;" and the marshal, on August 24, 1878, after thirty days' advertisement of "the property described in this order," sold by auction Frost's interest in these lots to Redick for $350. Frost's solicitor at the time of the sale gave notice to the marshal that Frost claimed the land as his homestead, and afterwards moved the court to set aside the sale for this and other reasons. But the court, upon a hearing, confirmed the sale, and directed the marshal to execute and deliver to Redick a deed in the usual form, which was accordingly done; and Redick, on September 8, 1880, conveyed to Spitley, the present appellee.

[555]

Mr. **John L. Webster**, for appellants.

No counsel appeared for appellee.

Mr. Justice **Gray**, after stating the case as above reported, delivered the opinion of the court:

The opinion of the circuit court proceeded upon the grounds that Frost's homestead right, as against the contract made by him with Redick in 1870, and the judgment and execution afterwards obtained by Redick on that contract, was governed by the Homestead Act of Nebraska of 1866, by which no consent of the wife to an alienation of the homestead was required; and that the sale on execution, confirmed by the court, cut off the right of homestead. 5 McCrary, 43. But it is unnecessary to consider the validity of either of those grounds, because, even if they are well taken, Spitley's bill cannot be maintained.

At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than

an equitable title. The sale on execution against him (if valid and effectual) and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not devest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than [556] Redick had. Spitley's title, therefore, at best, is but equitable, and not legal; and Frost, and not Spitley, is in actual possession of the land.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of the real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton*, 12 U. S. 8 Cranch, 462 [3: 624]; *Peirsoll* v. *Elliott*, 31 U. S. 6 Pet. 95 [8: 332]; *Orton* v. *Smith*, 59 U. S. 18 How. 263 [15: 393]; *Crews* v. *Burcham*, 66 U. S. 1 Black, 352 [17: 91]; *Ward* v. *Chamberlain*, 67 U. S. 2 Black, 430 [17: 319]. As observed by *Mr. Justice* Grier in *Orton* v. *Smith*, "Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." 18 How. 265 [15: 394]. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment. *United States* v. *Wilson*, 118 U. S. 86 [*ante*, 110]; *Fussell* v. *Gregg*, 113 U. S. 550 [28: 993].

It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession. *Carroll* v. *Safford*, 44 U. S. 3 How. 441, 463 [11: 671, 681]; *Van Wyck* v. *Knevals*, 106 U. S. 360, 370 [27: 201, 204]; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 169 [29: 845, 851]. But no such case is presented by the record before us.

In *Stark* v. *Starrs*, 73 U. S. 6 Wall. 402 [18: 925], the suit was founded on a Statute of Oregon, authorizing "any person in possession" to bring the suit; the court, after observing that "his possession must be accompanied with a claim of right, legal or equitable," held that the plaintiff proved neither legal nor equitable title; and consequently the question whether an equitable title only would have been sufficient to maintain the suit was not adjudged. In *Reynolds* v. *Crawfordsville F. N. Bank*, 112 U. S. [557] 405 [28: 733], the decision was based upon a Statute of Indiana, under which, as construed by the Supreme Court of that State, an equitable title was sufficient, either to support or to defeat the suit. *Jefferson R. R. Co.* v. *Oyler*, 60 Ind. 383; *Burt* v. *Bowles*, 69 Ind. 1. See also *Grissom* v. *Moore*, 106 Ind. 296.

A Statute of Nebraska authorizes an action to be brought "by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Neb. Stat. Feb. 24, 1873, Rev. Stat. 1873, p. 883. By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for. *Holland* v. *Challen*, 110 U. S. 15, 25 [28: 52, 56]. The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is "the title," that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In *State* v. *Sioux City & Pac. R. R.*, the Supreme Court of Nebraska said: "Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title in order to maintain the action." 7 Neb. 357, 376. And in *Holland* v. *Challen*, above cited, this court said, "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises."

The necessary conclusion is that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title; he cannot maintain it for the purpose of compelling a conveyance of the legal title, because Durant, in whom that title is vested, though named as a defendant, has not been served with process or appeared in the cause; and for like reasons Frost [558] and wife cannot maintain their cross bill.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the appellee's bill, and the appellants' cross bill, without prejudice, the appellee to pay the costs in this court and in the Circuit Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN F. HARTRANFT, Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plf. in Err.*, [609]

v.

JOHN H. WIEGMANN ET AL., Trading as J. H. WIEGMANN & SON.

(See S. C. Reporter's ed. 609-616.)

Duties—shells—removal of outer surfaces by acids or mechanical means as manufactures of—practice—findings by jury—special verdict or agreed statement.

1. The application of labor to an article, either by hand or by mechanism, does not necessarily make it a manufactured article, within the meaning of that term as used in the tariff laws.

2. The removal of the outer surfaces of shells by acids or mechanical means does not constitute them manufactures of shells, within the sense of the statute imposing a duty of 35 *per centum* upon such manufactures.

[No. 242.]

Argued April 20, 21, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The history and facts of the case appear in the opinion of the court. Compare the following case of *Hartranft* v. *Winters*, *post*, 1015.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Frank P. Prichard,** for defendants in error.

[610] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action at law brought in a court of the State of Pennsylvania and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, by the firm of J. H. Wiegmann & Son, against the Collector of Customs for the District of Philadelphia, to recover moneys alleged to have been illegally exacted by him as duties on imported merchandise. After a trial before a jury, the plaintiffs had a judgment for $55.29, and the defendant has brought a writ of error. The record contains the following statement of the result of the trial:

"The jurors aforesaid, upon their oaths or affirmation aforesaid, respectively do say that they find as follows, to wit:

"Plaintiff imported into the United States from London, in December, 1881, and May, 1882, a quantity of shells, on which he paid duties June 11, 1883. Among these shells were: 87½ doz. regius murex; 8 doz. green ears; 3 doz. white ears; valued at $71.68, on which the Collector imposed a discriminating duty of 10 per cent, or $7.16, as the products of a country east of the Cape of Good Hope; 12 doz. green snails; 27 doz. Lord's prayers; 12 doz. mottoes; 9 doz. Turk's caps; 3 doz. magpies; 8 doz. snails; 1 doz. trocus; 16 doz. green ears; 3 doz. white ears; valued at $125.70, on which the Collector imposed a duty of 35 per cent, or $44.09, as manufactures of shells

"The testimony in regard to these shells was as follows:

"*Frederick W. Wiegmann.* These shells were purchased in London. The merchants there obtain them from all parts of the world; they [611] are cleaned and prepared for market there; the epidermis is first cleaned off, and then the shells are ground or polished for the market; they are cleaned by acid; they are ground on an emery wheel to expose the pearly interior; the purpose of both operations is to fit the shells for market; we sell them for ornaments; we import them for the sea shore, and sometimes we sell them for buttons, handles to penknives, etc., there is no difference in name and use between the shells ground on the emery wheel and those not ground; the Lord's-prayer shell is sold for the same purpose; there is no new use.

"*Dr. Joseph Leidy.* [Regius murex shown witness.] That comes from Panama. [Green ear shown witness.] That is from the Pacific coast. [Two white ears shown witness.] One of these is from the west coast of Africa and the other from Japan. Most shells have three layers; they have the thin brown skin, the outside layer, like the common fresh water mussel, then they have an inner layer which is very brilliant. Very frequently the water is sufficient to wear off the skin, and they show the dull layer on the outside. By artificial means that opaque whitish layer is ground off by means of a wheel, and the inner layer is exposed, which presents that inner pearly appearance. [Samples shown witness.] These shells have had the outer layer ground off so as to exhibit the beautiful inner layer; that has been done by the application of a wheel, and afterward by polishing.

"Q. There is something here called the 'Lord's prayer.' I do not suppose you know it by that name, but please tell us about it.

"A. Well, I understand its nature. The shell happens to be of the kind which is very frequently imported and used as an ornament without any alteration whatever. The outer covering was taken off in the shape of letters, by first covering the letters with wax or grease, and then covering that with lime, having in the meantime eaten out the letters by acid or by etching. The object of taking off the epidermis is simply to show the internal beauty, for the purpose of ornament; and the object of taking off the second layer is the same, simply for the purpose of ornament.

"The jury find that the regius murex, green [612] ears, and white ears, are products of countries west of the Cape of Good Hope, as above testified, and that the discriminating duty on them amounted to $7.16, which, with interest to October 5, 1883, amounts to $7.72.

"The jury find that the green snails, Turk's caps, magpies, snails, trocus, green ears, and white ears have been ground upon an emery wheel in the manner and for the purpose described in the above testimony; that the duty collected on them as manufactures of shells amounted to $25.98, which with interest to October 5, 1883, amounts to $28.03.

"The jury also find that the Lord's prayers and mottoes have been etched with acid, in the manner and for the purpose described in the above testimony; that the duty collected on them as manufactures of shells amounted to $18.11, which, with interest to October 5, 1883, amounts to $19.54.

Recapitulation.

Discriminating duty.....	$ 7 72
Duty on ground shells.....	28 03
Duty on etched shells.....	19 54
	$55 29

"And the court reserved the following points:

"1. If the court should be of opinion that both the shells ground on an emery wheel and the shells etched with acids, in the manner found by the jury, were not liable to duty as 'manufactures of shells,' but were entitled to be admitted free, as 'shells unmanufactured,' then judgment to be entered in favor of the plaintiff for fifty-five dollars and twenty-nine cents.

"2. If the court should be of opinion that the shells etched by acids in the manner found by the jury were liable to duty as 'manufactures of shells,' but that the shells ground on an emery wheel, as found by the jury, were not so liable, then judgment to be entered in favor of the plaintiff for thirty-five dollars and seventy-five cents.

"3. If the court should be of opinion that both the shells ground on an emery wheel and [613] those etched by acids were liable to duty as 'manufactures of shells,' then judgment to be entered for plaintiff for seven dollars and seventy-two cents only, being the amount of dis-

criminating duty on shells found by the jury to have been imported from countries west of the Cape of Good Hope."

The defendant then moved for a new trial, in refusing to grant which the court held "That, in order to render the shells subject to duty as 'manufactures of shells' something more must be done than simply to remove the outer surface either by acids or mechanical means; and that, while the shells retained their special form and character, they could not be classified as 'manufactures of shells.'"

The finding of the jury is not in the usual form of a special verdict, but the jury make certain findings, and the statement is that the court reserves the three points stated; and each point reserved is stated in one and the same form; namely, that if the court should be of opinion that the shells are dutiable thus and so, or are free from duty, then judgment is to be entered for the plaintiff for a specified sum. As the circuit court, and the counsel for both parties in that court, appear to have treated the findings and the reservation as amounting to either a special verdict or an agreed statement of facts, we are disposed to overlook the irregularity, and to consider the case on its merits. *Mumford* v. *Wardwell*, 73 U. S. 6 Wall. 423 [18: 756].

It is contended, on the part of the government, that the shells were dutiable under the following provision of section 2504 of the Revised Statutes, Schedule M, page 481, 2d edition: "Shells, manufactures of: thirty-five per centum ad valorem."

On the other side, it is contended that the articles were free, under the following provision of section 2505, page 488, 2d edition, in regard to articles exempt from duty: "Shells of every description, not manufactured."

The Collector levied a duty upon the shells of 35 per centum. The circuit court held that they were exempt from duty. The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer, is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that the shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufactures of shells, within the meaning of the statute.

[614]

By the Act of March 2, 1861, chap. 68, section 22, 12 Stat. at L. 192, a duty of 30 per cent ad valorem was imposed on "manufactures of shell," and by the Act of July 14, 1862, chap. 163, section 13, 12 Stat. at L. 557, that duty was increased to 35 per cent ad valorem. By the Act of July 14, 1870, chap. 255, section 22, 16 Stat. at L. 268, "shells of every description, not manufactured," were exempted from duty. These enactments were carried into the Revised Statutes.

It is stated in the brief on the part of the government that the interpretation of these provisions by the treasury department has not been uniform. In April, 1872, it ruled that "Shells which have merely been cleaned and polished with acids cannot fairly be classified as manufactures of shells." In July, 1876, it ruled that shells engraved by the application of acids were manufactured shells. In August, 1877, it ruled that where the manufacture of the shells consisted merely in polishing them and removing, by grinding or otherwise, a portion of the surface, the shells were exempt from duty, because their character and condition had not been materially changed, and they still preserved their identity as shells. At a later date, in regard to shells that had been cleaned by the use of the emery wheel and buffer, and shells which had been polished by the use of acids, it held that they were dutiable at the rate of 35 per centum, as manufactures of shells, on the ground that they had been advanced, by cleaning, grinding and otherwise, to a condition beyond that of crude, unmanufactured shells.

We are of opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In "Schedule M" of section 2504 of the Revised Statutes, page 475, 2d edition, a duty of 30 per cent ad valorem is imposed on "coral, cut or manufactured;" and, in section 2505, page 484, "coral, marine, unmanufactured," is made exempt from duty. These provisions clearly imply that, but for the special provision imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee* v. *Moffitt*, 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, though labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence* v. *Allen*, 48 U. S. 7 How. 785 [12:914], it was held that India Rubber shoes, made in Brazil, by simply allowing the sap of the India Rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In *United States* v. *Potts*, 9 U. S. 5 Cranch, 284 [3:102], round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States* v. *Wilson*, 1 Hunt's Merchants' Magazine, 167,

[615]

Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but [616] was free from duty, as being unmanufactured.

We are of opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers* v. *Barney*, 5 Blatchf. 202; *U. S.* v. *Isham*, 84 U. S. 17 Wall. 496, 504 [21:728, 730]; *Gurr* v. *Scudds*, 11 Exch. 190, 191; *Adams* v. *Bancroft*, 3 Sumn. 384.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN F. HARTRANFT, Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

ANTON WINTERS.

(See S. C. Reporter's ed. 616, 617.)

Duties — shells — manufactures of — removal of outer surfaces by acids or mechanical means.

The removal of the outer surfaces of shells by acids or mechanical means does not constitute them manufactures of shells within the sense of the statute, imposing a duty of 35 per centum upon such manufactures.

[No. 243.]

Argued April 20, 21, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

With the exceptions noted in the opinion this case is the same as the preceding case of *Hartranft* v. *Wiegmann, ante.*

Mr. **G. A. Jenks,** *Solicitor-Gen.* for plaintiff in error.

Mr. **Frank P. Prichard,** for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action by Anton Winters, brought in the state court of Pennsylvania and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, against the Collector of Customs for the District of Philadelphia. The proceedings in it, and the questions arising, are in all respects the same as those in the case of *Hartranft* v. *Wiegmann*, just decided, the only difference being that in this case there were no shells called "green snails" or "mottoes" or "Turk's caps" or "magpies" or "trocus," and that there were shells [617] called "rose murex," "motto cowries," "banded snails," "Japan ears," "turbo shells," "red ears," and "pearl snails."

The same conclusion is arrived at as in the *Wiegmann Case*, and *the judgment of the Circuit Court is affirmed.*

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[474] JAMES N. CARPENTER, *Plff. in Err.*,

v.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

(See S. C. Reporter's ed. 474-478.)

Street railroads—ejection from car—mistake in transfer ticket—instructions.

In an action against a street railroad company to recover damages for the forcible ejection from defendant's car, after the tender by the plaintiff of a transfer ticket which was intended for use on another line, it is *held:* that the instructions are not open to objections by the plaintiff, and that, taking the evidence and the charge together, it is clear that the jury found for the defendant on the ground that the plaintiff himself was mainly in fault in regard to the mistake in the transfer ticket; and that no unnecessary force or violence was used in ejecting him from the car.

[No. 262.]

Submitted April 22, 1887. Decided May 2, 1887.

IN ERROR to the Supreme Court of the District of Columbia. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **C. C. Cole** and **W. L. Cole,** for plaintiff in error:

"Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury."

Cooley, Torts, 674; Shearm. & Redf. Neg. §§ 2, 37; *Davis* v. *Mann*, 10 Mees. & W. 546; *Brownwell* v. *Flagler*, 5 Hill, 282; *New Haven Steamboat Trans. Co.* v. *Vanderbilt*, 16 Conn. 420; *Trow* v. *Vermont Cent. R. R. Co.* 24 Vt. 487; *Young* v. *Pa. R. R. Co.* 5 Cent. Rep. 848.

The conduct of the defendant's agents in this case was the more reckless and wanton, because they were bound to observe towards the plaintiff the utmost caution and vigilance for his protection while he was a passenger upon the defendant's cars.

Pennsylvania Co. v. *Roy*, 102 U. S. 451 (26:141).

The evidence tends to show that the plaintiff paid his fare and became entitled to ride on the car from which he was forcibly ejected. The evidence also tends to show that he made an effort in good faith to comply with the regulation of the defendant as to procuring a transfer ticket. That he obtained the wrong ticket may or may not have been his error under the circumstances. That was for the jury to determine. But the defendant having knowledge of the mistake immediately after it occurred, and when it might have been corrected, and refusing to make any effort to rectify the error, and forcibly ejecting the plaintiff from the car, is such reckless disregard of a passenger's right as to make the defendant responsible for the injuries inflicted.

Messrs. **Enoch Totten** and **W. D. Davidge,** for defendant in error:

A conductor of a car has no discretion. He must collect the fare or receive a ticket. If the agent happens to give the passenger the wrong ticket, it is the passenger's duty to pay the fare or leave the car. He has his remedy at law for the breach of contract.

Townsend v. *N. Y. Cent R. R. Co.* 56 N. Y. 295; *Yorton* v. *Milwaukee etc. R. Co.* 6 Am. & Eng. R. R. Cas. 322: *Hall* v. *Memphis & C. R. Co.* 9 Am. & Eng. R. R. Cas. 348; *Mosher* v. *St. Louis I. M. & S. R. Co.* 17 Fed. Rep. 880;

Mosher v. *St. Louis, I. M. & S. R. Co.* 23 Fed. Rep. 326.

[475] *Mr. Justice* **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the District of Columbia.

The defendant in error, the Washington and Georgetown Railroad Company, is a street railroad company doing business in the City of Washington, its road having two branches, crossing each other at right angles at the intersection of Pennsylvania Avenue and Seventh Street. Passengers who had paid their fare on either branch of the road, upon arriving at this crossing, were entitled to receive a transfer ticket which permitted them, without further payment, to take the other branch in the continuation of their journey.

The plaintiff in error, James N. Carpenter, who was also the plaintiff below, who testified to taking his passage on the Seventh Street branch of this road, got off at this crossing, received a ticket from the agent, who was stationed at that point for the purpose of delivering transfer tickets to passengers who wished to change cars, and took his seat in a car on the Pennsylvania Avenue branch going east toward the capitol. When the conductor of the car came around to collect tickets, it was found that Carpenter had a transfer ticket which was intended for use on the Seventh Street branch and not on Pennsylvania Avenue. The conductor refused to accept this ticket, and demanded of Carpenter the usual fare charged for riding on that road. After some altercation, Carpenter peremptorily refusing to pay the fare demanded or get off when requested so to do, the car was stopped and the conductor and driver put him off forcibly. He then brought suit against the Company. Upon a trial before a jury, a verdict was rendered for the defendant, and the judgment on this verdict, on appeal to the Supreme Court of the District in bank, was affirmed.

The entire testimony is embodied in a bill of exceptions, and no question arises on the admission or rejection of evidence, nor is there much contradiction in it, except that there may be some little difference between the statement of the plaintiff as to the degree of force used to put him off the car and that of the conductor and driver on the same subject.

[476] There were, however, some exceptions taken to the charge of the court, as well as to the refusal to give instructions prayed for by plaintiff. We think, however, that the charge given by the court *sua sponte*, when taken in connection with the verdict of the jury, contains all that need be considered. That charge is embodied in the fifth bill of exceptions, and is as follows:

"And thereupon the court instructed the jury that if they believed from the evidence that the agents of the defendant had made a mistake in giving to the plaintiff a transfer ticket, and instead of giving him a Pennsylvania Avenue transfer had given him a Seventh Street transfer, that the plaintiff was entitled to recover, and that in assessing the damages the plaintiff was entitled to have reasonable damages, compensatory for the treatment which he had received, and that the defendant Company was bound to see to it that the plaintiff was provided with a proper transfer, and that if the mistake had been made the responsibility therefor rested upon the Company and not upon the plaintiff.

"And the court further instructed the jury that if, upon the other hand, they believed that the conduct of the agents of the Company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had maliciously and wantonly ejected him from the car because of personal dislike or animosity, that then the plaintiff was entitled to recover and in assessing damages, in that view of the case, the plaintiff was entitled to recover not only compensatory but vindictive damages; and to this latter branch of the instruction the defendant, by its counsel, then and there objected, and the objection was overruled and an exception was duly noted.

"The court thereupon further instructed the jury that if the jury were satisfied from the evidence that the plaintiff did not get off from the Seventh Street car, as related by him, but that he came from the west-bound Avenue car, with the passengers from that car and presented himself, with those passengers, to the transfer agent of the defendant, and that the plaintiff received the Seventh Street transfer without objection or remark, and undertook to ride upon it on a Pennsylvania Avenue car, that the defendant was entitled to a verdict." [477]

This whole charge, it seems to us, was eminently favorable to the plaintiff. The first point made in it was that if the jury believed from the evidence that the agent of the defendant had made a mistake in giving to the plaintiff a Seventh Street instead of a Pennsylvania Avenue transfer ticket, that then the plaintiff was entitled to recover. It is obvious from the verdict of the jury, which was against the plaintiff, that they did not believe that the agents of the defendant Company at the crossing were responsible for the mistake that had been made there; because in the same connection the court instructed the jury that if they were satisfied from the evidence that the plaintiff did not get off from the Seventh Street car, as related by him, but that he came from the west-bound Avenue car, with the passengers from that car, and presented himself, with those passengers, to the transfer agent of the defendant, and that the plaintiff received the Seventh Street transfer without objection or remark, and undertook to ride upon it on a Pennsylvania Avenue car, that the defendant was entitled to a verdict.

Taking these two charges together, in connection with the testimony, it is evident that the jury founded their verdict upon the hypothesis contained in the latter; namely, that either he did not get off from the Seventh Street car, but came from the west-bound Avenue car, or that he came with the passengers from that car and presented himself with them to the agent of the defendant in a way to lead him to believe that he came from the Avenue car and desired to proceed on the Seventh Street car, which was confirmed by his taking without objection or remark the Seventh Street car transfer ticket. The testimony also showed that Carpenter had traveled a great deal on the cars of the defendant Corporation, was familiar with the manner of transferring passengers,

and must have known the character of the ticket which was handed to him if he had paid any attention to it whatever.

The remaining portion of the charge was also favorable to the plaintiff; that is, that if the jury believed that the conduct of the agents of [478] the Company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had wantonly and maliciously ejected him from the car, then the plaintiff was entitled to recover, and in assessing damages he was entitled not only to compensatory but to vindictive damages.

Taking the testimony, which is all set forth in the record and is but little controverted, together with the charge of the judge, we think it perfectly clear that the jury found a verdict for the defendant on the ground that the plaintiff himself was mainly in fault in regard to the mistake in the transfer ticket, and that no unnecessary force or violence was used in ejecting him from the car. This renders a further consideration of the case unnecessary, and *the judgment of the Supreme Court of the District of Columbia is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,
v.
GEORGE E. WHITE.

122 US 647

Practice—deficiency in the record.

This court dismisses the appeal from a decree dismissing a bill, filed by the appellant in the court below to vacate and cancel a patent issued to the appellee for 160 acres of land in California, because it does not appear from the record that the premises in question exceed $5,000 in value.

[No. 274.]
Dismissed May 2, 1887.

APPEAL from the Circuit Court of the United States for the District of California.

Reported below, 9 Sawy. 125.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for appellant.

Mr. **James K. Redington,** for appellee:

An appeal will be dismissed when it does not appear by the record or otherwise that the value of the matter in dispute exceeds $5,000.

Parker v. *Morrill*, 106 U. S. 1, 2 (27: 72).

No considerations as to the forms of the objection enter into the question. Whenever and however the facts appear, the case will be dismissed.

Richmond v. *Milwaukee*, 62 U. S. 21 How. 80-82, 391 (16: 72, 60); *Johnson* v. *Wilkins*, 116 U. S. 392 (29: 671); *S. C.* 118 U. S. 228 (*ante*, 210).

Even when the parties are silent or the record is so framed as to give a colorable jurisdiction, the court will, upon its own motion, dismiss the case.

Webster v. *Buffalo Ins. Co.* 110 U. S. 386 (28: 172); *Bowman* v. *Chicago & N. W. R. Co.* 115 U. S. 611 (29: 502).

And although a defect in jurisdiction, apparent in the record, may be cured by affidavits, yet the showing must be made before the argument; and a case will neither be continued nor reinstated to give an opportunity to produce them.

Rush v. *Parker*, 9 U. S. 5 Cranch, 287 (3: 103); *Richmond* v. *Milwaukee*, and *Johnson* v. *Wilkins*, *supra*.

Per Curiam:

On consideration of the transcript of the record, it not appearing to the court that the amount in controversy exceeds the sum of $5,000, the cause is dismissed for the want of jurisdiction.

GEORGE C. McCOY, *Appt.*, [484]
v.
FREDERICK NELSON.

(See S. C. Reporter's ed. 484-488.)

Patents—demurrer to bill for infringement—failure to show grounds of decision—answers to hypothetical objections to the bill—jurisdiction in equity.

Upon appeal from a decree sustaining a demurrer to a bill for the infringement of letters patent No. 254993, for an "improvement in boots," this court not being furnished with a copy of the opinion of the court below, nor with any brief or argument for appellee, and this court being without knowledge of the grounds of said court's decision, it is *held:* that the bill is entirely sufficient to put the defendant upon his answer; and that the patent having been issued fifteen months before the bill was filed, and having nearly sixteen years then to run, and the bill alleging that the public has generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it was not necessary to show a recovery at law, to warrant jurisdiction in equity, for an injunction and an account.

[No. 255.]
Argued April 22, 1887. Decided May 2, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Mr. **Leigh Robinson,** for appellant.

No counsel appeared for appellee.

Mr. Justice **Blatchford** delivered the opin- [485]
ion of the court:

This is a bill in equity, filed in the Circuit Court of the United States for the District of Colorado, by George C. McCoy against Frederick Nelson, for the infringement of letters patent of the United States, No. 254993, granted to McCoy, March 14, 1882, for an "improvement in boots." The bill sets forth a copy of the patent, and of its specification and drawings, at length. The defendant interposed a general demurrer to the bill, for want of equity, specifying no grounds of demurrer. The court sustained the demurrer and entered a decree dismissing the bill, from which the plaintiff has appealed.

We are not furnished with a copy of any opinion of the circuit court, nor with any brief from the appellee, and the case was not orally argued on his part. We are left therefore without information as to the grounds upon which the demurrer was sustained.

The bill alleges that the plaintiff "is the original and first inventor of a new and useful improvement and invention in boots, which are fully and particularly described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention." It then sets out that he applied for and obtained the patent. The patent states, on its face, that he has applied for a patent "for an alleged new and useful improvement in boots, a description of which invention is contained in the specifications, of which a copy is hereto annexed and made a part hereof." The patent grants to him, his heirs or assigns, for seventeen years from its date, "the exclusive right to make and vend the said invention throughout the United States and Territories." The specification states that he has "invented a new and improved boot, of which the following is a full, clear and exact description." It says: "The object of my invention is the production of a boot of novel and improved construction, [486] as hereinafter described and claimed." It refers to seven figures of drawings which accompany the specification, one of which "is a perspective view of my improved boot." It states that "the sole and heel of the boot are of ordinary form, and the upper and counter may be secured to the sole by any of the well known and common means." It then describes the vamp, the quarters which form the leg, the mode of sewing the quarters together, the hooks and holes for lacing and the lacing device, and the strip secured over the front seam, and the leather tongue which closes the opening in front in the main material of the leg and is itself secured to the leg pieces or quarters and the vamp. The claim is as follows: "Having thus described my invention, I claim as new, and desire to secure by letters patent, the herein described boot, consisting of the vamp B, the quarters *d*, sewed together in the back and a short distance in front from the top down, and provided with the hooks *e*, holes *i*, and a suitable lacing device, the strip *f*, secured over the said front seam, and the tongue G, secured to the said leg pieces and vamp, substantially as set forth." The bill then alleges that the plaintiff was and is the owner of the patent; that he has invested and expended large sums of money for the purpose of carrying on the business of making and selling boots containing the invention; that the invention has been of great utility; that boots were made according to it, and containing it, and sold by him, to the great advantage of the public; that the public have generally acknowledged and acquiesced in the validity of the patent and in his rights; that the defendant has manufactured, used and vended to others to be used, boots containing and embracing the invention, in the District of Colorado, without the license of the plaintiff, and in violation of his rights, and in infringement of the patent, with full knowledge of those rights, and to the injury of the plaintiff, whereby he has been and still is being deprived of profits which he otherwise would have obtained; and that the defendant has made and sold large quantities of said boots, and is still engaged in selling the same, and has a large quantity thereof on hand, which he is offering for sale, and has made large profits from such sales. The bill prays for an answer on oath; and that the defendant may account for and pay to the plaintiff the [487] profits acquired by the defendant, and the damages suffered by the plaintiff, from the unlawful acts of the defendant. It also prays for an injunction.

Groping in the dark and grappling with shadows, we are unable to perceive the objection to this bill. The brief of the appellant does not state upon what ground it is understood the court below proceeded. If it be suggested that the claim of the patent is for the boot described, and that the bill merely alleges that the defendant has made, used and sold boots containing and embracing the invention covered by the patent, instead of alleging that the defendant has made, used and sold the invention or the patented boot, we are of opinion that there is no force in the objection. If the boot made, used and sold by the defendant is not a boot consisting substantially of the parts mentioned in the claim of the patent, it does not infringe the patent, and is not, in judgment of law, a boot containing and embracing the invention, in the language of the bill. Although the claim of the patent is a claim to the described boot, consisting of the elements specified, the invention patented is an "improvement in boots," as stated in the patent, and any boot which contains that improvement, according to the terms of the claim, infringes the patent and is a boot containing and embracing the invention patented. The bill is entirely sufficient to put the defendant upon his answer, and the rights of the parties will be properly and adequately adjusted in the further proceedings in the cause. The bill is in accordance with approved precedents, and is in the usual form.

The patent having been issued fifteen months before the bill was filed, and having nearly sixteen years then to run, and the bill alleging that the public have generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it was not necessary to show a recovery at law, to warrant jurisdiction in equity, for an injunction and an account. *Root* v. *R. Co.* 105 U. S. 189, 205 [26: 975, 981]. [488]

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to take such further proceedings as shall be in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

FRANCES E. LAWRENCE, *Appt. and Plf. in Err.*, [634]

v.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY; ROBERT B. TODD, Trustee, AND MINOS T. GORDY, Sheriff.

(See S. C. Reporter's ed. 634-637.)

Removal of causes—application for injunction to stay proceedings in a state court—removal before grant of—practice—Louisiana Code.

1. A cause arising upon a petition for an injunction to stay proceedings in a state court cannot be removed before the grant of the injunction.

2. In the case presented the allowance of the injunction by the clerk of the state court does not appear to have been authorized by law, and, under the circumstances, the case is to be treated as having been removed to get an injunction, and not after one had been granted.

[No. 251.]

Submitted April 21, 1887. Decided May 2, 1887.

APPEAL from and error to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **B. R. Forman,** for plaintiff in error and appellant:

The cases of *Bondurant* v. *Watson*, 103 U. S. 281 (26:447), and *Kern* v. *Huidekoper*, 103 U. S. 485 (26:354), seem conclusive of the only question in the case, and that the judge below erred in remanding the case.

Mr. **Henry J. Leovy,** for defendants in error and appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, from an order of the circuit court remanding a suit or proceeding which had been removed from a state court. The record shows that a *fieri facias* had been issued out of the 19th Judicial District Court for the Parish of St. Mary, Louisiana, on a judgment in that court at the suit of Robert Todd, Trustee, against Robert B. Lawrence, under which certain lands claimed by Mrs. Frances E. Lawrence, a citizen of New Jersey, had been seized and advertised for sale on the second of June, 1883, by Minos Gordy, [635] the Sheriff of the county. The judgment had been assigned to Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation; and on the 31st of May, 1883, Mrs. Lawrence caused to be prepared what is called in the practice of the courts of Louisiana, a "petition of third opposition," to be filed in the 19th Judicial District Court of the Parish of St. Mary, to restrain Todd, the Trustee, the Railroad Company, and the Sheriff from selling the property under the seizure, claiming it as her own. This is a proceeding authorized by the Code of Practice of Louisiana (arts. 395, 396); but it must be had in the court which rendered the judgment in virtue of which the seizure has been effected. Art. 397. The petition was verified by the oath of Mrs. Lawrence May 31, and in her affidavit she stated "that Hon. T. S. Goode, the Judge of the 19th Judicial District in and for the Parish of St. Mary, is absent from said parish." A bond was also executed on the same day, such as the Code of Practice required in case of the allowance of an injunction, and at the foot of the petition, as printed in the record, is the following:

"Considering the allegations and prayer of the foregoing petition, it is ordered that the third opposition of the plaintiff be, and is hereby, allowed to be filed, and that an order and writs of injunction issue, as prayed for, on plaintiff giving bond and security, according to law, in the amount equal to one half of the claim under which the seizure enjoined was made.

"Granted at Franklin, Parish of St. Mary, this 31st day of May, A. D. 1883.

"(Signed) J. B. VERDIN, Jr., *Clerk.*"

All these papers were filed with the clerk of the 19th Judicial District Court on the first of June, and also the following:

"PARISH OF ST. MARY, 1 *June*, 1883.

"I hereby accept service of the foregoing petition and writ of injunction herein prayed for, and waive service of citation on me in the premises."

"(Signed) M. T. GORDY, *Sheriff.*"

The record also shows a petition by Mrs. Law- [636] rence to the judge of that court, setting forth that she had "sued out of your honorable court a third opposition, coupled with a writ of injunction," for the purpose of restraining the sale under the seizure, as above stated, and praying for the removal of such suit to the Circuit Court of the United States for the Eastern District of Louisiana, on account of the citizenship of the parties, she being a citizen of New Jersey and all the defendants citizens of Louisiana. At the foot of this petition, as printed in the record, is the following:

"On the pleadings and proceedings herein, and on the petition and bond filed herein by plaintiff, Mrs. Frances E. Lawrence, under the provisions of the Acts and laws of the United States to regulate the removal of causes from state courts, and for other purposes, and on motion of counsel of petitioner in said case and the foregoing petition, it is ordered that the security offered by Mrs. Frances E. Lawrence, plaintiff therein; to wit, Townsend Lawrence, be approved, and that the state court proceed no further in the cause, and that this cause be removed into the Circuit Court of the United States for the Eastern District of the State of Louisiana next to be held in said district.

"Dated this 1st of June, 1883.

"(Signed) F. S. GOODE, *Judge.*"

The petition for removal and this order were filed with the clerk of the court on the second of June. On the 5th of November following, the suit was entered in the circuit court, and, on the 20th of March, 1884, the defendants moved that it be remanded. This motion was heard April 5, 1884, and granted April 7. From the order to that effect this appeal was taken.

Section 720 of the Revised Statutes provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy;" and, in *Bondurant* v. *Watson*, 103 U. S. 288 [26:450], which was a suit removed from [637] a state court on the application of the defendant after an injunction staying proceedings in the state court for his benefit had been granted, it was said: "If Watson had filed his petition for injunction in the state court, and before it was allowed had petitioned for a removal of the cause to the circuit court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute." Such clearly is this case. The petition for removal was filed by the party who brought the suit; and there is nothing whatever in the record to show that the injunction he asked for was ever granted by the court or any judge thereof prior to the removal. The affidavit of Mrs. Lawrence shows that the judge was absent from the parish at the time the order which

is in the record signed by the clerk purports to have been granted; and we have been referred to no statute or judicial decision in Louisiana authorizing the clerk to make such an order in the absence of the judge. Under the circumstances, therefore, the case is to be treated as having been taken to the circuit court to get an injunction, and not after one had been granted. This, we have no hesitation in saying, cannot be done; and, without deciding whether, under any circumstances, a proceeding such as this was in the state court can be removed to a circuit court, we *affirm the order to remand.*

Affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court. U. S.

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[631] PENINSULAR IRON COMPANY ET AL., *Appts.*,

v.

ANDROS B. STONE.

(See S. C. Reporter's ed. 631-633.)

Jurisdiction—joinder of parties having distinct interests to enforce a common obligation—citizenship—costs on appeal.

1. Where several parties whose interests are distinct join in a proceeding to enforce an obligation which is common to all, the court will not distinguish the case, as respects jurisdiction depending on the citizenship of the parties, from one in which they are compelled to unite.

2. This court reverses the decree of the court below at the costs of the appellants, whose duty it was to make the jurisdiction appear.

[No. 229.]

Argued April 18, 1887. After argument by counsel for appellants, the court declined to hear further argument. Decided May 2, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa, Eastern Division. *Reversed, Remanded.*

The case is sufficiently stated by the court.

Messrs. **Andrew Howell** and *W. A. Underwood*, for appellants.

Mr. James H. Anderson, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court.

This is an appeal from a decree dismissing the bill in a suit in equity begun by certain citizens of Michigan and Samuel M. Carpenter, Charles Wason, and Leander M. Hubby, citizens of Ohio, against Andros B. Stone, a citizen of New York, the St. Louis, Keokuk and Northwestern Railway Company, an Iowa corporation, the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation, and Dan. P. Eels, a citizen of Ohio, to bring the defendants Stone and Eels to an accounting under a certain contract made by Stone with the complainants and others, by which he was to purchase the property of the Mississippi Valley and Western Railway Company, about to be sold under a decree of foreclosure, and [632] hold the same in trust for such of the holders of the bonds secured by the foreclosed mortgage as should surrender their bonds to him for use in paying the purchase money, and contribute such further sums in cash as should be necessary to enable him to meet the obligations of his bid at the sale. According to the allegations of the bill the defendant Eels became a trustee of the proceeds of a sale of the purchased property, made by Stone for the benefit of the parties in interest, which he has misappropriated and claims to hold in connection with Stone, adversely to the complainants and others in like interest. The character of the controversy is such that all the citizens of Ohio, who are parties to the suit, cannot be placed on one side so as to give the circuit court jurisdiction, under the construction which was given the second section of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, in the *Removal Cases*, 100 U. S. 457 [25:593], the first section being the same as the second so far as this question is concerned.

In *Strawbridge* v. *Curtiss*, 7 U. S. 3 Cranch, 267 [2:435], decided in 1806, it was held: "Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in those courts." "But," it was added, "the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States." In *New Orleans* v. *Winter*, 14 U. S. 1 Wheat. 91 [4:44], decided in 1816, a suit had been brought in the District Court for the District of Louisiana by the heirs of Elisha Winter, deceased, to recover possession of certain lands under an alleged grant from the Spanish Government. One of the plaintiffs could sue in the courts of the United States, but the others could not, and the question of jurisdiction in the district court was raised. *Chief Justice* Marshall, in delivering the opinion of the court, after referring to what had been decided in *Strawbridge* v. *Curtiss*, said: "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to [633] unite." It was consequently held that the district court had no jurisdiction, and its judgment was reversed. This rule has been adhered to steadily ever since: *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 287 [18:827]; *Coal Co.* v. *Blatchford*, 78 U. S. 11 Wall. 174 [20:180]; *Sewing Machine Cases*, 85 U. S. 18 Wall. 574 [21:918]; and in removal cases, under section 2 of the Act of 1875, it has uniformly been applied, unless there is a separable controversy. *Removal Cases* [*supra*]; *Blake* v. *McKim*, 103 U. S. 336 [26:563]; *Hyde* v. *Ruble*, 104 U. S. 407 [26:823] and numerous cases since.

In the present case the rights of each and all of the parties depend on the alleged contract with Stone, and although, as between themselves, they have separate and distinct interests, they join in a suit to enforce an obligation which is common to all. There is but a single cause of action, and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule in *New Orleans* v. *Winter* [*supra*], controls the jurisdiction. It is, therefore, a suit to which citizens of Ohio are parties on one side, and a citizen of Ohio a party on the other, with interests so

conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute. It follows that the circuit court was without jurisdiction, and could not render a decree dismissing the bill on its merits. For this reason the decree must be reversed (*Continental Ins. Co.* v. *Rhoads*, 119 U. S. 239 [*ante*, 880], and cases there cited); but as the error is attributable to the present appellants, whose duty it was to make the jurisdiction appear, the reversal will be at their costs in this court. *Everhart* v. *Huntsville Female College*, 120 U. S. 228 [*ante*, 628].

The decree is reversed and the cause remanded, with directions to dismiss the bill for want of jurisdiction, and without prejudice.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[522] ALFRED ROBINSON, *Plff. in Err.*,
v.
JOHN ANDERSON ET AL.

(See S. C. Reporter's ed. 522-524.)

Jurisdiction—section 5, Act of 1875—determination from entire pleadings—Mexican grant—boundaries.

1. The circuit court cannot be required to keep jurisdiction of a suit simply because the complaint or declaration makes a case arising under the Constitution, laws or treaties of the United States if, from the entire pleadings, it appears that the averments making such a case are immaterial, and especially if they were evidently made "for the purpose of creating a case" cognizable by said court.
2. In the case presented it seems doubtful whether the complaint itself makes a case cognizable by the circuit court, as the rights of the complainant appear to depend merely on the boundaries of a certain Mexican grant confirmed and patented by the United States.

[No. 231.]

Submitted April 13, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the District of California. *Affirmed.*

The case is sufficiently stated by the court.

Mr. **L. D. Latimer**, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error sued out under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court dismissing a suit brought by Robinson, a citizen of California, against other citizens of the same State, for want of jurisdiction. The claim on the part of the plaintiff in error is that upon the face of the complaint it appears that the suit is one arising under the Constitution or laws or treaties of the United States, and that consequently the circuit court had jurisdiction by reason of the subject matter of the action; but on examination we find that, according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of the Rancho Los Bolsas, granted by the Mexican Government to Manuel Nieto, and confirmed and patented to his representatives by the United States under the Act of March 3, 1851, chap. 41, 9 Stat. at L. 631, "to ascertain and settle the private land claims in the State of California." Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of confirmation, and it nowhere appears that either the Constitution or any law or treaty of the United States is involved in this.

[523]

It is true that in the complaint the plaintiff alleges that the several defendants claim to be the owners of parts of the Rancho Santiago de Santa Ana, adjoining the Rancho Los Bolsas on the east, granted by the Mexican Government to Antonio Yorba in 1810, and confirmed and patented by the United States to Bernard Yorba and others in 1855; and that, if the ranchos overlap, the title of the defendants is the best, because the grant of the Rancho Santiago de Santa Ana is the oldest and has precedence. He also alleges that the defendants claim "that they are 'third persons' as to whom the patents of Los Bolsas are not conclusive under the Act of" 1851, just referred to, and there are also some allegations as to the authority of the Commissioner of the General Land-Office, under the laws of the United States, to order a resurvey of the Rancho Santiago de Santa Ana, which had been once surveyed so as to exclude the premises in dispute. Many of the defendants answered, denying that they were in possession of any portion of the premises in dispute, and others claiming that they were in possession "by and with the consent of plaintiff made and given to defendants by plaintiff's agent, R. J. Northam, on or about the — day of June, 1882, and not otherwise." Others claim to be in possession "in severalty under and by virtue of written contracts for the conveyance of said several tracts of land * * * by the said plaintiff to said defendants." None of the defendants in their answers claim title under the grant of the Rancho Santiago de Santa Ana.

Upon the pleadings the court dismissed the suit, evidently for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction" of that court. Such was the clear duty of the court under the Act of 1875, unless from the questions presented by the pleadings it distinctly appeared that some right, title, privilege or immunity, on which the recovery depended, would be defeated by one construction of the Constitution or some law or treaty of the United States, or sustained by an opposite construction. *Starin* v. *New York*, 115 U. S. 257 [29: 390]. [524]

Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be; and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on. The circuit court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were

evidently made "for the purpose of creating a case" cognizable by the circuit court, when none in fact existed. The provision in section 5 of the Act of 1875, requiring the circuit court to proceed no further, and dismiss the suit when it satisfactorily appears that "such suit does not really and substantially involve a dispute or controversy properly within" its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complaint was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff.

The order dismissing the case is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[558] METROPOLITAN RAILROAD COMPANY, *Plff. in Err.*,

v.

HAMILTON A. MOORE, by Next Friend.

(See S. C. Reporter's ed. 558-575.)

Practice—Supreme Court of D. C.—appeals from special to general term—construction of statute—"insufficient evidence"—discretion.

1. Under section 772, R. S. of the District of Columbia, every order, judgment or decree, which involves the merits of the action or proceeding, may be the subject of an appeal from the Special to the General Term of the Supreme Court of the District of Columbia.

2. It is immaterial whether a motion for a new trial, based on the ground that the verdict is against the weight of evidence, is within section 804 as a motion to set aside a verdict "for insufficient evidence." This court is, however, of opinion that such motion is within said section, and that the words "insufficient evidence" apply to insufficiency of fact as well as of law.

3. The legal discretion of the Supreme Court of the District of Columbia, whether sitting at special or general term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. But this court holds, in the case presented, that the plaintiff in error was entitled by law to have that discretion exercised by said court at general term, the order appealed from having denied his motion for a new trial, on the ground that the verdict was against the weight of the evidence.

4. The provisions of the Act of March 3, 1863, establishing the Supreme Court of the District of Columbia, with its Special and General Terms, which was taken from the legislation of New York in substantially the same language, are to be construed in the sense in which they were then understood in the system from which they were taken.

[No. 247.]

Argued April 21, 1887. Decided May 2, 1887.

IN ERROR to the Supreme Court of the District of Columbia. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Nathaniel Wilson** and **Walter D. Davidge**, for plaintiff in error.

Messrs. **Frank T. Browning** and **William F. Mattingly**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This an action at law, brought by the defendant in error, in the Supreme Court of the District of Columbia, against the plaintiff in error, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servants in the management of its cars while running upon a street railroad in the City of Washington. On the trial of the cause, and after the testimony for the plaintiff was closed, the defendant asked the court to instruct the jury that, upon the testimony offered in behalf of the plaintiff, he was not entitled to recover. This was refused and an exception taken. The jury returned a verdict in favor of the plaintiff for $5,000, on which judgment was rendered. The defendant thereupon filed a motion for a new trial on the following grounds: (1) because the verdict was [559] against the weight of evidence; (2) because the verdict was against the instructions of the court; (3) because the damages awarded by the jury were excessive; and also upon exceptions taken at the trial.

The record then shows the following proceedings: "The motion for a new trial coming on to be heard upon the pleadings, the testimony and the rulings of the court, as set forth in said pleadings and in the stenographic report filed herewith and marked Exhibit A, which said report contains all the testimony in the case and the rulings of the court, the same is hereby overruled; and from the order of the court overruling said motion the defendant hereby appeals to the court in general term. And thereupon the defendant, by its said attorney, tenders to the court here its bills of exception to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record now for then, which is done accordingly." The bills of exception state the rulings of the court during the progress of the trial with the evidence applicable thereto, and Exhibit A, referred to in the order of the court overruling the motion for a new trial, sets out in full all the testimony in the case.

The record then shows the proceedings and judgment on the appeal in the general term, as follows: "Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, it appearing to the court that the order of the court below overruling the motion for a new trial on a case stated, upon the ground that the verdict of the jury was against the weight of evidence, is not an order from which an appeal lies to this court; and it also appearing to the court that the defendant's exceptions to the admissibility of evidence and to the rulings and instructions of the court were not well taken, the said appeal is hereby dismissed, and the motion for a new trial on exceptions is now overruled, and the judgment of the court is affirmed, with costs."

The defendant below sued out the present writ of error. The assignment of error relied [561] on, and the only one we find it necessary to consider, is that the court in general term refused to entertain the appeal from the action of the court at special term, overruling the motion for a new trial, so far as it was based on the ground that the verdict of the jury was against the weight of evidence, because it was not an order from which an appeal lies from the special to the general term of the court.

The opinion of the court, which is sent up with the record, expressly considers, discusses,

and decides all the questions arising on the bills of exception; but no reason is given for that part of the judgment refusing to consider the appeal so far as it rested upon the order of the court at special term, overruling the motion for a new trial, based on the ground that the verdict of the jury was against the weight of evidence. It was said in argument at the bar that this was because, a few weeks before, in the case [562] of *Stewart* v. *Elliott*, 2 Mackey, 307, decided March 13, 1883, the Supreme Court of the District of Columbia had given a carefully considered opinion concerning the very point in controversy. It was decided in that case that the right of appeal on motions for a new trial from the special to the general term was given only in three cases: (1) where the motion is based on exceptions taken during the progress of the trial; (2) where the verdict has been rendered upon insufficient evidence; and (3) for excessive damages. It was also decided that a verdict against the weight of evidence cannot be said to be a verdict upon insufficient evidence; the term "insufficient evidence," in section 804 of the Revised Statutes of the District of Columbia, being construed as meaning evidence not sufficient in law to support a verdict. It therefore held that a motion for a new trial, because the verdict was against the weight of evidence, is left by the statute entirely within the discretion of the judge at special term trying the case, and that no appeal lies from his determination to the general term.

The sections of the Revised Statutes of the United States relating to the District of Columbia, affecting the question, are as follows:

"Sec. 753. The several general terms and special terms of the circuit courts, district courts, and criminal courts, authorized by law, are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings, and acts of the general terms, special terms, circuit courts, district courts, and criminal courts rendered, made, or had, are and shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of the supreme court; but nothing contained in this section shall affect the right of appeal, as provided by law.

* * * * * *

"Sec. 772. Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and, upon such appeal, the general term [563] shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just.

* * * * * *

"Sec. 800. Nonenumerated motions in all suits and proceedings at law and in equity shall first be heard and determined at special terms. Suits in equity, not triable by jury, shall also be heard and determined at special terms. But the justice holding such special term may, in his discretion, order any such motion or suit to be heard, in the first instance, at a general term.

* * * * *

"Sec. 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised; but such case or bill of exceptions need not be sealed or signed.

"Sec. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

"Sec. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"Sec. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict, or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

The construction given by the court below to section 804 of the Revised Statutes is that it does not limit "the range of reasons for which the new trial might be granted by the judge who heard the cause;" but that "The only purpose of the enumeration in the section was to [564] designate the cases in which an appeal might be taken to the general term from the order of the trial justice refusing a new trial; and this enumeration constituted an effective limitation of the right of appeal to the three cases mentioned; viz., where the motion has been urged either '*upon exceptions*, or *for insufficient evidence*, or *for excessive damages*.' In no other case was an appeal to be allowed." *Stewart* v. *Elliott*, 2 Mackey, 307, 313.

But this construction of the statute overlooks the operation and effect of section 772. By that section an appeal will lie from the special to the general term from any order, judgment or decree, "if the same involve the merits of the action or proceeding." Certainly, motions for a new trial upon grounds other than those recited in section 804 are included in this description. A motion may be made to set aside a verdict and grant a new trial on the ground that the verdict is against law, or against the instructions of the court, or for newly discovered evidence, or because the amount is less than it should have been where the damages are ascertainable by some fixed rule of law, or for misconduct of the jury, or for fraud practiced by the successful party. None of these cases are specifically recited in section 804; and yet, if we adopt the construction put upon that section by the Supreme Court of the District of Columbia, no appeal can be had from the judgment of a special term in any of them, although they involve the merits of the action or proceeding as completely as any of those mentioned in section 804.

It is the evident purpose and meaning of section 772 to give the right of appeal from the special to the general term from every order, judgment or decree involving the merits of the action or proceeding. There is nothing in the other sections referred to which necessarily limits that right; and any construction of their language which has that effect is unwarranted.

Their object is not to specify the cases in which the action of the special term upon motions for a new trial may be reviewed on appeal by the general term. Section 804 by itself merely provides that the justice who tries the cause at special term may, in his discretion, entertain or refuse to entertain a motion to be made on [565] his minutes to set aside a verdict and grant a new trial for the grounds therein mentioned. If he entertains the motion and hears it, then by section 805 an appeal will lie to the general term from the decision. The form of that appeal is by means of a bill of exceptions or case, which shall be settled in the usual manner. Of course, if the ground of the motion for a new trial is for insufficient evidence, or for excessive damages, the bill of exceptions or case for the appeal must contain a statement of all the evidence offered and received on the trial, because it must bring to the general term all the material necessary to enable it to act upon the appeal precisely as the judge at special term acted upon the motion. If, however, the judge at special term exercises his discretion under section 804, by refusing to entertain the motion for a new trial to be made on his minutes, then the party moving for the new trial may, under section 806, predicate his motion on a case or bill of exceptions, containing, as in the former instance, all the evidence; and in that event the motion shall be heard in the first instance at a general term.

The proper conclusion in reference to motions for a new trial upon other grounds than those specified in section 804 would seem to be that in such cases the justice who tries the cause would have no discretion in reference to entertaining them, but is required to consider them in the first instance of course, with the right of appeal to the general term from his action, as provided by section 772. Section 806 mentions the cases in which the hearing on a motion for a new trial shall be heard in the first instance at a general term. Section 804 provides for cases in which, according to the discretion of the justice who tries the cause, the hearing of the motion may be had before him on his minutes in the first instance at a special term. Section 770 gives authority to the Supreme Court of the District of Columbia, in General Term, to "determine by rule what motions shall be heard at a special term, as nonenumerated motions, and what motions shall be heard at a general term in the first instance." This power of discrimination by rule is, of course, subject to the statutory provisions con- [566] tained in sections 800, 804, 805 and 806; but in every instance the order, judgment or decree, made or pronounced at any special term, if it involve the merits of the action or proceeding, may be the subject of an appeal to the general term of the supreme court by virtue of section 772. Even in cases of motions not involving the merits, such as nonenumerated motions, which by section 800 it is said "shall first be heard and determined at special terms," it is also provided by the same section that "the justice holding such special term may, in his discretion, order any such motion or suit to be heard in the first instance at a general term."

It may be said that this construction of section 772 renders section 805 superfluous. If the former section, it may be said, secures the right of appeal from every order involving the merits, there was no necessity in section 805 for expressly granting it in the cases therein referred to. If this were true, it could not, we think, limit the operation of section 772. It must have effect according to its express terms and evident meaning; and a reason may be found for the introduction of section 805, as intended, by way of more abundant caution, to exclude a possible contrary conclusion, or to show that the appeal must be upon a bill of exceptions or a case.

If section 805 is construed to limit the appeal to the general term to the particular cases mentioned in section 804, it may with equal force be contended that the enumeration of the particular motions, which by the latter section the justice, at special term, is permitted to entertain, by a necessary implication denies to him the power to consider motions for a new trial based on any other reasons. The language of the section is that the judge, at special term, may in his discretion entertain the motions therein specified. No other section professes to confer power upon the court, at special term, to consider motions for a new trial of any other description. Can it thence be inferred that no such power exists? That conclusion is rejected by common consent. How then can it be said that section 805, which recognizes the right of appeal only in the cases specified in section 804, by implication denies it in every other? It might more plausibly be argued that all other cases, not included in sections 804 and 805, are within the provisions of section 806, and may, in the first instance, be heard at a general term in the form of a case [567] or bill of exceptions, containing the necessary predicates for their support. But the only consistent interpretation to be placed on the whole enactment is that which secures the right of appeal, under section 772, from the special to the general term, in every case of an order, judgment or decree which involves the merits of the action or proceeding, and which is not otherwise specially provided for. The object of sections 804 and 805 seems to be to provide for a special class of cases, in which discretion is given to the justice, at special term, to hear or to refuse to hear motions for a new trial, providing, in the first case, for an appeal in the usual manner, and in the latter case, when he refuses to hear the motion, leaving it to be heard, under section 806, on a case or bill of exceptions, in the first instance, in the general term.

Upon this view of these statutory provisions, it is immaterial whether the motion for a new trial made in this case, so far as it was based on the ground that the verdict was against the weight of evidence, is embraced by section 804 as a motion to set aside a verdict for insufficient evidence; because, if it is not, still, as we have seen, an appeal lies by virtue of section 772 from the order of the special term denying the motion, because it involved the merits of the action. Nevertheless, we are of the opinion that the proper construction of section 804 embraces a motion for a new trial on the ground that the verdict is against the weight of evidence, as being within the terms "for insufficient evidence," as used in that section.

Upon this point, the Supreme Court of the

District of Columbia, in *Stewart* v. *Elliott*, 2 Mackey, 307, 315, said: "By a loose use of language, it may be said that a verdict '*contrary to the evidence*,' or 'against the weight of evidence,' was rendered upon '*insufficient evidence*;' and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a twofold sufficiency, *i. e.*, sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency [568] *in fact* is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, whether others may differ from them in their conclusions or not. As expressed in a recent decision in Maryland, following numerous familiar cases, 'if no evidence is offered, or if it is not such as one in reason and fairness could find from it the fact sought to be established, the court ought not to submit the finding of such fact to the jury.' *Griffith* v. *Diffenderfer*, 50 Md. 466. To the same effect is the language in 40 N. Y. Sup. Ct. 181, *Haipin* v. *R. R. Co.*: 'If there is no conflict, the sufficiency is no longer a question of fact, but becomes a question of law to be determined by the court.' It is to this legal sufficiency that the statute refers when it authorizes the appeal to this court, and to that inquiry alone have we the right to address an examination."

The court in the same opinion uses the following language (p. 314): "There is not the slightest desire upon our part to circumscribe the methods by which, according to the long established practice in this jurisdiction, the losing party may apply in the trial court for a new trial. The courts of justice would lose much of their value unless this mode of redress against unjust verdicts was tenaciously preserved by the judge, to be applied in his discretion where he believed the jury have done manifest injustice by returning a verdict against the weight of the evidence."

We see no reason, however, for supposing that the language in section 804, "for insufficient evidence," is to be limited to evidence insufficient in point of law. The words them- [569] selves do not import any distinction. It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact. Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of such proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged agreement was proven to be verbal, when the law required it to be in writing. In such cases, a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion. This is illustrated by the case of *Algeo* v. *Duncan*, 89 N. Y. 313. That was an action upon a promissory note, and the plaintiff's *prima facie* case was fully made out; the defense arose upon a plea of infancy, which was also fully proved, there being no evidence to contradict or discredit the testimony upon that point, and yet the jury returned a verdict for the plaintiff. In that case it was decided that a motion to set aside the verdict "for insufficient evidence" was properly made and entertained. *Judge* Woodruff, delivering the opinion of the court, said: "The term 'insufficient evidence,' as used in the Code, should be considered with reference to the actual issue upon which the jury were to pass, and not less with reference to the whole state of the case made by the adverse party. Suppose the sole issue in a given case was upon a plea of release. The defendant, having the affirmative of that issue, produces and proves a release under the hand and seal of the plaintiff, and the latter gives no evidence in avoidance of the release sufficient to warrant the submission of any [570] question to the jury, and yet the jury find for the plaintiff. It is true that such a verdict would be against the defendant's conclusive evidence, but it is equally true that such a verdict is without any sufficient evidence."

So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence. Therefore it was said by this court in *Randall* v. *Baltimore & O. R. R. Co.* 109 U. S. 478 [27: 1003]: "It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." In many cases, therefore, the evidence

is insufficient in law, because insufficient in fact.

The sections of the Revised Statutes relating to the District of Columbia under consideration, it is admitted, were taken substantially from the New York Code of Procedure of 1851, 1852; and it is admitted, also, that, by the construction placed upon the language contained in section 804 by the courts of New York, it includes motions to set aside a verdict against the weight of evidence, as within the phrase "for insufficient evidence." This was the very point determined in the case just referred to, of *Algeo* v. *Duncan*, 89 N. Y. 313, and in *McDonald* v. *Walter*, 40 N. Y. 551. The Supreme Court of the District of Columbia, however, in *Stewart* v. *Elliott*, *ubi supra*, declined to follow [571] these decisions of the New York Courts, because they construed the Code of Procedure of that State so as to conform to the previous well established practice in that State; and it was held that in the District of Columbia the case was widely different, because prior to the adoption of these provisions in the Act of Congress the well established practice in the District of Columbia was that which had always been in force in the State of Maryland. The argument was that in that State the granting or refusal of a motion for a new trial was a matter resting in the discretion of the court, and could not be ground for a writ of error or appeal; and that, consistently with that previous practice, sections 804 and 805 must be construed strictly, so as to limit the appeal originating in them to the cases particularly mentioned.

The language of the court in *Stewart* v. *Elliott*, *ubi supra*, on this point is: "This well settled practice, existing here when the Act of March 3, 1863, was passed, should only be considered as changed by that Act to the extent clearly indicated by its terms; and no latitude of construction can be allowed in the interpretation of a statute framed in derogation of common-law principles. As was said by the court in the case in 24 Howard (Pr.) 211, *Allgro* v. *Duncan*, before referred to, it is a safe rule to apply the former practice and interpret the obscurities and deficiences of the Code by the light of that practice."

But the Act of March 3, 1863, "To reorganize the courts in the District of Columbia and for other purposes," 12 Stat. at L. 762, was the introduction into the District of Columbia of a new organization of its judicial system. It established a single court, to be called the Supreme Court of the District of Columbia, having general jurisdiction in law and equity. It gave to that court the same jurisdiction as was then possessed and exercised by the Circuit Court of the District of Columbia, and to the justices of the new court the powers and jurisdiction of the judges of the circuit court. It also gave to each of the justices of the court power to hold a District Court of the United States for the District of Columbia, with all the powers and jurisdiction of other District Courts of the United States; and also to hold a criminal court for the trial of all crimes and offenses [572] arising within the District, with the same powers and jurisdiction as was then possessed and exercised by the Criminal Court of the District of Columbia. All the courts, therefore, previously existing in the District of Columbia, as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new Supreme Court of the District of Columbia. The arrangement of that court, for purposes of convenience and dispatch of business, into general and special terms, was taken from the system long previously established and known in the State of New York in reference to its supreme court; and, for the purpose of determining the relation of the special to the general term, the Act of Congress of March 3, 1863, adopted the provisions from the legislation of New York incorporated into the sections of the Revised Statutes now under consideration.

Instead of construing these new statutory provisions in the light of the jurisprudence of Maryland previously prevailing in the District in reference to this subject, we think that when Congress reorganized the judicial system of the District, by abolishing the old courts and by establishing the present Supreme Court of the District, with its General and Special Terms, and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words, we think that Congress adopted for this purpose the law of New York as it was understood in New York. *McDonald* v. *Hovey*, 110 U. S. 619 [28:269].

It follows, therefore, that the previous practice of the courts of Maryland, and the decisions of the Supreme Court of the United States in reference to writs of error to and appeals from the former Circuit Court of this District, are not entitled to the weight which was given to them by the Supreme Court of the District of Columbia in *Stewart* v. *Elliott*, *ubi supra*, and in their judgment in this case. It is true that motions to grant a new trial, upon the ground that the verdict is against the weight of the evidence, are, in a certain sense, addressed [573] to the discretion of the court, and can be more satisfactorily dealt with by the judge who tried the cause and who had the opportunity of seeing the witnesses and hearing them testify. And this furnishes one of the reasons why ordinarily a writ of error or an appeal will not lie for the purpose of revising and controlling the exercise of that discretion by an appellate tribunal; yet in some of the States a contrary practice prevails, and a writ of error is authorized to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below erred in not granting a new trial because the verdict was against the weight of the evidence. Such a practice in the appellate courts of the United States is perhaps forbidden by the Seventh Amendment to the Constitution of the United States, declaring that "No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." But that rule is not applicable as between the Special and General Terms of the Supreme Court of the District of Columbia as now organized. The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of

the cause during its pendency in the same court. The supreme court sitting at special term and the supreme court sitting in the general term, though the judges may differ, is the same tribunal. It is quite true, nevertheless, that the judge sitting at special term, on the trial of a cause by a jury, is, from the nature of the case, better qualified (because he sees the witnesses and hears them testify), to judge whether the verdict is warranted by the evidence, than other judges, even of the same court, who are called in to decide the same question upon a report of the testimony in writing; and where the question comes up in general term, on an appeal, all proper allowance will be made, in its consideration, for that difference, and its due weight given to the order of the judge at special term denying the motion.

[574] The difficulty in the way of a satisfactory judgment on the appeal is, therefore, not to be considered as insuperable; in fact, it applies equally to the case of motions for a new trial based on the ground that the damages allowed by the verdict are excessive, which presents purely a question of fact, not determinable by any fixed and certain rule of law. It will apply also in many cases where the ground of the motion is that the verdict is not sustained by evidence sufficient in law, for in one aspect that may involve questions of fact. That would be a proper form of motion in cases where, although there is some testimony to support the conclusion, it is so slight that the judge trying the case would be legally justified in instructing the jury to return a verdict the other way; and although in such cases it is said to be a question of law, it nevertheless involves an estimate on the part of the court of the force and efficacy of the evidence.

It is our opinion, therefore, that the Supreme Court of the District at General Term erred in dismissing the appeal from the order at special term denying the motion for a new trial, on the ground that the verdict was against the weight of evidence. It should have entertained and considered the appeal on that ground.

It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in [575] trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.

For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THEODORE J. McGOWAN ET AL., Partners as THE McGOWAN PUMP CO., *Plffs. in Err.* [575]

v.

AMERICAN PRESSED TAN BARK COMPANY.

(See S. C. Reporter's ed. 575-609.)

Contract for the construction of machinery—breach—partnership—agency—delay—modification of contract—counterclaim—recoupment—estoppel—expert witness—competency.

In an action to recover damages for the alleged breach by the defendants of a contract for the construction and erection by them of certain machinery for pressing tan bark, upon a steamboat, it is *held:* that the instructions given by the court below on the question whether the defendants contracted as partners, or as the representatives and agents of a corporation, were proper and as favorable to them as could be required; that the court committed no error in giving and refusing various other instructions, which appear in the opinion of the court; that, if the defendants proceeded under the contract, although there was a delay in preparing the boat to receive the machinery, they were bound to complete the work within the length of time contemplated by the original agreement, and such additional time as was lost by the delay in the construction of the boat; that the contract of March 30, 1882, was not substituted for the original contract of June 23, 1881, but merely waived the provision of said original contract in regard to the time required for pressing and delivering each bale; that the defendants cannot claim any balance due on account of the contract for the machinery, or on account of any other contract, as they did not in their pleadings set up any counterclaim or right of recoupment; and that an objection to the competency of the testimony of a certain witness, as an expert, was properly overruled, the question as to the weight of his evidence being for the jury, in view of his testimony as to his experience.

[No. 168.]

Argued March 25, 28, 29, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George Hoadly, T. D. Lincoln,** *Edgar M. Johnson, Edward Colston, George*

Hoadly, Jr., C. H. Stephens and *J. L. Lincoln*, for plaintiffs in error.

Mr. **Thomas McDougall** and **E. W. Kittredge**, for defendant in error.

[576] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Southern District of Ohio, by the American Pressed Tan Bark Company, a New Jersey corporation, against Theodore J. McGowan, and Robert C. Bliss, partners under the firm name of "The McGowan Pump Company," doing business at Cincinnati, Ohio, to recover damages for the alleged breach by the defendants of a contract for the construction and erection of machinery upon a steamboat. The petition by which the action was commenced sets forth a contract entered into on the 23d of June, 1881. After a trial before a jury, which occupied thirty days, there was a verdict for the plaintiff for $18,000, and a judgment accordingly, to review which the defendants have brought a writ of error.

The petition alleges that the plaintiff, being the owner of patents for the manufacture and sale of pressed tan bark, entered into a contract with one Mack, of Cincinnati, for the construction of a steamboat which was to receive, carry, and operate machinery to be erected on it by the defendants under the contract sued upon, and was to be constructed, by agreement with the defendants, under their control and supervision, and to their acceptance; and that the boat was so constructed by Mack and was accepted by the defendants. The contract be-
[577] tween the plaintiff and Mack for the construction of the boat was in writing, and was made on the 17th of June, 1881. It contained the particulars as to the size and material and mode of construction of the boat, and stated that its construction and acceptance on the part of the plaintiff was left with "Theo. J. McGowan & Bliss," and that it was to be finished and delivered, afloat, to the plaintiff, on or before August 26, 1881. The petition alleges that this contract with Mack was made with full knowledge on the part of the defendants of the purpose for which the boat was being constructed, and with their direction, counsel and advice.

The written papers constituting the contract between the plaintiff and defendants were as follows: On the 23d of April, 1881, the defendants, using the signature "Theo. J. McGowan & Bliss," wrote from Cincinnati to A. G. Darwin, the president of the plaintiff, the following letter:

"CIN'TI, O., APRIL 23d, 1881.

"A. G. Darwin:

"DEAR SIR: We herewith submit plan for bark press, two views, one plan and the other elevation. They were gotten up in great haste and are not as full as they should be, but they show what our ideas are. The operation is 2 12" hyd. presses, E E, one on each side of 20" hyd. press D, to remove the bark from containing cyl. G, alternately, after being pressed in 20" hyd. press D. They pass from the hyd. press E to hyd. press D by a track, and are filled at top end from floor above, and the bale is also delivered from top end of containing cyl. on to the floor from which cylinders are filled. F is a chamber 40" in diameter and 12 feet high, and is supplied with water and air by steam pump A, which keeps up a pressure in F to 300 lbs., to operate the hyd. presses rapid at beginning of the operation, and, when the hyd. pumps B and C have raised the pressure in hyd. press beyond 300 lbs., the check valves close and shut off connection between hyd. presses and pressure chamber. Then the hyd. pumps B and C complete the pressure until bale is pressed in 20" press and bale removed from containing cyl. The hyd. pump C is used exclusively for 20" hyd. press, and hyd. pump B is used for the two 12" presses E E. The hyd. pumps are independent of each other, [578] and each has its own steam cyl. The steam pumps use the water over again from tank from which it has been delivered from hyd. presses. The operation is about as follows: The containing cyl. is filled from upper floor, is run under 20" press and pressed up to desired pressure; it is then run on track to 12" press, where it is forced from containing cyl., which is again filled and operation repeated, and, while cyl. is being emptied the other is going through 20" press, and so on; work is done very rapidly and well. 20" press can be used up to 1,500 tons pressure.

"Trusting this hurried explanation is satisfactory and that we may have your favors,

"Yours, &c., THEO. J. MCGOWAN & BLISS.

"P. S.—Time required for each pressing and delivery of bale 2½ minutes. We guarantee the whole."

On the 20th of May, 1881, the following letter, signed "The McGowan Pump Co.," was written to Darwin:

"CINCINNATI, O., *May, 20th*, 1881.

"A. G. D., Chicago:

"Yours 18th to hand, and contents noted. By enlarging press, as per your suggestion (which we think very good), we are of opinion that we have large surplus power in presses, and almost agree with you in your ideas as to amount, but we are inexperienced with the nature of tan bark to press into a cylinder and remove therefrom, and have been governed entirely by the calculations given us by Mr. Hill, and we think there will have to be some little experimenting before you can accomplish just what you want. We do not know how much compression there will be to make bale and weight required, nor how bulky the bark will be, when loose, to make bale of required size. We do know the motions can be made in 2½ minutes and the pressure 1,500 tons given, but what kind of bale it will be we do not know. We [579] are constructing this machinery to make these bales 14" x 16", and not much clearance. We think it would be advisable to have more clearance made, by extending columns further out, to permit a large bale being made, by enlarging cylinder, as you suggest. This would necessarily make the press cost more money. The bars would have to be extended further out and the castings make heavier to resist pressure. If you come to the conclusion to have enlargement made, notify us at the earliest moment possible. We have now got scale drawings about complete, and, when the boat is procured, or other selection made for erection, we will have to add to our plan the supports for the support of presses to foundations. It will

materially change our plans if changed from boat to land, as presses are very long, and on a shallow boat would throw them above main deck. We will be glad to see you.

"THE McGOWAN PUMP CO."

On the 23d of June, 1881, the following written contract was executed:

"CINCINNATI, O., *June 23d*, 1881.

"The Am'r. Pressed Tan Bark Co., of 240 Broadway, New York.

"GENTLEMEN: We hereby propose to furnish you the following machinery:

"1. 14' x 24' engine and all necessary trimmings for grinding bark.

"2. 14' x 28' engine and all necessary trimmings for propelling boat.

"3. 3 boilers, 42" x 26', and all necessary trimmings for propelling boat.

"3 bark mills and all necessary trimmings and gearing.

"1 bark elevator, 2 elevators with platforms, for raising and lowering pressed bark to and from hold of boats, to be provided with safety catches and unwinding device; 3 heaters—1 for bark engines, 1 for boat engines, and 1 for steam pumps; 1 steam pump for boiler feed; 1 deck hand pump; 250 feet of rubber hose, couplings, and 3 nozzles; 2 hoppers and scales [580] to weigh bark; all the necessary shafting, hangers, pulleys, beltings, and all steam and escape pipes; also one 20' hyd. press and two 12' hyd. presses, with their necessary fixtures and connections, together with the necessary hyd. steam pumps, tank, etc., for pressing bark into bales; all to be done in a workmanlike manner and of first class material, and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty-three thousand seven hundred ($23,700) dollars; the above machinery to have a sufficient capacity to do the required work, and guaranteed to pass government inspection.

"THE McGOWAN PUMP CO.

"To be completed in 60 days.

"We accept the above.

"Accepted June 23, 1881.

"AM'R. TAN BARK CO.,
"By S. H. BEACH, Att'y."

On the 30th of June, 1881, the following letter was written by Darwin to "The McGowan Pump Co.:"

"NEW YORK, *June* 30, 1881.

"To the McGowan Pump Co., Cin'ti, Ohio.

"Mr. S. H. Beach hands us contract for presses, engines, boilers, etc., etc., entirely satisfactory, as we understand—that is, that the capacity of the presses, etc., are in keeping with guarantee expressed in your letter of April 28, 1881, which we consider a part of your contract, in so far as guarantee of the presses are concerned. Please give us formal acknowledgment of the same.

"Yours Respectfully, A. G. DARWIN,
"Pres't A. P. T. B. Co."

On the 5th of July, 1881, the following letter was written by the McGowan Pump Co. to Darwin:

"CINCINNATI, OHIO, *July* 5, 1881.

"A. G. Darwin, N. Y.

"DEAR SIR: Your favor of June 30th to hand and noted. Our contract is in accord with ours of April 28. Of course we do not know nor could we guarantee anything in reference [581] to whether the bark will bale or not, or weight or size of bale. That we consider an experiment, and can only be demonstrated by test.

"Yours Respectfully,
THE McGOWAN PUMP CO."

At the trial, the plaintiff offered evidence, in connection with the contract with Mack, tending to prove that that contract was drawn up in the office of the defendants, and read over by the parties before it was signed, in the presence of the defendants, and was left in their safe until sometime in November, 1881, when the boat was launched by Mack; and evidence tending to show that the defendants agreed to superintend the erection and construction of the boat, and took upon themselves the supervision and control of the same, and undertook to accept the same, for the plaintiff; that the boat was constructed for the purpose of receiving and operating the machinery of the defendants, according to plans of construction discussed between the agents of the plaintiff and Mack, and the defendants, and approved by the defendants; and that the defendants did superintend the construction of the boat and accept the same.

The petition alleges that the contract of the 23d of June, 1881, was a contract whereby the defendants agreed and guarantied to construct, erect, complete and have in operation on board of the boat, within sixty days from the date of the contract, the machinery specified in it, for the purpose of pressing tan bark under the patented process, and according to plans, specifications and details furnished by the defendants; and that the defendants guarantied that all of the machinery should be done in a workmanlike manner and of first class material, and set up on board of the boat at Cincinnati, and that all of said machinery should have sufficient capacity to do, and would do, the required work, and would pass government inspection, and that the hydraulic machinery would sustain and work up to a pressure of 1,500 tons, and that the time necessary for pressing and delivering each bale of bark would be 2½ minutes.

The breach alleged in the petition is that the [582] defendants have failed to construct, erect and complete the machinery according to the contract, and have failed to erect and complete it within the time set forth in the contract; that the machinery constructed and erected on board of the boat by the defendants is of insufficient and inferior material, is inferior and defective in character and quality of workmanship, and fails to do the work required by the contract; and that the hydraulic machinery constructed will not give, sustain or work up to the 1,500 tons pressure as guarantied by the defendants, and is defective in workmanship and unsafe. The petition further alleges that the plaintiff has wholly performed on its part the contract of the 23d of June, 1881, and paid to the defendants, on account of the $23,700 to be paid thereby, the following sums, at the following dates: November 5, 1881, $4,500; November 26, 1881, $2,500; January 24, 1882, $3,000; February 28, 1882, $2,500; and March 30, 1882, $4,000; making a total of $16,500.

The defendants put in an answer, denying generally the averments of the petition, on which the case went to trial. On the third day

of the trial, by leave of the court, the defendants filed an amendment to their answer, in the following language:

"Second defense. These defendants, protesting that the contract dated June 23, 1881, described in the petition, was not made with them, but with the McGowan Pump Company, a corporation of Ohio, say: that if it shall appear, upon the trial of this cause, that the contract was made with them as partners, under the name of the McGowan Pump Company, and not with said Corporation, then they say that said contract, as made June 23, 1881, did not provide, as a part of said contract, that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, as alleged in said petition. The defendants say that said contract, as originally executed, contained neither of said provisions, and that, if it shall appear that, by a subsequent modification of said contract, such provisions [583] were added to and became a part of said contract, then they say that the same were wholly without consideration.

"Thirdly. And for a further defense in this behalf, these defendants, protesting that the contract, dated June 23, 1881, described in the petition, was made with the McGowan Pump Company, a corporation of Ohio, say that if it shall appear, upon the trial of this cause, that it was made with them as partners, under the name of the McGowan Pump Company, then, that on and before the 30th day of March, 1882, extra work, not required by said contract, to the amount of fifteen hundred and eighty-two dollars and fifty-one cents, had been furnished to the said American Tan Bark Company, being the same extras described in the contract hereinafter copied, and that, in consideration of the transfer to the American Pressed Tan Bark Company of all the machinery embodied in the said contract of June 23, 1881, and said extras, with receipts in full for all material and machinery furnished T. G. McGowan and Bliss by other parties for steamer Tan Bark, the said contract of June 23, 1881, has been wholly released and discharged, and other terms of agreement substituted therefor, by reason of the fact that, on the 30th day of March, 1882, a contract was executed and delivered by and between the parties to the contract of June 23, 1881; viz., the McGowan Pump Company and the American Pressed Tan Bark Company, and which contract of March 30, 1882, if it shall turn out that it was made by the defendants as a partnership, under the name of the McGowan Pump Company, was made and delivered for the benefit of the same McGowan Pump Company which executed the contract of June 23, 1881, which contract is still in full force and binding between the parties, and is in the words and figures following to wit:

'CINCINNATI, O., *March* 30, 1882.

'In consideration of 11,200 dollars to be paid us we hereby transfer to the American Pressed Tan Bark Company of New York all the machinery embodied in our contract, and extras, with receipts in full for all material and [584] mach'y furnished T. J. McGowan & Bliss by other parties for steamer 'Tan Bark.' The terms of this sale are as follows: To continue all former agreements and guaranties, except time required to press bark into bales and removal from cylinders. We further agree to transfer to said Co. all special patterns made for our hyd. machinery, and also agree to transfer to said Co. our exclusive interest in the accumulator and double-end arrangement on hyd. press for bark purposes only. It is hereby agreed that the above guaranty, covering hyd. mach'y, extends only to the strength of material only up to the fifteen hundred tons pressure. We hereby acknowledge receipt of four thousand dollars; balance to be paid on presentation of receipts, as above.

'All erasures and changes made before signing.

THE MCGOWAN PUMP CO.
AMERICAN PRESSED TAN BARK CO.
By S. H. BEACH, Attorney.'

"And the defendants further say that the four thousand dollars described in the petition as paid on the 30th day of March, 1882, was paid to the said McGowan Pump Company under and in pursuance of the said contract of March 30, 1882, at the date of its execution, and is the same sum therein named and receipted for, but that no further or other payments have been made under said contract, although the same has been wholly complied with by the said McGowan Pump Company.

"Fourthly. And by way of a fourth defense in this cause, the defendants, protesting that the said contract of June 23, 1881, was made by the McGowan Pump Company, a corporation of Ohio, and not with the defendants as partners under the name of the McGowan Pump Company, nevertheless, if it shall prove, upon the trial of this cause, that it was made with them in such partnership capacity, by way of further defense, say: that in the month of March, 1882, the defendants took possession of and accepted the machinery constructed upon the said steamer 'Tan Bark,' as and for full performance of said contract, and waived any claim for further performance thereof, and have prevented the defendants from making further performance thereof, if such were [585] necessary, which the defendants deny, by taking the same into their exclusive custody and possession, and have made divers and sundry changes in said machinery themselves, so as to prevent and render impossible any further performance thereof, if any such were necessary under said contract, and have employed the McGowan Pump Company of Cincinnati, Ohio, being the same Company which entered into the contract of June 23, 1881, described in the petition, to do work to be used in making other changes and alterations, which last named work done by the McGowan Pump Company, and which, if said Company turn out to have been a partnership, was done by the defendants as such partnership, amounts to the sums of $1,384.96 and $146,50, for which an action is now pending against the said plaintiff on behalf of the said McGowan Pump Company, as aforesaid; and said defendants have removed said steamer 'Tan Bark,' and all said machinery so altered, from the jurisdiction of this court and into the State of Tennessee, where the same now is, and have appropriated the same to their own use."

The plaintiff put in a reply to this amended answer. In regard to the second defense, the reply denies that the provisions of the contract,

that the hydraulic machinery would sustain and work up to a pressure of 1,500 tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, were without consideration, and denies the other allegations of the second defense. As to the third defense, it alleges that the instrument of the 30th of March, 1882, was executed by it on the faith of representations made to it by the defendants that they had operated and tested the hydraulic machinery up to a pressure of 1,000 tons, and that the bales of bark pressed by them on the trial of the machinery made by them on the 27th of March, 1882, had received a pressure of 1,000 tons therefrom, and that the machinery as so constructed had been operated by the defendants under said pressure of 1,000 tons; that those representations were untrue; that had the plaintiff known that fact, it would not have executed the instrument; that, on discovering the untruth of the representations, it immediately notified the defendants that the agreement [586] set forth in the instrument was null and void; that the same was thereupon abandoned by the parties thereto; and that the hydraulic machinery never has worked, and never will work, up to a pressure of 1,500 tons, and wholly fails to comply with the agreements and guaranties made by the defendants. It denies the other allegations of the third defense. As to the fourth defense, it avers that, after the defendants refused to do any further work on the machinery, it made, at heavy expense, alterations in it to make it operative.

The bill of exceptions states that the plaintiff gave evidence "tending to prove that the defendants were partners under, and signed, the name of T. J. McGowan & Bliss and The McGowan Pump Company, and tending to show that, at the time the contract of June 23 was signed, the defendants, upon being asked the reason for using the name of The McGowan Pump Company, said it was to retain the old name;" also, that the plaintiff gave evidence "tending to show defendants had negotiated with plaintiff as a firm, under the name of The McGowan Pump Company, prior to June 23, 1881, and that the defendants contracted with the plaintiff June 23, 1881, as a firm, under the name of The McGowan Pump Company, and that all the plaintiff's dealings with the defendants were as such partnership;" and evidence tending to show that the plaintiff was a Corporation duly organized under the laws of New Jersey, and owned valuable patents for the grinding and pressing of tan bark, which it expected to utilize in this machinery and the use thereof; and evidence tending to show "that the machinery named in the said contract of June 23, 1881, was not completely finished and put upon the said boat within the sixty days named in said contract, nor for a long time thereafter, and that, when completed, it was of insufficient material, and not of sufficient power or strength to press a bale of tan bark with a pressure of fifteen hundred tons in two and one half minutes, nor within any time; that the entire machinery was wholly insufficient to accomplish the purpose for which it was constructed, and was very rough, [587] and was made in an unworkmanlike manner; that, in consequence thereof, it suffered great delay in the use of the said boat and machinery, and great damage in having to expend a large sum of money upon the same; and that it lost a very large sum of money by the breach of the said contract before it was finished, and after that, because of the insufficiency of the said machinery and its defective character."

The contract of March 30, 1882, was in the words set forth in the third defense in the amendment to the answer. The plaintiff gave evidence tending to show that it had prior to the 30th of March, 1882, paid to the defendants, on account of the machinery and work, $12,500; that, a few days after signing the last named contract, it paid the $4,000 named therein; that no machinery had been put in the boat on the 10th of November, 1881; and that there was nothing ready on the boat by December 5, 1881; and evidence tending to show that, after it took possession of the boat and machinery, it made additions thereto, costing some $1,200, a part of which the defendants did for it under a written contract of the 19th of April, 1882, mentioned hereafter.

The bill of exceptions also contains the following statements: "The plaintiff offered evidence of experts tending to show that the machinery and material of which it was constructed was poor and insufficient to sustain the required pressure, and, upon cross examination upon this point, the said witnesses gave evidence tending to show that a single hydraulic cylinder could not be made of cast iron so as to bear 1,500 tons pressure; that the water would permeate and pass through the iron; and upon examination by the court, evidence tending to prove that it was not practicable to get such pressure with one cylinder of the kind, but that it might be done with three cylinders, of a pressure of 500 tons each upon one platen; and, on further cross examination, they gave evidence tending to show that water would force itself through cast iron at 700 tons pressure, that cast iron is not safe for more than 600 tons. And the plaintiff gave evidence tending to show that the machinery was only of the value of scrap. The plaintiff also gave evidence tending to show that, at and before the contract of March 30, 1882, was entered [588] into, McGowan had stated that he had had a pressure, on previous tests, of 800 to 1,000 tons on the machinery in pressing bark, and that said representations were false, and that plaintiff was thereby induced to enter into said agreement. Plaintiff gave evidence tending to show that the defendants had tested the machinery, and it was found defective, on the 27th of March, 1882, before the execution of the contract of March 30; and defendants gave evidence tending to show the contrary, and that they made no false representations, and that plaintiff knew, from its employés present at the test, what pressure it bore at the time, and reported to the plaintiff that it had never borne a pressure of over 400 tons, and that there was no more on it at that time. They gave evidence tending to show that McGowan claimed that the failure of the machinery was caused by the insufficient foundations of the boat, because the machinery was not adapted to the boat; that they had done all that was practicable, under the condition of the boat upon which the machinery was to be placed. But the plaintiff gave evidence tending, on the con-

trary, to show that it was practicable to construct such machinery of cast iron and place it upon said boat." "The defendants offered evidence tending to show that any such boat with machinery upon it had never before been known and used; that it had in no way been tested; and that it was an experiment. They also offered evidence tending to show that the plaintiff had possession of the said boat immediately after she came off the ways, on or about the first of November, 1881, and received the boat from Mack, and that it had witnessed experiments of pressing bark made with the machinery in January, February and March, 1882, and was familiar with the condition, strength and workmanship of the same before entering into the contract of March 30, 1882, and had knowledge before that of the amount of pressure which the defendants had used thereon." "The defendants offered evidence tending to show that they were not boat builders, had no knowledge of boats or of boat building, as the plaintiff knew, and that defendants refused to take any responsibility about the boat, and had [589] nothing to do with planning, constructing, supervising, accepting, or controlling it or its foundations; that they supposed Mr. Mack would attend to that; that the boat was not launched or presented for the machinery until November, 1881; that they supposed, when they commenced to put the machinery upon it, that it would be sufficiently strong; that the foundations, as they proceeded, proved wholly insufficient for that purpose, being too weak; that they reported it to the plaintiff's agent; that he said to them to go ahead and put it on and he would guaranty that they would stand; that the defects in the boat and the bad management of the machinery by the plaintiff caused all the difficulty and breakage in the machinery, and all the expense in repairing; and, in addition thereto, the defendants also offered proof tending to show that the boat was not ready for their work until about the 10th of November, 1881, and that they used due diligence in the manufacture of the machinery and in putting it upon the boat, and that the delay therein was due to the delay in finishing the boat and in the character of the boat when presented for the machinery to be put upon the same. They also offered proof tending to show that the material of which the said machinery was constructed was of sufficient strength to work 1,500 tons and more. They also offered proof tending to show that, in March and April, 1882, the plaintiff took possession and control of said machinery, and that it was built and set up on its boat by the defendants under the contract of June 23, 1881, and afterwards, to make it more perfect, effectual, and useful, entered into the contract of April 19, 1882, with the defendants, and the defendants furnished the labor and the material provided for in said contract and that the plaintiff used it on their boat. The defendants also gave evidence tending to show that the machinery for pressing the bark was constructed of the very best cast iron, and that that was the only material of which said machinery is ever constructed; that the same was of the very highest and best character, and that the workmen upon it and the workmanship were of the highest and best character, and that they endeavored in every way they could to make this machinery as strong and as well as it could be made. They also offered evidence tending to [590] show that, after the boat was launched and ready for the machinery, they proceeded to put the machinery upon the boat, and thereafter they worked with due diligence in putting the same upon the said boat. The defendants also offered proof tending to show that they had fulfilled their contract and were not liable for any damage to the plaintiff, but, on the contrary, the plaintiff owed them for said work, and under the agreement of March 30, 1882, the sum of $8,731.46. The defendants also offered evidence tending to show that they never examined Mack's contract, and that there was nothing said about the character of the foundations of such machinery; that they supposed that, Mack being a boat builder, he knew what foundations for the machinery would be necessary. They also gave evidence tending to show that the McGowan Pump Company was a corporation at the time of entering into the contract of June 29, 1881, and was so acting in making the contract, and that the plaintiff was so informed of it before the signing of the contract." "They also offered evidence tending to show that the boat was not constructed to carry freight or passengers, and the propelling machinery was to be plain, unornamented machinery, to propel the boat from landing to landing at a rate of from two to two and a half miles per hour, and that, on her trip to Paducah and her trial trip up stream, she did more than that."

"All the letters of defendants, copies of which are attached in the exhibits, had the following letter head printed on them:

'Established 1862.

'Theo. J. McGowan, R. C. Bliss.
'Senior partner of late McGowan Bros.

'Manufacturers of railroad water station supplies, water columns, tank valves, steam and power pumps, wrought and cast iron pipe, etc.

'OFFICE OF THE MCGOWAN PUMP CO.,
'Nos. 141 AND 143 WEST SECOND STREET,
CINCINNATI, ——, 188–.'

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being the printed letter head that was in use [591] prior to June 20, 1881, except" the letter of April 23, 1881, which had the same letter head omitting the word "The" before "McGowan Pump Co.," and a letter dated May 8, 1881, signed "The McGowan Pump Company," and addressed to Darwin. The bill of exceptions does not purport to set forth all the evidence that was given at the trial.

After the verdict and before judgment the defendants moved for a new trial, and, in case it should not be granted, then in arrest of judgment, and, in case neither of such motions was granted, then to restrain the issuing of execution in this case to the amount which should remain after making the deduction of the amount sued for in the suit mentioned in the fourth defense in the amendment to the answer. These motions were denied, and the defendants excepted.

The first error assigned relates to the question whether the contract of June 23, 1881, was made by the defendants as copartners, or was

made by a corporation called "The McGowan Pump Company." If by the latter, the action must fail.

The court under exceptions by the defendants, gave the following instructions to the jury:

"1. If the jury find from the evidence that defendants, prior to the making of the contract of June 23, 1881, held themselves out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of said contract, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not in fact a firm, and that there was a corporation called 'The McGowan Pump Company.'

"2. If the jury find, from the evidence, that the defendants were, prior to June 23, 1881, doing business as partners under the name of 'The McGowan Pump Company' or 'McGowan Pump Co.,' and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability [592] thereon, even if on that date a corporation existed called 'The McGowan Pump Company,' with which defendants may have been connected, and to which they had turned over their entire partnership business and assets."

The court also charged the jury as follows on the question of partnership, no part of which charge was excepted to by the defendants:

"The plaintiff has sued the defendants as partners, and can recover against them only as individuals, jointly, equally, and severally liable upon their contract. The two defendants McGowan and Bliss, undeniably negotiated and executed the contract, but whether as individuals, or as the representatives and agents of a corporation, is a question you are to determine. On the facts of this case, which are not disputed, the law charges them as partners, in their liability on the contract with the plaintiff, unless they have established by proof that they were, in making the contract, only the agents of a corporation, and disclosed their agency to the plaintiff, or that this in fact was otherwise known to the plaintiff. It is wholly immaterial, if they were in fact partners, or held themselves out to the plaintiff as partners, which is precisely the same thing as if they were partners in fact, by what name they did their business or made this contract; whether they were known or contracted as 'Theodore J. McGowan & Bliss,' as 'McGowan Pump Company,' or as 'The McGowan Pump Company,' or whether they used any or all of these names indifferently or interchangeably. Now, if they held themselves out to the plaintiff as partners, it is unimportant whether they were a corporation or not in fact. Your inquiries are: (1) Were they partners in fact in making this contract? If so, they would be liable as partners. (2) Did they hold themselves out to the plaintiff as partners? If so, they would be liable in that relation. (3) Were they in fact the authorized agents or representatives of a corporation competent to contract as a corporation, or did they assume to be so authorized, and in that representative capacity make this contract? If so, they cannot be held as partners, provided they disclosed their agency to the agents acting about this business for the plaintiff Corporation; namely, Darwin, Beach, or Hill, or any of them, or if these [593] agents of the plaintiff Corporation otherwise knew that fact. If the jury find that, on the 23d of June, 1881, there was in existence a corporation called 'The McGowan Pump Company,' qualified to do business, when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed Beach that it was that Corporation making the contract, the verdict must be for the defendants, because the Corporation is not here sued. And in ascertaining whether the Corporation existed in fact, if you find that the entire amount of capital stock of 'The McGowan Pump Company' was subscribed, and the subscribers met and elected directors, and the directors elected Theodore J. McGowan president and Robert C. Bliss secretary, and said president and secretary made the contract of June 23, 1881, in the name of 'The McGowan Pump Company,' and informed the agent of the plaintiff at the time that 'The McGowan Pump Company' was a corporation, and was contracting in that capacity, then the defendants are entitled to a verdict, notwithstanding it may appear to the jury that the subscribers to the articles of incorporation failed to certify to the Secretary of State, as required by law, that said subscription of stock had been made. But, as a corporation in Ohio can only act by or under the authority of its board of directors, and on the 23d June, 1881, there is no evidence tending to show any action of the board of the Corporation known as the McGowan Pump Company authorizing the contract in this case to be made, and authorizing either McGowan or Bliss to contract for the Corporation, you should consider the fact that they had no such authority on that date to make a contract for the Corporation, in determining whether they did in fact undertake to contract for the Corporation, and whether the signature to said contract was the signature of the Corporation or of the defendants as partners. But, while you should give this fact its due weight, also the fact that the final organization sought to be proved was only a few days prior to the contract, together with all the other facts relating to the formation of the Corporation, it is proper to say that, in the opinion of the court, the want of direct authority conferred by a board of directors [594] would not, in this controversy, so affect the contract as to convert it into one of partnership, because that is a question between the Corporation and its officers assuming to act for it; wherefore, if you find that, notwithstanding this want of authority, the defendants assumed, in their corporate capacity, to contract with the plaintiff, and notified Beach that they were so assuming to act, or he otherwise knew it, your verdict must be for the defendants, irrespective of any want of anthority. This point of notifying Beach is one of direct conflict of testimony between the parties, which you must settle under the rules to be hereafter mentioned, the court being content to say here that it is a matter in this lawsuit of paramount importance to both parties, which demands your most careful consideration. In determining these ques-

tions submitted to you on this branch of the case you may look to all the facts in proof having any bearing on the questions." "I invite your attention to certain features of the evidence on this branch of the case. From the origin of the transaction in controversy in this case, found in Darwin's letter of March 12, 1881, and even prior to that time, as shown by the defendants' dealings with him as president of another company, it is undisputed that the defendants dealt, in the negotiations with the plaintiff's agent, as partners, no matter under what name, until, at the very earliest, about the 20th May, when the alleged transfer of assets to the Corporation is said to have taken place; and it may be you will find, in the disputed facts, that they so dealt down to about June 20, 1881, when the minutes of corporate organization, in proof, show that a more complete organization was attempted or perfected. The exact status of this Corporation between these dates might be under some circumstances a matter of grave importance, as to which it would be the duty of the court to instruct you more fully. But here the court has, in the instructions already given, indicated the greatest influence it can have on this issue between the parties. Perhaps a fuller explanation of the legal effect of the proof about the status of this Corporation may aid you. It cannot be denied that the defendants were partners from the date of their partnership articles to the dissolution of [595] the partnership by the substitution of a corporation; nor can it be denied that, as early as 1880, more than a year before this transaction began, the defendants took the primary step to organize a corporation, but nothing more until May or June, 1881, a short time before this contract was made; but it is equally undeniable that they negotiated and dealt with plaintiff as partners, necessarily so, until the Corporation was more thoroughly established than it was by this primary step. Now, there is no proof tending to show the plaintiff's agents had any sort of knowledge of the corporate existence of 'The McGowan Pump Company,' in fact, down to the very moment of signing the contract of June 23, 1881 when the defendants testify they told Beach of it, and that they were contracting as a corporation, which is denied by the plaintiff." "There is no proof whatever that plaintiff's agents" "were ever informed by defendants of their own corporate capacity, be it what it may, at any time prior to the signing of the contract, or that by other means they had such information. Therefore the court charges you that, by their relations in fact, the course of their dealings with the plaintiff, as shown by their letters and repeated interviews with each other throughout the negotiations, from the beginning to the moment of signing the contract, the defendants are estopped, in fact and law, to deny that, as to the plaintiff, they were partners in making the contract, unless you believe that they then disclosed their corporate character to Beach. If you find that to be a fact, the court has already told you that your verdict should be absolutely for the defendants. If you do not find that to be a fact, but, on the contrary, believe the plaintiff's proof that no such disclosure was made, the defendants are liable as partners for whatever damages you may find for the plaintiff, on the merits of the case."

The court also gave the following instruction, at the request of the defendants: "2. If, before the 23d day of June, 1881, the McGowan Pump Company had become incorporated and organized under the laws of Ohio, with Theodore McGowan as president and Robert C. Bliss as secretary, and if, when the contract of [596] that date was made, the plaintiff was informed by the defendants that the McGowan Pump Company, which entered into said contract, was a corporation, then the plaintiff cannot recover against the present defendants."

The court refused to give the following instructions asked by the defendants, and to each refusal the defendants excepted: "If the McGowan Pump Company, which entered into the contract of June 23, 1881, was in fact an incorporated company and not a partnership, then the plaintiff cannot recover in this case, whether the plaintiff supposed it to be a partnership or not." "31. If the agent of the plaintiff, sent here to make a contract for this work, did contract with the McGowan Pump Company, and had it explained to him that the said Company had organized as a corporation, and the defendants went on under said Corporation, and did the work provided for, which the plaintiff subsequently took from said Corporation, they cannot now deny that they dealt with the said Corporation."

It is objected by the defendants that the court did not specify any limit of time prior to the making of the contract of June 23, 1881, during which the holding out of the defendants to the plaintiff as partners, and the dealing of the plaintiff with them as such, would have the effect, in the absence of notice to the plaintiff of the change from a partnership to a corporation, to fix the liability of the defendants as partners; that, although the bill of exceptions states that the plaintiff and the defendants were in correspondence prior to the organization of the Corporation, it does not state that there had been any dealings between them; and that especially there was error in refusing to charge proposition 31, above quoted.

The bill of exceptions does not show that there was any evidence that the defendants went on doing the work as a corporation, or that the plaintiff took the work from the Corporation. There was no exception to the general charge of the court on the subject, above quoted. The court, in its general charge, distinctly instructed the jury that if McGowan, as president of the Corporation, and Bliss as its secretary, made the contract of June 23, 1881, in the name of "The McGowan Pump Company," and informed the agent of the plaintiff [597] at the time that the McGowan Pump Company was a corporation and was contracting in that capacity, the defendants were entitled to a verdict. Again, the court instructed the jury that if, notwithstanding any want of authority in McGowan and Bliss to contract for the Corporation, they assumed, in their corporate capacity, to contract with the plaintiff, and to notify the plaintiff's agent, Beach, that they so assumed to act, or he otherwise knew it, their verdict must be for the defendants, irrespective of any want of authority. Again, in its general charge, the court instructed the jury as follows: "If the jury find that, on the 23d of June, 1881, there was in existence a corporation called 'The Mc-

Gowan Pump Co.,' qualified to do business when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed Beach that it was that Corporation making the contract, the verdict must be for the defendants, because the Corporation is not here sued."

This disposition of the question of partnership by the court seems to us to have been proper and to have been as favorable to the defendants as they were entitled to ask.

The criticism as to the want of the specification of the limit of time has no force. The bill of exceptions does not purport to state all the evidence that was given at the trial. It does not show what dealings had been had between the parties prior to the making of the contract of June 23, 1881; nor does it appear by the record that the attention of the court was drawn by the defendants to this point of the limit of time, or that any request was made in regard to it.

It is next objected by the defendants that the petition of the plaintiff alleges that the contract sued upon was fully performed by the plaintiff, and alleges, as a breach, that the defendants failed to erect and complete the machinery within the time set forth in the contract; that the averment of performance by the plaintiff is inconsistent with a recovery based on the theory that the defendants waived the performance by the plaintiff of the part of the contract relating to the time when the boat was to be furnished; that the plaintiff could not recover, on the averments of the petition, without proving that the boat was ready to receive the machinery in time to allow it to be erected on the boat before the end of sixty days from June 23, 1881; and that the proof was that the boat was not ready for the machinery until about the 10th of November, 1881. [598]

On this subject the court charged the jury as follows, under the exception of the defendants: "If the jury find that the contract was made, as alleged, with defendants, and that, after the day named for the completion of the contract, the work not being then completed, the boat was not then in readiness to receive it, yet if the boat was thereafter made ready by James Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement, and such additional time as may have been lost in the prosecution of the work, occasioned by Mack's delay in the construction of the boat; and, failing in this, they are liable for the consequences of such failure and delay. Therefore, the court charges you that the defendants are only liable for any damage caused by delay for the period of delay found by application of the above rule to the proof in this case."

The defendants contend that this was not a proper charge under the issues, and that, if the boat was not ready for the machinery within the sixty days provided for by the contract, the agreement of the defendants, if they proceeded to construct the machinery, became an agreement to deliver it within a reasonable time after the boat should be made ready to receive it. In accordance with these views, the defendants asked for the following instructions, each of which was refused and to each refusal they excepted: "4. That the contract sued on is entire, and required the plaintiff to have the machinery therein described built and set up on board a boat to be furnished by the plaintiff, within 60 days from June 23, 1881, and that, if the plaintiff failed to furnish such boat until after the said period of 60 days from June 23, 1881, had expired, and, by reason of such failure, the defendants were unable to begin to set up such machinery on board said boat until after the expiration of said period of 60 days from June 23, 1881, then the defendants are entitled to recover." "21. That, if the boat was not ready for the machinery in time to have the same put up within 60 days from the date of the contract, but the parties subsequently proceeded, at the request of Beach, to put the machinery upon the boat, they were only bound to proceed with reasonable diligence under the circumstances, and were not bound to complete the same within 60 days thereafter, if the boat or the foundations provided for the machinery were so insufficient as to prevent such completion within said time." "23. That, as the machinery was to be put upon a boat to be furnished by the plaintiff, to require of the defendants that they have the machinery finished and put up on the boat within the 60 days, the plaintiff must have had the boat ready and fit for the purpose in time to enable the defendants to have put the machinery in place upon the boat, the same being ready therefor, within the 60 days, and, if the boat was not ready in such time, then the plaintiff cannot recover damages for not having the said machinery so completed within 60 days. In such case the defendants were only bound to proceed with due diligence under the circumstances." [599]

The argument on the part of the defendants is that the plaintiff, by failing to have the boat ready in time for the performance of the contract according to its terms, prevented such performance; that there was no mere postponement of it for the number of days of delay caused by the plaintiff; that there is nothing to show that the defendants agreed, or would have agreed, to erect the machinery within 60 days after November 10, 1881; that, although both parties went on to perform the contract, the element of the fixed time was eliminated from it; and that the true rule is that the contract was to be performed in a reasonable time, having regard to the nature and circumstances of the performance.

The bill of exceptions states that the plaintiff "gave evidence tending to show that the machinery named in the said contract of June 23, 1881, was not completely finished and put upon said boat within the 60 days named in said contract, nor for a long time thereafter;" that, in consequence thereof, it "suffered great delay in the use of the said boat and machinery, and great damage in having to expend a large sum of money upon the same; and that the plaintiff lost a very large sum of money by the breach of said contract before it," the machinery, "was finished." [600]

The petition contains an allegation of special damage, from the loss of tan bark occasioned by the delay in not erecting the machinery within 60 days from June 23, 1881; but the

bill of exceptions does not show that there was any evidence tending to establish this special damage, except as it may be inferred, from the general charge of the court, that such testimony was offered. But the court, in its general charge, instructed the jury as follows: "The contract bound the defendants to complete the machinery and set it up on the boat within 60 days. It is too plain for argument that the failure of the plaintiff to have the boat ready would excuse the defendants from strict compliance with this part of the contract, and that all delay which occurred before the boat was ready is out of the case. The plaintiff was as much responsible for that as the defendants, or sufficiently so to preclude him from complaint on that score."

It is therefore claimed by the plaintiff that no damages were included in the verdict on account of the delay in not erecting the machinery within 60 days from June 23, 1881. This appears to be a sound proposition. We see no error in the charge of the court, that, if the defendants proceeded under the contract, they were bound to complete the work within the length of time contemplated by the original agreement, and such additional time as was lost by the delay in the construction of the boat. There is nothing in the bill of exceptions to show that the machinery could not have been erected within 60 days after the boat was ready to receive it. The parties treated the contract as in full force, except as to the time in which it was to be performed, and the work was done and the payments were made under the contract as thus extended in time. The defendants made no claim before the suit was brought, that the contract was rescinded by reason of the nonreadiness of the boat until the 10th of November, 1881, or that there was any reason [601] in that fact which prevented them from complying with their part of the contract within the 60 days after the delivery of the boat. No such defense is set up by them in their answer, and they introduced no evidence to that effect, so far as the bill of exceptions shows. These views are in accordance with the ruling of this court in *Phillips & Colby C. Co.* v. *Seymour*, 91 U. S. 646 [23: 341]. The plaintiff went on paying the defendants on account for the machinery, and the defendants proceeded in erecting it without complaining of the delay in the furnishing of the boat, and without any claim that they were not required to furnish the machinery within the 60 days after the furnishing of the boat. See also *Graveson* v. *Tobey*, 75 Ill. 540.

The next assignment of error relates to the effect of the contract of March 30, 1882, set up in the third defense in the amended answer. The theory of the defendants is that this contract was substituted for all prior contracts and ought to have been the basis of the suit. The circuit court treated it as merely waiving the provision of the original contract in regard to the time required for pressing and delivering each bale.

The court, in its general charge, charged as follows, in regard to the contract of March 30, 1882, under exception by the defendants: "But the plaintiff has not sued on that contract, nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defense to a claim of breach, and, so setting it up, the only question is whether it constitutes a defense. It is only a supplemental contract to that of June 23. It continues the guaranties of that contract, with the exception as to time. It does not make new guaranties for a new consideration, but obligates the defendants to carry out the old contract with the named exception, and imposes on defendants new obligations about the patterns, etc., which are independent and separable from the old contract and the old consideration. The court, therefore, charges you that its only effect is to reduce the original guaranty of the capacity of the machine, in respect to the time [602] for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud it leaves that guaranty still in force." And again: "The defendants claim that its proper construction requires that the 1,500 tons only applies to strength of material to endure that pressure, as a maximum of endurance, not for a continuous working pressure. It belonged to the plaintiff to say what it wanted, and to defendants to consider it when they made the contract, whether they could give that which was wanted. There is no proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons; but, on the contrary, read in the light of the circumstances proved, the language of the contract clearly means that the plaintiff wanted a machine by which it could deliver on each and every bale a compression of 1,500 tons, if it chose so to use it, and which would endure the work for the length of time such a machine would wear, under prudent and reasonable management by the plaintiff." Still further: "If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23 and July 5, 1881, then, while the McGowan Pump Co. did not guarantee that bark would bale, it did guaranty to furnish practical machinery, set up on board of the boat, that was capable, in its design and in all its parts, of being worked to apply 1,500 tons pressure to press a bale of bark every two and one half minutes, or within a reasonable time, if the contract of March 30 be valid, and capable, with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such mechanism constructed for similar uses." "If the jury find that the contract of March 30, 1882, was duly made and is binding between the parties, it in no wise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guaranties contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales, and to remove them from the cylinders. All the other obliga- [603] tions and guaranties of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30, 1882."

The defendants requested the following instructions, each of which was refused by the court, and to each refusal the defendants ex-

cepted: "5. That the plaintiff cannot recover upon the issue in this cause if it appear to the jury, from the testimony, that the contract which has been read in evidence, bearing date March 30, 1882, was in good faith executed and delivered by both the parties to this cause." "10. That the plaintiff does not entitle itself to recover upon the contract of June 23, 1881, by showing that the defendants failed to comply with the contract of March 30, 1882." "That, even if it be true, and believed by the jury from the testimony, that the contract of March 30, 1882, was broken by the defendants by nondelivery of the receipts, or of assignments of patent-rights, therein described, nevertheless, such breach does not entitle the plaintiff to recover in this case upon the contract of June 23, 1881." "12. A breach of the contract of March 30, 1882, entitles the party who did not break such contract, if it suffered damages by reason of such breach, to recover in an action for such damages founded upon such contract; but it furnishes no ground for recovery in this case upon the contract of June 23, 1881, for damages suffered by reason of a breach of the last named contract." "14. That, by the contract of March 30, 1882, the parties waived and withdrew all previous agreements and guaranties relating to the hydraulic machinery, except only that the material of which it was composed had sufficient strength to work up to a total pressure of a thousand tons, and that the defendants are not liable to damages, in this action, for any defect in said hydraulic machinery, if said material had sufficient strength to work up to such pressure, unless, under the charge of the court, the jury believe, from the testimony, that the said contract was procured by fraud or false representation, and is, therefore, not binding upon the plaintiff." "28. If it appear, in this case, that the machinery contracted for in the contract of March 30, 1882, was not possible to be made as working machinery, because the material of which it was [604] to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1,500 tons, then the contract of the 30th March, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

The argument on the part of the defendants is that the instrument of March 30, 1882, contained a new contract, and that the effect of it was to withdraw all guaranties relative to the hydraulic machinery, except that the strength of the material would be such as to bear 1,500 tons pressure; that the new contract did not modify the original guaranty that the boilers and machinery for propelling the steamboat would be made in a workmanlike manner and of first class material, with sufficient capacity to do the required work and to pass government inspection, but that all guaranties in regard to the hydraulic machinery intended to press the bark into bales were withdrawn except the one relating to the strength of material; and that, as to that, all guaranties were withdrawn except that the material would bear 1,500 tons pressure, not for continuous work, but a pressure up to 1,500 tons, or without bursting upon test.

The view taken by the court on this subject is shown by the following instructions given by it, to each of which the defendants excepted: "5. The written contract, if the jury find it was made between the plaintiff and the defendants, requires the machinery to be made under it to be constructed in a workmanlike manner and of first class materials and to be set up aboard of the plaintiff's boat in Cincinnati. The machinery is to have sufficient capacity to do the required work, and is guarantied by the McGowan Pump Company. The contract having thus defined the character of the work, it cannot in that respect be varied by parol evidence, which is admissible only to enable us to properly interpret the contract. It required the machinery to be constructed in a workmanlike manner and of first class materials." "6. The machinery being constructed to be set up on the plaintiff's boat, it is for the jury to determine what the boat was that was referred to, [605] and, if the boat intended was one provided to be constructed by one James Mack, of a kind, and of dimensions, and with bulk heads and foundations, then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulk heads so defined and understood by the parties, for rendering the machinery stable to do the required work, when set up aboard the boat."

The court also refused to give the following instructions asked by the defendants, and they excepted to each refusal: "18. If the machinery contracted for in this case was in fact incapable of working up to the pressure of 1,500 tons, required by contracts between the parties, and this incapacity resulted not from any defect of workmanship or construction, but from the fact that such machinery, of the character and description provided for by said contracts, cannot be made capable of working up to such pressure, and if the machinery was in fact made of first class material and in a workmanlike manner, and was capable of receiving the greatest pressure machinery of the description called for by said contract could be made to work up to—then the fact that said machinery will not work up to such pressure does not entitle the plaintiff to recover any damages based on such incapacity to work up to such pressure." "That the guaranty referred to in the contract of June 23, 1881, is a guaranty of the machinery to be made, and not a guaranty as to its operation upon the boat which the plaintiff might present for that purpose to the defendants."

The defendants also excepted to the following parts of the general charge of the court: "But, if you find that, within the range of mechanical art, such pressure could have been delivered to the bark, it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing the machine upon a floating foundation, to be furnished by the plaintiff, of which more here- [606] after will be given you in charge. They were not restricted in plans, specifications or materials, and were bound to select such plans and materials as were available and capable of doing the work. It was their misfortune if the

price demanded was not sufficient to cover the cost; but that fact, if it be one, cannot relieve them. In short, they contracted as 'mechanical engineers,' and as manufacturers, and are bound by the contract as they made it, in this respect."

In regard to the foregoing matters the defendants allege, as error, that the circuit court held that the contract was broken unless the hydraulic machinery had sufficient capacity to do the required work, was constructed in a workmanlike manner and of first class materials, and would work efficiently and be capable of continuous operation for the ordinary duration of such mechanism, constructed for similar uses, and be able to deliver a pressure of 1,500 tons to the bark, and that the plaintiff could by it compress every bale to the extent of 1,500 tons pressure, for the length of time such a machine would work under prudent and reasonable management.

The contract of March 30, 1882, did not, as erroneously stated in the 28th request of the defendants, contract for any machinery. It refers to the machinery as being in existence, and provides for the transfer to the plaintiff of the title to it and to certain extras, and adjusts the amount due under the original contract at the sum of $11,200. It contains a modification of the original contract in respect to the time required for each pressing and delivery of a bale, and provides, in substance, that the original agreement, with its guaranties as to the hydraulic machinery, shall otherwise remain unaltered The court, in its general charge to the jury, charged on these matters as follows: "But it is insisted this contract of March 30, 1882, is not binding and can have no effect in this suit, because defendants have not performed their part of the consideration; namely, the delivery of the vouchers or receipts mentioned, the transfer of the patterns, the interest in the patents for the accumulator, and the double end; that, as to the latter, there is no patent and can be no performance. The defendants insist, on the other hand, that the balance of the money has not been paid by plaintiff, and it cannot complain of nonperformance; and there is proof tending to show defendants have still pending an application for this patent. The court regards all this subject as immaterial to this controversy, and charges you that the obligation to perform these things by the defendants does not arise until the money is tendered or paid, and no breach could be averred until that has been done. But the plaintiff has not sued on that contract or averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defense to a claim of breach, and, so setting it up, the only question is whether it constitutes a defense." "The court, therefore, charges you, that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud, it leaves that guaranty still in force. But you must understand that the failure, if any, of the defendants to deliver the vouchers, patterns, etc., does not at all contribute to any alleged breach of the guaranty for the capacity and quality of the machine, and such failure does not entitle plaintiff to recover for anything sued for in this suit."

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We are of opinion that the court rightly disposed of the questions involved in the foregoing branch of the case.

It is also alleged by the defendants, as error, that the court instructed the jury that if they found for the plaintiff, they were not to make any deduction from the amount of damages on account of any balance claimed to be due from the plaintiff to the defendants on account of the contract for the machinery, or on account of any other contract. The defendants claimed to recoup the sum of $7,200 as remaining due to them under the contract of June 23, 1881, or that of March 30, 1882, and the further sum of $1,531.46 for extra work alleged to have been performed by them; but they did not, in any of their pleadings, set up any counterclaim or right of recoupment as to those items; and it is alleged, in the fourth defense in their amended answer, that an action is pending against the plaintiff by the McGowan Pump Company to recover the $1,531.46.

[608]

It is also alleged, by the defendants, as error, that the court did not instruct the jury, as requested by the defendants, that, although the machinery was in fact incapable of working up to the pressure of 1,500 tons, and the incapacity resulted from the fact that machinery of the character and description provided for by the contract could not be made capable of working up to such pressure, the fact that it would not work up to such pressure did not entitle the plaintiff to recover any damages based on such incapacity. The bill of exceptions states that the plaintiff gave evidence tending to show that the machinery was only of the value of scrap, and it does not state that there was any testimony given to show that, without the capacity called for by the contract, it was of any value beyond its value as scrap iron, or that there was any testimony tending to show that the loss of actual value upon the machinery was less than the amount found by the jury, or that the machinery had any value except that of old iron, if the pressure with which it would work would have no effect in doing the needed work upon the tan bark.

The rule of damages laid down by the court was as follows, and was not excepted to: "The rule for measuring the plaintiff's damages is to find the difference between the money value of the machinery contracted for, if it had been constructed in all respects according to the contract as it has been construed for you by the court, and the money value of the machinery as it was actually construed and delivered to the plaintiff, to which may be added the items of expense for keep of the boat during the delay, caused solely by the delay."

As to the refusal of the court to give the 24th instruction requested by the defendants, we are of opinion that the general charge of the court properly covered the matter involved, and that the court made no error in refusing to charge as requested in regard to the contract of April 19, 1882.

There are other matters arising on the charge and the refusals of the court to charge, which are either covered by the observations already made, or upon which, although the questions

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raised in regard to them have been considered by the court, it is not deemed necessary specially to remark.

The objection to the competency of the testimony of the witness Kemplin, as an expert, was properly overruled. He was a hydraulic engineer, and had been engaged in the construction of steam engines and other machinery for many years, although he had never built any steam engines to be used on the western rivers. He was on board of the boat during its trip from Cincinnati to Paducah, and saw the propelling machinery in operation and examined it, and gave testimony as to the value of propelling engines for such a boat and as to what it would cost to make them good. The question as to the weight of his evidence was one for the jury, in view of his testimony as to his experience.

On the whole case, we are of opinion that there is no error in the record, *and the judgment of the Circuit Court is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[488] TIERY WRIGHT, *Plff. in Err.*,
v.
B. H. ROSEBERRY ET AL

(See S. C. Reporter's ed. 488-521.)

Public lands—Swamp-Land Act of 1850—grant in præsenti—*subsequent identification—failure of Secretary of Interior to identify—other proof—Act of 1866—state certificates of purchase—Statute of California*—prima facie *evidence of title—ejectment—when patent may be collaterally attacked—omission to mark segregation map as filed—double operation of patent.*

1. The Swamp-Land Act of September 28, 1850, operated as a grant *in præsenti* to the State then in existence of all the swamp lands in their respective jurisdictions, passing the title to said lands as of its date, but requiring identification to render the title perfect.

2. The action of the Secretary of the Interior in identifying such lands is conclusive against collateral attack; but, when he has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode.

3. The first section of the Act of July 23, 1866, does not apply to swamp and overflowed lands. It was not in satisfaction of a grant of those lands that the State could select lands from any part of the public domain. All it could do was to ascertain where those lands were.

4. Under the Statute of California, certificates of purchase of swamp and overflowed lands are *prima facie* evidence of legal title to the premises in the holders, and upon them ejectment can be maintained in the state courts.

5. A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.

6. The omission by a Surveyor-General to mark a segregation map as filed does not affect its validity as evidence.

7. In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation.

[No. 156.]

Submitted March 21, 1887. Decided May 2, 1887.

IN ERROR to the Supreme Court of the State of California.

The history and facts of the case appear in the opinion of the court.

Messrs. **John Mullan,** and **C. P. Sprague** for plaintiff in error.

Mr. **W. C. Belcher,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

This is an action to recover possession of a tract of land situated in the County of Yolo, in the State of California, consisting, according to the public surveys, of portions of sections 24, 25 and 36 of township 11 north, range 2 east, in that county, and embracing 560 acres. The land is particularly described as follows: The north half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-four (24), the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five (25), the southeast quarter of section twenty-five (25), and the northeast quarter of section thirty-six (36), all in township eleven (11) north, range two (2) east, Mount Diablo base and meridian. It is alleged to be swamp and overflowed land, which was granted to the State by the Act of Congress of September 28, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." 9 Stat. at L. 519. The complaint is in the usual form in such actions, alleging the plaintiff's seisin in fee of the land and his right of possession, the unlawful entry thereon of the defendants and their ousting him therefrom, and their continued withholding of the possession, to his damage of $1,000. It also alleges that the rents and profits of the land are of the value of $560 a year. The prayer is for judgment of restitution of the premises and for the damages, rents and profits claimed. [489]

Two of the defendants united in their answer, one of them being a tenant of the other; the other defendants answered separately. All denied the allegations of the complaint, and, except in the case of the tenant, asserted ownership in fee of portions of the demanded premises, which they described in their respective answers; and all set up the Statute of Limitations in bar of the action.

The action was twice tried by the State District Court in which it was commenced, and, by stipulation of parties, without a jury. At both trials the plaintiff asserted title to the premises as swamp and overflowed lands by conveyance from parties who had purchased them from the State. The defendants claimed the premises through patents of the United States, issued under the preemption laws to them or to parties from whom they derived their interest. On the first trial, the court found that 160 acres were swamp and overflowed land on the 28th of September, 1850, within the meaning of the Act of Congress of that date, and gave judgment in favor of the plaintiff for their possession; but, as to the other portions of the premises, the court failed to find whether or not the plaintiff was the [490]

owner thereof or entitled to their possession. For this failure the Supreme Court of the State, on appeal, reversed the judgment, and remanded the cause to the district court, with directions to find upon those issues from the evidence already taken, and such further evidence as might be adduced, and to render judgment upon the whole case. Upon the second trial thus ordered, further testimony was accordingly taken. The court thereupon set aside its previous findings, found on all the issues in favor of the defendants, and gave judgment in their favor. On appeal to the su-
[494] preme court this judgment was affirmed. It does not distinctly appear what caused the district court to change its first decision with respect to those lands, which it had originally held to be swamp and overflowed; but, as it admitted in evidence the patents of the United States, and held that they passed the title to the defendants, it probably had reached the conclusion which the supreme court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the State, pursuant to the fourth section of the Act of Congress of July 23, 1866, "To Quiet Land Titles in California." For want of such certificate, the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. To determine its correctness, it will be necessary to consider the nature of the grant to the State of the swamp and overflowed lands, the proceedings taken
[495] under the laws of the State and of the United States to ascertain and define their boundaries, and the effect of the Act of July 23, 1866, and of section 2488 of the Revised Statutes as confirmatory of previous segregations by the State. The following is the Swamp-Land Act of September 28, 1850:

"AN ACT to Enable the State of Arkansas and Other States to Reclaim the 'Swamp Lands' Within Their Limits.

"*Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled*, That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be and the same are hereby granted to said State.

"Sec. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this Act, to make out an accurate list and plats of the lands described, as aforesaid, and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor cause a patent to be issued to the State therefor; and on that patent the fee simple to the lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof; *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. *And be it further enacted*, That the provisions of this Act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as [496]
aforesaid, may be situated." 9 Stat. at L. 519.

Soon after the passage of this Act, the question arose as to the time the grant took effect; whether at the date of the Act, or on the issue of the patent to the State upon the request of the Governor, after the list and plats of the lands were made out by the Secretary of the Interior and transmitted to him. The question was one of great importance to all the States in which there were swamp and overflowed lands. These lands amounted to many millions of acres. In California alone there were, according to the reports of the land department, nearly two millions of acres.

The object of the grant, as stated in the Act, was to enable the several States to which it was made, to construct the necessary levees and drains to reclaim the lands; and the Act required the proceeds from them, whether from their sale or other disposition, to be used, so far as necessary, exclusively for that purpose. The early reclamation of the lands was of great importance to the States, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the cause of malarial fevers and diseases in the neighborhood.

The language of the first section of the Act indicates a grant *in præsenti* to each State of lands within its limits of the character described. Its words "shall be and are hereby granted" import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the Act were read that a doubt was raised as to the immediate operation of the Act. On the one hand, it was contended that these sections postponed the vesting of title in the State until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the Act should be regarded as simply providing the mode of identifying the lands, and furnishing documentary evidence of their identification, and not as a limitation upon vesting the [497]
right to them in the State, as this would make the investiture dependent upon the request of the Governor, and not upon the Act of Congress. It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identi-

fication by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should pass, was merely declaratory of the nature of the title, the patent operating merely by way of further assurance.

The question thus brought to the attention of the department, under whose supervision the Act was to be carried into effect, was one upon which men might very well differ; but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned.

There are numerous cases in the history of the country, where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself. An illustration of this is presented in the case of claims confirmed to lands in the Northwest Territory which originated previously to its cession to the United States. By the Act of Congress of March 26, 1804, 2 Stat. at L. 277, chap. 35, every person claiming lands within certain designated limits of that territory by virtue of a legal grant made by the French Government prior to the Treaty of Paris of the 10th of February, 1763; or by the British Government subsequent to that period, and prior to the Treaty of Peace between the United States and Great Britain on the third of September, 1783; or by virtue of any Resolution or Act of Congress subsequent to that Treaty, was required to deliver, on or before the first of January, 1805, to the register of the land-office of the district in which the land was situated, [498] a notice stating the nature and extent of his claim, together with a plat of the tract or tracts claimed. The register of the land-office and the receiver of public moneys were constituted commissioners within their respective districts for the purpose of examining the claims. It was made their duty to hear in a summary manner all matters respecting them, to examine witnesses, and to take any testimony that might be adduced before them and decide thereon according to justice and equity, and to transmit a transcript of their decisions in favor of claimants to the Secretary of the Treasury, who was required to lay it before Congress at the ensuing session.

Among the claims presented under this Act was one by the heirs of Jean Baptiste Tongas for lands in the neighborhood of Vincennes, the claim being founded upon an ancient grant to their ancestor. The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, who laid the same before Congress. By the Act of March 3, 1807, 2 Stat. at L. 446, chap. 47, this and other decisions in favor of persons claiming lands in the same District of Vincennes, transmitted to the Secretary of the Treasury, were confirmed. The Act declared that every person or his legal representative, whose claim was confirmed and who had not previously obtained a patent therefor from the Governor of the Territory northwest of the Ohio, or of Indiana Territory, should, whenever his claim was located and surveyed, have a right to receive from the Register of the Land-Office at Vincennes a certificate, which should entitle him to a patent for his land, to be issued to him in like manner as is provided by law "for the other lands of the United States." A survey of the tract thus confirmed was made in 1820, but no patent was issued until 1872, when one was issued, reciting the confirmation by the Act of 1807 of the decision of the commissioners under the Act of 1804. The patent purported "to give and grant" to the heirs of Tongas the tract in question in fee. A party claiming under the heirs brought ejectment for the premises. The defendant claimed as tenant under one who had been in actual possession under claim and color of title for thirty years. The question for decision was, when did the title to the land [499] vest in the heirs of Tongas. The court below held that it vested by the Act of confirmation of 1807, when the land was located and surveyed in 1820, and that the patent was not itself the grant of the land by the United States, but merely evidence that a grant had been made to the heirs of Tongas. The defendant, therefore, had judgment. The case being brought to this court, the judgment was affirmed. *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521 [22:606]. In deciding the case, the court said:

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government. In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States, and would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia."

The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the Swamp-Land Act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or other disposition made before such road becomes definitely fixed. [500] The usual words of grant in such cases are similar to those in the Swamp-Land Act—"there is hereby granted." Though it is impossible to locate the land granted until the route is

fixed, yet when that is fixed, the grant takes effect as of the date of the Act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus in the case of *Leavenworth, L. & G. R. R. Co.* v. *United States*, 92 U. S. 733 [23: 634], the language was, "There be and is hereby granted to the State of Kansas," and in reference to it the court said: "It creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the State of Kansas, though a survey of the lands and a location of the lands are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." See also *R. R. Co.* v. *Baldwin*, 103 U. S. 426 [26: 578]; *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491 [24: 1095]; *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 60 [22: 551, 554]; *Rutherford* v. *Greene's Heirs*, 15 U. S. 2 Wheat. 196 [4: 218].

It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified, the title would become perfect as of the date of the Act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the State under the first section would not be enlarged by the action of the secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue.

[501]

The conclusion which the land department reached upon its examination of the character of the grant, soon after the passage of the Act, was that the title passed to the State at the date of the Act. In a communication to the Commissioner of the General Land-Office, under date of December 28, 1851, Mr. Stuart, then Secretary of the Interior, referring to the Act of 1850 and the Act of 1849 to aid Louisiana to drain her swamp lands, and stating that the first question involved was as to the period when the grants took effect—whether at the date of the law, or at the date of the approval of the selections by the secretary—said: "In each case the granting clause is in the first section, and the words employed, viz., 'are hereby granted,' seem to me to import a grant *in præsenti*. They confer the right to the land, though other proceedings are necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefor becomes perfect, and has relation back to the date of the grant." And further, "As the grants are regarded as taking effect from the date of the laws making them respectively, and as vesting the inchoate title in the States, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal, and the purchase money refunded, or a change of location ordered." Lester, Land Laws, 549, No. 578.

This construction of the grant has been followed by the secretary's successors to this day. In a communication to the Commissioner of the General Land-Office, April 19, 1877, Secretary Schurz said: "The legal character of this grant (of 1850) has often been passed upon by the courts, and it has been uniformly held that the Act was a present grant, vesting in the State, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect." And therefore, he held that swamp lands were not, in March, 1853, when the preemption laws were extended to California, public lands, and for that reason could not be entered and sold under those laws. "The Act of September 28, 1850," he added, "was notice to the world that all of the swampy lands in California were thereby granted *in præsenti* to the State, and were not subject to preemption, entry or sale thereafter; and the person who files a declaratory statement on lands actually swampy does so with full notice that they are not public lands and that he cannot obtain any right thereby." Copp, Public Land Laws, Vol. 2, p. 1048.

[502]

In a communication to the commissioner, of February 25, 1886, Secretary Lamar said: "The principle has been formerly established by the decisions of the courts and of this department that the grant of swamp lands made to the several States was a grant *in præsenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes of survey may be taken as a basis in determining the character of the land if the State so selects." Decisions of Dept. Interior, Vol. 4, 415.

A similar construction of the grant was given by Attorney-General Black in an official communication to the Secretary of the Interior, under date of November 10, 1858. In February, 1853, Congress had made a grant of land to the States of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the State of Arkansas by the Act of September 28, 1850, under the designation of swamp lands, was included; and the question asked of the Attorney-General was which of the two Acts gave the better title. In reply, he said: "Where there is a conflict between two titles

derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail; *Prior in* [503] *tempore potior est in jure.* This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject matter of the grant, except what is expressly excepted. I refer you to that opinion for the reasons and authorities upon which the principle is grounded. It is not necessary that the patent should issue before the title vests in the State under the Act of 1850. The Act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect; and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land his title is vested as much as if he had the patent itself, which is but evidence of his title." 9 Ops. Attys-Gen. 254.

The same view of the Act as a present grant, vesting in the State from its date the title to all the land within its limits of the particular description designated, wanting only a definition of boundaries to render the title perfect, was taken at an early period by the highest courts of several States within which swamp and overflowed lands existed. It was so held by the Supreme Court of Arkansas in 1859, in *Fletcher* v. *Pool*, 20 Ark. 100; in 1866, in *Branch* v. *Mitchell*, 24 Ark. 431, 444, and in 1874 in *Ringo's Exr.* v. *Rotans' Heirs*, 29 Ark. 56.

In *Fletcher* v. *Pool*, the court said: "That the Act was a present grant vesting in the State, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubts can be entertained. The object of the second section was not to postpone the vestiture of title in the State until a patent should issue, but was to provide for the ascertainment of [504] boundaries and to prevent a premature interference with the lands by the State Legislature before they were so designated as to avoid mistake and confusion."

In *Branch* v. *Mitchell*, the court said: "We continue satisfied with the decisions heretofore made; and again hold that all the lands in the State, which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the wood land, or all the alluvial land, in the State; the difficulty of ascertainment of its character not affecting the question. The words of grant, the operative words, are direct and positive: "Shall be and the same are hereby granted to the State;" and the provision of the second section, that the Secretary of the Interior should make out and transmit to the Governor a list and plats of the land described, and at the request of the Governor cause a patent to issue to the State; and that "on that patent the fee simple to said lands shall vest in the said State," can no more be held to limit the effect of the present grant in the first section, than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made, "on which the fee simple should vest." This would make the title of the State to any of the land depend on the request of the Governor for a patent. The words of the second section must be held to be simply a definition of the *nature* of the title which the State took under the grant, and not a postponement of the period at which the title should vest." 24 Ark. 444-5.

And in *Ringo's Exr.* v. *Rotan's Heirs*, the court held that the title of the State to swamp and overflowed lands granted to her by the Act of September 28, 1850, accrued from the date of the Act, and that a title derived from the State took precedence over a grant by the United States subsequent to that time.

The same view was held by the Supreme Court of California in 1858, in *Owens* v. *Jackson*, 9 Cal. 322; and in *Somers* v. *Dickinson*, Id. 554; and in 1864 in *Kernan* v. *Griffith*, 27 Cal. 87; and in 1882 was assumed to be the correct [505] view in *Sacramento Valley Reclamation Co.* v. *Cook*, 61 Cal. 342. In the first of these cases, which was an action for the possession of swamp and overflowed lands held under a patent of the State, the defendant demurred to the complaint, on the ground that it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the court below, but the supreme court reversed the decision, holding that the State had the right to dispose of lands of that character granted to her by the Act of 1850, prior to the patent of the United States. "The Act of Congress," said the court, "describes the land, not by specific boundaries, but by its quality, and is a legislative grant of all the public lands within the State, of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State." The same conclusion was reached in 1861 by the Supreme Court of Iowa in *Allison* v. *Halfacre*, 11 Iowa, 450, which was subsequently followed in all its decisions on the subject.

At a later day the Supreme Courts of Missouri and Oregon held the same doctrine. *Clarkson* v. *Buchanan*, 53 Mo. 563; *Campbell* v. *Wortman*, 58 Mo. 258; *Gaston* v. *Stott*, 5 Oreg. 48. The Supreme Court of Illinois, in 1863, expressed the same view in *Supervisors* v. *State's Attorney*, 31 Ill. 68; then receded from it in *Grantham* v. *Atkins*, 68 Ill. 359, and, in 1873, in *Thompson* v. *Prince*, 67 Ill. 281; but returned to its first conclusion, in 1875, in *Keller* v. *Brickey*, 78 Ill. 133.

The question came before this court at the December Term, 1869, in *R. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19:599], and the same doctrine as to the character of the grant was affirmed. On the 10th of June, 1852, Congress had made to the State of Missouri a grant of land to aid in the construction of certain rail-

roads, and the Legislature of the State had conveyed the land to the Hannibal and St. Joseph Railroad Company. One Smith held certain swamp and overflowed lands, which he had [506] obtained from the State, and the question presented was whether the grant to the State in aid of the railroads covered the swamp and overflowed lands granted to her by the Act of September, 28, 1850, the latter not having been certified to the State by the Secretary of the Interior, nor patented to her. After referring to the first section the court said: 'Here is a present grant by Congress of certain lands to the States within which they lie, but by a description which requires something more than a mere reference to their townships, ranges and sections to identify them, as coming within it. In this respect it is precisely like the railroad grants, which only become certain by the location of the road." And after stating that it was the duty of the Secretary of the Interior to ascertain the character of the lands as swamp and overflowed, and to furnish the State with evidence of it, the court continued: "Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the Act of Congress; and though the States might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay." The court added, that, as the Secretary of the Interior had no satisfactory evidence under his control to enable him to make out these lists, he must, 'if he attempted it, rely on witnesses whose personal knowledge would enable them to report as to the character of the tracts claimed to be swamp and overflowed; "that the matter to be shown was one of observation and examination, and, whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose." And it was held that the grant in aid of the railroads did not include the swamp and overflowed lands.

In *French* v. *Fyan*, 93 U. S. 169 [23: 812], which was before this court at October Term, 1876, the same view was taken of the grant, and the effect to be given to a patent of the [507] United States for swamp lands was stated. That was an action of ejectment for such lands for which a patent had been issued to the State of Missouri under the Act of 1850. The lands had been conveyed to the Missouri Pacific Railroad Company by the State as part of the land granted to aid in the construction of its road by the Act of June 10, 1862, and the plaintiff had by purchase become vested with the title of the company. To overcome the *prima facie* case made by him the defendant gave in evidence the patent of the State under the Swamp-Land Act of 1850, from which he traced title by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land from 1849 down to the time of the trial, that the land was not swamp and overflowed, and made unfit thereby for cultivation, and that, since 1849, the greater part was not, and never had been, in that condition. The court below held that the question was concluded by the patent of the United States to the State for the land as swamp land under the Act of September 28, 1850, and rejected the testimony. The admissibility of the testimony was thus presented for determination. In giving our decision we said: "This court has decided more than once that the Swamp-Land Act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to the States admitted into the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that Act, relates back and gives certainty to the title of the date of the grant. As that Act was passed two years prior to the Act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State under the Act of 1850. For, while the title under the Swamp-Land Act, being a present grant, takes effect as of the date of that Act, or of the admission of the State into the Union when this occurred afterwards, there can be no claim of an earlier date than that of the Act of 1852, two years later, for the inception of the title of the railroad company." And upon the admissibility of parol testimony to show that the land [508] in the patent was not swamp land, the court said that by the second section of the Act the power and duty were conferred upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on that subject was to be controlling. The parol evidence, therefore was held to be inadmissible. 93 U. S. 172 [813].

In commenting upon the case of *R. R. Co.* v. *Smith* [*supra*], upon which reliance was placed for the admission of the parol testimony, the court said: "The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the Act." "There was no means," it added, "as this court has decided, to compel him to act; and if the party claiming under the statute in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the State might be defeated by this neglect or refusal to do his duty."

This view of the character of the grant was recognized in *Rice* v. *Sioux City & St. P. R. R. Co.* decided at the October Term 1883, 110 U. S. 695 [28: 289]. The question there was whether the Swamp-Land Act extended to Territories upon their subsequent admission as States into the Union. It was held that it did not. Said the court, speaking by the Chief Justice: "That the Swamp-Land Act of 1850 operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions, is well settled;"

citing the cases of *R. R. Co.* v. *Smith*, *French* v. *Fyan*, [*supra*], and *Martin* v. *Marks*, 97 U. S. 345 [24: 940]. And again: "The grant under the Act of 1850 was to Arkansas and the other States of the Union. Arkansas was an existing State, and the grant was to all the States *in præsenti*. It was to operate upon existing things, and with reference to an existing [509] state of facts." "It was to take effect at once between an existing grantor and several separate existing grantees."

The result of these decisions is that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character.

The legislation of Congress subsequent to the Act of 1850, for the purpose of giving it effect, has been in consonance with the view stated of the nature of the grant. It has uniformly recognized the paramount character of the State's title, and has endeavored to correct the evils which in many cases followed from the delay of the Secretary of the Interior in identifying the lands, and furnishing to the State the required lists and plats. The Legislatures of the several States in which such lands existed very generally themselves undertook to identify the lands and to dispose of them, and for that purpose passed appropriate legislation for their survey and sale and the issue of patents to the purchasers. Much inconvenience, and in many instances conflicts of title, arose between those claiming under the State and those claiming directly from the United States. To obviate this, on the second of March, 1855, Congress passed an Act "For the relief of purchasers and locators of swamp and overflowed lands." 10 Stat. at L. 634, chap. 147. The Act provided that the President of the United States should cause patents to be issued to purchasers and locators who had made entries of the public lands claimed as swamp and overflowed lands with cash or land warrants, or scrip, prior to the issue of patents to States under the Act of 1850, "*Provided*, That [510] in all cases where any State through its constituted authorities may have sold or disposed of any tract or tracts of such land to any individual or individuals, and prior to the entry, sale or location of the same under the preemption or other laws of the United States, no patent shall be issued by the President for such tract or tracts until such State through its constituted authorities shall release its claim thereto in such form as shall be prescribed by the Secretary of the Interior."

The Act also provided "That upon due proof by the authorized agent of the State or States, before the Commissioner of the General Land-Office, that any of the lands purchased were swamp lands within the true intent and meaning of the Act aforesaid, the purchase money shall be paid over to said State or States, and when the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like land upon any of the public lands subject to entry at $1.25 an acre, or less, and patents shall issue therefor upon the terms and conditions enumerated in the Act aforesaid."

There is here a plain recognition of the prior right of the State to the swamp lands within her limits, by the declaration that no patent of the United States shall be issued to purchasers from them of such lands without a release from the State, and that, in case of completed purchases from them, the purchase money shall be paid to the State, or if the purchase was made by warrant or in scrip, the State may locate an equal quantity of land upon any other public lands subject to entry. By Act of March 3, 1857, 11 Stat. at L. 251, chap. 117, "To confirm to the several States the swamp and overflowed lands selected under the Act of September 28, 1850, and the Act of March 2, 1849," the Act of March 2, 1855, was continued in force and extended to all entries and locations of lands claimed as swamp, made since its passage.

The Act of Congress of March 12, 1860, 12 Stat. at L. 3, chap. 5, extending the provisions of the Swamp-Land Act to Minnesota and Oregon, recognizes in its second section their [511] right and that of other States to make selections of the swamp lands, or rather to provide for their identification, without waiting for the action of the Secretary of the Interior. That section provides that the selection to be made from lands already surveyed in each of the States should be made within two years from the adjournment of the Legislature of the State at its next session after the date of the Act, and, as to all lands thereafter to be surveyed, within two years from such adjournment at the next session, after notice by the Secretary of the Interior to the Governor of the State that the surveys have been completed and confirmed.

By an Act passed on the 23d of July, 1866, entitled "An Act to Quiet Land Titles in California," 14 Stat. at L. 219, chap. 219, Congress changed the provisions of law for the identification of swamp and overflowed lands in that State. It no longer left their identification to the Secretary of the Interior, but provided for such identification by the joint action of the state and federal authorities.

As early as 1855 the Legislature of California undertook to control and dispose of those lands. The Secretary of the Interior had neglected to make out any list and plats of the lands of this character, and to transmit them to the Governor of the State, as required by the second section of the Act of 1850. The State therefore proceeded in 1855 to assert her ownership over the lands, by providing for their survey and sale, and the issue of patents to the purchasers. Further legislation was also had on the subject in 1858 and 1859; and, in 1861, an Act was passed providing for their reclamation and segregation, making it the duty of the county surveyors to segregate these lands in their re

spective counties from the high lands, and to make a complete map of the lands in legal subdivisions of sections and parts of sections, and to transmit a duplicate thereof to the Surveyor-General of the State. Cal. Laws of 1861, 355.

The Act of Congress of 23d of July, 1866, was intended to effect the purpose indicated in its title. Previously to its passage there had been great confusion and uncertainty in relation [512] to land titles in California. This arose with respect to other lands than swamp and overflowed lands, principally from the delay in extending the public surveys of the government, and the action of the state authorities in attempting to select and dispose of the lands granted to her in advance of such surveys. With respect to the swamp and overflowed lands, the confusion had arisen principally from the delay of the Secretary of the Interior in listing such lands to the State, and from inaccuracies of description arising from the want in many parts of the country of the public surveys. The Act of July 23, 1866, tended to remove this uncertainty and confusion, principally by recognizing the action of the State in disposing of the lands granted to her, in cases where such disposition was made to parties in good faith, and did not interfere with previously acquired interests, and by providing a mode for identifying the swamp and overflowed lands in the future without the action of the Secretary of the Interior. The first section of the Act declared that in all cases where the State of California had made selections of any portion of the public domain, in part satisfaction of any grant made to her by Act of Congress, and had disposed of the same to purchasers in good faith under her laws, the lands so selected should be and were thereby confirmed to the State, subject to certain exceptions. This section does not, as supposed by counsel, apply to the swamp and overflowed lands. It was not in satisfaction of a grant of those lands that the State could select lands from any part of the public domain. All she could do was to ascertain where those lands were. She had no power of selection, though that term is sometimes used when merely the power of ascertainment or identification is intended. Secretary Schurz, in *Kile* v. *Tubbs*, July 15, 1879, 6 Copp, 108; Secretary Teller, in *State of California*, Dec. 21, 1883, 2 Decisions of Dep. Int. 643; *Sutton* v. *Fassett*, 51 Cal. 12. It is the fourth section of that Act which applies to swamp and overflowed lands. That section, among other things, provides, "That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty [513] of the Commissioner of the General Land-Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this Act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States Surveyor-General for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward [them] to the General Land-Office for approval." As thus seen, lands represented as swamp and overflowed on the approved plats of township surveys, made under authority of the United States, were, after that date, to be certified to the State; and lands were to be represented as swamp and overflowed on the township plats which were found on the state segregation maps and surveys of such lands; the approval of the township plats to be made by the Land-Office.

Under the Act of California of 1861, the surveyor of the County of Yolo, in 1862, segregated the swamp and overflowed lands in that county, and made a map thereof, entitled "Supplemental Segregation of Swamp and Overflowed Land in Yolo County, by Amos Matthews, County Surveyor," on which all the lands in controversy were designated as swamp and overflowed lands, and deposited the same in the State Surveyor-General's Office. A copy of such segregation map, duly certified by the Surveyor-General of the State, was given in evidence, accompanied with the following certificate of the Surveyor-General of the United States:

"U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

"I hereby certify that this diagram has been compared with the original by me, and that the same is a correct transcript of a plat embracing townships eleven north, range two east; twelve north, two east; twelve north, one east (fractional), and eleven north, one east, Mount Diablo meridian, said plat having been filed in [514] this office between the 22d of March and 4th of April, 1872, and being plat of survey made by the County Surveyor of Yolo County, under and in pursuance of the Statutes of the State of California then in force, and showing the segregation lines of the swamp and overflowed land in said townships; and further, that the whole of that portion of said plat is designated thereon as swamp and overflowed land; that I have compared the certificate of approval of said plat with the original indorsed thereon, and that the same is a full, true and correct transcript thereof.

"Witness my hand and the seal of this office this 22d day of September, A. D. 1873.

"[SEAL.] J. R. HARDENBURGH,
U. S. Surveyor-General, California."

Objection was taken to a copy of this map, because the one deposited in the office of the Surveyor-General of the State was not marked as filed. If such was the case, the omission was one of that officer, and could not affect the validity of the map as evidence. It was in proof that the county surveyor deposited the map in that office, and that ever since it had remained there. No other segregation map was ever in the office.

On the first of July, 1861, the swamp and overflowed lands in the county, in controversy in this case, and designated as such on this map, subsequently made, were purchased by different parties from the State, as shown by certificates of purchase issued to them bearing that date, which were produced in evidence These certificates were assigned to the plaintiff. They are made by statute *prima facie* evidence of legal title in the holders thereof; and upon them ejectment can be maintained for the land

described. Act of April 13, 1859; *Richter* v. *Riley*, 22 Cal. 639.

On the 10th of January, 1866, a plat or map of the township, in which the lands in controversy are situated, was approved by L. Upson, United States Surveyor-General for California, on which map only one parcel of the lands was designated as swamp and overflowed land. The map showed on its face that the survey of the township was made in the field, in 1864. On the 4th of April, 1872, J. R. Hardenburgh, United States Surveyor-General for California, who had succeeded Mr. Upson, compared this map with the segregation map of swamp and overflowed lands in the township, made by the surveyor of the county under the laws of the State, which conformed to the system of surveys adopted by the United States, and amended the township plat in accordance with the segregation, and forwarded the same to the General Land-Office, where it was officially used as an approved plat. Upon this amended map all the lands in controversy are designated as swamp and overflowed. The following letter of the Surveyor-General accompanied the map:

[515]

"U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, *April* 19, 1872.

"Hon. WILLIS DRUMMOND,
Commissioner General Land-Office, Washington, D. C.

"SIR: I transmit in a separate roll by to-day's mail certified plats, also certified descriptive lists, of the following townships, showing all tracts which the State of California claimed as swamp and overflowed prior to July 23, 1866; also showing the segregation of swamp and overflowed lands made by the United States, viz: Township eleven north, range one east; township eleven north, range two east; township twelve north, range two east, Mount Diablo meridian. The lists of said tracts contain annotations in red ink made by the Register of the U. S. Land-Office at Marysville, stating all titles to said lands adverse to the claims of the State of California, together with the register's certificate testifying to the correctness of such annotations, as appears from the records of this office.

"These plats and lists are sent you in accordance with the instructions contained in your letter of July 7, 1871, which enclosed for my guidance a copy of a letter addressed to L. Upson, U. S. Surveyor-General, dated Sept. 13, 1866.

[516]

"Very respectfully, your obedient servant,
"J. R. HARDENBURGH,
U. S. Surveyor-General for California."

The commissioner, Mr. Williamson, who succeeded Mr. Drummond in office, certifies, under date of January 12, 1878, to a copy of this plat of township eleven north, range two east, of Mount Diablo meridian, as one received with the Surveyor-General's letter of April 19, 1872, and "since which time it has been officially used as approved plat made in accordance with section 2488, U. S. Revised Statutes." This section declares that "It shall be the duty of the Commissioner of the General Land-Office to certify over to the State of California, as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States." Subsequently, in July, 1877, the State Surveyor-General forwarded to the Commissioner of the Land-Office certified copies of certain swamp-land surveys, with a statement that the lands described in them were all sold by the State in good faith as swamp and overflowed lands prior to July 23, 1866, and requested that the lands not already listed, which included those in controversy, be certified to the State. The commissioner replied that the lands in the township had all been disposed of, and patents issued to settlers under the laws of the United States, and upon that ground alone he refused the application. This refusal was approved by Mr. Schurz, Secretary of the Interior, the latter observing, in justification of it, that it had been decided by the Supreme Court of the United States that a patent, when issued and delivered to and accepted by the grantee, passed the legal title to the land, and all control of the Executive Department over it ceased. "If any lawful reason exists," said the Secretary in his communication to the commissioner, "why the patent should be canceled or annulled, such as fraud on the part of the grantee, or mistake or misconstruction of the law on the part of your office, the appropriate remedy is by a bill in chancery, and an action may be maintained by the United States, or any contesting claimant; but you are not authorized to reconsider the facts on which a patent was issued, and to recall or rescind it, or to issue one to another party for the same tract," citing *U. S.* v. *Hughes*, 52 U. S. 11 How. 552 [13: 809]; *U. S.* v. *Stone*, 69 U. S. 2 Wall. 525 [17: 765]; *Hughes* v. *U. S.* 71 U. S. 4 Wall. 232 [18: 303]; and *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]. There was no suggestion by either the commissioner or the secretary that the lands were not swamp and overflowed as designated upon the township plat.

[517]

The question, therefore, is whether, upon the proof thus presented of the segregation of the lands in controversy as swamp and overflowed lands by the authorities of the State of California, and their designation as such lands on a plat of the township made by the Surveyor-General of the United States, and approved by him, and forwarded to the General Land-Office, pursuant to the fourth section of the Act of 1866, and approved by the commissioner, as shown by its official use, the plaintiff can maintain an action for the recovery of the lands, they never having been certified over to the State, as required by section 2488 of the Revised Statutes, or patented to her under the Act of 1850. According to the decisions we have cited, the holders of the certificates of purchase had a good title to the lands if in fact they were swamp and overflowed lands on the 28th of September, 1850.

The certificates were conclusive as evidence against the State that they were such lands. The Statute of California, as already stated, makes them *prima facie* evidence of legal title to the premises in the holders, and upon them ejectment can be maintained in the state courts. The case of the plaintiff was therefore *prima facie* established by the production of the certificates, and showing their assignment to him. *Richter* v. *Riley*, 22 Cal. 639, cited above.

The representation of the lands as swamp

and overflowed on the approved township plat would be conclusive as against the United States that they were such lands, if they had [518] not been patented before the return of such township plat to the land-office. The Act of Congress intended that the segregation maps prepared by authority of the State, and filed in the State Surveyor-General's office, if found upon examination by the United States Surveyor-General to be made in accordance with the public surveys of the General Government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests. In this case the defendants trace title by patents of the United States purporting to be issued to settlers under the preemption laws, in 1866, 1867, 1868 and 1871, upon declaratory statements made in 1864, three years after the purchase from the State by the grantors of the plaintiff, and two years after a map segregating these lands had been made by the surveyor of the county, pursuant to the law of the State, and deposited in the Surveyor-General's office. These patents were evidence that whatever title the United States then held passed to the patentees, and, as against a mere intruder without claim of title from a paramount source, were conclusive that the lands were of the character which by the patents they were represented to be. This was the case of *Ehrhardt* v. *Hogaboom*, 115 U. S. 67 [29: 346]. There the plaintiff claimed by a patent issued to his grantor under the preemption laws. The defendant admitted he was in possession of twenty acres, and contended that these were swamp and overflowed lands which passed to the State under the Act of 1850. It appeared, however, that the certificate of purchase which he produced did not embrace the lands in controversy, and his offer to prove the character of the land as swamp and overflowed by parol was rejected. The court said: "He was, as to the twenty acres, a mere intruder without claim or color of title. He was therefore in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the land department in issuing it." And again: "It is the duty of the land department, of which the secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the [519] preemption laws; and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title." But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity. As we said in *Smelting Co.* v. *Kemp*, 104 U. S. 641 [26: 876]: "When we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

And again, in the same case, we said, p. 646 [878]: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establish- [520] ing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

"There are cases," said *Chief Justice* Marshall, "in which a grant is absolutely void, as when the State has no title to the thing granted, or when the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." *Polk's Lessee* v. *Wendal*, 18 U. S. 9 Cranch, 87, 99 [3: 665, 669]. Indeed, it may be said to be common knowledge that patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void. *Easton* v. *Salisbury*, 62 U. S. 21 How. 426 [16: 181]; *Reichart* v. *Felps*, 73 U. S. 6 Wall. 160 [18: 849]; *Best* v. *Polk*, 85 U. S. 18 Wall. 112 [21: 805]. It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before they had granted the property to the State, and thus were without title at the time of their subsequent conveyance. As this court said in *New Orleans* v. *United States:* "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative." 35 U. S. 10 Pet. 668, 731 [9: 573, 600].

The court below held, and placed its decision upon the ground, that, because the Commissioner of the General Land-Office had not certified the lands in controversy to the State as swamp and overflowed, when this action was commenced in 1870, there was no title in the State by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the commissioner instead of the Act of Congress; whereas, the certificate of that officer, [521] when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases to which our attention has been called.

In *Sacramento Valley Reclamation Co.* v. *Cook*, decided as late as 1882, that court recognized the swamp-land grant of 1850 as one *in præsenti*. Its language was: "It is as well settled as anything can be by the courts that the donation of swamp and overflowed lands by the United States to the States in which such lands were situated at the date of the passage of the Act of September 28, 1850, 'was a grant *in præsenti*, by which the title to those lands passed at once to the States in which they lay, except as to States admitted into the Union after its passage,'" citing *French* v. *Fyan*, 93 U. S. 169 [23: 812].

For the error in holding that the certificate of the commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the Swamp-Land Act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to preemption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and, after the segregation map was deposited with the Surveyor-General of the State, with notice also that they were actually segregated and claimed by the State as such lands.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[637] NEW JERSEY STEAMBOAT COMPANY,
Plff. in Err.,
v.
LEONARD A. BROCKETT.

(See S. C. Reporter's ed. 637-650.)

Common carriers of passengers—liability for acts of servants—enforcement of reasonable regulations—reasonable force, question for jury—evidence res gestæ—*measure of damages.*

1. A common carrier of passengers undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.

2. In the enforcement of the reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force; but the law will not protect the carrier if its servants use excessive or unnecessary force in so doing.

3. In the case presented, it is *held:* that the question whether the defendant's servants, in executing a regulation as to deck passengers, used unwarrantable force and thereby caused the injuries complained of, was one peculiarly for the jury in view of the serious conflict of evidence; that the instructions of the court fairly presented the case to the jury, and that certain declarations, made by one servant of the defendant while assisting another in enforcing said regulation, constituted part of the *res gestæ*.

[No. 254.]

Argued April 22, 1887. Decided May 2, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **James Lowndes** and *W. P. Prentice*, for plaintiff in error:

On the complaint and the evidence a verdict should have been directed for the plaintiff in error.

Marshall v. *Hubbard*, 117 U. S. 415 (29:919); *Gilmer* v. *Higley*, 110 U. S. 47 (28: 62); *Randall* v. *Baltimore & O. R. R. Co.* 109 U. S. 479 (27: 1004).

The question upon the evidence was for the judge—whether the plaintiff's statement, uncorroborated, was sufficient to support a verdict in the face of the admitted facts and the other testimony by which it was contradicted.

Randall v. *Baltimore & O. R. R. Co. supra; Board of Comrs.* v. *Clark*, 94 U. S. 279 (24: 60); *Vanderbilt* v. *Richmond Turnpike Co.* 2 N. Y. 479; *Searles* v. *Manhattan R. R. Co.* 101 N. Y. 661; *Culhane* v. *N. Y. C. & H. R. R. R. Co.* 60 N. Y. 133; *Higgins* v. *McCrea*, 116 U. S. 671 (29: 764).

Mr. **Eugene E. Sheldon**, for defendant in error:

A common carrier by its contract with its passenger undertakes to carry him safely and to treat him respectfully, and undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants during the passage.

Stewart v. *Brooklyn & C. R. R. Co.* 90 N. Y. 583.

The fact that Brockett was out of his place in being on the freight "abaft the shaft," even if he had known of the rule, cannot prevent a recovery.

Rounds v. *Delaware, L. & W. R. R. Co.* 64 N. Y. 134; *R. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); *Sandford* v. *Eighth Ave. R. R. Co.* 23 N. Y. 343; *Hoffman* v. *N. Y. C. & H. R. R. R. Co.* 87 N. Y. 25.

The master is liable for the acts of the servant acting as such, though done in disobedience to orders of the master.

Phila. & R. R. R. Co. v. *Derby*, 55 U. S. 14 How. 468 (14: 502).

And in case of a passenger the master, being a common carrier, is liable for acts of a servant outside of the scope of his employment.

Stewart's Case, 90 N. Y. 588.

Even if Brockett had known he had no right where he was, he would not from that fact lose his right of action.

Sandford v. *Eighth Ave. R. R. Co.* and *Rounds* v. *Delaware, L. & W. R. R. Co. supra.*

[638] *Mr. Justice* **Harlan** delivered the opinion of the court:

This action was brought to recover damages sustained by the defendant in error, the plaintiff below, in consequence of personal injuries inflicted upon him by the employés of the plaintiff in error, a carrier of freight and passengers between the Cities of Albany and New York, in the State of New York. A verdict and judgment having been rendered for the sum of $5,500, the case is brought here for review, upon the ground that the court below committed errors of law in the conduct of the trial.

The plaintiff avers that he was received by the defendant as a deck passenger upon its boat, The Dean Richmond, at Albany, and that, in consideration of his having paid the price established for passengers of that class, it undertook to carry him safely to the City of New York, and thereby became bound that its servants and employés on said boat should not needlessly injure him while engaged in the discharge of their duties; that the defendant did not keep its contract, but broke the same, in that, by its servants on said boat, it needlessly and severely wounded him in his person during the voyage to New York, whereby he was [639] put to great expense for surgical attendance, and whereby, also, incurable injuries were inflicted upon him. These allegations are accompanied by a statement of the circumstances under which, the plaintiff insists, the alleged wrongs were committed.

The answer denies generally that the Company's agents or servants were guilty of negligence or improper conduct, and states "that the plaintiff paid for a deck passage, and it received him on its boat as a deck passenger for passage to New York on a certain part of the boat allotted to deck passengers, as was well known to the plaintiff, and subject to long established rules and regulations of the defendant, including that mentioned in the complaint, of which the plaintiff had due and full notice; that the said rules and regulations were reasonable, and the defendant's officers and employés on the said boat were charged with the duty of enforcing them in a reasonable and proper way, without unnecessary force or violence, and the said rules and regulations and the officers and employés of the boat in uniform were well known to the plaintiff; that the plaintiff did not remain on the part of the boat allotted to deck passengers, and did not obey the said reasonable rules and regulations of the defendant, but refused so to do, and contrary to the peace, quiet, good order and safety of the said boat and its passengers, made a disturbance on the said boat; and the defendant neither used nor authorized any undue or unnecessary force or violence in the enforcement of the aforesaid rule and regulation, but the contrary thereof; and the plaintiff was not injured by any of the defendant's officers, employés, or agents, as alleged in the complaint."

[640] We will not extend this opinion by a recital of all the facts and circumstances established by the proof. It is sufficient to say that there was evidence tending to sustain both the allegations of the complaint and the averments in the answer. In view of the serious conflict in the statements of witnesses, the case was one peculiarly for the determination of a jury, under appropriate instructions as to the law. The court, therefore, rightfully refused to direct a verdict for the Company, unless, as claimed, the plaintiff, according to his complaint and the evidence, had no cause of action.

It appears from the complaint that the Company had a regulation restricting deck passengers to a particular part of the boat; but of the existence of that rule, the plaintiff averred, he did not, at the time, have notice. It also appears by uncontradicted evidence that, upon the ticket purchased by the plaintiff were printed the words "deck passengers not allowed abaft the shaft," and that placards, in different parts of the boat, indicated the place on it which such passengers were prohibited from occupying. As the plaintiff was "abaft the shaft" when injured, no case, it is insisted, was made that would sustain an action upon the contract of transportation; consequently, it is contended, the request to instruct the jury to find for the defendant should have been granted. This argument assumes that the plaintiff could not claim protection under the contract for safe transportation in respect to an injury done him by the Company's servants while he was upon a part of the boat other than that to which he was restricted by the rule or regulation printed on his ticket. This position cannot be sustained. We shall not stop to inquire whether the regulation in question is shown to be a part of the contract for transportation; and we assume, for the purposes of this case, that the plaintiff stipulated that, during the voyage, he would remain upon the part of the boat to which deck passengers were assigned; still, it would not follow that his violation of that stipulation deprived him of the benefit of his contract. Such violation only gave the carrier the right to compel him to conform to its regulation, or, upon his refusing to do so, to require him to leave the boat, using, in either case, only such force as the circumstances reason- [645] ably justified. If the injuries necessarily arose from his violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, he is not precluded from claiming the benefit of the contract for safe transportation.

The plaintiff was entitled, in virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the Company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the Corporation, which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, "if," as was adjudged in *Phila. & R. R. R. Co.* v. *Derby*, 55 U. S. 14 How. 486 [14: 509], "it

be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment." See also *Phila. W. & Balt. R. R. Co.* v. *Quigley*, 62 U. S. 21 How. 210 [16: 75]. "This rule," the Court of Appeals of New York well says, "is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If his business is committed to an agent or servant, the obligation is not changed." *Higgins* v. *Watervliet Turnpike Co.* 46 N. Y. 27. The principle is peculiarly applicable as between carriers and passengers; for, as held by the same court in *Stewart* v. *Brooklyn & C. R. R. Co.* 90 N. Y. 591, a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and copassengers, and undertakes absolutely to [646] protect them against the misconduct of its own servants engaged in executing the contract.

What will be misconduct on the part of its servants towards a passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. In the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force. But the law will not protect the carrier if the servant uses excessive or unnecessary force. This doctrine is well illustrated in *Sanford* v. *Eighth Ave. R. R. Co.* 23 N. Y. 345. In that case it appeared that the plaintiff's intestate got upon a street railroad car in the night time and, after being shown to a seat, refused, without sufficient cause, to pay his fare. He was ordered to leave the car and, failing to do so, the conductor led him to the forward platform and, without stopping the car, forcibly ejected him therefrom. The injuries received by the passenger resulted in his death. The court said: "It must be conceded that the conductor had a right to expel the intestate for the reason that he would not pay his fare when asked to do so. But this was not a right to be exercised in a manner regardless of all consequences. A person cannot be thrown from a railroad train in rapid motion without the most imminent danger to life; and, although he may be justly liable to expulsion, he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay his fare will not justify homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him, when such attempt will endanger him, that he has to resist a direct attempt to take his life. The great law of self preservation so plainly establishes this conclusion that no further argument is necessary. * * * It is said that the intestate offered resistance when he was thus seized. But this he had a right to do in order to save life, which he had not forfeited by refusing to pay the fare. He was liable to be expelled, and the conduct- [647] or's assault would have been justified if the car had been stopped, and the expulsion had been made without unnecessary violence. But, as the conductor has no right to make the assault when he did and as he did, so the law will justify such resistance as was offered to that assault." See also *Hoffman* v. *N. Y. C. & H. R. R. R. Co.* 87 N. Y. 24; *Rounds* v. *Delaware etc. R. R. Co.* 64 N. Y. 129, 134; *Lynch* v. *Metropolitan R. R. Co.* 90 N. Y. 77; *Ramsden* v. *Boston & A. R. R. Co.* 104 Mass. 121; *Noble* v. *Cunningham*, 74 Ill. 53; *North Western R. R. Co.* v. *Hack*, 66 Ill. 242; *Robinson* v. *Webb*, 11 Bush. 464, 482.

In the present case the jury were instructed, in substance, that the plaintiff had no right to be in any part of the boat except that assigned to deck passengers, and that the carrier's servants had the right—using no more force than was necessary—to remove him from the place where he was found by the watchman. Referring to the testimony of the plaintiff, the court observed: "He says that he went upon the bales of hops, remained there a short time, went to sleep, and was awakened by the watchman, Thiel, striking him with a cane; that he struck him first on the feet, afterwards in the face, and told him to get down. He asked Thiel if he was doing any harm there, and asked to be allowed to stay. Part of the answer was, 'Get down, come down.' The assault upon him continuing, he then put up his satchel for protection, and was thereupon caught by the collar of his coat and pulled headlong from the freight, his shoulder striking one of the barrels standing near, dislocating it or causing the injury which has been described. He says that upon regaining his feet, he was again struck by the watchman. Soon after another officer of the boat came and he was pushed towards the shaft and told that was the part of the boat for him to remain in; that he went to the barber shop, and there for the first time read his ticket and saw the requirement in reference to deck passengers. That very briefly is the statement of the plaintiff." The court proceeded: "If you believe that statement to be true, then I say, as a matter of law, that there was more force than was necessary to accomplish the result, and the plaintiff is entitled to a verdict." To this last part of the charge the defendant took an exception. [648] But we preceive no ground upon which the exception can properly rest. If the statements of the plaintiff were true, then neither argument nor citation of authorities is necessary to show that undue force was used by the Company's servants. And it was the right of the court to so instruct the jury.

But that the jury might also have in mind the case as made by the defendant, the court said: "On the other hand, you have the testimony of the witness Thiel, who says he came to the freight two or three times before the transaction and told plaintiff to get down; that the other passengers all got down; that on the third occasion he stepped on a box and told him to come down; that the plaintiff, instead of doing so, endeavored to climb higher or get away from him; that the plaintiff kicked him in the breast, and in the excitement he caught hold of him, and in the struggle which ensued, the boxes, the plaintiff, and the witness came down together in a crash upon the floor. If you believe that statement, then the plaintiff brought this assault upon himself; it was an unavoidable accident, and the plaint-

iff is not entitled to recover. Other witnesses have been called, who in part corroborate the story of the watchman, and in some particulars corroborate the story of the plaintiff."

The whole case was thus fairly placed before the jury, upon the issue as to whether the defendant's servants, in executing its regulation as to deck passengers, used unwarrantable force and thereby caused the injuries of which the plaintiff complains.

One objection made by the defendant to the admission of evidence deserves to be noticed. The plaintiff in his evidence described the manner in which, as is contended, he was dragged by the watchman from the boxes. After stating that he was thrown to the floor, and was being roughly pushed by the watchman, he proceeded: "*Then* I saw another man coming with the uniform of the boat on, and the cap, and he said: 'All such men as you ought to be killed.' I says, 'What do you want to kill me for?' he says, 'You farmers are so stingy; you are too stingy to buy a state room, and you [649] ought to be killed.' I said, 'You ought not call me stingy;' then he said, 'Have you looked at your ticket?' I think he had 'Third assistant mate' on his cap, the cap had a yellow cord, the same as the officers of the boat wore." It appeared, in proof, that the person here referred to was one of the mates of The Richmond.

The defendant objected, at the trial, to the competency of the statements of the mate. The objection was overruled and an exception taken. It is now insisted that the defendant is not responsible for the brutal language of its servants, and that the declarations of the mate to the plaintiff were not competent as evidence against the carrier. We are of opinion that these declarations constitute a part of the *res gestæ*. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently "pushing" him, while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff. *Vicksburg & M. R. R. Co.* v. *O'Brien*, 119 U. S. 99, 105 [*ante*, 299, 302]; *Ohio & Miss. R. R. Co.* v. *Porter*, 92 Ill. 437, 439; *Toledo & Wabash R. Co.* v. *Goddard*, 25 Ind. 190, 191. As bearing upon this point, it may be stated that the jury were instructed that the case, as presented, did not authorize vindictive or punitive damages, and that in no event could they award the plaintiff any larger amount than would reasonably compensate him for the injuries received; thus guarding against undue weight being given to the harsh words of the Company's servants, apart from their acts.

Other questions arise upon the admission of evidence against the objection of the defendant; upon the refusal of the court to grant requests for instructions in its behalf; and upon certain parts of the charge to which it excepted. [650] In our opinion none of these questions require consideration; and the action of the court, in respect to them, constitute no ground for the reversal of the judgment. The charge of the court embodied all that need have been said. It correctly stated the propositions of law arising in the case. No substantial error having been committed, *the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

END OF VOL. 121.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1886.

Vol. 122.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1886.

LEHIGH WATER COMPANY, *Plff. in Err.,*

v.

CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

121 US 388.

Constitutional law—obligation of contracts—impairment of—law enacted prior to making of contract—jurisdiction of this court—rights of water company not exclusive—Constitution and Statutes of Pennsylvania.

1. The provision of the Constitution which declares that "no State shall pass any law impairing the obligation of contracts" does not apply to a law enacted prior to the making of the contract, the obligation of which is claimed to be impaired.
2. The judgment of a state court, construing a contract, is not reviewable by this court, unless, under said provision of the Constitution and existing statutes, such judgment, in terms or by its necessary operation, gives effect to some provision of the State Constitution or legislative enactment, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question.
3. Under the Constitution and legislation of Pennsylvania the Lehigh Water Company is not entitled to an exclusive right to maintain water works in the Borough of Easton, said Borough itself having the authority to maintain a public system of water works under the Act of 1867, which does not impair the rights derived by the Company from the Act of 1874.

[No. 199.]

Argued April 7, 1887. Decided April 18, 1887.

IN ERROR to the Supreme Court of the State of Pennsylvania. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Edward J. Fox** and *Edward J. Fox, Jr.*, for plaintiff in error.

Messrs. **Robert I. Jones** and *William S. Kirkpatrick*, for Board of Water Commissioners of Easton, defendants in error.

Frank Reeder and *William Beidelman*, for Borough of Easton, defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

For many years prior to June 21, 1880, the Lehigh Water Company, a corporation organized, under the laws of Pennsylvania, by the purchasers at judicial sale of the rights, powers, privileges, and franchises of the West Ward Company, also a Pennsylvania corporation, maintained a system of water works whereby the inhabitants of the Borough of Easton, in that Commonwealth, were supplied with water for domestic and business purposes. On that day, it accepted the provisions of an Act of the General Assembly of Pennsylvania, approved April 20, 1874, entitled "An Act to Provide for the Incorporation and Regulation of Certain Corporations." By such acceptance it acquired the privileges, immunities, franchises, and powers conferred by the Act upon corporations created under it.

It also became entitled to the benefit of the third clause of the 84th section of that Act, relating to water and gas companies.

That clause provides:

"The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock; *Provided*, That the said corporations shall at all times furnish pure gas and water; and any citizen using the same may make complaint of impurity or deficiency in quantity, or both, to the court of common pleas of the proper county, by bill filed, and, after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints or compel the corporation to correct the evil complained of."

The seventh clause of the same section provides: "It shall be lawful, at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district in which the said company shall be located, to become the owners of said works and the property of said company by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared." Laws Pa. 1874, pp. 78, 98.

After the acceptance by the Lehigh Water Company of the provisions of the Act of 1874, the constituted authorities of the Borough of

Easton, in conformity with a vote of its qualified electors, and under power conferred by Acts of the General Assembly, approved March 12, 1869, and April 15, 1867 (Pamph. Laws Pa. 1867, pp. 412, 1254), determined to construct and itself maintain a system of public works for supplying its inhabitants with water.

This suit was brought by the Lehigh Water Company for the purpose of enjoining the authorities of the Borough from constructing or providing such works or from appropriating money therefor. The suit proceeds upon these grounds: 1. That the Acts of 1867 ceased to be valid after the adoption of the present Constitution of Pennsylvania. 2. That the Lehigh Water Company acquired, by the Act of 1874, the exclusive right to erect and maintain water works for supplying water to the inhabitants of Easton. 3. That the Acts of 1867, if not superseded by the Constitution of Pennsylvania, impaired the obligation of the contract created between that Commonwealth and the Company by the latter's acceptance of the provisions of the Act of 1874; consequently, they were void under the National Constitution.

The Supreme Court of Pennsylvania, affirming the judgment of the court of original jurisdiction dismissing the suit, held that the exclusive right acquired by the Lehigh Water Company, under the Act of 1874, was exclusive only against other private water companies, and that the legislation did not intend to prohibit a city, borough, or other municipal corporation from providing its inhabitants with water by means of works constructed by itself from money in its own treasury; also, that the Acts of 1867 were neither repealed by the Act of 1874, nor superseded by the State Constitution.

In reference to the remaining ground relied upon by the Company the state court said:

"The third ground of objection is wholly without merit. By constructing water works of its own the Borough will not destroy the franchises of the plaintiff Company. It may impair their value, and probably will do so; but of this the Company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded itself from such new grant the incidental injury can constitute no obstacle. *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 420 [9: 773]; *Turnpike Co.* v. *Maryland*, 70 U. S. 3 Wall. 210 [18: 180]; *Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. 35. No contract has been shown between the Water Company and the State by which the latter is precluded from granting to the Borough of Easton the privilege of erecting works to supply its citizens with water."

The only question presented by the record which this court can properly consider is whether the judgment below denies to the plaintiff in error any right or privilege secured by that provision of the Constitution of the United States which declares that "No State shall pass any law impairing the obligation of contracts." Obviously, this clause cannot be invoked for the reversal of the judgment below. It is equally clear that the law of the State to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired. Neither the Lehigh Water Company nor its predecessor had, under any statute enacted prior to 1874, an exclusive right to maintain water works in the Borough of Easton for supplying its inhabitants with water. Nor did the grant to the Borough, in the Acts of 1867, of the power to construct and maintain a system of public water works, infringe any right or privilege which the plaintiff in error *then* had under its charter. But the claim is that the exclusive privilege acquired by the Company under the Statute of 1874 was impaired in value by the Acts passed in 1867. It cannot, however, with propriety, be said that the obligation of a contract made with the State in 1874 was impaired by statutes enacted in 1867. Whether the former repealed, by implication, the Acts of 1867, presents no question arising under the National Constitution. That is a question simply of statutory construction, which the state court was competent to determine, and whose judgment in respect thereto is not subject to re-examination in this court. Had the Borough of Easton been authorized by a statute enacted *after* the Lehigh Water Company had acquired the exclusive privilege given by the Act of 1874, then this court would have been compelled to decide, upon its independent judgment, whether the latter applied only to private corporations; for, in such case, the determination of that question would be involved in the inquiry whether there was a contract between the State and the Company, and, if there was a contract, whether its obligation was impaired by a law subsequently enacted. *Louisville Gas Co.* v. *Citizens Gas Co.* 115 U. S. 683, 697 [29: 510, 515].

The argument in behalf of the Company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may re-examine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the State Constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question. *R. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177, 181 [18: 331, 332]; *R. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 511, 515 [19: 997, 998]; *Knox* v. *Exchange Bank*, 79 U. S. 12 Wall. 379, 383 [20: 414, 415]; *Delmas* v. *Ins. Co.* 81 U. S. 14 Wall. 661, 665 [20: 757, 759]; *University* v. *People*, 99 U. S. 309, 319 [25: 387, 388]; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 582 [28: 1084, 1087].

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN NOONAN ET AL., *Appts.*,
v.
CALEDONIA GOLD MINING COMPANY. 121
(See S. C. Reporter's ed. ——)

Mines—location and development within Indian Reservation—subsequent compliance with laws—relinquishment of reservation—specific objection to evidence when necessary—pleading and practice—codefendant added at trial—Dakota Code.

1. Where a party was in possession of a mining claim in the Black Hills within the Indian Reservation prior to the relinquishment of February 28, 1877, with the requisite discovery, with the surface boundary sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day.

2. Where an objection to the introduction of evidence is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it could not have been obviated at the trial.

3. Under the Code of Civil Procedure of Dakota a codefendant may be added by amendment of the pleadings at the trial; and a judgment against him will be sustained if allegations supporting it appear somewhere in the record.

[No. 170.]

Argued Mar. 29, 30, 1887. Decided Apr. 18, 1887.

APPEAL from the Supreme Court of the Territory of Dakota. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This is an action to determine the rights of the parties to mining ground in Lawrence County, in the Territory of Dakota. In April, 1878, one of the defendants below, and of the appellants here, John Noonan, asserted ownership to a tract of mineral land in that county, bearing the name of the Bobtail Lode. It was of great value, and he desired to obtain a patent of the United States for it. He, therefore, pursued the course prescribed in such cases by sections 2325 and 2326 of the Revised Statutes; and, on the 20th of that month, filed the necessary application in the proper land-office of the district.

At the same time Henry Lackey and eight other persons asserted ownership of mining ground known as the Caledonia Lode, which conflicted with the Bobtail claim, as alleged, to the extent of three acres and fifty-seven hundreths of an acre. They, therefore, in May, 1878, filed in the land-office an adverse claim to the application of Noonan; and, in June following, brought the present action, to determine their respective rights to the disputed ground.

Subsequently, these adverse claimants sold their interest in the Caledonia Lode to Thomas Bell, of San Francisco; and he conveyed the property to the Caledonia Gold Mining Company, a corporation organized under the laws of California. Upon application to the court, this Company was substituted as plaintiff in the action, without prejudice to the rights of the defendants. An amended complaint was thereupon filed in its name, and substituted for the original one. It alleges the incorporation of the plaintiff under the laws of California; its compliance with the laws of Dakota relating to foreign corporations, to enable it to transact business, and to acquire, hold, and dispose of property in the Territory; the transfer of the Caledonia Lode to Thomas Bell, and his conveyance of the property to the Company. It also sets forth the original location of the lode by four of the original plaintiffs, on the 21st of June, 1876, and their actual possession thereof afterwards; and that they and the others of the original plaintiffs, who had become interested with them, made, on the 15th of March, 1877, an additional and supplementary claim, and location of the Caledonia Lode, and, on the same day caused a certificate or notice of the original claim and location, as well as of the additional and supplementary claim and location, to be recorded in the mining records of the district.

The amended complaint further alleges that, from its original location in June, 1876, the plaintiff or its grantors have been in the actual and continuous possession of the Caledonia claim, and every part of it, and in accordance with the laws of the United States and of the Territory of Dakota, and the local rules and regulations of miners in the district; and have expended, in labor and money, more than $5,000 in its development and improvement; that the defendant Noonan claims an interest in a portion of its mining ground, to the extent of three acres and forty seven hundreths of an acre, by virtue of an alleged location of a quartz mining claim, called the Bobtail Lode, made by his predecessors in interest, in February, 1876, which is invalid and a cloud upon its title to the Caledonia Lode. It prays that the defendant may answer and set out particularly his claim to that portion of the Caledonia Lode which conflicts with the Bobtail Lode, and the nature of it; and that it may be adjudged that he has no estate or interest therein, and that he be enjoined from asserting any right or title to it.

The defendant, in his answer, denies the allegations of the complaint, except as they are afterwards admitted; and, specifically, any knowledge of the incorporation of the plaintiff, or of its compliance with the laws of Dakota in regard to foreign corporations; admits his claim to be the owner of the Bobtail Lode, his application for a patent, and the adverse action of the former plaintiffs; and sets up the discovery and location of that lode on the 24th of February, 1876, by parties through whom he derives his interest.

A replication traverses some of the matters set up in the answer, and asserts an abandonment and forfeiture of the interests of the original locators of the Bobtail Lode.

The action was tried by the court without the intervention of a jury, by consent of parties. During the trial it appeared that one Thomas F. Mahan asserted an interest in the Bobtail Lode, and that he was a proper, if not a necessary, party to a complete determination of the matters in controversy. Thereupon, by consent of parties, he was made a codefendant in the action. The following is the entry made, at the time, in the journal of proceedings, following the title of the cause:

"Now, on this 15th day of July, A. D. 1880, the trial of the cause is resumed. By consent of all parties, Thomas F. Mahan is made a party defendant in this action. Counsel for defendant appear and answer instanter for him, any amendments to pleadings required to be pre-

pared and served during the pendency of this action, or at its conclusion."

It appears that subsequently the two defendants joined in all proceedings taken. Before the entry of judgment, the plaintiff's attorneys, in order to make the record complete as to the new defendant, Mahan, instead of inserting his name at the proper place in the complaint, or rewriting it entirely, served upon the defendants' attorneys, and filed with the judgment roll, the following amendment:

"In the District Court, First Judicial District, Lawrence County, Dakota Territory.

"Caledonia Gold Mining Company (formerly Henry Lackey *et al.*), Plaintiff,
v.
"John Noonan and Thomas F. Mahan, Defendants.

"Now comes the above named plaintiff, and in pursuance and by authority of the court hereinbefore made, on the 15th day of July, 1880, making the said Thomas F. Mahan a defendant in this action, amends its amended and substitute complaint, which was herein filed November 6, 1879, by inserting therein the name of the said Thomas F. Mahan as a defendant, and by inserting in and adding to said complaint, immediately after the subdivision thereof numbered 9, and before the prayer thereof, the following allegation, to wit:

"10. And plaintiff further avers that the defendant, Thomas F. Mahan, has, or claims to have, some right, title, or interest adverse to plaintiff in or to that portion of the said Caledonia Lode claim above described by survey; that said claim of said defendant Mahan is without foundation or right as against plaintiff, but said Mahan persists in the same and makes said claim, as plaintiff is informed and believes, under the said alleged and pretended location of the said alleged Bobtail Lode claim above described as co-owner with, and claiming under the same right as, defendant Noonan, as above mentioned, and that said claim of said Mahan casts a cloud upon plaintiff's title to its said portion of said Caledonia Lode above described; and plaintiff, therefore, makes said Mahan a defendant in this action, and asks the same judgment, decree, and relief against him as hereinafter prayed against said defendant Noonan.

"CLAGETT & DIXON,
Att'ys for Pl'tiff."

No objection was taken in the district court to this mode of amending the pleadings. It was made the subject of comment for the first time in the Supreme Court of the Territory when the case was there on appeal, when it was contended that the amendment was irregular and insufficient, and left the original complaint without any allegations against the defendant Mahan, against whom, with the original defendant, the judgment was entered; and, therefore, that the judgment could not be sustained by the pleadings. That court held the objection to be untenable; and its ruling in this respect is assigned as error.

On the trial, the plaintiff, to establish its corporate existence, gave in evidence a copy of its articles of incorporation, certified by the clerk of the City and County of San Francisco, the place of its principal business, under his official seal, to be a correct copy of the original on file in his office; to which there was also appended a certificate of the Secretary of State of California, under the seal of the State, that it was also a correct copy of those on file in his office. By the law of California, the articles upon which a certificate of incorporation is issued are required to be filed with the clerk of the county in which the principal business of the corporation is to be conducted, and a certified copy with the Secretary of State. Civil Code, sec. 296. The plaintiff at the same time produced a copy of the articles on file in the office of the Secretary of the Territory, certified by him to be a correct copy, with the seal of the Territory annexed. To the introduction of these certified copies it was objected, generally, that they were "incompetent, irrelevant and immaterial," without any specification of the particular ground on which they were thus objectionable.

In the Supreme Court of the Territory, on appeal, it was objected that the documents were not properly authenticated as required by the Act of Congress, and that the certificates were signed by deputy officers; but that court held that the specific objection being one which, if taken below, might have been obviated there, it could not be urged on appeal under the general objection taken; and, therefore, ruled the point untenable. This ruling is also assigned as error.

Numerous other objections were taken by the plaintiffs, during the progress of the trial, to the introduction of evidence of acts of the predecessors of the plaintiff in locating and developing the Caledonia Lode, previous to February 28, 1877, when the right of the Indians to the Territory was extinguished by agreement with the United States. These and objections to the findings of the court on matters of fact constitute, in addition to those mentioned, the burden of the appellant's complaint. The court found for the plaintiff, and rendered judgment that it was the owner and entitled to the possession of the ground in controversy. On appeal to the Supreme Court of the Territory, the judgment was affirmed, and the defendants have brought the case to this court.

Messrs. **Daniel McLaughlin** and *William R. Steele*, for appellants.

Messrs. **T. L. Skinner** and **S. S. Burdett**, for respondent.

Mr. Justice **Field** delivered the opinion of the court, as follows:

The exceptions taken in the district court were fully considered and answered by the Supreme Court of the Territory in a clear and satisfactory opinion. The objections to the sufficiency of the evidence to justify the findings of fact cannot be heard here; they were matters for consideration only in the courts below. Of the numerous assignments of error presented to us, we deem only three of sufficient importance to require special consideration. They are:

1. That the judgment is not sustained by the pleadings;

2. That the articles of incorporation of the plaintiff were admitted in evidence without due authentication; and,

3. That evidence of acts of the predecessors of the plaintiff in locating and developing the

Caledonia Lode prior to the relinquishment of the Indian title to the United States was improperly admitted.

1. There would be some force in the objection that the judgment is not sustained by the pleadings, if the amendment joining Mahan as a codefendant with Noonan could not be read as a part of them. The judgment is against him as well as against Noonan, and there must appear somewhere in the record allegations by which it can be supported. It would have been the better course, when the order was entered that Mahan be joined as a codefendant, for the attorneys of the plaintiff to have had his name at once inserted in the complaint, with such other changes as to make the allegations apply to him. That such changes might have been made by consent of parties, without the formality of suspending the trial, and filing a new complaint, and waiting for an answer to it, there can be no doubt; and when thus made, the parties would be estopped from any subsequent objection to them. A provision of the Code of Civil Procedure of Dakota vests ample authority in the court to make changes of this character in furtherance of justice. Its language is: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, if the amendment does not change substantially the claim or defense, by conforming the proceeding or pleading to the facts proved." Sec. 142.

The trial continued after the amendment, the defendant Mahan participating in all its proceedings as if his name had been inserted in the complaint in the most formal manner, and he had answered it specifically. The agreement provided that the amendment might be made during the pendency of the action, or on its conclusion; and in accordance with it the amendment to the complaint filed with the judgment roll may properly be read and treated as part of the pleadings. If the defendant Mahan had desired to file a formal answer to the allegations of the complaint, he should have insisted upon it at the time. He was probably satisfied with the answer of his codefendant on file, which put in issue the plaintiff's title and set up all that he could have pleaded for himself. He had on the trial all the benefits of the most formal answer, and his connection with the case as a party sufficiently appears from the amendment filed.

2. The objection to the introduction of the articles of incorporation at the trial was that they were "immaterial, irrelevant, and incompetent" evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. *U. S.* v. *McMasters*, 71 U. S. 4 Wall. 680 [18: 811]; *Burton* v. *Driggs*, 87 U. S. 20 Wall. 125 [22: 299]; *Wood* v. *Weimar*, 104 U. S. 795 [26: 781].

3. The objection urged to the admission of evidence of acts done by the grantors of the plaintiff in locating and developing the Caledonia mine previous to February 28, 1877, is founded upon the Treaty between the United States and the Sioux Indians, concluded on the 29th of April 1868, and ratified on the 16th of February, 1869. By the second article, a district of country embracing the region known as the Black Hills of Dakota, and which includes the mining property in controversy, was set apart as a reservation for the absolute and undisturbed use and occupation of those Indians, and such other friendly tribes or individual Indians to whose admission, from time to time, they and the United States might consent. And the United States stipulated that no person, except those designated and authorized by the Treaty, and such officers, agents, and employés of the government as might be authorized to enter upon Indian Reservations in the discharge of duties enjoined by law, should ever be permitted "to pass over, settle upon, or reside in the territory" described, or in such territory as might be added to the reservation. 15 Stat. at L. 635.

In a subsequent agreement with the Indians, ratified by Act of Congress on the 28th of February, 1877, the northern and western boundaries of the reservation were changed, leaving out the country of the Black Hills, which was relinquished by the Indians to the United States. That region was thus freed from the prohibition against settlement upon it, and opened like other public lands of the United States to exploration and occupation under the mining laws. It is contended that the Treaty operated as an actual prohibition against all acts taken by the predecessors of the plaintiff in the location and development of their mine, until the supplemental agreement of 1877, and that no support to their title can be derived from such acts, and therefore that no evidence of them was admissible.

Notwithstanding the prohibition of the Treaty, as soon as it became known, early in 1874, that the precious metals existed in the Black Hills, large numbers of persons entered upon the reservation and proceeded to appropriate mining ground, and to work and develop the mines. The subject soon attracted the attention of the public authorities, and an exploring expedition, to ascertain and report as to the mining and agricultural resources of the country, was organized and sent out by the Secretary of the Interior in 1875. The report of the geologist accompanying the expedition, made in November of that year, confirmed the existence of the precious metals on the reservation. In the meantime, as early as June, 1875, the Secretary, under direction of the President,

appointed a commission to visit the Sioux Nation, with a view to secure to the citizens of the United States the right to mine in the country known as the Black Hills. Report of Commissioner of Indian Affairs for 1875, pp. 184, 185. The commission was unsuccessful, but the government was determined, notwithstanding, to open the mineral lands to development; and by the Act of August 15, 1876, 19 Stat. at L. 176, making appropriations for the Indian service, it was provided that thereafter there should be no appropriation made for the subsistence of the Indians unless they should first agree to relinquish all right and claim to so much of their permanent reservation as lay west of the 103d meridian of longitude. This was the Black Hills country. Negotiations were resumed, and a supplementary agreement was concluded, which was approved February 28, 1877, relinquishing that portion of the reservation, and ceding it to the United States. 19 Stat. at L. 254.

While it is true that, before the new agreement, the prohibition against settlement upon the country constituting the reservation of the Indians remained in full force, yet it was evident to all that it would soon be withdrawn by some arrangement; that immediately afterwards the mineral lands would be open to occupation and development; and that from that time mining claims taken up in the Territory would be respected and protected. With the new agreement the results anticipated followed. The presence of the miners on the reservation up to that time was illegal, but from that time it was legal. Those then in possession of mining claims, which had been taken up and developed in accordance with the rules of miners in mining districts of the country, were entitled to protection in their possessory claims as against the intrusion of others. The effect of the withdrawal of the district from the reservation, and the consequent end of the prohibition, was to leave the predecessors of the plaintiff exempt from liability to be disturbed for their unlawful entry on the land, and free to take measures under the mining laws for the perfection of their claims. Evidence of what had been done by them, the location of their claim, its extent, the amount of work done in its development, was competent, not as creating any absolute right to the property, but as showing the existence and condition of the property when their possession became lawful under the new agreement. Whether they should be protected in holding the property afterwards, depended upon their future compliance with the laws, statutory and mining, governing the possession and use of mineral lands in Dakota. The rule laid down by the Supreme Court of the Territory is, in our judgment, the correct one, which should govern cases of this kind, and that is substantially this: that where a party was in possession of a mining claim on the 28th of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession. By this rule substantial justice is done to all parties who were entitled to protection in their mining claims when the new agreement took effect.

Such proceedings were taken in this case by the owners of the Caledonia mine. They renewed their location and claim, making a record of their original claim and location and of the supplementary one, in the proper mining records of the district.

The case appears to have been examined with great care in the Supreme Court of the Territory, and every consideration given to the positions of the appellants; and in its rulings we see no error.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

HARRIS EAMES, *Appt.*, [40]

v.

WILLIAM D. ANDREWS, ET AL.

(See S. C. Reporter's ed. 40-70.)

"Driven-well patent"—validity of—process—not necessary to set out scientific theory or principle—reissue, not void for want of novelty nor for describing different invention—infringement—when reissue is within statute—evidence—foreign publications.

1. Letters patent No. 73425 and reissued letters patent No. 4372 cover a process, the element of novelty in which consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, thereby putting into practical use the new principle of forcing the water in the water bearing strata of the earth into a well pit, by the use of artificial power to create a vacuum.

4. The fact that the scientific theory or principle, the application of which is supposed to constitute the invention secured by said letters patent, is not set out in either the original patent or the reissue is immaterial.

3. The reissue is not void for describing a different invention in stating that the tube is "made air tight throughout its length," and that the patentee attaches "to the tube by an air tight connection any known form of pump." An air tight connection being indispensable to the operation of a pump, it was implied in the original specification. It is also fairly to be implied, from the entire language of the original specification, that the tube was intended to be air tight throughout its length.

4. There is nothing in these additions and amendments which either was not virtually contained by reasonable implication in the original description, or, if new, amounted to more than specific and exact directions to supplement those contained in the original.

5. With reference to the penetration of rock in constructing a well, the true meaning of the original patent is that the process of driving cannot be used to overcome the obstacle presented by the rock, but that otherwise the tube may be driven until it reaches the proper supply of water, and then operate as a driven well. The only effect of the amendments contained in the new specification and claim is to make that intention clear; and in legal effect the original and reissued patents are the same.

6. This court holds, upon a review of the evidence presented, that the reissued patent is not void for want of novelty.

7. The evidence presents a clear case of infringement, the patent not having been successfully evaded by boring until the water bearing stratum was reached.

8. Where the amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the

original, and thus cause the patent to include an invention not within the original, the rights of the public are not thereby narrowed, and the case is within the remedy intended by the statute.

9. Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent.

[No. 120.]

Argued Jan. 7, 8, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. Opinion below, 15 Fed. Rep. 109. *Affirmed.*

The history and facts of the case fully appear in the opinion of the court.

Compare the following case of *Beedle* v. *Bennet, post*, 1074.

[41] *Mr.* **C. R. Ingersoll**, for appellant.

Messrs. **A. Q. Keasbey** and *J. C. Clayton*, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the District of Connecticut upon a bill in equity filed by the appellees to restrain the alleged infringement of reissued letters patent No. 4372, issued to Nelson W. Green, on May 9, 1871, for an improved method of constructing artesian wells. The original letters patent, No. 73425, were issued to the patentee January 14, 1868. The defenses relied on were that the defendants did not infringe; that the patent was void for want of novelty in the invention; and that the reissued patent was void because it was not for the same invention as that described and claimed in the original patent. The controversy relates to what is commonly known as the "driven-well patent."

As one of the defenses is that the reissued patent is void, as covering more than was described and claimed in the original patent, it becomes necessary to compare the two, and for that purpose they are here printed in parallel columns, the drawings being the same in both:

Specification forming part of Letters Patent No. 73425, dated January 14, 1868.

ORIGINAL.

By it known that I, Nelson W. Green, of Cortland, in the County of Cortland, and State of New York, have invented a new and useful improvement in the manner of sinking and constructing artesian or driven wells where no [42] rock is to be penetrated, and of raising water therefrom; and I do hereby declare the following to be a full, clear and exact description of the same, reference being had to the accompanying drawin ga, making a part of this specification, in which—

Fig. 1 represents a portion of the rod which is driven or forced into the ground to form the opening or hole for the insertion of the tube that forms the casing or lining of the well and the avenue through which the water is raised to or above the surface of the ground, and Fig. 2 represents a portion of the tube.

My invention consists in driving or forcing an iron or a wooden rod with a steel or iron point into the earth until it is projected to or into the water, and then withdrawing the said rod and inserting in its place a tube of metal or wood to the same depth, through which and from which the water may be drawn by any of the usual well known forms of pumps.

Specification forming part of Letters Patent No. 73425, dated January 14, 1868; Reissue No. 4372, dated May 9, 1871.

REISSUE.

Be it known that I, Nelson W. Green, of Amherst, in the County of Hampshire, and State of Massachusetts, have invented a new and improved method of constructing artesian wells; and I do hereby declare that the following is a full, clear and exact description of the same, reference being had to the accompanying drawings, forming part of this specification.

My invention is particularly intended for the construction of artesian wells in places [43] where no rock is to be penetrated.

The methods of constructing wells previous to this invention were what have been known as "sinking" and "boring," in both of which the hole or opening constituting the well was produced by taking away a portion of the earth or rock through which it was made.

This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument and not removed upward from the hole, as it is in boring.

Fig. 1.

Fig. 2.

The instrument to be employed in producing such a well, which to distinguish it from "sunk" or "bored" wells may be termed a "driven" well, may be any that is capable of sustaining the blows or pressure necessary to drive it into the earth; but I prefer to employ a pointed rod, [44] which, after having been driven or forced down until it reaches the water, I withdraw and replace by a tube made air tight throughout its length, except at or near its lower end, where I make openings or per-

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings.

The driving rod A I construct of wood or iron, or other metal, or of parts of each, with a sharp point, *b*, of steel, or otherwise, to penetrate the earth, and a slight swell, *a*, a short distance above the point, to make the hole slightly larger than the general diameter of the rod. This rod I drive, by a falling weight or other power, into the earth until its point passes sufficiently far into the water to procure the desired supply. I then withdraw the rod and insert in its place the iron or wooden tube B, which may be slightly contracted at its lower end to insure its easy passage to its place. In general, this tube B I make of iron, and of a thickness that will bear a force applied at its upper extremity sufficient to drive or force it to its place; and where a large or continuous flow of water is desired, I perforate this lower end of the tube to admit the water more freely to the inside.

[45]

The perforations *c* may be about one half of an inch in diameter, less or more, and from one to one and a half inches apart; and the perforations may extend from the bottom of the tube upward, from one to two feet. The diameter of the tube, should be somewhat smaller than the diameter of the swell *a* on the drill end of the driving rod A.

[46]

In localities where the water is near the surface of the ground, and the well is for temporary use only, as in the case of a moving army, or for temporary camps, lighter and thinner material than iron may be used for making the tubes—as for instance, sinc, tin, copper, or

forations for the admission of water, and through and from which the water may be drawn by any well known or suitable form of pump.

In certain soils the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself through which the water is to be drawn, may be the instrument which produces the well, by the act of driving it into the ground to the requisite depth.

To enable others to make and use my invention, I will proceed to describe it with reference to the drawings in which—

Figure 1 represents a portion of the pointed rod above mentioned, and Fig. 2 a portion of the tube which forms the casing or lining of the well.

The driving rod A I construct of wood or iron or other metal, or of parts of each, with a sharp point, *b*, of steel or otherwise, to penetrate the earth, and a slight swell, *a*, a short distance above the point, to make the hole slightly larger than the general diameter of the rod. This rod I drive, by a falling weight or other power, into the earth until its point passes sufficiently far into the water to procure the desired supply. I then withdraw the rod and insert in its place the air tight iron or wooden tube B, which may be slightly contracted at its lower end to insure its easy passage to its place. In general, this tube B I make of iron, and of a thickness that will bear a force applied at its upper extremity sufficient to drive or force it to its place; and where a large or continuous flow of water is desired I perforate this tube near its lower end to admit the water more freely to the inside.

The perforations *c* may be about one half of an inch in diameter, less or more, and from one to one and a half inches apart; and the perforations may extend, from the bottom of the tube upward, from one to two feet. The diameter of the tube should be somewhat smaller than the diameter of the swell *a* on the drill end of the driving rod A.

In localities where the water is near the surface of the ground, and the well is for temporary use only, as in the case of a moving army or for temporary camps, lighter and thinner materials than iron may be used for making the tubes—as, for instance, sinc, tin, copper, or sheet metal

sheet metal of other kind, or even wood may be used. The rod may be of any suitable and practical size that can be readily driven or forced into the ground, and may be from one to three inches in diameter.

Any suitable, well known pump may be applied to raise the water up through the tube to the surface or above it.

of other kind, or even wood, may be used.

The rod may be of any suitable and practical size that can be readily driven or forced into the ground, and may be from one to three inches in diameter.

In some cases the water will flow out from the top of the tube without the aid of a pump. In other cases the aid of a pump to draw the water from the well may be necessary. In the latter cases I attach to the tube, by an air tight connection, any known form of pump.

I am aware of James Suggett's patent of March 29, 1864, and I disclaim all secured to him therein.

Having thus fully described my invention, what I claim and desire to secure by letters patent is—

The herein described process of sinking wells where no rock is to be penetrated, viz.: by driving or forcing down a rod to and into the water under ground and withdrawing it and inserting a tube in its place to draw the water through, substantially as herein described.

What I claim as my invention, and desire to secure by letters patent, is—

The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water without removing the earth upward, as it is in boring, substantially as herein described.

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The attempts judicially to enforce the rights claimed under this patent have met with determined resistance, and given rise to extensive litigation, in the course of which the original and reissued patents have been subjected to great scrutiny and criticism. The first reported case is that of *Andrews* v. *Carman*, 13 Blatchf. 307, decided by *Judge* Benedict in 1876. That has been followed by *Andrews* v. *Wright*, before *Judges* Dillon and Nelson, 13 Off. Gaz. 969; *Hine* v. *Wahl*, before *Judge* Gresham; *Andrews* v. *Cross*, before *Mr. Justice* Blatchford, then circuit judge, 19 Blatchf. 294; *Green* v. *French*, before *Judge* Nixon, 11 Fed. Rep. 591; *Andrews* v. *Creegan*, before *Judge* Wheeler, 19 Blatchf. 113; *Andrews* v. *Long*, before *Judge* McCrary, 2 McCrary, 577; the present case before *Judge* Shipman, 15 Fed. Rep. 109; and *Andrews* v. *Cone*, and *Andrews* v. *Hovey* heard before *Judges* Love, Shiras, and Nelson, 5 McCrary, 181. The case of *Hine* v. *Wahl* was argued in this court on appeal at October Term, 1882, the decree below being affirmed by a divided court. The patent has been sustained against all defenses made in the cases just mentioned, except in those of *Andrews* v. *Cone*, and *Andrews* v. *Hovey*, 5 McCrary, 181, which are now pending on appeal in this court.

The extent of this litigation attests at least the utility of the process supposed to be described in the patent, as it shows and measures the extent of the public demand for its use. This is further shown by the statement of one of the complainants in the present cause when examined as a witness, who says that large numbers of wells constructed according to the process described in the patent are in use in the New England States, New York, Pennsylvania, and most of the Western States, as well

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as in New Jersey, and probably in every State in the Union; and that from estimates made by agents, well drivers, and others having an opportunity of knowledge in the matter, it is believed that the number of driven wells throughout the United States is somewhere between five hundred thousand and a million.

The wells in general use prior to the date of this patent were of two kinds: 1, the open, common, dug well, usually walled or boarded or otherwise lined, from which the water which collected in the well was usually lifted by means of a bucket and windlass, or by a pump: and 2, artesian wells, bored frequently to a great depth by means of drills, chisels, augers, and other such tools, whereby the opening was made into the earth to the water supply. In both kinds the process used was to make an excavation, removing the material through the opening. It was usual in making artesian bored wells to drive down a wooden or iron pipe, open at both ends, having a sharp edge around the circumference of its lower extremity, the earth being taken out from within it. As the driving proceeds, and after it reaches the rock, chisels, drills, and other tools are used to disintegrate the rock, which is taken to the surface through the tube so driven. In the latter case, the tube is inserted into the hole bored for the purpose of preventing the caving in of the sides of the opening. Through that tube the water is drawn, if necessary, by a pump, or otherwise flows in consequence of pressure from the head.

The manner in which the water is obtained and supplied, by means of these two descriptions of wells, is thus stated, as we suppose correctly, by an expert witness in this case. He says:

"Water is supplied to open dug wells only by the force of gravity, and when the water is pumped from them by the ordinary suction pump, the pressure of the atmosphere is the same on the surface of the water in the well as it is upon the water in the earth surrounding it; and the result is that the water in the well [49] itself, being in free space, is more readily forced by the pressure of the atmosphere into the suction pipe of the pump than the surrounding water, which is retarded by friction through the earth; and in consequence the continued operation of the pump soon exhausts the water in the well, which supply can only be replenished by the action of gravity, the pressure of the atmosphere to retard its flow into the well being equal to and counterbalancing the pressure exerted by the atmosphere upon the surface of the water in the earth; and the operation of the pump has no effect upon the water in the surrounding earth to force it into the well; hence, the supply to the open dug well is due to and produced only by the action of gravity.

"In the artesian well the same principles govern in regard to the means of supply, when they are not flowing wells, but in consequence of such wells being usually inserted down into rock or like substance until they meet with open fissures in the rock, through which water flows more freely and readily than it does through ordinary compacted earth, sand, etc., which form the water bearing strata above the rock, a much larger quantity of water is obtained therefrom in proportion to their diameter than is usually obtained from the dug well, unless, as in some cases, the dug wells are carried down into a rock stratum and strike a similar seam in the rock. When artesian wells are flowing wells, the generally received opinion is that their supply of water comes from a water bearing stratum lying beneath a stratum practically impervious to water, but which lower stratum extends beyond and crops out at the surface of the earth at a greater or less distance from the well itself (often many miles away), and at a considerably higher elevation than the surface of the earth at the well."

The same witness describes the invention, which he supposes to be embodied in the driven well and covered by the patent in suit, as follows:

"I understand the invention to be founded upon the discovery by Col. Green, that if a pipe which is air tight throughout its length, except at its upper end and at or near its lower end, where are openings for the admission of water, be inserted into the earth, down and into a water bearing stratum, the pipe within the [50] water bearing stratum being surrounded and in close contact with the earth, and having a pump of any ordinary construction attached by an air tight connection to its upper end, thus forming a well, air tight from its upper end, into and below the surface of the water in the earth, that upon operating the pump so attached and removing the pressure of the atmosphere from the well, the pressure of the atmosphere through the earth upon the surface of the water within the earth would force the water into the body of the well with a velocity due to the pressure of the atmosphere, and that the supply of the water to the well directly from the earth surrounding it would be continuous and lasting, so long as water was contained in the stratum of earth with which the lower end of the pipe was in communication, and that the water contained in that stratum could be made directly tributary to the well without regard to the distance to which said water bearing stratum might extend. In other words, that unlike the previously known open wells, either dug or bored, into which the water from the surrounding earth was forced by the action of gravity alone, he could control the delivery of water to a well by this pressure of the atmosphere, which he discovered acted as effectually, through the earth, to force water from the earth into a well from which the pressure of the atmosphere had been removed, as if no earth existed above the surface of the water.

"To utilize this discovery he proposed a method of making a well by simply driving a tube down through the earth into a water bearing stratum, by which means he secured a close contact of the lower end of his tube with the earth of the water bearing stratum."

The differences between the wells previously in common use and the driven wells are stated by the same witness as follows:

"The distinguishing characteristics of a driven well, as it differs from the dug well, is that when the pressure is relieved from the interior of the tube which itself forms the body of the well, not only does the force of gravity act to supply it with water directly from the [51] earth, but there being no intervening body of water between the wall of the well itself and

the earth surrounding it, upon which the atmosphere can act directly and with greater effect to force it into the well (as it can and does in the open well), the water is supplied directly to it from the earth surrounding it in a direct inverse ratio to its distance from the well, and the friction of the water through the earth being directly as the square of its velocity, as the distance from the well increases the water moves very much slower than it does immediately next to the well itself; but the area of the source of supply being increased exactly in the ratio of the square of its distance from the well, and the friction being increased exactly as the square of the velocity (in any given stratum), the one exactly counterbalancing the other, it follows that, from natural laws, the surface of the water in the earth surrounding the well is and must be maintained practically at a given level; whereas, in the open well, supplied by gravity only, the water in the earth inclines from the natural surface of the stratum in the earth to the bottom of the well, the angle of that decline decreasing as the supply is taken from the well, and, unless pumping is stopped and time allowed for a resupply, the lowering of the water in the earth extends to a continually increasing distance and a longer time is required to obtain the original quantity in the well, while the supply to the driven well is continuous and steady and practically inexhaustible, the supply in a given time being proportioned in any given soil to the size of the pipe forming the well, having openings proportionate to its size, different wells varying in the supply according to the nature of the soil in which they are inserted, but remaining virtually constant at all times in the same soil. It is not claimed, nor is it a fact, that water can be pumped from a driven well, in any given stratum, with greater ease than from an open well sunk into the same stratum; but the great advantages are that a much larger and more extended supply of water is controlled, and, in consequence of the passage of the water through the earth, under the pressure of the atmosphere, a constant filtration is secured, thus securing both a greater supply and better [52] water. And where large and continuous supplies are obtained by unintermitted pumping, for days and weeks at a time, experience has shown that the quantity of water has gradually but perceptibly improved, as in the case of the wells at Bellville, heretofore mentioned, where an amount of water is emptied largely exceeding the rainfall upon the entire territory not shut out from the valley by outcropping rocks on three sides and open to salt water upon the fourth, and no practical diminution of the height of the water is observed.

"One peculiar characteristic of a driven well, as distinguished from the bored artesian well, is that the driven well is for use in soil where no rock is to be penetrated, and where the pressure of the atmosphere is free to act upon the surface of the water in the earth surrounding it; while the artesian well is usually, if not always, bored into a rock stratum, and is supplied with water through fissures in the rock instead of through the earth itself surrounding the entrance or opening to the well."

In describing the mode of constructing a driven well under the patent, the same witness states that the pipes in general use, which are driven into the ground, have openings for the admission of water into them near the lower end, usually extending up around the sides of the pipe from fifteen inches, sometimes up to several feet. These holes are about three eighths of an inch square, over which upon raised rings is placed a screen of perforated brass, having openings of a size giving from one hundred and fifty to three hundred to the square inch. When the pump is first applied to such a pipe, a small amount of mud or sand is at first usually brought up, coming from a greater or less distance from the outside of the tube, but not leaving an open space around the perforations, as these are not large enough to admit of but the smaller particles near the tube. It leaves interstices between the coarser particles in it, and through which the water flows, and which are constantly filled with water. The swell on the point of a driven well tube, shown in the drawing and marked *a*, is made larger in diameter than the tube itself, or the coupling to the tube, for the reason, as stated, that there is a certain elasticity in the soil, which, after driving a certain sized instrument into it, causes [53] the hole to contract after the point passes; and it was thus found necessary to make the point somewhat larger than even the couplings of the pipe, for the purpose of partially relieving the pipe and couplings from the great friction resulting from their passage through the hole thus contracted. After reaching a water bearing stratum of the earth, the earth at once settles around the point and tube, even more rapidly and effectually than it does above the water stratum, and the hole made by driving an instrument into a water bearing stratum and withdrawing it will remain intact but a very short time, unless that stratum is composed of gravel and similar substances, thus leaving the entrance to the pipe in close contact with the earth and effectually protecting the entrance from the admission of air or free water standing between the pipe and the earth surrounding it. The effect, therefore, of this feature of the tube is more effectually to make air tight the point or lower part of the tube.

The scientific theory stated by the expert witness on behalf of the complainants, as an explanation of the principle according to which the patented process operates in furnishing a supply of water by means of a driven well, is not contradicted or qualified by any opposing testimony, and, so far as we can know, is not inconsistent with accepted scientific knowledge. The general introduction and use of driven wells since the date of the patent, both in in this country and abroad, strongly corroborates the supposition that their construction and operation is based upon the application of some natural force not previously known or used. It appears from the evidence in this cause that the process of making driven wells was subjected to experimental tests by the best authorities in England, and found so successful that it was used to great advantage in the supply of water to British troops in the Abyssinian expedition under General Napier, in 1867.

In view of these premises, *Judge* Benedict, in *Andrews* v. *Carman*, 13 Blatchf. 307, construed the patent in suit according to the following extracts from his opinion in that case:

"The difference between the new process under consideration and the old is that the pressure of the atmosphere, which, in the ordinary [54] well, operates at the sides and bottom of the well pit to maintain an equally distributed atmospheric pressure upon the water, whereby the flow of water into the well is made dependent upon the force of gravity, in the new process is removed from within the well pit, and ceases there to operate against the inward flow of water, so that the pressure of the atmosphere operates with its full power to force the water in the earth from the earth into the well pit, and without any opposition caused by meeting, in its flow, the pressure of the atmosphere at the sides or bottom of the pit. This process involves a new idea, which was put to practical use when the method was devised of fitting tightly in the earth, by the act of driving without removing the earth upwards, a tube, open at both ends, but otherwise air tight, and extending down to a water bearing stratum, to which is attached a pump, a vacuum in the well pit, and at the same time in the water bearing stratum of the earth, being necessarily created by the operation of a pump attached to a pipe so driven."

* * * * *

"The novelty of the process under consideration does not lie in a mechanical device for sinking the shaft or raising the water to the surface, but in the method whereby water, by the use of artificial power, is made to move with increased rapidity from the earth into the shaft, whence it results that a tube but a few inches in diameter, driven down tightly to a water bearing stratum of the earth, affords an abundant supply of water to a pump attached thereto, and constitutes a practical and productive well. Such an invention is without the field of mechanical contrivance. It consists in the new application of a power of nature, by which new application a new and useful result is attained. There is no new product, but an old product—water—is obtained from the earth in a new and advantageous manner."

* * * * *

"In the specification we find stated more clearly the distinguishing feature of the process, wherein it differs from any process before adopted for procuring a supply of water from the earth; for the specification says that an in- [55] strument is to be driven into the ground until it reaches water, having the earth tightly packed around it. It is by means of this packing of the earth tightly around the tube that the force developed by the creating of the vacuum in the well pit is brought to bear directly upon the water lying in the water bearing stratum, to force it into the well pit; and this driven tube forms the well pit of the new invention, for, as stated, it is to be a tube made air tight throughout its length, except at its lower end, where are to be perforations for the admission of water, and through and from which the water may be drawn by a pump. The specification also mentions the vacuum, and points out where it is to be created, for a vacuum must of necessity be formed in the well pit and in the water bearing stratum, by operating a pump attached to such a tube, so driven into the earth."

* * * * *

"I therefore understand this patent to be a patent for a process, and that the element of novelty in this process consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum, in the manner described."

Assuming this construction of the patent to be correct, it is, however, now contended on behalf of the appellant that the reissue is void because the invention described in it is not contained in the original patent.

It is to be observed that the scientific theory and principle, the application of which is supposed to constitute the invention of Col. Green, are not set forth either in the original or reissued patents. This feature was commented upon by *Mr. Justice* Blatchford in *Andrews* v. *Cross*, 19 Blatchf. 294, 305, as follows: "It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. He sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation. The principle referred to is only the why and the wherefore. That is not required to be set forth. Under section [56] 26 of the Act of July 8, 1870, 16 Stat. at L. 201, under which this reissue was granted, the specification contains a description of the invention and of 'the manner and process of making, constructing, compounding and using it,' in such terms as to enable any person skilled in the art to which it appertains to make, construct, compound, and use it; and, even regarding the case as one of a machine, the specification explains the principle of the machine, within the meaning of that section, although the scientific or physical principle on which the process acts when the pump is used with the air tight tube, is not explained. An inventor may be ignorant of the scientific principle, or he may think he knows it and yet be uncertain, or he may be confident as to what it is and others may think differently. All this is immaterial, if by the specification the thing to be done is so set forth that it can be reproduced."

The particulars relied on to establish the proposition that the reissued patent describes a different invention from that contained in the original are as follows: 1. It is said that it is essential to the success of the process that the end of the tube should form an air tight connection with the surrounding earth; that the tube itself should be air tight, and attached to a pump with an air tight connection; which elements are set out in the reissued patent, and are not contained in the original.

Upon this point, speaking of the original patent, *Judge* Shiras, in the Circuit Court for the Southern District of Iowa, in *Andrews* v. *Hovey*, 5 McCrary, 195, said: "He describes a driving rod, having a swell thereon, which is to be driven into the ground and then withdrawn, and a tube of a diameter somewhat smaller than the diameter of the swell of the drill rod is to be inserted in the hole thus made. In no part of the description is it said, either expressly or by fair implication, that the tube, when inserted,

must fit so closely into the opening made by the rod that no air can pass down on the outside of the tube to the water; nor is it stated that the [57] pump must be attached by an air tight connection to the top of the tube. A person can follow with exactness all the instructions therein given, and yet it would not necessarily follow that he had excluded the air from the lining of the well, or from the water bearing stratum at the place where the tube penetrated the same. In other words, the description of the means to be employed, as set forth in these specifications, does not show that one of the results arrived at is to render the lining of the well air tight, and to have attached thereto a pump by an air tight connection. The description of the means to be employed can be carried out in practice without making an air tight lining or tube, and hence without forming a vacuum around the bottom of the tube or in it. This being true, it follows that it cannot, from the description of the means employed, be inferred that Col. Green then intended to claim, as part of his discovery or invention, the application of the principle that by creating a vacuum in and about the tube, the same having been made air tight, the flow of water would be largely increased. He did not claim it in express words, and the description of his invention, and the means to be used in carrying the same into practical use, fail to show that such was the main or even a necessary part of his invention."

To this view there are two sufficient answers:

1. We think it is a reasonable inference, from the language employed in the specification of the original patent, that the tube, in the act of being driven into the earth, to and into a water bearing stratum, would form an air tight connection with the surrounding earth, and that the pump should be attached by an air tight connection. This inference reasonably follows from the fact, shown in the evidence, that the mere act of driving the tube, as distinguished from boring, usually results in making an air tight connection with the surrounding earth. The necessary effect of driving the tube is to displace the earth laterally by compressing it; and the elasticity of the earth is such as to cause it to cling and contract around the tube so as to exclude the air, so that anyone following the directions in the specification of the original patent would in fact usually so drive [58] the tube as to make the necessary air tight connection, whether he consciously intended to do so or not. As the object of applying a pump to the upper orifice of the tube was to draw the water flowing into its lower end, it would equally follow, as a matter of common knowledge, both that the tube itself should be air tight, and that it should be attached to the pump with an air tight connection, because a vacuum in the tube is necessary to raise the water in all cases where it does not flow out in consequence of the superior height of its source, and the consequent pressure of the head.

The precise objection to the reissued specification is that it states that the tube which is to replace the driven rod is "made air tight throughout its length," and also that in cases where the aid of a pump to draw the water from the well may be necessary, the patentee attaches "to the tube by an air tight connection any known form of pump;" and that the original specification does not state that the tube is made air tight throughout its length, nor that the pump is to be attached to the tube by an air tight connection, but only states that "any suitable well known pump may be applied to raise the water up through the tube to the surface or above it."

It appears, however, in evidence, that the patentee, when applying for his reissue, with the text of the specification reading as it does now, applied to have granted to him a second claim in these words: "I also claim, in combination with a tube driven well, an attachment of a pump to the tube by an air tight connection substantially as herein set forth;" that the Patent Office rejected this second claim, assigning its reasons in these words: "The second clause is for a pump attached to a tube by an air tight connection. This is indispensable to the operation of a pump, and a universal right. Whenever a supply of water is found, a pump may be applied without new invention;" that, in a subsequent communication by the Patent Office to the patentee, the office, in speaking of this proposed second claim, said: "This device is of universal use in artesian well tubes and other connections, and is a necessity in the relation of pumps to well tubes;" and that the patentee afterwards withdrew the proposed second claim.

As the air tight connection was indispensable to the operation of a pump, it was implied of necessity in the original specification, as much so as if it had been expressed; and there was no [59] enlargement of the invention in stating the fact in the reissued specification.

In view of all this, it is also fairly to be implied, from the entire language of the original specification, that the tube was intended to be air tight throughout its length. As that specification states that the water is to be raised up through the tube to the surface by the pump, and as an air tight connection at the junction of the pump with the tube was "indispensable to the operation of the pump," so it was equally a necessity to the perfect operation of the apparatus that the tube should be air tight throughout its length, these facts being both of them common knowledge in the art.

2. But even if this were not so, the case would be simply that of a specification defective for not containing a full and perfect description of the process intended to be patented. It presents the very case of the right secured to a patentee by section 53 of the Act of July 8, 1870, which provides "That whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, * * * if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee," etc.

If the amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the original, and thus cause the patent to include an invention not within the original, the rights of the public are not thereby narrowed, and the case is within the remedy intended by the

statute. Those cases in which this court has held reissues to be invalid were of a different character, and were cases where by the reissued patent the scope of the original was so enlarged as to cover and claim as a new invention that which was either not in the original specification, as a part of the invention described, or if [60] described, was, by not being claimed, virtually abandoned and dedicated to public use.

Such is not the present case. Here the amended specification does not enlarge the scope of the original invention as described in the original specification. It simply, in this respect, supplies a deficiency, by describing with more particularity and exactness the means to be employed to produce the desired result. It is thus said, in the specification of the reissued patent, that "This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument, and not removed upward from the hole as it is in boring;" and "I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw, and replace by a tube made air tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well known or suitable form of pump;" and "In certain soils the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well by the act of driving it into the ground to the requisite depth;" and "In some cases the water will flow out from the top of the tube without the aid of a pump. In other cases, the aid of a pump to draw the water from the well may be necessary. In the latter cases, I attach to the tube, by an air tight connection, any known form of pump."

There is nothing in these additions and amendments which either was not virtually contained by reasonable implication in the original description, or, if new, amounted to more than specific and exact directions to supplement those contained in the original. The invention is not differently described, and is not described so as to be a different invention, nor is the claim enlarged.

In the second place, however, under this head, a material alteration from the original, [61] in the amended specification, is said to have been made in the following respect: the original specification starts out with a declaration that the patentee has "invented a new and useful improvement in the manner of sinking and constructing artesian or driven wells, where no rock is to be penetrated, and of raising water therefrom;" and the claim is stated to be "the herein described process of sinking wells where no rock is to be penetrated," etc. In the specification of the reissued patent, he says: "My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated;" and the claim is for "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described;" from which, it will be observed, are omitted the words "where no rock is to be penetrated."

It is therefore contended that the effect of this amendment to the specification and claim is to enlarge the scope of the patent, so as to cover by the reissued patent the process of constructing driven wells, whether rock is to be penetrated or not, while the original patent was expressly limited to cases where no rock was to be penetrated. We do not, however, so understand either the reason or the effect of these amendments. It is perfectly evident, from the nature and description of the invention, that a driven well cannot be made where, through its whole course, the formation is rock, or where the supply of water to be utilized is found in the fissure of a rock formation. This is so for the reason that the tube cannot be driven through rock. Rock must be bored by drills, augers, chisels, and other similar instruments for perforating it and withdrawing the comminuted particles. So, where the supply of water which must be utilized consists of a flowing stream, or a pool, found in a rock formation, the point of the driven rod or tube cannot be inserted by driving, as described in the patent, so as to form the air tight connection necessary to the successful operation of the principle on which the process of the patent depends. Therefore, it follows from the amended specification and the claim of the reissued patent, by the necessity of the case, as expressly declared in the original, that a driven well cannot be constructed in a rock formation.

On the other hand, it does not follow, either [62] from the amended or the original patent, that a driven well, according to the process described, may not be constructed and operated, notwithstanding in its construction some rock has to be penetrated. There may be a layer of rock on the surface; when this is removed or cut through, a driven well may then be constructed in the space thus uncovered from the obstruction. So, if a stratum of rock is met in the course of driving the rod or tube, that layer may be penetrated, not by driving the rod or tube through it, but by other usual means of boring and drilling. After it is passed, the rod or tube having been inserted in the opening made through the rock may then be driven in the usual manner through the remainder of its course until it reaches a water bearing stratum of earth, as if no rock had been met in its passage.

The object and purpose of the amendments to the specification obviously were to meet a possible construction of the original whereby the patentee would be precluded from the use of his process where it was evidently intended to be applied, simply because one or more strata of rock had to be penetrated in the process of driving. Such, in our opinion, is not the meaning of the original patent. Its true meaning is that, so far as it may be necessary to penetrate a rock in the course of constructing a well, the process of driving cannot be used to overcome the obstacle presented by the rock, but that otherwise the tube may be driven until it reaches the proper supply of water, and then operate as a driven well. The only effect of the amendments contained in the new specification and claim is to make that intention clear.

So far as, in the course of constructing a well, rock must be penetrated, the driven-well process cannot be used in the perforation of the rock, but in every other part of its course it may be applied. Such, in our judgment, is the legal effect of both the original and the reissued patents.

In our opinion, therefore, the grounds on which it is sought to invalidate the reissued patent, as being for a different invention from that described in the original, cannot be sustained.

[63] This conclusion is not in conflict with anything said in *Russell* v. *Dodge*, 93 U. S. 460 [23:973]. *Mr. Justice* Field, in delivering the opinion of the court in that case, referring to the provisions of the statutes in reference to reissues, said: "According to these provisions a reissue could only be had where the original patent was inoperative or invalid, by reason of a defective or insufficient description or specification, or where the claim of the patentee exceeded his right, and then only in case the error committed had arisen from the causes stated. And as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification could be rendered more definite and certain so as to embrace the claim made, or the claim could be so modified as to correspond with the specification; but, except under special circumstances, such as occurred in the case of *Morey* v. *Lockwood*, 75 U. S. 8 Wall. 230 [19:389], where the inventor was induced to limit his claim by the mistake of the Commissioner of Patents, this was the extent to which the operation of the original patent could be changed by the reissue. The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue." And this is in harmony with all that has since been said by this court on the subject of reissued patents.

It is further contended on the part of the appellant that the reissued patent in suit is void for want of novelty:

1. Under this head, it is first alleged that it is anticipated by a patent granted to James Suggett, March 29, 1864. In the specification of the original patent of Green, of January 14, 1868, he says: "I am aware of James Suggett's patent of March 29, 1864, and I disclaim all secured to him therein." The reissued patent omits that disclaimer. After the application for the reissued patent, as appears by the contents of the file wrapper, an interference was declared to which the parties were Byron Mudge, for a reissue of his patent for a mode [64] of constructing wells, and the above named patent of James Suggett, for putting down and operating bored wells, and the application of Col. Green. The matter was carried by appeal from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia. The judgment of that court was that Suggett was entitled to priority of invention in regard to what was claimed by him in his patent, and that Col. Green was also entitled to have a patent issue to him according to his amended specification. The decision of the judge of the Supreme Court of District of Columbia says: "I am clearly of opinion that Green first put into practice the conception of making a driven well, and is entitled, therefore, to his patent for the broad claim of sinking wells by driving down the pump or rod without removing the dirt upward, and that Suggett was entitled to a patent for the perforated pipe and point for sinking wells; and I therefore affirm the decision of the Commissioner." Suggett's patent, on the face of his specification, is for a "new and improved method of putting down and operating bored wells," and all that his claim covers is the apparatus consisting of the perforated pipe with a pointed end, constructed as a drill, and united with a pump. The subjects of the two patents are quite different, and do not necessarily conflict, even on the supposition that Suggett's patent is in force, although, as testified in this case, it as been judicially declared to be invalid for want of novelty.

2. An anticipation of the driven-well patent is also alleged by reason of an English patent granted to John Goode, August 20, 1823. That patent, however, like that of Suggett's, does not profess to be a patent for a process of raising water from the earth by means of wells of any particular construction or mode of operation, but merely for "certain tools of various formation for the purpose of boring the earth, and certain apparatus for the purpose of raising water," which the patentee says "constitute my certain improvements as aforesaid."

3. It is further contended that the driven-well patent is anticipated by having been previously described in numerous printed publications. Of these there were introduced in evidence in this cause by the appellant those enu- [65] merated in the following list:

1. An extract from volume 4, "Repertory of Patent Inventions," published in London in 1827, by T. & G. Underwood, page 113, which however, merely contains a detailed description of the machinery, tools and apparatus for boring the earth, described in John Goode's patent of August 20, 1823.

2. Extract from "Dictionary of Arts, Manufactures, and Mines," by Andrew Ure, published in New York in 1847; by D. Appleton & Co., page 63, under the head of "*Artesian Wells.*"

3. Extract from page 388 of "MacKenzie's 5,000 Receipts in All the Useful and Domestic Arts," first published in 1840.

4. Extract from "Rees' Cyclopædia," Vol. 40, published at Philadelphia, by Samuel F. Bradford, about 1819, title, *Well in Rural Economy.*

5. Extract from "Journal of the Franklin Institute," third series, published at Philadelphia, by the Franklin Institute, in 1844, Vol. 7, page 128.

6. Extract from "Brande's Encyclopædia, or Dictionary of Science, Literature, and Art," published by Harper Bros., New York, in 1843, Vol. 3, page 1338, under article *Well.*

7. Extract from "Rees' Cyclopædia," Vol. 38, title, *Spring Draining Pump.*

8. Extract from "London Encyclopædia," published by Thomas Tegg, London, 1839, Vol. 22, page 593.

9. Extract from "Mechanics' Magazine," published by Knight & Lacey, London, 1824, Vol. 2, pages 15 and 16.

10. Extract from "Harper's New Monthly Magazine", September 1851, page 540.

11. Extract from "De L'Art du Fontenier Sondeur et des Puits Artesiens," published in Paris, France, in 1822, page 99, sec. 79.

12. Extract from "Bulletin du Musée de l'Industrie," published by De Mot et Cie, Bruxelles, 1846, tome 10, page 168.

13. Extract from "Hericart de Thury, Jaillissement des Eaux," published by Bachelier, Paris, France, 1829, pages 274-275.

14. Extract from "F. Arago, Œuvres", tome 6, by Gide et J. Baudry, Paris and Leipzig, by J. O. Weigel, 1856, page 457.

15. Extract from "F. Garnier, Traité sur les Puits Artesiens," published by Bachelier, Paris, France, 1826, page 207.

[66] 16. Extract from "The Encyclopædia of Domestic Economy," published in New York in 1849, by Harper Bros., page 848.

The rule governing defenses alleging the invalidity of the patent by reason of prior printed publications was stated by *Mr. Justice* Clifford in *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516, 555 [20:33, 42] in this language: "Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of a complete and operative invention, capable of being put into practical operation."

The same rule was repeated by *Mr. Justice* Strong in the opinion of the Court in *Cohn* v. *U. S. Corset Co.* 98 U. S. 366, 370 [23:907,908], as follows: "It must be admitted that, unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent." This rule was affirmed in *Downton* v. *Yeager Milling Co.* 108 U. S. 466, 471 [27:789,791].

The application of this rule to the publications relied upon in the present case shows that none of them can properly be said to anticipate the invention of the driven well. It would [67] serve no useful purpose specially to notice in this opinion all the publications mentioned in the record; a few, as samples most relied on, will be considered.

The first is the extract from MacKenzie's 5,000 Receipts. It appears, from the file wrapper in the matter of the reissued letters patent in the suit, that the application was rejected at first by the examiner in the Patent Office on reference to this extract, which is as follows: "To raise water in all situations. The finest springs may be found by boring, which is performed in the simplest manner by the mere use of an iron rod forced into the earth by a windlass. The workmen in a few days get to a genuine spring of pure water, fit for every purpose. After the water is found they merely put the tin pipes down the aperture, and it preserves a fine stream which sometimes rises from four to five feet high." It is quite obvious that this has no relation whatever to the process of obtaining water by means of driven wells. It is nothing more than a simple process of finding water in the usual way, as in the case of an ordinary dug or bored well, such as have been immemorially used.

The same observation equally applies to the extract from Rees' Cylopædia, under the title of *Well in Rural Economy*, which is as follows: "The most ingenious of these is that proposed by a French philosopher, who has advised that the ground should be perforated to a sufficient depth by means of an auger or borer; a cylindrical wooden pipe being then placed in the hole and driven downward with a mallet, and the boring continued, that the pipe may be forced down to a greater depth, so as to reach the water or spring. In proportion as the borer becomes filled with earth it should be drawn up and cleared, when, by adding fresh portions of pipe, the boring may be carried to much extent under ground, so that water may in most cases be thus reached and obtained. It is stated that wells made in this manner are superior to those constructed in the common method, not only in point of cheapness, but also by affording a more certain and abundant supply of water, while no accident can possibly happen to the workmen employed. In case the water near the surface should not be of a good quality, the [68] perforation may be continued to a still greater depth, till a purer fluid can be procured; and when wells have become impure or tainted from any circumstance or accident, when previously emptied, and the bottom perforated in a similar manner, so as to reach the lower sheet of water, it will rise in the cylindrical tube in a pure state into the body of the pump fixed for the purpose of bringing it up."

The extract from "Brande's Encyclopædia," under the article *Well*, is as follows: "The use of the borer alone may procure an adequate supply of water in particular situations. This mode appears to have been long resorted to in this and other countries. From what we have already stated as to the disposition of strata, the conditions requisite for its success will be readily conceived; viz., watery strata connected with others on a higher level. The pressure of the water contained in the higher parts of such strata on that in the lower will readily force up the latter through any orifice, however small. All that is necessary, therefore, is to bore down to the stratum containing the water, and, having completed the bore, to insert a pipe into the bore, which may either be left to overflow into a cistern or it may terminate in a pump."

A similar one from the Mechanics' Magazine, volume 2, page 16, is this:

"BORING WELLS.

"*Answer to Question.*

"LEEDS, March 15, 1824.

"Drive a cast iron pipe through the gravel —*i. e.*, by means of a weight hung at the end of a spring pole, used in boring; and should the pipe meet with any loose stone to obstruct its passage, put the boring rods into the pipe, and bore until the stone is broken to pieces or driven sideways; then drive the pipe as before. I have had the management of a great many bore holes for water in this neighborhood, some above 100 yards deep, and many contrivances I have used on account of difficulties met with in different strata. I shall be happy to give your correspondent every information in my power on the subject, and, if agreeable to you, [69] will send a list of a few holes, stating the different strata gone through and the several springs of water met with.

"Yours, &c., T. T.

"N. B.—The shell borer must be used at times to bring out the gravel that gets into the pipe, and the pipe must have spigot and faucet joints."

There is nothing in these extracts to suggest the peculiarities which distinguish the driven well as described in the reissued patent; and it may be said, in general, of all the extracts contained in the record, including these, that so far as they undertake to describe anything in actual and practical use, they point merely to the ordinary, bored, artesian well, or the instruments and implements to be used in its construction.

This view of these publications is strongly corroborated by the circumstances attending the introduction of Green's process of driven wells into public use in England. It is shown that his agent for the introduction of the well into that country, and to whom the invention was sold, James L. Norton, took out in his own name an English patent, and, as has already been stated, and as is shown in the proof, after various experimental tests made by civil and military engineers of high authority, the driven well according to this process was adopted and and successfully employed for the purpose of obtaining a water supply for the British troops in the Abyssinian expedition. The present record contains extracts from standard scientific publications in England showing how extensively and successfully the driven well has, since its first introduction, been employed in England for the purpose of raising water, in which it is admitted, as the facts show, that the process was considered new, differing in substance from any previously known and in use, and ascribed to the American invention.

The next defense relied upon by the appellant is that the evidence fails to establish a case of infringement. It is not important to set out fully the evidence on this point; the substance [70] of it is contained in the opinion of *Judge* Shipman in this case. 15 Fed. Rep. 109. In reference to it, the court says: "The defendant's counsel strenuously urge that these wells were constructed by boring; that the wells were bored until water was struck—that is, until a supply of water was obtained; and that the wells were finished by pressing the pipes more deeply into the source of supply which had been reached when the workmen 'struck water.' In other words, the defendant seeks to bring the case within the decision of *Judge* McCrary in *Andrews* v. *Long*, 12 Fed. Rep. 871. In this case, however, the witnesses, when they used the common expression 'struck water,' did not mean that they had reached an adequate source of supply for a well, but that they had reached a place where the presence of water manifested itself, and where by continuous excavation an adequate supply would be attained. The wet sand or wet clay upon the auger showed that water was at hand. The well was then finished and a supply of water was obtained by pressing or driving a tube into the ground without removing the earth upward and attaching thereto a pump. When this was done, there was put 'to practical use the new principle of forcing the water in the water bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the water bearing strata of the earth, and at the same time in the well pit'. *Andrews* v. *Cross*, 8 Fed. Rep. 269."

In other words, the case of the appellant is this: He sought to evade the patent by boring instead of driving until he came to the water bearing stratum. Then, in order to avail himself of the patent, he drove the tube downward into the water bearing stratum, so as to secure those conditions of an air tight connection between the point of the tube and the surrounding earth, which constitute the principle of the driven-well patent. It is, therefore, a clear case of infringement.

The decree of the Circuit Court is accordingly affirmed.

True copy. Test.
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting: *Mr. Justice* **Bradley**, *Mr. Justice* **Field** and *Mr. Justice* **Gray**.

A. T. BEEDLE, *Appt.*,
v. [71]
FRANK O. BENNET ET AL.

(See S. C. Reporter's ed. 71-73.)

"Driven-well patent"—a process—continuing infringement—abandonment and dedication—Act of March 3, 1839—rebuttal of presumption—delay of four years.

1. The "driven-well patent," secured by original letters patent No. 73425 and reissued letters patent No. 4872, covers the process of drawing water from the earth by means of a well driven in the manner described therein.

2. The use of a well so constructed is a continuing infringement of said patent.

3. The Act of March 3, 1839, has no effect to invalidate a patent, unless there be proof of abandonment, or of a use of the invention for more than two years prior to the application for the patent.

4. In the case presented, the circumstances stated in the agreed statement of facts are held to sufficiently rebut any presumptions which might otherwise have arisen of an intention to abandon and dedicate the invention to the public from a delay of four years in applying for the patent in question.

5. Upon a bill for the infringement of a patent, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time pending

the proceedings; but a permanent injunction will not be granted.

[No. 1320.]

Submitted Jan. 7, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Compare the preceding case of *Eames* v. *Andrews*, *ante*, 1064.

Mr. **Arthur Stem**, for appellant.

Messrs. **John F. Follett, Thomas H. Kelly** and **David M. Hyman**, for appellees.

[72] *Mr. Justice* **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the appellees May 15, 1883, to restrain the alleged infringement of reissued letters patent No. 4372, issued to Nelson W. Green, for a driven well. The cause was heard by stipulation between the parties upon an agreed statement of facts set out in the record, as follows:

"For the purpose of saving the expense of taking testimony, it is hereby agreed by and between the parties hereto that the above cause and the others hereinafter referred to may be tried upon the following agreed statement of facts, said statement to be accepted as proof of the facts recited as fully and completely as if the same had been duly and formally proven.

"It is agreed that Nelson W. Green was the patentee of a new and valuable process in the construction of wells, and claimed to be its first and original inventor, for which process he received original letters patent of the United States, No. 73425, on the 14th day of January, 1868, and for which reissue letters patent No. 4372 were granted to Nelson W. Green on May 9, 1871, the application for which having been filed February 24, 1871.

"That the title to the letters patent sued on for the State of Ohio is in the complainants.

"That the defendants have had in use on their farm for the past seven or eight years one or more driven wells, which wells were put down for the defendants by an ordinary well [73] driver in the following manner: a tube, of which the lower portion was perforated with small holes and the lower end provided with a point, was driven into the ground until it projected into the water, without removing the earth upwards, as in boring.

"The water then entered the tube through the perforations and was pumped up through the tube by an ordinary pump.

"That the defendants have never driven wells for themselves, except as above described or for other purposes; never have sold or offered for sale driven wells or the materials for driving them, but have simply used their own wells for their personal use on their farms.

"It is agreed that printed copies of the original and reissued letters patent granted to N. W. Green in 1868 and 1871, Nos. 73425 and 4372, respectively, may be offered in evidence at the hearing, and may be accepted as proof with the same force and effect as if formally proven.

"That the said N. W. Green made his alleged invention or discovery as early as 1861, when he put down on his own grounds, at Cortland, New York, the first driven well for the purpose of demonstrating his discovery.

"That he, at the time of his alleged invention, claimed to have made a valuable discovery and to have invented a new process.

"That he then declared an intention to secure his process by letters patent and expressed his belief that large profits would accrue therefrom.

"That he at that time, having been partly educated at West Point, was engaged in organizing a regiment at Cortland, N. Y., his residence, and was expecting soon to take part in the War of the Rebellion.

"That in June, 1861, he put down a well at his house in Cortland, and in October, 1861, he publicly drove a well, in the manner described in his original patent, at the fair grounds near Cortland, for the use of the soldiers in camp, and demonstrated to his own complete satisfaction its success.

"That he gave orders and directions for the [74] construction of proper apparatus for driving such wells, and made arrangements for its transportation with his regiment as it was moved to the seat of war.

"That on the 6th of December, 1861, while in discharge of what seemed to be his duty, he felt compelled to shoot one of the captains of his regiment named McNett; that the shot was not mortal, but inflicted serious injury; that in the then state of the public mind this occasion gave rise to intense public excitement, out of which sprang a controversy of extraordinary bitterness, involving numerous persons and continuing for several years; that the effect upon Green was disastrous in the extreme; that he was suspended from his command, then tried by a court of inquiry at Albany, and reinstated in command; that his regiment, after having, it is said, required the protection of a battery to save it from violence at the hands of evil disposed people of the country, removed to Washington, where Green was relieved from command, and then dismissed the service and subjected to military charges.

"That he was, in addition, harassed by civil suits brought to charge him with a personal liability for articles used by his regiment.

"That he was also arrested and then indicted for the shooting of McNett, and after repeated postponements of the trial, effected because of the excited state of the public mind, was tried in 1866, and, the jury having disagreed, was discharged.

"That during this period he also became involved in church difficulties arising out of the shooting of McNett; was expelled from the church and compelled to appeal to the bishop, and also became involved in litigation with the pastor of his church.

"That his efforts during this period to secure a reversal of the order dismissing him from the service were constant and absorbing, and were attended with such anxiety of mind as to give rise to the charge that he was insane.

"That this state of things continued up to 1866, during which period he was of necessity often absent from Cortland, at Albany and at Washington, and that he was compelled to devote his entire time to the controversy in which he had become involved, abandoning all other occupation and exhausting all his means.

[75] "That in November, 1865, when Green saw, by an advertisement in the papers, that driven wells were being put down, although he was advised by counsel defending him on the indictment for the shooting of McNett not to apply for a patent, as he would thereby increase the number of his enemies and prejudice him on the trial of the indictment, then about to come on, he nevertheless did then, and in opposition to the advice of his counsel, file his application and assert his right to the invention.

"That the said Green, during this period aforesaid, never declared any intention of abandoning his said discovery and invention, and that, having so made his application as aforesaid, original letters patent were granted the said N. W. Green, January 14, 1868.

"It is further agreed that whatever order or decree is made in this cause the same shall be made in all the cases pending in this court in which the same parties are complainants, a list of which cases, with the title and number thereof, is hereto attached and made a part of this stipulation.

"It is further admitted that the complainants' price for settling for infringement under the above patent without suit has been ten dollars per well and the recognition of complainants' rights, and that the complainants offered to settle on such terms with these defendants before bringing suit, which offer was refused."

A decree was rendered in favor of the complainants on the 6th day of December, 1886, but, as at that time the patent had expired, no injunction was granted. The amount of the damages awarded was at the rate of $10 for each well used, that being the amount of royalty which the complainants had offered to take before suit brought, and admitted to be the customary price for the same, as a license fee. The defendant prosecutes the present appeal.

As the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time [76] before final decree. There is nothing in the case of *Root* v. *R. Co.* 105 U. S. 189 [26:975], to sustain the objection made by the appellant on this account. See also *Clark* v. *Wooster*, 119 U. S. 322, 325 [*ante*, 392], and cases there cited. All other defenses made in the cause, except that of prior public use and the defendant's infringement, have been passed upon in the case of *Eames* v. *Andrews* [*ante*, 1064], just decided.

In the present case the appellant contends that the patentee publicly used his invention more than two years before he applied for his patent, and thereby forfeited his right to a patent under the law. This defense was raised and considered, upon facts substantially the same, in the case of *Andrews* v. *Carman*, 13 Blatchf. 307, and also in the case of *Andrews* v. *Cross*, 19 Blatchf. 294. The law governing the subject of the alleged dedication and abandonment by Green of his invention prior to obtaining his patent is that which was in force prior to November, 1865, when he made his application. By the Patent Act of 1870, as well as by the Revised Statutes, all rights previously acquired were preserved. The law, therefore, applicable to the question, is to be found in the Acts of 1836 and 1839. The Act of 1839, as has repeatedly been held, has no effect to invalidate a patent, unless there be proof of abandonment, or of a use of the invention for more than two years prior to the application for the patent. The only facts from which such an abandonment or dedication can be inferred are that Green, in June, 1861, put down a well at his house in Cortland, New York; that in October, 1861, he publicly drove a well, in the manner described in his original patent, at the fair grounds near Cortland, for the use of the soldiers in camp, and demonstrated to his complete satisfaction its success; and that he gave orders and directions for the construction of proper apparatus for the driving of such wells, and made arrangements for its transportation with his regiment as it was moved to the seat of war. The circumstances of delay, which intervened between that date and the time when he made his application for his patent in November, 1865, are stated in the agreed statement of facts. Those circumstances sufficiently rebut any presumptions which might otherwise have arisen of an intention on his part to abandon and dedicate to the use of the public the invention described in his patent. The wells made by Green himself at Cortland, and at the fair grounds near Cortland, for the use of his [77] soldiers, were his first experiments. In respect to these, it was said by *Judge* Benedict, in *Andrews* v. *Carman*, 13 Blatchf. 307, 325: "The first experiment was a success in this: that it proved the possibility of obtaining a supply of water by this process; but, of course, it could not prove that a tube could be driven down to a water bearing stratum in all localities, with the cheapness and dispatch necessary to render the process one of general utility. It was natural therefore to suppose that, before the process could be declared to be satisfactory, other experiments, in other and different localities, should be made. He could, by law, use his invention for this purpose, and permit it to be used, for two years, without forfeiting his right to a patent. Under such circumstances, it would be going far to say that his act of permitting the use of his process at the camp in Cortland, where his regiment was then in camp, and of providing material wherewith to construct such wells for his regiment when it should move into hostile territory, amounted to a dedication of his invention to public use, and worked a forfeiture of his right to it."

Section 7 of the Act of March 3, 1839, 5 Stat. at L. 354, protects everyone who had purchased or constructed the subject of the invention prior to the application for the patent, and adds as follows: "And no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." There is no evidence in the record of any use or sale of the invention by Green before his application for a patent, and no evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him, except in the instances mentioned at Cortland, which were merely experimental tests, made by himself. Much less is there any evidence to show that there was any

use of the invention by others for more than two years prior to his application.

Upon the question of infringement, the agreed statement of facts shows the following: "That the defendants have had in use on their farm [78] for the past seven or eight years one or more driven wells, which wells were put down for the defendants by an ordinary well driver in the following manner: a tube, of which the lower portion was perforated with small holes and the lower end provided with a point, was driven into the ground until it projected into the water, without removing the earth upwards, as in boring. The water then entered the tube through the perforations and was pumped up through the tube by an ordinary pump. That the defendants have never driven wells for themselves, except as above described, or for other purposes; never have sold or offered for sale driven wells, or the materials for driving them, but have simply used their own wells for their personal use on their farms."

It is now contended, on the part of the appellant, that the claim of the patent is for the process of driving the well, and not for the use of the well after it has been driven, and that consequently the appellant is not shown to have infringed; but, as has been shown in the case of *Eames* v. *Andrews*, the patent covers the process of drawing water from the earth by means of a well driven in the manner described in the patent. The use of a well so constructed is, therefore, a continuing infringement, as every time water is drawn from it the patented process is necessarily used. As was said by *Mr. Justice* Blatchford in *Andrews* v. *Cross*, 19 Blatchf. 294, 305: "Under this construction the defendant has infringed by using the pump in a driven well, constructed in a house hired by him, to obtain a supply of water for the use of his family, although he may not have paid for driving the well, or have procured it to be driven. Such use of the well was a use of the patented process."

The decree of the Circuit Court is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Dissenting: *Mr. Justice* **Bradley**, *Mr. Justice* **Field** and *Mr. Justice* **Gray**.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, [79] *Plff. in Err.*,

v.

BENJAMIN B. KNIGHT ET AL.

(See S. C. Reporter's ed. 79-97.)

Common carriers—bill of lading is both a receipt and a contract—carrier only required to deliver goods actually received—deficiency in quality—liability as warehouseman—delivery of cotton to be compressed—liability to broker—control—when liability as common carrier begins—instructions—pleading—local statute.

1. A common carrier is not responsible for a difference in the quality of goods carried as compared with that described in the bill of lading if he safely delivers the very goods received by him for transportation.

2. A bill of lading is at once a receipt and a contract. It is an acknowledgment of the receipt of the property and a contract to carry safely and deliver.

3. In an action to charge the defendant as a common carrier with damages for a failure to deliver cotton of the quality called for by certain bills of lading, issued by its agent, it is *held*: that the defendant is not liable as a common carrier by reason of anything occurring after the transportation actually commenced; that the plaintiffs cannot recover on the ground of a liability on the part of the defendant as a warehouseman, the action being on the bills of lading alone, and its liability, if any, as a warehouseman being to the broker, who delivered the cotton to the defendant to compress it before shipment, and not to the plaintiffs; that its liability as a common carrier did not commence until the cotton was designated and set apart by said broker or his agents for immediate transportation, all of the cotton delivered to the defendant by said broker being (until so designated and set apart) subject, so far as grading, classifying and marking was concerned, to his control; that certain instructions, set out in the opinion of the court, are erroneous; and that the defenses made by the defendants were open to it under the pleadings, a Statute of Illinois requiring a plea to be verified by affidavit under certain circumstances, not being applicable to the circumstances of the case.

[No. 283.]

Argued and submitted May 3, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **John F. Dillon**, for plaintiff in error:

The agent of the Railway Company had no authority to issue bills of lading for cotton not actually received by him for transportation; and bills so issued can impose no liability upon the Railway Company to deliver the goods therein described; but it may be shown, even as against an innocent indorsee for value, that such goods were never received for carriage.

Lickbarrow v. *Mason*, 2 T. R. 63; *Grant* v. *Norway*, 2 Eng. L. & Eq. 337; *Hubersty* v. *Ward*, 18 Eng. L. & Eq. 551; *Brown* v. *The Powell D. S. Coal Co.*, L. R. 10 C. P. 562; *The Freeman* v. *Buckingham*, 59 U. S. 18 How. 182 (15:341); *The Loon*, 7 Blatchf. 244; *Robinson* v. *Memphis, etc. R. R. Co.* 9 Fed. Rep. 129; *S. C.* 16 Fed. Rep. 57; *Pollard* v. *Vinton*, 105 U. S. 7 (26: 998); *Sears* v. *Wingate*, 3 Allen, 103; *Baltimore & O. R. R. Co.* v. *Wilkens*, 44 Md. 11; *Hunt* v. *Miss. Cent. R. Co.* 29 La. Ann. 446; *Louisiana Nat. Bank* v. *Laveillé*, 52 Mo. 380. See *Chandler* v. *Sprague*, 38 Am. Dec. 407, note; *Cox* v. *Bruce*, L. R. 18 Q. B. Div. 147.

By the insertion of the words "contents unknown," in the bill of lading, the Railway Company expressly exonerated itself from all liability in regard to the quality of the cotton which it received and carried under these bills, and in the absence of evidence to the contrary cannot be held responsible for nondelivery of the cotton sued for, upon a warranty that the cotton carried should be of the quality indicated in the bills, and by the marks upon the bales themselves.

Haddow v. *Parry*, 3 Taunt. 303; *Jessel* v. *Bath*, L. R. 2 Exch. 267; *Clark* v. *Barnwell* 53 U. S. 12 How. 272 (13: 985); *The Columbo*, 3 Blatchf. 521; *Bissel* v. *Price*, 16 Ill. 408; *Barrett* v. *Rogers*, 7 Mass. 297; *Shepherd* v. *Naylor*, 5 Gray, 591; *Miller* v. *Hannibal & St. J. R. R. Co.* 90 N. Y. 430.

As to all cotton in the compress warehouse, and until its actual delivery upon the loading platform for shipment, the Railway Company

can at most be deemed only a warehouseman, and its liability as such cannot be inquired into in this action. It was not in issue.

Hutchinson, Carriers, § 82; *Michigan, etc. R. R. Co.* v. *Shurts*, 7 Mich. 515; *Platt* v. *Hibbard*, 7 Cow. 497; *St. Louis, etc. R. R. Co.* v. *Montgomery*, 39 Ill. 335; *Roskell* v. *Waterhouse*, 2 Stark. 461; *O'Neill* v. *N. Y. C. & H. R. R. R. Co.* 60 N. Y. 188; *Barron* v. *Eldredge*, 100 Mass. 455; Angell, Carriers, § 184, and note.

The court below erred in charging the jury that the Railway Company was liable in case of connivance by its agent at the substitution of an inferior quality of cotton in the place of that called for by the bills of lading, both because there was no such issue, and no evidence to warrant such a charge, and the charge misconceived the actual case in hand.

Messrs. **Julius Rosenthal** and **Abram M. Pence**, for defendants in error:

Under the pleadings the defendant is not entitled to raise any question as to the validity of the bills of lading, and is estopped from claiming that the cotton described in the bills was not on hand at time same were issued. Defendant's plea not being verified by affidavit, it is precluded from controverting the execution of the bills of lading.

Stevenson v. *Farnsworth*, 2 Gilm. 715; *Gaddy* v. *McCleave*, 59 Ill. 182; *Templeton* v. *Hayward*, 65 Ill. 178; *Dwight* v. *Newell*, 15 Ill. 335; *Walker* v. *Krebaum*, 67 Ill. 252.

The bills of lading in this case were issued by an agent of defendant. Confidence had been reposed in such agent, and apparent authority had been conferred upon him by the defendant Company to receipt for property and issue such bills of lading; and hence such principal, as against an innocent purchaser for value, must suffer from an actual exercise of authority not exceeding the appearance of that which is granted to such agent. The defendant Company is estopped by the acts and declarations of its agent, upon which plaintiff relied and parted with his money, from denying that it had received the cotton in question, as stated in its bill of lading.

St. Louis & Iron Mt. R. R. Co. v. *Larned*, 103 Ill. 293; *Armour* v. *Mich. Cent. R. R. Co.* 65 N. Y. 111.

The evidence shows that at the time these bills of lading were signed there was a large amount of cotton of this grade and of these marks in the hands of the Railway Company; and also that in December 5,000 bales of cotton were in its possession and that over 5,000 bales of cotton, with same marks as this, were sent to parties other than plaintiffs.

If other persons had rights superior to plaintiffs to this cotton, it should have been shown by defendant. The burden was upon them to show it. And upon our proving that cotton of the quality and description of ours came into the hands of defendant, although after the bills of lading were given, yet, when it came into such possession, it became the property of the holders of the bills.

The Idaho, 93 U. S. 575 (23: 978); *Rowley* v. *Bigelow*, 12 Pick. 307; *Robinson* v. *Memphis R. R. Co.* 16 Fed. Rep. 60.

[81] *Mr. Justice* **Matthews** delivered the opinion of the court:

This is an action of assumpsit brought by the defendants in error against the St. Louis, Iron Mountain and Southern Railway Company in the Superior Court of Cook County, Illinois, and removed into the Circuit Court of the United States for the Northern District of Illinois by the defendant below, the parties being citizens of different States. The declaration set out several similar causes of action in different counts against the Railway Company as a common carrier, in one of which it was alleged that the defendant, having received from one G. T. Potter a large number of bales of cotton, described in a certain bill of lading acknowledging receipt thereof, thereby agreed safely to carry the same from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and thence to Woonsocket, in the State of Rhode Island; and avers that, in violation of its promise and duty, and by reason of its negligence, the said goods became and were wholly lost. The plaintiffs below sued as purchasers of the cotton from Potter and assignees of the bills of lading. The bills of lading sued upon were similar in their tenor, except as to the description of the articles named therein, and commenced as follows: "Received from G. T. Potter the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported [82] from Texarkana, Ark., to St. Louis, and delivered to the consignee or a connecting common carrier." A specimen of what was contained on the margin is as follows:

"Marked. List of articles. Weight.
"[P. P.]...Seventy-four bales cotton, adv. ch'g's $111.00...85,964
"Order shipper notify—
"B. B. & R. KNIGHT,
Providence, R. I.
"Deliver cotton Woonsocket, R. I."

Some of the bills of lading specified that the goods were to be transported from Texarkana to Providence, R. I., to be forwarded from St. Louis to destination. The whole number of bales in controversy is 525.

To the declaration the defendant filed a plea of the general issue, which was not verified.

The ground of the complaint on the part of the plaintiffs was, not that they did not receive the whole number of bales called for by the bills of lading, but that, as to the 525 bales in controversy, they were not of the grade and quality designated by the marks contained in the bills of lading. By reason of this difference in quality, on the arrival of the cotton at destination, the plaintiffs refused to receive the same, and, after notice to the defendant, caused the same to be sold for its account. The amount claimed was the loss thereby incurred.

The cause was tried by a jury, and a verdict and judgment rendered for the plaintiffs for $11,808.51. A bill of exceptions, duly taken, sets out the entire evidence given on the trial, and the charge of the court to the jury, with the exceptions taken by the plaintiff in error.

The court below in its charge to the jury gave in outline a statement of the main features of the case sufficient for present purposes, as follows:

"The proof tends to show that Potter was a cotton broker at Texarkana, Arkansas, in the

fall of 1879 and winter following; that he bought most of his cotton at points in Texas on the lines of railroads running south and southwest and west from Texarkana, and that [83] it was brought to Texarkana by these railroads and there delivered upon the platform of what is known in the testimony as the Cotton Compress Company; that this compress company was a corporation whose business it was to compress cotton, and that all the cotton bought by Potter and delivered at Texarkana was to be there compressed before it was shipped East and North by the defendant. This compress company had a large warehouse, where cotton was stored until it could be compressed and made ready for shipment.

"The testimony tends to show the course of business to have been this: cotton was bought by Potter and delivered into the compress house. It was there weighed, classed, or graded by Potter, and marks put upon each bale indicating the grade or quality of the cotton and the lot to which it belonged. When Potter had so weighed, graded, and marked a number of bales he made out a bill of lading, describing certain bales of cotton by the marks on the bales, had the superintendent of the compress company warehouse certify to the fact that the cotton called for by these bills of lading was in the warehouse, and the bills of lading thus certified to by the letters 'O K' and the signature of Martin, the superintendent of the compress warehouse, were signed by O'Connor, the freight agent of the defendant at Texarkana. Potter then drew drafts on the persons to whom he had sold cotton of the grade called for by these bills of lading, attached these bills of lading to the drafts, and some local bank at Texarkana or some of the adjacent towns or cities cashed these drafts, and they went forward to some correspondent of such bank for collection, and in due course of mail and long before the actual arrival of the cotton the drafts were paid; and this seems, from the proof, to have been the course of business between the plaintiffs and Potter.

"There is also testimony in the case, given by Potter himself, which tends to show that the bills of lading were issued upon cotton before it had been received into the warehouse upon some understanding or agreement be- [84] tween Potter and O'Connor that they should be so issued, and that Potter would afterwards put the cotton to respond to those bills of lading into the warehouse.

"It is conceded that the defendant, and it is in fact provided in the bills of lading that the defendant, the Railroad Company, should compress this cotton before shipping to the North or East, and that the expense of compressing was paid by the defendant out of its charges for transportation; that some time necessarily elapsed between the arrival of the cotton in the compress warehouse and the time when it was compressed and made ready for shipment. Especially was this so in the fall and early part of the winter, when there was a large rush on cotton, and it was impossible to compress and handle the cotton as fast as it came in. The cotton therefore accumulated in large quantities in the compress house, awaiting compression and getting ready for shipment.

"And there is also proof in the case tending to show that when it was ready for shipment it was turned out on to what was known as the loading platform, and was there shipped to such consignees as Potter directed: that is, bills of lading having been given to various persons, Potter directed to whom he would have each lot, as it was turned out ready for shipment, sent or forwarded.

"The controversy in this case is wholly in regard to 525 bales of cotton covered by the eight bills of lading offered in evidence in this case. These bills of lading, as you will remember, covered a large amount of other cotton which it is conceded was received in due course of business, and answered to the marks of quality which were upon the bales; but it is claimed on the part of the plaintiffs that 525 bales of the whole number of bales covered by the bills of lading were not of the quality called for by these bills of lading, and this suit is wholly in regard to those.

"The plaintiffs claim that, on or about the 9th of April, 1880, there still remained unshipped from Texarkana and in the compress warehouse 525 bales of this cotton, for which they held bills of lading; that, on or about the 9th of April, there remained in the compress house about 800 bales of cotton of an inferior grade [85] to that indicated by the marks on the cotton called for by these bills of lading; and that certain employés of Potter, as plaintiffs insist, with the knowledge of O'Connor, the defendant's freight agent, re-marked this cotton with marks indicating the grade or quality called for by the bills of lading; and the defendant forwarded this inferior cotton to the plaintiffs, instead of the actual quality called for by these bills of lading.

"The plaintiff's proof also tends to show that when this inferior cotton arrived at its destination, Providence, Rhode Island, plaintiffs declined to accept it, caused it to be put into an auction house, and sold for the benefit of whom it might concern, notified the defendant of what they had done before this sale took place, giving the defendant opportunity to reclaim and take the cotton if it saw fit, and dispose of it itself; and this suit is now brought to recover the difference between the proceeds of this inferior cotton, as the plaintiffs claim, and the drafts and freight they have paid."

It is not denied that the Railroad Company delivered to the plaintiffs below the whole number of bales of cotton mentioned in the bills of lading, with external marks thereon as called for, and that no change was made in the cotton or in the marking thereof after it was loaded on the cars for transportation to Texarkana, and that no damage or loss was occasioned by reason of any want of care or diligence in the transportation. The bill of lading contains no warranty that the goods described shall answer any particular quality; on the contrary, it expressly specifies that the contents of the packages are unknown. That a bill of lading in such cases does not operate as such a guaranty appears from the case of *Clark* v. *Barnwell*, 53 U. S. 12 How. 272 [13:985], where *Mr. Justice* Nelson, delivering the opinion of the court, p. 283 [989], said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the

cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."

[86] The observations of the Master of the Rolls, *Lord* Esher, in the case of *Cox* v. *Bruce*, L. R. 18 Q. B. Div. 147, are very much in point. He says: "But, then, secondly, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant* v. *Norway*, 10 C. B. 665. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to content that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board; as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

It follows, therefore, that if any liability attached to the plaintiff in error upon these bills of lading, it must be by reason of what occurred [87] prior to the actual loading of the cotton upon the cars at Texarkana, when the transportation actually commenced. If Potter had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Freeman* v. *Buckingham*, 59 U. S. 18 How. 182 [15:341], and *Pollard* v. *Vinton*, 105 U. S. 7 [26:998]. In the latter case, *Mr. Justice* Miller, delivering the opinion of the court, and speaking of the nature and effect of a bill of lading, says: "It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea. *Baltimore & O. R. R. Co.* v. *Wilkins*, 44 Md. 11; *Miller* v. *Hannibal & St. Jo. R. R. Co.* 90 N. Y. 430. *A fortiori* the carrier is not responsible, as we have already seen, for a deficiency in the quality as compared with that described in the bill of lading, if he safely delivers the very goods he actually received for transportation.

It becomes necessary, therefore, further to inquire what facts, happening before the actual loading of the cotton in question on the cars of the plaintiff in error at Texarkana, create a liability on its part to make good the loss complained of by reason of its duty as a common carrier under the bills of lading sued on. On this point, the court below charged the jury as follows:

"1. This compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same —that is, if while the defendant was getting the cotton ready for shipment North it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed [88] the defendant's warehouse for that purpose.

"2. The proof without controversy seems to be that it was understood between Potter and the defendant that all the cotton covered by these bills of lading was to be compressed before it was to be put on the defendant's cars for actual transportation. While it remained in the compress house for compression, awaiting further shipment, the defendant's liability was that of a warehouseman only, and not that of a carrier; that is, the defendant was liable for due and ordinary care, such as warehousemen are expected to take of property placed in a warehouse for keeping. A common carrier's liability is of an extraordinary character, and covers every risk that the property can be subject to, except a loss by the act of God or by an unavoidable accident, and by the public enemy, unless this extraordinary liability which the law imposes is limited or restricted by the contract between the parties, so that this extraordinary liability, as a common carrier, did not commence until the property was actually loaded or taken for transportation; but the liability was that of a warehouseman until the transportation was actually commenced."

After charging the jury, in the same connection, that the bills of lading were not negotiable, so that any defense open to the plaintiff in error, if sued by Potter, might be made against the plaintiffs below, notwithstanding they had paid value for the property on the faith of the bill of lading, the court further said:

"But this rule must be taken with this qualification: that after the issuing of a bill of lading by the defendant as a warehouseman or common carrier no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading. The plaintiffs have the right to have the contract performed

substantially as it was made between Potter and the defendant. There can be no substantial change in the terms of the contract to the prejudice of the plaintiffs or any person to whom the contract or bill of lading may be assigned."

[89] The court further charged the jury that the defendant, as a common carrier, was not a guarantor of the quality of the commodity it assumed to transport, and added as follows:

"This rule may, however, be subjected to a qualification or limitation under the facts in this case as you may find them to be. The proof tends to show that Potter marked quite a large number of bales with the same grade and lot marks as those described in these bills of lading; and there is proof tending to show that no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading; but it was understood between Potter and the defendant that out of the lot or quantity of bales marked in the manner designated in these bills of lading a sufficient number to make up what are called for by those bills of lading should be shipped. If you so find, then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks; and this would be the contract, if you find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks.

"The testimony on the part of the defendant tends to show that the defendant's agents did not know at the time of the issuing of these bills of lading that the marks on these bales indicated the quality or the grade of the cotton; that, so far as Mr. O'Connor and the other agents of the defendant who had the responsible charge of the defendant's business at Texarkana were concerned, the marks only indicated a means of identification, and the quality of the cotton was not considered by them; that a bale of cotton to them was only a bale of cotton, without regard to quality; that in shipping the cotton in fulfillment of these bills of lading they only referred to the marks as a means of identifying or determining what cotton they were to ship under each bill of lading.

"As has been stated, the plaintiffs' proof tends to show that on or about the 9th of April the employés of Potter, with the knowledge of the defendant's agent, marked a lot of 800 bales of inferior cotton, then in the compress warehouse, with grade marks corresponding to those called for by these bills of lading, and that the defendant shipped this inferior cotton

[90] to the plaintiffs in fulfillment of its contract under those bills of lading; while the defendant's proof tends to show that the defendant's agents had no knowledge of the fact that this cotton was of a quality inferior to that called for by these bills of lading, and had no knowledge of the fact that the grade marks on the bales so shipped had been changed from marks indicating a lower grade to those indicating the grade called for by the bills of lading, but that, on the contrary, they accepted the cotton with the belief that it was the cotton called for by the bills of lading, and which had been delayed in the warehouse up to that time for the purpose of compressing and getting it ready for shipment.

"4. If the proof in the case satisfies you that the defendant's agents knew or were informed at the time they shipped this cotton to the plaintiffs or accepted it for shipment that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped—that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of a lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable. While, if from the proof you are satisfied that when the agents of the defendant actually shipped the cotton they had no knowledge of the difference in quality between the cotton so shipped and that called for by the bills of lading, and had no knowledge that the cotton was, in fact, inferior to that called for by the bills of lading, and that the grade marks on the bales had been changed from marks indicating a lower grade to marks called for by the bills of lading, then the defendant is not liable.

"You are to determine, then, as a question of fact, from the testimony:

"First. Whether it was in the course of [91] business in the handling of this cotton in the warehouse to set apart and keep separate the cotton covered by each bill of lading from the time such bill of lading was issued, or whether the defendant's agent, O'Connor, only satisfied himself, through the agency of Martin or his employés, that there was enough cotton, as stated in the bills of lading, to fill such bill as part of a common lot answering to the same description. As, for illustration, there might be in a railroad warehouse in this city 10,000 barrels of flour of one brand, and ten bills of lading might be issued, each to a different person, calling each for 1,000 barrels of this lot of flour. No one barrel would be specifically set apart as belonging to any one of these bills of lading; but any one of the 10,000 barrels would be liable to be shipped on any of these bills of lading—that is, it would be assumed that the entire lot was uniform and alike in quality, and it would, therefore, make no difference to the person to whom it was shipped which particular barrel of flour he got. If such was the mode of doing business in this compress warehouse, and Potter understood it, then the defendant was not obliged to keep separate cotton called for by each bill of lading, but could fill the bill of lading out of the common lot bearing the same marks.

"Second. Did the agents of the defendant in charge of the issue of these bills of lading and the shipment of this cotton know the grade marks of this cotton called for by the bills of lading; and did they know that this 525 bales in question was of an inferior grade to that called for by the bills of lading; and did they knowingly accept this inferior quality of cotton in place of that called for by the bills of lading, and ship the same to plaintiffs?

"As I have stated, a common carrier is not, as a rule, a guarantor of the quality of the goods transported, but it is bound to transport and deliver the identical goods covered by its contract, where such identity can be established; and, therefore, if at the time these bills of lading were issued it was not intended that they should cover any specific bales, but only a given number of bales, bearing certain common marks without regard to quality, as understood by the defendant's agents, and that the defendant did ship the number of bales called for by the bills of lading, and marked as required by the bills of lading, with no knowledge or information that the cotton contained in those bales was inferior to that called for by the bills of lading, then the defendant is not liable.

"But if you are satisfied, from the proof, that the agents of the defendant knew at the time they received and shipped the 525 bales in question that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable.

"The defendant having, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton while it was being compressed and prepared for shipment, was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

The suggestion in the charge of the court of a possible ground of liability on the part of the defendant as a warehouseman was entirely outside of the issues. The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances out of which any duty as warehouseman could arise were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken was contained in them. The duty charged to have been violated was the duty of the defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safekeeping. Its relation as a warehouseman was with Potter, and him alone. It was an error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs.

It may be contended, however, that in one possible view of the fact this error was not prejudicial to the defendant. It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter, on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation until designated and set apart by Potter or his agents. The cotton received at the compress warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him given by other carriers; still, the cotton, as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the respects already mentioned; and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, the latter had no possession of the property as a carrier. The undisputed facts are that the whole quantity of cotton purchased by Potter, and received on his account in the warehouse, did not answer the grades and descriptions according to which he had sold it to different purchasers. He was unable out of the cotton to perform all of these contracts. The whole number of bales received by him were sufficient in number, and they were all transported according to his directions. It is not claimed that any of them were converted to the use of the Railroad Company, or that any of them were delivered by the Railroad Company, after they were received for transportation, to any other than the proper consignees.

The court below, however, charged the jury that, notwithstanding "no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading," if "it was understood between Potter and the defendant that, out of the lot or quantity of bales marked in the manner designated in these bills of lading, a sufficient number to make up what are called for by those bills of lading should be shipped, that "then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks," if the jury "find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks."

This charge seems to assume that, during the progress of the receipt and accumulation of cotton for Potter in the warehouse, there were

a sufficient number of bales of the proper grade and quality, and from time to time so marked, to satisfy the bills of lading sued on; and that it was, therefore, the duty of the defendant so to apply them; but it ignores the fact that they were actually applied to satisfy other bills of lading in the hands of parties equally entitled to call for them, and also the more important, because controlling, fact that they were thus applied by the order and direction of Potter, the owner and consignor, who had the right so [95] to direct. There was no relation established between the plaintiffs and the defendant, in respect to the cotton described in their bills of lading, out of which any duty or obligation could arise with respect to it on the part of the defendant until the specific lots of cotton intended for the plaintiffs had been separated and set apart by Potter, and by him delivered to the defendant for immediate transportation, according to the terms of the bills of lading.

The court also instructed the jury, as shown by the extracts from the charge already made, that if the agent of the defendant accepted the cotton in question for shipment, knowing at the time that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and the marks on the bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant was liable. This charge seems to have been given independently of any other circumstances than the mere fact of such knowledge. Possibly it was intended to be taken only in connection with the previous portion of the charge already considered, fixing upon the defendant the duty of selecting the specific quantity called for by these bills of lading out of any larger lot that may from time to time have been on hand in the warehouse answering the same description; and this instruction, therefore, may have been intended by the court as a qualification of what had been previously said. It stands, however, and may have been so understood by the jury, as a complete and separate statement of a distinct ground of liability. In either view, we think it erroneous. If intended as a qualification of the preceding instruction, it does not have the effect of correcting it in the particulars in which we have found it to be erroneous; standing by itself, we think it also to be erroneous. Taken, as it must be, in view of the undisputed facts, it would make it to have been the duty of the defendant, when the cotton in question was tendered by Potter for delivery to the Railroad Company to be carried under the terms of the bills of lading sued on, to have [96] refused the shipment altogether, on the ground that the goods offered did not correspond in grade and quality with those called for by the bills of lading. As we have already seen, the defendant undertook no such obligation in respect to these plaintiffs. The only alternative, if they did not receive them, would be to reject them altogether, and to refuse to carry them. In that event, upon the facts as they stood, the plaintiffs would have lost the whole 525 bales, instead of merely the difference between the value of those actually carried and those which Potter had agreed to deliver. For, on this supposition, Potter had no other cotton except this to deliver, and the case would have stood, as between the plaintiffs and the defendant, upon bills of lading where no property at all had been received by the carrier for transportation, bringing it exactly within the rule declared in *Pollard* v. *Vinton*, 105 U. S. 7 [26: 998].

It is argued, however, on the part of the defendants in error, that the defenses made by the defendant below, based on the propositions we have considered, were not open to it on the pleadings. The only plea was the general issue of nonassumpsit, not verified by an affidavit of its truth. The law of Illinois, as declared by statute, Hurd's Rev. Stat. Ill. Practice Act, § 34, declares that "No person shall be permitted to deny on trial the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." This statute regulates the practice and pleadings in similar cases in the Circuit Court of the United States for that district by virtue of section 914 of the Revised Statutes of the United States. This provision, however, is not applicable to the circumstances of this case. The execution of the bills of lading, which are the written instruments on which the action is founded, is not denied by anything set up on the part of the defendant below. Their existence and validity, so far as their form and terms are involved, are not in question. The only questions made and decided [97] are those which relate to their legal effect when considered with reference to the facts and circumstances of the case as disclosed in the evidence. The defense actually shown by them, so far as the present record is concerned, is not that the bills of lading were not valid and binding, but that the contract contained in them has been fully performed by the defendant.

In accordance with these views the judgment of the Circuit Court is reversed, and the cause is remanded, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE GIBSON ET AL., *Appts.* [27]

v.

HENRY H. SHUFELDT & CO. ET AL.

(See S. C. Reporter's ed. 27-40.)

Jurisdiction—distinct decrees—general rules—review of authorities—suit by general creditors to set aside conveyance as fraudulent.

1. Distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.

2. Speaking generally, this court *holds:* that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights each of which is contested by the ad-

verse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.

3. In a suit by general creditors, only one of whose debts exceeds $5,000, the decree having set aside a conveyance in trust for the benefit of preferred creditors as fraudulent, a motion to dismiss the appeal as to all the complainants except the one whose debt exceeds such sum is granted.

[No. 868.]

Submitted April 11, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia. Motion to dismiss. *Granted.*

Statement by *Mr. Justice* **Gray:**

This was a motion to dismiss an appeal in equity. The material facts, appearing by the record, were as follows: Jenkins made a deed of assignment of a large amount of property to Watkins, in trust to sell it and to apply the proceeds to the payment of his debts, first, to Gibson for more than $20,000, next, to other persons named, and lastly, to his creditors generally. Shufeldt & Co. filed a bill in equity in the circuit court against Jenkins, Watkins and [28] Gibson, to have the assignment set aside as fraudulent and void against themselves and other unpreferred creditors of Gibson, and for general relief. The Mill Creek Distilling Company filed a similar bill. The defendants answered severally, denying the allegations of the bills, and praying to be dismissed with costs. By consent of the parties and order of the court, the two bills and intervening petitions of other unpreferred creditors were heard together as one cause. At the hearing upon pleadings and proofs, a receiver was appointed, the assignment was adjudged to be fraudulent and void as to the plaintiffs and petitioners, and the case was referred to a master; and upon the return of his report a final decree was entered for the distribution of the fund in the receiver's hands, paying $6,756.22 to the Mill Creek Distilling Company, $3,943.21 to Shufeldt & Co., and a less sum to each of the petitioning creditors. Gibson and Watkins appealed to this court, and the appellees now moved to dismiss the appeal as to all of themselves except the Mill Creek Distilling Company.

Messrs. **William A. Maury, John A. Coke** and **W. W. Crump,** for appellees, in support of motion.

No counsel appeared for appellants.

Mr. Justice **Gray,** after stating the case as above reported, delivered the opinion of the court:

The question presented by this motion can hardly be considered an open one. But the subject has been so often misunderstood, that the court has thought it convenient to review the former decisions, and the grounds on which they rest.

By the Act of February 16, 1875, chap. 77, section 3, which differs from earlier laws only in increasing the amount required to give this court appellate jurisdiction from a Circuit Court of the United States, it is necessary that "the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." 18 Stat. at. L. 316. [29]

The sum or value really in dispute between the parties in the case before this court, as shown by the whole record, is the test of its appellate jurisdiction, without regard to the collateral effect of the judgment in another suit between the same or other parties. *Elgin* v. *Marshall*, 106 U. S. 578 [27: 249]; *Hilton* v. *Dickinson*, 108 U. S. 165 [27: 688]; *The Jessie Williamson, Jr.* Id. 305 [27: 730]; *New Jersey Zinc Co.* v. *Trotter*, Id. 564 [27: 828]; *Opelika* v. *Daniel*, 109 U. S. 108 [27: 873]; *Wabash etc. R. Co.* v. *Knox*, 110 U. S. 304 [28: 155]; *Bradstreet Co.* v. *Higgins*, 112 U. S. 227 [28: 715]; *Bruce* v. *Manchester & K. R. R.* 117 U. S. 514 [29: 990].

The value of property sued for is not always the matter in dispute. In replevin, for instance, if the action is brought as a means of trying the title to property, the value of the property replevied is the matter in dispute; but if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute, and the limit of jurisdiction. *Peyton* v. *Robertson*, 22 U. S. 9 Wheat. 527 [6: 151].

When the object of a suit is to apply property worth more, to the payment of a debt for less, than the jurisdictional amount, it is the amount of the debt, and not the value of the property that determines the jurisdiction of this court. This is well illustrated by two cases, in one of which the appeal was taken by the creditor, and in the other by a mortgagee of the property.

In *Farmers Bank of Alexandria* v. *Hooff*, 32 U. S. 7 Pet. 168 [8: 646], this court dismissed an appeal from a decree of the Circuit Court for the District of Columbia, dismissing a bill to have land worth more than $1,000 sold for the payment of a debt of less than $1,000, which was the limit of jurisdiction, *Chief Justice* Marshall saying: "The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit."

In *Ross* v. *Prentiss*, 44 U. S. 3 How. 771 [11: 824], land worth more and mortgaged for more than $2,000 was about to be sold on execution for a debt of a less sum; and a bill by the mortgagée to stay the sale was dismissed. He appealed to this court, and insisted that its juris- [30] diction depended on the value of the property and the amount of his interest therein, and that he might lose the whole benefit of his mortgage by a forced sale on execution. But the appeal was dismissed, *Chief Justice* Taney saying. "The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend on the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is in this case below $2,000 the appeal must be dismissed."

When a suit is brought by two or more plaintiffs, or against two or more defendants,

or to recover or charge property owned or held by different persons (which more often happens under the flexible and comprehensive forms of proceeding in equity and admiralty, than under the stricter rules of the common law), the question, what is the matter in dispute, becomes more difficult. Generally speaking, however, it may be said that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendant's alleged liability to the plaintiff, or claim to the property is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.

In the leading case of *Oliver* v. *Alexander*, 31 U. S. 6 Pet. 148 [8: 349], upon a libel in admiralty against the owners of a vessel to recover [31] seamen's wages, and an attachment of the proceeds of the vessel in the hands of assignees, the libelants obtained a decree for the payment out of those proceeds to them respectively of sums less than $1,000, but amounting in all to more than $2,000, and the assignees appealed. This court, at January Term, 1832, in a judgment delivered by *Mr. Justice* Story, dismissed the appeal, for the reasons that the shipping articles constituted a several contract with each seaman to all intents and purposes; that, although the libel was in form joint, the contract with each libelant, as well as the decree in his favor, was in truth several, and none of the others had any interest in that contract or could be aggrieved by that decree; that the matter in dispute between each seaman and the owners, or other respondents, was the sum or value of his own demand, without any reference to the demands of others; that it was very clear, therefore, that no seaman could appeal from the circuit court to this court, unless his claim exceeded $2,000; "And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute."

Upon like reasons, in *Rich* v. *Lambert*, 53 U. S. 12 How. 347 [13: 1017], where a libel by several owners of cargo against the ship to recover damages by improper stowage had been consolidated by order of the court with similar libels by other owners of cargo, and a decree entered awarding to the libelants respectively various sums, some more and some less than $2,000; but amounting in all to more than $10,000, an appeal by the owner of the ship was dismissed as to all the libelants who had recovered less than $2,000 each. Similar decisions were made at October Term, 1882, in two cases of libels to recover damages to ship and cargo by collision, in one of which the appeal was taken by the libelants, and in the other by the owner of the vessel against which the suit was brought. *Ex parte Balt. & O. R. R. Co.* 106 U. S. 5 [27: 78]; *The Nevada*, Id. 154 [27: 149]. See also *Clifton* v. *Sheldon*, 64 U. S. 23 How. 481 [16: 429]. In the intermediate case of *The* [32] *Rio Grande*, 86 U. S. 19 Wall. 178 [22: 60], in which materialmen joining in a libel *in rem* had severally recovered in the circuit court various sums, a motion by them to dismiss the appeal of the owners of the vessel was not sustained, because the motion was "to dismiss the appeal" generally, and not as to those only who had recovered sums insufficient to give this court jurisdiction.

The decisions in cases of salvage illustrate the application of the rule to different states of facts. From a decree on a libel for salvage of a ship and cargo, or of several parcels of goods, belonging to different owners, when the salvage demanded against the whole exceeds the jurisdictional limit, but the amount chargeable on the property of each owner is within it, no appeal lies, either by the salvors or by the owners. *Stratton* v. *Jarvis*, 33 U. S. 8 Pet. 4 [8: 846]; *Spear* v. *Place*, 52 U. S. 11 How. 522 [13: 796]. The reasons for this were summed up by *Chief Justice* Taney as follows: "The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable." *Shields* v. *Thomas*, 58 U. S. 17 How. 3, 6 [15: 94]. Because the salvage service is entire, and is the common service of all the salvors acting together, and the salvage awarded is for that service, and the matter in dispute is the amount due the salvors collectively, and it is of no consequence to the owner of the property saved how the money recovered is apportioned among those who have earned it, this court has since decided that the owner of the ship may appeal from a decree against the ship for salvage which exceeds the sum of $5,000, although the amount awarded to each salvor is less than that sum. *The Connemara*, 103 U. S. 754 [26: 322].

Upon like grounds, it was held, in the case of *The Mamie*, 105 U. S. 773 [26: 937] that from a decree dismissing a petition to obtain the benefit of the Act of Congress limiting the liability of ship owners, the owner of the vessel might ap- [33] peal, even if the value of the thing surrendered was less than $5,000, when the claims against it were for much more than twice that sum in the aggregate, though for only $5,000 each; because, as explained in *Ex parte Balt. & O. R. R. Co.* [*supra*] the matter in dispute was the owner's right to surrender the vessel, and to be discharged from all further liability; and if that right was established, he had nothing to do with the division of the fund thus created among those having claims against it.

To the same class may perhaps be assigned *Rodd* v. *Heartt*, 84 U. S. 17 Wall. 354 [21: 627], where the appeal, which the court declined to dismiss, was by many creditors, secured by one

mortgage for more than $5,000, from a decree *in rem*, postponing that mortgage to claims of materialmen upon the vessel; but the report, both of the facts and the opinion, is so brief, that it is difficult to ascertain exactly upon what ground the court proceeded.

In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.

The earliest case of that class is *Shields* v. *Thomas* [*supra*], in which this court held that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding $2,000, and apportioning it among them in shares less than that sum. The case was distinguished from those of *Oliver* v. *Alexander* and *Rich* v. *Lambert*, above cited, upon the following grounds:

"The matter in controversy," said *Chief Justice* Taney, "was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. [34] He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

"It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

To the same class belongs *Freeman* v. *Dawson*, 110 U. S. 264 [28:141], in which the only matter in dispute was the legal title to the whole of a fund of more than $5,000, as between a judgment creditor and the grantee in a deed of trust; no question arose of payment to or distribution among the *cestuis que trust*, and this court therefore took jurisdiction of an appeal by the trustee from a decree in favor of the judgment creditor.

In *Market Co.* v. *Hoffman*, 101 U. S. 112 [25:782], in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that "The case is one of two hundred and six complainants suing jointly; the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the Act of Congress, is the limit below which an appeal is not allowable."

But in equity, as in admiralty, when several persons join in one suit to assert several and distinct interests and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction.

In *Seaver* v. *Bigelow*, 72 U. S. 5 Wall. 208 [18:595], a bill in equity by two judgment creditors for less than $1,000 each, against their debtor and a person alleged to have fraudulently obtained possession of a fund of more than $2,000 in value, to compel satisfaction of the debts out of that fund, was dismissed, and the plaintiffs appealed. This court dismissed the appeal for lack of jurisdiction, *Mr. Justice* Nelson saying: "The judgment creditors who have joined in this bill have separate and dis- [35] tinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than $2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." "It is true, the litigation involves a common fund, which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

In that case, indeed, the whole amount of both debts did not exceed $2,000. But the opinion, as appears by the reasoning above quoted, and by the reference in it to *Oliver* v. *Alexander* and *Rich* v. *Lambert*, above cited, was evidently framed to cover two other cases, argued and decided contemporaneously with *Seaver* v. *Bigelow*, which do not appear in the official reports, except in this brief note: "Similar decree made for the same reason in the case of *Field* v. *Bigelow*, and in one branch of *Myers* v. *Fenn*." 5 Wall. 211 [18:596], note. The opinions of *Mr. Justice* Nelson in those two cases, remaining on file, and published in the edition of the Lawyers' Coöperative Publishing Company (Bk. 18, p. 604), show the following facts: In *Field* v. *Bigelow*, the whole amount of debts sued for was more, although each debt was less, than $2,000, and *Mr. Justice* Nelson said: "No one of the three separate and distinct classes of creditors held a judgment exceeding $2,000. Neither judgment creditor, therefore, is entitled to an appeal to this court within the statute, as decided in the case of *Seaver* v. *Bigelow*." In *Myers* v. *Fenn*, the appeal was dismissed, on the authority of *Seaver* v. *Bigelow*, as to creditors whose claims were severally less, but not as to those whose claims were severally more, than that sum.

So in *Russell* v. *Stansell*, 105 U. S. 303 [26: 989], where all the lands within a particular [36] district were assessed to pay a decree against the levee board of the district, and the amount assessed to each owner was less than $5,000, and a bill filed by them jointly for an injunction against the collection of the assessment was dismissed, it was held that they could not appeal, because, as observed by the Chief Justice, "Their object was to relieve each separate owner

from the amount for which he personally, or his property, was found to be accountable;" and "Although the amount due the appellee from the levee district exceeds $5,000, his claim on the several owners of property is only for the sum assessed against them respectively." See also *Chatfield* v. *Boyle*, 105 U. S. 281 [26: 944]; *Adams* v. *Crittenden*, 106 U. S. 576 [27: 99].

The same rule has been applied in many recent cases where the appeal has been taken by the party who had been ordered by the decree below to pay several distinct claims amounting together to more than $5,000.

In *Schwed* v. *Smith*, 106 U. S. 188 [27:156], property worth more than $5,000 having been taken on execution upon a judgment confessed by the owners in favor of one Heller for more than $5,000, subsequent attaching creditors, whose claims were jointly more, but severally less, than that sum, filed a bill in equity against the debtors, Heller and the sheriff, and obtained a decree declaring Heller's judgment void as against the plaintiffs. An appeal by the defendants was dismissed on motion, for want of jurisdiction, the Chief Justice saying: "It is impossible to distinguish this case in principle from *Seaver* v. *Bigelow* [*supra*]." "If the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is that although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." "Although the effect of the decree is to deprive Heller in the aggregate of more than $5,000, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense."

[37] In *Farmers Loan & T. Co.* v. *Waterman*, 106 U. S. 265 [27:115], the purchasers of a railroad subject to the debts of intervening petitioners appealed from a decree ordering them to pay various sums to the petitioners respectively, amounting in all to more than $5,000, and the appeal was dismissed as to those petitioners whose debts were severally less than that sum. And in *Hassall* v. *Wilcox*, 115 U. S. 598 [29:504], a similar decision was made upon an appeal by the trustee in a railroad mortgage from a decree in favor of several creditors claiming prior liens.

In *Fourth Nat. Bank* v. *Stout*, 113 U. S. 684 [28:1152], the court dismissed the appeal of a bank from a decree adjudging that it held property of another corporation in trust for the creditors of the latter (one of whom had filed the bill, and the others had intervened by leave of court pending the suit), and directing the bank to pay to the creditors severally sums of less than $5,000, amounting in all to more than $5,000.

In *Stewart* v. *Dunham*, 115 U. S. 61 [29:329], upon a bill in equity in behalf of judgment creditors (including some who came in pending the suit), against their debtor and one to whom he had made a conveyance of property alleged to be fraudulent and void as against his creditors, by the decree below, the conveyance was adjudged to have been made to hinder, delay and defraud creditors, with the knowledge and connivance of the grantee, and was canceled, set aside, and declared to be null and void; and the defendants were ordered to pay out of the property to the plaintiffs respectively various sums, one of which was more and the others less than $5,000; and the defendants took an appeal, which was dismissed as to all the creditors except the one to whom more than $5,000 had been awarded.

Upon the same principle, neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount. For instance, it was decided in *Paving Co.* v. *Mulford*, 100 U. S. 147 [25:591], that the plaintiff could not appeal from the dismissal of a bill to assert a right against two defendants in two distinct certificates of indebtedness, held by them sev- [38]
erally, for sums severally less, though together more, than that amount; and in *Ex parte Phœnix Ins. Co.* 117 U. S. 367 [29:923], that four insurance companies could not appeal from a decree that each of them should pay $3,000 to the plaintiff.

In the less frequent instances in which similar questions have arisen in proceedings at common law, the same distinctions have been maintained.

Where a writ of *mandamus* was issued to compel a county clerk to extend upon a tax collector's books a sum sufficient to pay several distinct judgments held by different persons, it was held that the case was like *Seaver* v. *Bigelow* and *Schwed* v. *Smith*, above cited, and the defendant's right of appeal was determined by the amount of each judgment. *Hawley* v. *Fairbanks*, 108 U. S. 543 [27:820]. But where the writ commanded a collector to collect a tax of 1 per cent upon the property of a county, which had already been levied for the joint benefit of all the relators, it was held that the case was like *Shields* v. *Thomas* and *The Connemara*, above cited, and that the right of appeal depended upon the whole amount of the tax. *Davies* v. *Corbin*, 112 U. S. 36 [28:627].

In ejectment against two defendants for two parcels of land, if each defendant claims only one parcel, the value of each parcel is the limit of appellate jurisdiction. *Tupper* v. *Wise*, 110 U. S. 398 [28:189]; *Lynch* v. *Bailey*, 110 U. S. 400 [28:190]. But if both defendants jointly claim both parcels, the value of both is the test. *Friend* v. *Wise*, 111 U. S. 797 [28:602].

In *Henderson* v. *Wadsworth*, 115 U. S. 264, 276 [29:377, 379], where, in an action against heirs upon a debt of their ancestor, separate judgments were rendered against them for their proportionate shares, it was held that no one who had been thus charged with less than $5,000 could appeal; and *Mr. Justice* Woods, in delivering judgment, referred to many of the cases above cited, and declared it to be well settled that "Where a judgment or decree against a defendant, who pleads no counterclaim or set-off, and asks no affirmative relief, is brought by him to this court by writ of error or appeal, the amount in dispute on which the jurisdiction depends is the amount of the judgment or de- [39]
cree which is sought to be reversed;" and that "Neither codefendants nor coplaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to

give this court jurisdiction upon writ of error or appeal."

The true line of distinction, as applied to cases like that now before us, is sharply brought out by the recent decisions of *Stewart* v. *Dunham* [*supra*], and *Estes* v. *Gunter*, 121 U. S. 183 [*ante*, 884], in each of which a preferred creditor for more than $5,000 was on one side, and general creditors for less than $5,000 each were on the other. In *Stewart* v. *Dunham*, the suit being brought by the general creditors against the debtor and the preferred creditor to whom the debtor had made the conveyance alleged to be fraudulent, and the latter seeking no affirmative relief, the matter in dispute as between the defendants and each of the plaintiffs was the amount of the claim of that plaintiff; but in *Estes* v. *Gunter*, the suit being brought by the preferred creditor against the trustee in the deed of assignment by which he was preferred, and the general creditors being summoned in as defendants, and themselves asking no affirmative relief, the matter in dispute was the value of the debt preferred and the property assigned to secure the preference.

The case at bar is exactly like *Stewart* v. *Dunham*. The suit is by the general creditors, only one of whose debts amounts to $5,000; the trustee and the preferred creditor appear as defendants only, file no cross-bill, and ask no affirmative relief; and the decree sets aside the fraudulent conveyance so far only as it affects the plaintiffs' rights. The sole matter in dispute, therefore, is between the defendants and each plaintiff as to the amount which the latter shall recover; and the motion to dismiss the appeal of the defendants as to all the plaintiffs except the one whose debt exceeds $5,000 must be granted.

This result, as we have seen, is in accordance with a long series of decisions of this court, extending over more than half a century. During that period Congress has often legislated on the subject of our appellate jurisdiction, without changing the phraseology which had re- [40] ceived judicial construction. The court should not now unsettle a rule so long established and recognized.

Motion granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[154] CHAUNCEY P. WILLIAMS, *Plff. in Err.*,

v.

BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

(See S. C. Reporter's ed. 154-166.)

National banks—state taxation of shares—assessment at par value—assessments, void for want of conformity to state laws—subsequent enactment to legalize and confirm, valid.

1. The valuation of national bank shares in common with those of state banks at par, although the actual value of the shares differ, is not a violation of the Act of Congress which prohibits the assessment by the States of national bank shares higher in proportion than other moneyed capital.

2. The mode in which property shall be appraised for taxation, by whom its appraisement shall be made, the time within which it shall be done, what certificate of official action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in the discretion of the Legislature. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation.

3. In the case presented, it is held that certain assessments, which were invalid for want of conformity to the laws of the State of New York, were duly legalized and confirmed by a subsequent legislative enactment.

[No. 887.]

Argued March 16, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of New York. Reported below, 22 Blatchf. 302. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Compare the case of *Stanley* v. *Board of Supervisors*, *ante*, 1000.

Mr. **Matthew Hale**, for plaintiff in error.

Messrs. **Wheeler H. Peckham** and **Simon W. Rosendale**, for defendant in error.

Mr. Justice **Field** delivered the opinion of [155] the court:

This is an action to recover the amount of certain taxes alleged to have been illegally collected from the plaintiff and others on sundry shares of stock held by them in the National Albany Exchange Bank, in the City of Albany, New York, and paid into the treasury of the County. The stockholders other than the plaintiff assigned to him their respective claims before its commencement. Their demands were originally embraced in an action brought by one Edward N. Stanley against the Board of Supervisors, he being at the time assignee of their claims. In that action judgment was recovered by him. The case being brought to this court, the judgment was reversed, and the cause remanded with leave to the court below, in its discretion, to hear evidence upon the point whether the shares were habitually and intentionally assessed higher in proportion to their actual value than other moneyed capital generally, and, if necessary, to allow an amendment of the pleadings that the point might be properly presented. *Supervisors* v. *Stanley*, 105 U. S. 305 [26: 1044]. When the case was remanded, on application to the court below, all the counts of the complaint, except the fourth, were amended. Subsequently, however, Stanley discontinued the action as to the claim for the taxes assessed and collected for the years 1876, 1877 and 1878. The plaintiff then took an assignment of the claim for those taxes from Stanley and commenced the present action. He contends that the assessment for those years upon the shares of the stock of the bank was illegal on these grounds:

1. Because it was not made within the period required by law, which was before the first of September of each year, but after that date.

2. Because it was not accompanied by the oath of the assessors, that it had been made at the full and true value of the shares, subject only to certain specified deductions allowed by law.

3. Because it was higher, in proportion to [156] the actual value of the shares, than the assessment of other moneyed capital in the hands of

individual citizens of the State was to its actual value.

The defendant answered these grounds by a general denial, and by setting up an Act of the Legislature of New York, passed April 30, 1883, legalizing and confirming the assessment.

The issues were tried by the court without [157] the intervention of a jury, by consent of parties. The court found the facts as admitted by the pleadings and by stipulation of the parties, from which it appeared, among other things, that no entry of any assessment of the shares of the stockholders of the bank was made upon the assessment roll of 1876, 1877, and 1878, until after the first day of September of those years, and after the time provided by law for revising and correcting the assessment; that the oath of the assessors, annexed to the assessment of each year, was defective in its averment respecting the estimated value of the real estate assessed, but was correct in its averment of the estimated value of the personal property; that there were several banks, state and national, located in the City of Albany, and that the actual value of their shares during those years, with one exception, was above par, varying in that respect from 10 to over 100 per cent, and yet the value of all of them was assessed at par; that the actual value of shares in the National Albany Exchange Bank was from 25 to 30 per cent above par; that the assessment of the shares of some of the other banks was higher and of some of them lower than this figure; and that the assessment at par was not made by the assessors with the [158] intent of discriminating against the holders of national bank shares, or in favor of the holders of state bank shares, or other moneyed capital. As a conclusion of law, the court found that the assessments were illegal because not made in conformity with the laws of the State, but that they were legalized and confirmed by the Act of its Legislature of April 30, 1883, and that they were not in violation of any law of the United States. 22 Blatchf. 302. Judgment was accordingly rendered for the defendant, and the plaintiff has brought the case here for review.

It may be conceded that the assessment of the shares of the National Albany Exchange Bank was in some instances higher in proportion to their actual value than the assessment of some other moneyed capital in the hands of individual citizens was to its actual value; but, as seen from the findings, such discrimination was not designed by the assessors. It is so stipulated by the parties. Whatever discrimination in such instances may have existed arose from the difficulty of devising any other mode than the one adopted, which would work out greater equality and uniformity in the valuation of different kinds of moneyed capital. There was no proof as to the assessment of any moneyed capital, except shares of other banks, state or national. The value of shares in some of these banks was higher, in some lower, than [163] that of the shares of the National Albany Exchange Bank. The method adopted of assessing all shares at par was generally satisfactory to the owners of the national bank stock in the City of Albany, with the exception of a few stockholders in the National Albany Exchange Bank. Considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, state and national, came, as we said in the recent case of Stanley against the same defendants, as nearly as practicable to securing between them equality and uniformity of taxation. All the banks, state and national, being thus placed, as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to undervaluation of the shares of national banks, the holders could not complain. If it sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as asserted, this course was not, in the years mentioned, available to the plaintiff and the stockholders whose interests were assigned to him, because their names were not placed on the assessment roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. We have considered this subject so fully in the recent case of Stanley against these same defendants, to which we refer, that it is unnecessary to pursue it further.

The irregularities in the assessment for the years 1876, 1877 and 1878, in that no entry of any assessment of the shares of the plaintiff and of the stockholders whose claims were assigned to him was made on the assessment roll of those years until after the first of September, and after the time for revising and correcting the assessment had passed, and in the defect of the oath annexed, in its averment as to the estimate of the value of real estate, were, in our judgment, cured by the validating Act of April 30, 1883. The power of taxation vested [164] in the Legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them; provided, always, that intervening rights are not impaired. Such is the conclusion of numerous adjudications by the state courts upon the ef-

fect of curative Acts, and of this court in *Mattingly* v. *Dist. of Columbia*, 97 U. S. 687, 690 [24: 1098, 1100]; *Hart* v. *Henderson*, 17 Mich. 218; *Musselman* v. *Logansport*, 29 Ind. 533; *Grim* v. *Weissenberg School Dist.* 57 Pa. 433. The completion of the assessment roll in the case at bar before the first of September in the years mentioned, and the form of the oath annexed, were not so vital to the assessment itself as necessarily to render the defect arising from a later return or a deficient oath incurable. The completion of the assessment roll by that date was deemed essential by the court below, because the law required the assessors forthwith to cause notices to be published in three of the public newspapers of the city for twenty days, specifying a day at their expiration when they would meet and remain in session five days for the purpose of reviewing their assessments on the application of any one aggrieved. The requirement was designed to afford taxpayers [165] whose names were on the roll an opportunity for the examination and correction of the assessment of their property. The assessment could not stand if they were deprived of that opportunity. But it is not perceived why it might not be legalized and confirmed by the Legislature giving to them such opportunity after the time originally designated had expired. No just right of the taxpayer would thereby be defeated.

The assessment of the shares of the bank for the years 1876, 1877 and 1878 was held invalid for the reason stated, under the laws of the State, although from what we have said it would not be open to objection as being in conflict with the Act of Congress. It is only in view of its invalidity for want of conformity to the laws of the State that the validating Act becomes of importance. That Act declares that the assessments contained in the assessment rolls of the wards of the city for the above years are "In all things legalized and confirmed, subject to the rights of the shareholders or their personal representatives, in national or state banks which were located in said city, during those years, and the assessments against whom by reason of their ownership of such shares were collected by process of law, to claim a deduction from or cancellation of such assessments." It required the assessors, within ten days after the passage of the Act, to publish in the official papers of the city daily for three weeks, Sundays and holidays excepted, a notice to the stockholders that the assessors would be in attendance at their office in Albany, for three weeks subsequent to the last day of publication of the notice, and hear applications for the deduction from the assessments of any amount which such stockholders or their personal representatives would have been entitled to deduct under the law as it existed in the year when the assessment was placed on the roll, had such application then been made. And the Act provided that such shareholders, or any one representing them, might appear before the assessors and apply for a reduction or cancellation of the assess- [166] ment upon any ground which would have been a legal one when the assessment was placed on the roll, and the assessors were empowered to grant such reduction or cancellation as the shareholders would have been legally entitled to at that time. The Act also made provision for the collection and payment to the parties of the amount found to be due them with interest.

It is difficult to see on what plausible ground the validity of this Act can be questioned, unless the power of the Legislature to cure by legislative Act any irregularities of the assessment be denied. Every right of the shareholder who had paid taxes on the assessment, and it does not appear that there were any others, was secured. He could present any claim he might have for a reduction or cancellation of the assessment, and be heard respecting it. He occupied the same position he would have held, if the assessment of his shares had been placed on the assessment roll within the time required —that is, before the first of September—and the oath annexed had been without any fault or omission in its averments. The plaintiff and the other shareholders were bound, as owners of property, to bear their just proportion of the public burdens; and if, in ascertaining what that proportion should be, some steps in the proceeding were omitted which invalidated the assessment, it would seem but just that the defect should be cured, if practicable, and the shareholders not be allowed to escape taxation and thus entail the burden they should bear upon other taxpayers of the community.

After the validating Act was passed, the plaintiff applied to the assessors for the cancellation of the assessment for the years 1876, 1877 and 1878, or a reduction from the amount assessed. The assessors refused to cancel the assessments, but they allowed a reduction from them to the amount of $2,071.66 which was paid to him.

It follows from the views expressed that the judgment of the Circuit Court must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ERWIN DAVIS, *Plf. in Err.*, [138]
v.
ALGERNON S. PATRICK.

(See S. C. Reporter's ed. 138-154.)

Contract to secure advances made and to be made to mining company—construction of—person secured, not a partner and not liable for debts incurred in operating the mine—manager—agency—erroneous instruction—practice—bill of exceptions—delay—stipulation.

1. In an action to recover compensation for transporting ore from a certain silver mine in Utah, it is *held*: that an agreement between the defendant and the mining company, to secure the former for advances made and to be made, whereby a manager was appointed to operate and control the mine, to pay over to the defendant the profits thereof and to deliver to him a certain quantity of ore which he had purchased, the defendant having the power to remove said manager and appoint a new one in his stead, did not make him a partner with the company, or with the manager, or make the manager his agent in managing the mine, so as to make him responsible for any contract entered into by the manager; and that certain instructions which left the jury to determine the legal effect of the contract and a power of attorney to the manager from the company, and which assumed that the defendant may have owned the ore transported, the evi-

dence failing to show any such ownership, were erroneous.

2. Where the parties stipulate that the judge may delay the settlement and signature of the bill of exceptions, this court will not consider an objection that it was signed after the beginning of the term at which the writ of error was made returnable, and during a term of the circuit court succeeding that at which the case was tried, although the delay extended beyond the time made in the stipulation.

[No. 221.]

Argued April 14, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **J. M. Woolworth, Joseph H. Choate,** *Henry A. Root* and *J. M. Thurston,* for plaintiff in error.

Messrs. **John L. Webster, John F. Dillon,** *A. J. Poppleton* and *Geo. W. Doane,* for defendant in error:

To make J. N. H. Patrick the agent or servant of the Flagstaff Company, the company must have more than the mere right of selection. It must have had the right of control over J. N. H. Patrick, which it did not have under the contract, having by that instrument expressly surrendered it.

Something more than the mere right of selection on the part of the principal is essential to that relation.

Boswell v. *Laird,* 8 Cal. 469.

The liability of a principal is based upon the power to control the agent or servant, or to discharge him for misconduct.

Ohio R. R. Co. v. *Davis,* 23 Ind. 556; *Maxmilian* v. *Mayor of N. Y.* 62 N. Y. 163; *Ham* v. *Mayor of N. Y.* 70 N. Y. 462.

The rule of *respondeat superior* is based upon the right which the employer has to select his servants, to discharge them if not competent or skillful or well behaved, and to direct or control them while in his employ.

Maxmilian v. *Mayor of N. Y.* 62 N. Y. 163.

The application of the rule referred to in this case depends upon the question whether the power to discharge, direct and control existed, and is the main point which is now to be determined.

Ham v. *Mayor of N. Y.* 70 N. Y. 462.

By the contract J. N. H. Patrick did not receive his appointment from the company alone. It is apparent that his appointment was dictated by Davis, and for his primary benefit, and both unite in the contract as parties to it. If, however, J. N. H. Patrick had been appointed by the Flagstaff Company only, still that fact would not make him the agent of the company.

Buttrick v. *City of Lowell,* 1 Allen, 172; *Walcott* v. *Swampscott,* 1 Allen, 101; *Barney* v. *City of Lowell,* 98 Mass. 570; *Wheeler* v. *Cincinnati,* 19 Ohio St. 19; *Maxmilian* v. *Mayor of N. Y.* 62 N. Y. 164.

Even if it had been provided that the Flagstaff Company should pay the salary of Patrick, it would not make him the agent of the company.

Hafford v. *New Bedford,* 16 Gray, 297; *Fisher* v. *Boston,* 104 Mass. 87; *Barnes* v. *District of Columbia,* 91 U. S. 546 (23: 441).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in a court of the State of Nebraska, on the 24th of November, 1880, and removed, on the petition of the defendant, into the Circuit Court of the United States for the District of Nebraska, by Algernon S. Patrick against Erwin Davis, to recover certain sums of money. [139]

There are two causes of action set forth in the petition by which the suit was commenced. Under the first one, the plaintiff claims to recover $2,677.90, with interest from September 3, 1877, and $8,806.92, with interest from February 7, 1877. No question arises here as to the first cause of action. The second cause of action alleged in the petition is that, on or about the 15th of November, 1873, the plaintiff was employed by the defendant to transport silver ore from the Flagstaff mine, in Utah Territory, to the furnaces at Sandy, in that Territory, for a certain hire and reward then agreed upon therefor between the parties; that the plaintiff continued in that employment until on or about the 20th of November, 1875, at which date the account of services was settled and stated from the books of the defendant, and there was then found to be due to the plaintiff $26,539.54; and judgment is prayed for that sum, with interest from November 20, 1875. The answer of the defendant to the second cause of action is a general denial. At the trial before a jury, there was a verdict for the plaintiff, on the 20th of June, 1883, for $50,015.72, and a judgment accordingly, to review which the defendant has brought a writ of error. [140]

The plaintiff moves to strike the bill of exceptions from the record, for the reason that it was not allowed and signed in proper time. On the day the judgment was entered, June 25, 1883, a written stipulation between the parties was filed, providing that the defendant should have forty days to prepare and present to the court his bill of exceptions, and that the plaintiff should have twenty days thereafter to examine the same and make any suggestions of omission, addition or correction thereto, etc. On the 16th of August, 1883, the writ of error was allowed and filed, a *supersedeas* bond, duly approved, was filed, and a citation was duly issued, the writ of error being returnable at October Term, 1883. On the 14th of September, 1883, the following written stipulation, entitled in the cause, was made between the parties. "The bill of exceptions in this case having been partially settled by His Honor, *Judge* Dundy, and he desiring to be absent from the district for a month or more, and being unable to settle the remainder of the bill before leaving, it is hereby stipulated that the same may be settled and signed at any time before November 1, 1883, and that the record may be filed in the supreme court by the first of December, 1883, with the same effect as if filed at the beginning of the October Term." The term of the court at which the trial was had and the judgment rendered adjourned *sine die* on the 20th of October, 1883. The succeeding term of the court began on the 12th of November, 1883. The bill of exceptions was allowed and signed by the judge on the 8th of December, 1883, and was filed on the same day. The record was filed in this court on the 26th of December, 1883. [143]

The point taken is that, as the bill of excep-

tions was signed after the beginning of the term of this court at which the writ of error was made returnable, and during a term of the circuit court succeeding that at which the case was tried, it cannot be considered. But we are of opinion that this objection cannot avail. The stipulation of September 14, 1883, shows on its face that the matter of the settlement of the bill of exceptions had been submitted to the judge, and that the delay was agreed to for the convenience of the judge. The purport of the stipulation is that the bill had, with the knowledge of the plaintiff, been tendered to the judge for signature. This being so, the consent of the parties that the judge might delay the settlement and signature did not have the effect to cause any more delay than would have occurred if the judge had delayed the matter without such consent. The defendant was not to blame for the delay beyond the time named in the stipulation. He appears to have done all he could to procure the settlement of and signature to the bill, and he cannot be prejudiced by the delay of the judge. The bill of exceptions shows on its face that the several exceptions taken by the defendant were taken and allowed at the trial and before the verdict. The cases cited by the plaintiff—*Walton* v. *U. S.* 22 U. S. 9 Wheat. 651 [6:182]; *Ex parte Bradstreet* v. *Thomas*, 29 U. S. 4 Pet. 102 [7:796]; *Sheppard* v. *Wilson*, 47 U.S. 6 How. 260, 275 [12:430, 436]; *Muller* v. *Ehlers*, 91 U.S. 249 [23:319]; and *Coughlin* v. *Dist. of Columbia*, 106 U. S. 7 [27:74]—do not contain anything in conflict with this ruling. It is supported by *U. S.* v. *Breitling*, 61 U. S. 20 How. 252 [15:900]. The motion to strike out the bill of exceptions is therefore denied.

The claim of the plaintiff is that he was employed, not by the defendant personally, but by the plaintiff's brother, M. T. Patrick. The defendant, not disputing the rendering of the services or their value, denies that they were rendered for him, and denies that M. T. Patrick was his agent. He contends that the services were rendered to the Flagstaff Silver Mining Company of Utah, Limited, an English corporation; that M.T. Patrick was the agent of that company; and that, as such, he employed the plaintiff. The question of this agency was the principal question in dispute at the trial.

[144] The Flagstaff mine was owned in 1870 by certain parties in Utah Territory, who sold it, through the defendant, to the Flagstaff Silver Mining Company. That company continued to own and operate the mine until December, 1873, when J. N. H. Patrick, another brother of the plaintiff, went from New York to London, the defendant being then in London. On the day that J. N. H. Patrick arrived in London the company received a telegram from one Maxwell, superintendent of its mine in Utah, stating that the mine was attached for debt. It applied to the defendant for a loan of money, whereupon the following written agreement was made between the company and the defendant, on the 16th of December, 1873:

"This agreement, made this 16th day of December, one thousand eight hundred and seventy-three, between the Flagstaff Silver Mining Company of Utah, Limited, of the one part, and Erwin Davis, now of the City of London, of the other part.

"Whereas, the said Erwin Davis, on the 12th of June, one thousand eight hundred and seventy-three, advanced the said company the sum of five thousand pounds, at the rate of 6 per cent per annum interest:

"And whereas, the said sum of five thousand pounds is now due and owing to said Erwin Davis, with the interest thereon:

"And whereas, it is necessary that the said company should have a further advance of money for the purpose of continuing the development of their mine, and for carrying on their business:

"And whereas, the said Erwin Davis doth hereby agree to advance to said company at such time or times as may be necessary for the purpose aforesaid, not to exceed in amount the sum of ten thousand pounds, in addition to the said sum of five thousand pounds already advanced:

"And whereas, the said company has, at different times and dates, sold to the said Erwin Davis five thousand one hundred and ninety-five tons of ore, which said ore the said company agreed to deliver to the said Erwin Davis at the ore house of said company, free of cost:

"And whereas, they have so delivered two [145] hundred tons of said ore, leaving a balance of four thousand nine hundred and ninety-five tons yet undelivered, the cost of said ore having all been paid to said company by said Erwin Davis:

"Now, therefore, it is agreed between the parties hereto, in consideration of the said sum of money now due and owing to said Erwin Davis by the said company, and the further advances to be made by the said Erwin Davis, as herein agreed, and in further consideration of the premises heretofore stated, J. N. H. Patrick, of Salt Lake, is appointed manager of all the property of said company in Utah, and the said J. N. H. Patrick, as said manager, by himself or his agents, is to have the exclusive, sole, and irrevocable (except as hereinafter mentioned) management of all the said company's properties in Utah, and of all the business in Utah of the said company in mining and smelting silver and other ores, and any and all other lawful business, and, as such manager aforesaid of the business and properties aforesaid, he is hereby authorized and empowered to do, execute, and perform any and all acts, deeds, matters, or things whatsoever, which ought to be done, executed, and performed, or which, in the opinion of the said J. N. H. Patrick, ought to be done, executed or performed, in or about the concerns, engagements, or business of the said company, of every nature and kind whatsoever, as fully and effectually as it could do if the said company were actually present, hereby ratifying and confirming whatsoever the said J. N. H. Patrick may do in and about the company's concerns and business; and it is hereby further agreed that the said J. N. H. Patrick, or his agents, in furtherance of the purposes aforesaid, is to enter into the possession of all the said company's properties in Utah necessary for conducting the business and management thereof as aforesaid, until such time as, out of the profits of the workings of the properties aforesaid, he, the said J. N. H. Patrick, has repaid to Erwin Davis the said sum of five thousand pounds, with the interest thereon,

and also has repaid to him all and every sums of money he may have advanced to the said company under this agreement, together with interest thereon at the rate of six pounds per [146] centum per annum, and also until he has mined and delivered to Erwin Davis all the ores sold him by said company, as per agreement herein stated, and also until he has smelted the ore so mined and delivered to him, in the said company's furnaces, according to the terms and agreement dated the 12th day of September last, made between the said company and Erwin Davis; and when he, the said J. N. H. Patrick, has so paid to him all the moneys so advanced said company and interest as aforesaid, mined and delivered the ores so sold and contracted, and smelted said ores, and done and performed all the agreements herein contained, then the said J. N. H. Patrick may resign the management aforesaid, and shall, upon being called upon so to do, deliver to said company all of said properties in as good condition as possible after the necessary workings, mining, and smelting, as herein agreed to be done and performed. And it is hereby further agreed that the said mine is to be worked and mined by the said J. N. H. Patrick in a proper and minerlike manner, and that the said business of said company is to be managed with economy and for the best interests of the parties hereto; that a statement of all the business transactions, with accounts of the same, showing all moneys received and the source from whence so received, and all moneys paid out, with the proper vouchers therefor, is to be made monthly to said company, at their office at the City of London, by the said J. N. H. Patrick. And it is hereby further agreed that nothing herein contained shall be construed to defeat or impair any legal rights the said Erwin Davis may have for the moneys now due said Erwin Davis, or so to be advanced by said Erwin Davis, or for the delivery of the ores so sold said Erwin Davis. And it is hereby further agreed, between the parties hereto, that if, at any time, the said Erwin Davis becomes dissatisfied with the management of the business and the property in Utah, he may suspend and remove the manager and appoint another manager in his place, with any or all rights, powers, or authority delegated under this agreement; and, should the said Erwin Davis proceed to act upon the powers contained in the last preceding clause, he will consult with the board of directors of the said company, as to the new manager from time to time to be appointed.

[147] "In witness whereof the said parties hereto have set their hands the day and year first above written.

"J. R. GOLE,

"*Secretary, for and on behalf of the Flagstaff Silver Mining Company of Utah, Limited.*

"ERWIN DAVIS.

"Witness to the foregoing signatures—

"E. JOHNSON."

At the same time, and as a part of the same arrangement, the company, on the 16th of December, 1878, executed to J. N. H. Patrick the following power of attorney:

"*Know all men by these presents*, That we The Flagstaff Silver Mining Company, do hereby constitute and appoint John Nelson Hays Patrick, of Salt Lake City, Utah, in the United States of America, their true and lawful attorney, to take possession of and carry on and manage the workings of the mine or mines belonging to the said company, and for that purpose to appoint officers, clerks, workmen and others, and to remove them and appoint others in their place, and to pay and allow to the persons to be so employed such salaries, wages or other remuneration as he shall think fit; also, to ask, demand, sue for, recover and receive of and from all persons and bodies politic or corporate, to pay, transfer and deliver the same, respectively, all sums of money, stocks, funds, interest, dividends, debts, dues, effects and things now owing or payable to the said company, or which shall at any time or times hereafter be owing or belong to the said company, by virtue of any security or upon any balance of accounts or otherwise howsoever, or of any part thereof, respectively; to give, sign and execute receipts, releases, and other discharges for the same, respectively; and on nonpayment, nontransfer or nondelivery thereof, or of any part thereof, respectively; to commence, carry on and prosecute any action, suit or other proceeding whatsoever for recovering and compelling the payment, transfer or delivery thereof, respectively; also, to settle, adjust, compound, submit to arbitration and compromise [148] all actions, suits, accounts, reckonings, claims, and demands whatsoever which now are or hereafter shall or may be pending between the said company and any person or persons whomsoever, in such manner and in all respects as the said John Nelson Hays Patrick shall think fit; also, to sell and convert into money any goods, effects or things which now belong or at any time or times hereafter shall belong to said company; and also to enter into, make, sign, seal, execute and deliver, acknowledge and perform any contract, agreement, writing or thing that may, in the opinion of him, the said John Nelson Hays Patrick, be necessary or proper to be entered into, made or signed, sealed, executed, delivered, acknowledged or performed for effectuating the purposes aforesaid, or any of them; and, for all or any of the purposes of these presents, to use the name of the said company, and generally to do, execute and perform any other act, deed, matter or thing whatsoever which ought to be done, executed or performed, or which, in the opinion of the said John Nelson Hays Patrick, ought to be done, executed or performed, in or about the concerns, engagements and business of the said company, of every nature and kind whatsoever, as fully and effectually as it could do if the said company were actually present; and the said company do hereby agree to ratify and confirm all and whatsoever the said John Nelson Hays Patrick shall lawfully do or cause to be done in or about the premises, by virtue of these presents.

"In witness whereof the said company have hereunto affixed their official seal this sixteenth day of December, one thousand eight hundred and seventy-three.

"A. MALES, } *Directors.*
"RUSSELL GOLE, }
"J. R. GOLE, *Secretary.*

"Witness:

"E. JOHNSON,

5 & 6 G't. Winchester St., London."

J. N. H. Patrick testifies that, in consequence of the arrangement made between the company and the defendant, though prior to the actual execution of the papers of the 16th of [149] December, 1873, he, J. N. H. Patrick, telegraphed from London to M. T. Patrick, in the United States, instructions to take charge of the mine, directing him to stave off all debts he could, and saying that money would be forwarded to him to keep the mine running, and that full instructions had been written to him; and that the company telegraphed to Maxwell to turn the mine over to M.T. Patrick. J. N. H. Patrick testifies that the defendant did not send any such telegram to M. T. Patrick.

On the other hand, M. T. Patrick testifies that he received a telegram from London with the name of the defendant signed to it, instructing him to go to Utah and take charge of the mine; that that was the authority upon which he did so; that he received possession of the mine from Maxwell; and that he employed the plaintiff to do the hauling of the ore.

J. N. H. Patrick testifies that, when the news of the financial difficulties of the company arrived in London, and the company applied to the defendant for a further loan of money, he refused to make it unless the company would give him the management of the mine; and that the company declined to do so, but agreed to make the arrangement evidenced by the papers of December 16, 1873.

The purport and bearing of these papers is very plain, on their face. The company owed the defendant £5,000, with interest at the rate of 6 per cent per annum, for that amount advanced by him to it on the 12th of June, 1873. A further advance of money was necessary to enable it to carry on its business. The defendant agrees to advance to it not to exceed £10,000, in addition to the £5,000 already advanced. It had previously sold to him a quantity of ore, which it had agreed to deliver to him at its ore house, free of cost, the cost of it having all been paid to the company by the defendant, and a balance of 4,995 tons being yet undelivered. In consideration of the premises, the company appoints J. N. H. Patrick manager of all its property in Utah, he, by himself or his agents, to have the exclusive and irrevocable management, except as thereinafter mentioned, of all its properties in Utah, and of all its mining and smelting business there. He [150] is to conduct and manage the above business until such time as, out of the profits of the working of the properties, he has repaid to the defendant the £5,000 and interest, and also all moneys the defendant may advance to the company under the agreement, with interest, and also, until he has mined and delivered to the defendant all the ore so sold to him by the company as stated in the agreement, and also until he has smelted in the furnaces of the company the ore so to be mined and delivered to the defendant, according to the terms and agreement of September 12, 1873, made between the company and the defendant. When all this is done, J. N. H. Patrick may resign the management. He is to work the mine in a proper manner, and manage the business of the company with economy, and for the best interests of the parties to the agreement, and is to render a monthly statement, with vouchers, to the company at London. If, at any time, the defendant becomes dissatisfied with the management of the business and the property in Utah, he may suspend and remove the manager and appoint another manager in his place, with any or all rights, powers or authority delegated under the agreement; and should the defendant proceed to act upon such power of suspension and removal, he is to consult with the board of directors of the company as to the new manager to be appointed. The power of attorney from the company to J. N. H. Patrick appoints him to be the attorney of the company to take possession of and carry on the mine, and for that purpose to appoint workmen and others, and to pay and allow them such remuneration as he shall think fit.

The relation between the defendant and the company was strictly that of creditor and debtor. The agreement of December 16, 1873, in connection with the power of attorney, was simply a method of securing the defendant, as a creditor of the company, for past and future advances, and to insure the delivery of the ore which he had bought and paid for. The irrevocable character of the appointment of J. H. N. Patrick as manager, with the power given to the defendant to suspend and remove him, and to appoint another manager in his place, on consultation with the board of directors of the company, was an incident of the [151] security to the defendant, and a means of having the operation of the mine continued until the debt to him should be discharged. Any new manager to be appointed was to have the rights, powers and authority delegated to J. N. H. Patrick under the agreement, and none others. The agreement did not in any manner make the defendant a partner with the company, or with J. N. H. Patrick, or make J. N. H. Patrick the agent of the defendant in managing the mine, so as to make the defendant responsible for any contract entered into by J. N. H. Patrick. The company continued to be the owner of the mine, operating it through J. N. H. Patrick, as its manager, agent and attorney, and responsible for his contracts as such. *Cox* v. *Hickman*, 8 H. L. Cas. 268; *Molloo* v. *Court of Wards*, L. R. 4 P. C. App. 419; *Cassidy* v. *Hall*, 97 N. Y. 159.

This being the proper legal view of the papers of December 16, 1873, the defendant, at the trial, asked the court to charge the jury as follows: "The jury are instructed that the contract between the Flagstaff Mining Company and the defendant, and the power of attorney from the company to J. N. H. Patrick, constituted J. N. H. Patrick the sole manager and controller of the mine, for the time being, as the general agent and representative of the company, and that the attitude of Erwin Davis, as a creditor of the company, to whom J. N. H. Patrick was bound to pay all profits of working the mine, did not render him personally liable for any of the expenses incurred by J. N. H. Patrick while working and operating the mine pursuant to the agreement and situation created by the contract and power of attorney. The legal effect of the contract and power of attorney was to give to the defendant, Davis, security for the indebtedness of the company to him, and was not in any way to render him liable personally for any debts

of the company incurred in workng the mine, in hauling ores or otherwise." The court gave this instruction with the following qualification and comment: "Of course that is to be taken in connection with the other instructions, if the original transaction between J. N. H. Patrick and the Flagstaff Company was what it purports to be; but if Davis was the [152] real party, then he is liable here." The defendant excepted to the giving of this qualification and comment.

This qualification and comment put aside entirely the legal effect of the agreement and the power of attorney, as those papers were construed by the court, and which construction was the correct one, and left it to the jury to determine what was the relation of the defendant to the business, and to ignore entirely the legal effect of the instruments. There was nothing ambiguous in the terms of the agreement, and there is nothing in the record to show that it did not truly represent the actual relations between the company and the defendant, and the actual circumstances of the connection of the defendant and of J. N. H. Patrick with the enterprise.

In another portion of the instruction of the court to the jury, it stated to the jury, under the exception of the defendant, that if they should conclude "that Davis was the Flagstaff Mining Company, operating the mine for his own use and benefit, then his liability is fixed and he cannot escape it. That is plaintiff's theory, and it may be a reasonable or an unreasonable one. If the testimony convinces you that the plaintiff's theory is correct, then you are justified in finding a verdict for the full amount claimed for these services, if they are according to contract price." This was substantially an instruction to the jury that they might conclude, from the terms of the agreement, that the defendant was the company, and that, if they should conclude that the agreement made J. N. H. Patrick the agent of the defendant, and not the agent of the company, in the management of the mine, then the defendant was liable to the plaintiff. This instruction overrode the legal purport of the agreement and was erroneous.

The court further instructed the jury as follows, under the exception of the defendant: "There is another view of the case, in which there may possibly be a liability. It is claimed that the ores hauled by Patrick were really the ores that belonged to Davis, independent of any person operating the mines. If that be so, and Patrick undertook to haul them for the defendant, by direction of the superintendent of the mines, representing Mr. Davis, the defendant would be [153] liable. If the ores belonged to him, then he would be required to pay for the hauling, if his agent represented him in the matter of making the alleged contract. If you are satisfied that the mines were operated by Davis, that he received the profits arising from the same, or that the ores belonged to Davis, and Patrick was employed by a representative of Davis to haul the same, then Davis would be liable for the hauling of the same." In this instruction, the theory of the liability of the defendant was that he really owned the ores which were hauled by the plaintiff; and that J. N. H. Patrick represented the defendant in procuring the plaintiff to haul them. This assumed liability of the defendant was not made to rest upon any connection which the defendant had with the management of the mine, or upon the written agreement between the defendant and the company, or the relation created by that agreement. But we do not understand the testimony of M. T. Patrick or any other testimony in the case, as showing that the ores hauled belonged to the defendant, independently of his relations with the company, created by the written agreement; nor that the testimony purports to show anything as to the ownership of the ores by the defendant, other than that the ores taken from the mine belonged to the defendant as the operator of the mine for the company. The testimony of M. T. Patrick shows that the proceeds of all the ores mined and hauled by A. S. Patrick to the smelting furnace, and smelted and sold, were deposited in bank in the name of the company; that the books and accounts were all kept in the name of the company; and that the mine was run in the name of the company. The entire testimony is to the effect that the ores taken from the mine did not belong to the defendant, independently of the fact that he was operating the mine for the company. J. N. H. Patrick testifies as follows: "There were no ores delivered to Davis during my management; all ores mined and hauled by plaintiff were smelted and sold, and the money put in the bank to the credit of the company, and went to pay expenses of running the mine." It does not appear that any ore taken from the mine was delivered to the defendant as a portion of the ore referred to in the written agreement [154] as purchased by him from the company, or that that portion of the agreement was ever carried into execution. The last instruction quoted was, therefore, based upon an erroneous theory, unsupported by evidence; and the jury may have rendered its verdict upon this erroneous theory, ignoring the view that the defendant was the company. This second erroneous instruction may therefore have misled the jury to the injury of the defendant.

For these errors, the judgment is reversed and the case is remanded to the Circuit Court, with a direction to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES H. BEATTY ET AL., Claimants of the Steamer MANITOBA, *Appts.*, [97]
v.
HOWARD MELVILLE HANNA ET AL., Owners of the Propeller COMET.

(See S. C. "*The Manitoba*," Reporter's ed. 97-111.)

Admiralty—collision—decree where both vessels are in fault—recovery of appraised value under limited liability proceedings, being less than half of the difference between the respective losses, with interest from date of the decree of the district court.

1. Where, in a case of collision, both vessels are in fault, the damages done to both should be added and the sum be equally divided, the decree being in favor of the owners of the vessel which suffered most, and against the owners of the other

for one half of the difference between the amounts of their respective losses.

2. Upon a libel and a cross libel to recover damages resulting from a collision between the propeller Comet and the steamboat Manitoba, causing a total loss of the former and injury to the latter, it is *held*: that both vessels were in fault; that the damages should be equally divided; and that the owners of The Comet are entitled to recover the appraised value of The Manitoba and her pending freight under limited liability proceedings, being a less sum than one half of the difference between the respective losses of the owners of the two vessels, with interest on said sum from the date of the decree of the district court, and costs on appeal.

[No. 289.]

Argued May 5, 1887. *Decided May 23, 1887.*

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **F. H. Canfield** and *William A. Moore*, for appellants.

Messrs. **H. H. Swan** and *H. L. Terrell*, for appellees.

[98] *Mr. Justice* **Blatchford** delivered the opinion of the court:

The propeller Comet and the steamboat Manitoba came into collision, between 8 and 9 o'clock in the evening of the 26th of August, 1875, on the waters of Lake Superior, about six or seven miles to the southward and eastward from Whitsfish Point, on the south shore of that lake, The Comet being bound from Grand Island, in Lake Superior, to Cleveland, Ohio, and The Manitoba being on a voyage from Sarnia, Ontario, to Duluth in Minnesota. The Manitoba struck The Comet on her port bow, causing her to sink almost immediately, and she and her cargo were totally lost. The Manitoba was also injured.

Howard M. Hanna and George W. Chapin, as owners of The Comet, filed a libel *in rem* against The Manitoba, on the 4th of September, 1875, in the District Court of the United States for the Eastern District of Michigan, to recover damages for the loss of The Comet and her cargo and freight money, claiming $70,125, being $30,000 for The Comet, $35,000 for her cargo, and $5,125 as freight money. The libel alleges that the collision was occasioned solely by the negligence and unskillfulness of the persons navigating The Manitoba, "in not having proper officers and men on duty and at their posts, in not porting, signaling, answering signals or stopping engine, and in starboarding and running into and upon said propeller, and, by said omissions of duty and other omissions of duty, and by said and other wrong movements and misconduct, solely causing said collision, and making it inevitable by any conduct, [99] vigilance or effort on the part of those in charge of the" Comet.

The statement of the libel is that The Comet made the white light, and, shortly afterward, the red light, of The Manitoba, off the port bow of The Comet, the night being clear; that The Manitoba was on a course opposite or nearly opposite to that of The Comet; that The Comet proceeded on her course with such red light off her port bow, and properly ported her helm, and gave a single blast of her whistle, and stopped her engine; and that, although the lights of The Comet were properly set and burning, and visible to The Manitoba, The Manitoba, instead of porting and taking further measures to avoid The Comet, starboarded her wheel and struck The Comet on her port bow.

Henry Beatty and John D. Beatty appeared as claimants of The Manitoba, and, with Robert J. Hackett and Frederick B. Sibley as sureties, gave a bond for the release of The Manitoba, in the sum of $28,948.85, $200 of that sum being for costs.

On the 17th of November, 1875, James H. Beatty, Henry Beatty, William Beatty and John D. Beatty answered the libel of the owners of The Comet. The answer denies the version of the occurrence given in the libel, and avers that The Manitoba made the bright light of The Comet when The Comet was heading upon nearly, if not quite, a parallel, opposite course to that of The Manitoba, The Manitoba being on a course about northwest half north; that The Comet showed her bright and green lights bearing from one half to three quarters of a point on the starboard bow of The Manitoba; that The Manitoba starboarded half a point and was steadied on that course; that The Comet continued to approach The Manitoba, showing only her white and green lights, and as if to pass at a good, fair berth on the starboard hand of The Manitoba, until she appeared to be but a short distance off, when she was observed by the watch of The Manitoba to be swinging across the bows of The Manitoba, as if under a port wheel, upon which the engine of The Manitoba was at once checked, stopped, and backed, but it was not possible for her to avoid the collision; and that The Manitoba suffered $5,000 damages. The answer denies the allegations of fault in The Manitoba, set forth in the libel, and alleges that the collision was [100] caused entirely by the fault of those navigating The Comet, in that (1) she did not have competent officers and watch on deck carefully attending to duty; (2) she did not keep her course and pass The Manitoba on her starboard hand, but recklessly attempted to cross the bow of The Manitoba when she was so near as to make collision probable; (3) she did not stop and reverse, but kept up a reckless speed, in her approach to The Manitoba, "when there was risk of collision." The answer also avers that, with the claim filed to The Manitoba, after her seizure under the warrant for her arrest, the respondents filed a petition setting forth that the claim of the libelants was much greater than the value of The Manitoba and her freight, and praying that she, and her freight then pending, might be appraised; and that such proceedings were had that the claimants gave a bond, with sureties, in the sum of $28,950, as a substitute for the vessel and her freight then pending. The answer claims the benefit of a limitation of liability, under the Act of Congress, against any recovery for any sum greater than the penal sum named in said bond.

On the same day, the owners of The Manitoba filed a cross libel against Hanna and Chapin, as owners of The Comet, to recover the damages caused to The Manitoba by the collision, being $5,000. The cross libel gives the same account of the collision that is given in the answer to the libel, and alleges the same faults on the part of The Comet.

The case rested in this position for more than

two years, when Hanna and Chapin filed an answer to the cross libel, denying its allegations as to the facts attending the collision, alleging the facts to be as set forth in the original libel, and denying any fault on the part of The Comet. It also avers that, as The Comet and her pending freight were totally lost by the collision, her owners became, by virtue of section 4283 of the Revised Statutes, discharged from any liability to the cross libelants by reason of the collision.

The two cases were heard together before the district court, and, on the 29th of April, 1878, it made a decree, on pleadings and proofs, that [101] the damages be divided, and referred it to a commissioner to report their amount.

On the 14th of June, 1880, the commissioner reported as follows: value of The Comet, a total loss, $25,000; value of her cargo, $31,941.88; freight money earned by her at the time of the collision, $500; making a total of $57,441.88. He reported the damage to The Manitoba to be $5,000.

On a hearing on the report, the district court, on the 15th of March, 1882, made a decree, entitled in both causes, confirming the report at the amounts so reported by the commissioner. The decree then proceeded as follows: "And it further appearing to the court, that the said libelants and cross libelants have respectively claimed the benefit of the Act of Congress of the United States entitled 'An Act to Limit the Liability of Ship Owners, and for Other Purposes,' being sections 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, and that the said steamer Manitoba has been duly bonded in accordance with the provisions of said statutes, by Henry Beatty and John D. Beatty, claimants, and Robert J. Hackett and Frederick B. Sibley, as sureties, in the sum of $28,694.95, by their bond or stipulation, conditioned to abide the decree of this court, and consenting that unless they shall so do execution should issue against them therefor, which sum is less than the damages occasioned by said collision; and this court having, by its interlocutory decree heretofore entered in this cause, found that both of said vessels were in fault for said collision, and that the damages occasioned thereby be equally divided, it is therefore ordered, adjudged and decreed, that said libelants recover from the said claimants and their sureties the sum of twenty-eight thousand six hundred ninety-four $\frac{95}{100}$ ($28,694.95), being the amount of said bond or stipulation, and that said libelants have execution therefor against said Henry Beatty, John D. Beatty, Robert J. Hackett, and Frederick B. Sibley; and it is further ordered that neither the libelants nor the cross libelants herein recover costs against the other." This decree was proper in its figures. Allowing interest on the damages from the date of the collision to the date of the decree (which [102] was proper) and fixing the liability for the $28,694.95 as of the date of the decree (which was proper, in view of the fact that the condition of the bond was to "abide and answer the decree," and so the $28,694.95 did not carry interest prior to the date of the decree), The Manitoba was liable to pay to The Comet $36,476.74, on a proper computation based on a division of the damages, according to the principle of computation hereinafter stated, and The Manitoba had the proper limitation of liability in paying only $28,694.95, at the date of the decree. The discrepancy between that amount and the amount stated in the bond is not explained, but is not remarked upon by the parties. The obligors in such a bond are not liable for interest prior to the decree of the district court, but are liable for interest from the date of such decree. *The Ann Caroline*, 69 U. S. 2 Wall. 538 [17: 833]; *The Wanata*, 95 U. S. 600 [24: 461].

The owners of The Manitoba, on the 13th of April, 1882, appealed to the circuit court from so much of the final decree of the district court, of March 15, 1882, as adjudged The Manitoba to be in fault for the collision, and also from so much of that decree as awarded to Hanna and Chapin the sum of $28,694.95, "without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba," and also from so much of the interlocutory decree of the 29th of April, 1878, as decreed that The Manitoba was in fault for the collision, and that the damages occasioned thereby should be equally divided between the owners of The Comet and the owners of The Manitoba. The owners of The Manitoba perfected their appeal, by giving a stipulation for damages and costs, in the sum of $35,000, in the names of James H. Beatty, Henry Beatty, and John D. Beatty, with the Detroit Dry Dock Company as surety. The owners of The Comet did not appeal. The circuit court heard the case on pleadings and proofs, and filed its finding of facts and conclusions of law, entitled in both causes, on the 26th of December, 1883, as follows:

"That the collision between the propeller Comet and the steamship Manitoba took place between the hours of eight and nine o'clock on the night of the 26th of August, 1875, and at [103] about six or seven miles distant from, and to the southward and eastward of, Whitefish Point, on the south shore of Lake Superior; that at that time said propeller was bound down the lake, upon a voyage from Grand Island to Cleveland, Ohio, and, when she made The Manitoba's light, her general course was southward. The Manitoba was moving in nearly an opposite direction, on a voyage from Sarnia, Ontario, to Duluth, Minnesota. She first made The Comet's light when she was between Whitefish Point and Point Iroquois, her general course then being northwest half north. The officers of each of the colliding vessels discovered, soon after The Comet had rounded Whitefish Point, first the white and soon thereafter the green lights of each other, and they continued to approach each other on nearly parallel opposite courses, each showing to the other her white and green lights only. Both vessels had the usual complement of officers and men. When they were from one and a half to two miles apart The Manitoba had The Comet's green light about three quarters of a point on her starboard bow. The Manitoba then starboarded her wheel half a point, and continued her course without change until just before the collision. In the meantime The Comet ported her wheel for the second time half a point, and the two vessels thus continued to approach each

other, showing their green and white lights only, until they had come within from 400 to 500 feet of each other, The Comet being then from 200 to 300 feet on the starboard side of The Manitoba, and if each had kept their respective courses, they would have passed without colliding; but at this juncture The Comet ported her wheel, displayed her red light, and suddenly sheered across The Manitoba's course. The Manitoba thereupon starboarded her wheel, and the collision ensued. At the time, The Manitoba was running about eleven and The Comet about nine miles an hour. The Manitoba struck The Comet on her port bow, which caused her to sink in about two minutes, whereby she and her cargo were irrecoverably lost and The Manitoba quite severely injured. Neither of said vessels sounded any signal of the whistle, indicating the side it intended or desired to take; nor did either of them reverse its engine or slacken its speed until the collision was inevitable; but The Manitoba did, just [104] before or about the time it collided with The Comet, reverse its engine. The fact that the two vessels were moving on nearly parallel, opposite, but slightly converging, lines was manifest and apparent to the officers of both, for some considerable time before The Comet ported and ran across The Manitoba's course, as hereinbefore stated. Nevertheless, neither, as hereinbefore stated, slackened speed, changed its course, or signaled its intentions. The relative courses of these vessels, and the bearing of their lights, and the manifest uncertainty as to The Comet's intentions, in connection with all the surrounding facts, called for the closest watch, and the highest degree of diligence, on the part of both, with reference to the movements of the other; and it behooved those in charge of them to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. If the requisite precautions had been observed by both or by either of said vessels, the collision, in the opinion of the court, would not have happened. Each vessel misapprehended the purposes of the other. The Comet was endeavoring to apply article 18 of chapter 5, title '*Commerce and Navigation*,' of the Revised Statutes of the United States, while The Manitoba probably believed, until The Comet's sudden sheer across her bow, that The Comet intended to pass on her starboard side. It was this misapprehension on the part of said respective vessels, which might have been timely obviated by proper signals from either, that occasioned the collision."

The court then finds the value of The Comet, and of her cargo and pending freight, and the damage to The Manitoba, at the amounts reported by the commissioner; that the value of The Manitoba and her pending freight was duly appraised under the order of the district court, and proceedings were had pursuant to sections 4283 to 4286 of the Revised Statutes, [105] and security was filed for such appraised value in the sum of $28,694.95; and that the owners of both vessels claimed and are entitled to the benefit of those sections. The court then proceeds:

"And from these facts the court deduces the following conclusions of law: 1. That said vessels were not meeting end on or nearly end on, within the meaning of article 18, of chapter 5, of title XLVIII, '*Commerce and Navigation*,' of the Revised Statutes of the United States, and that The Manitoba was not, in view of the circumstances of the case, in fault for starboarding her wheel just prior to said collision. 2. That the immediate or proximate cause of the collision was the putting by The Comet of her wheel hard-a-port, as herein previously found, and endeavoring to cross on the port side of The Manitoba, and that she was in fault for so doing. 3. That The Manitoba was in fault in ignoring the fact that The Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved risk of collision, and in failing to take proper precaution in time to prevent the collision which afterwards occurred. 4. That she was further in fault in not indicating her course by her whistle, and for not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby. 5. That both vessels were in fault in failing to take necessary and proper precautions against collision, which the circumstances manifestly required, and that the damages occasioned by said collision ought to be equally apportioned between said two vessels." The court further finds that the libelants are entitled to recover from the owners of The Manitoba, and their sureties on appeal, by reason of the limited liability proceedings, only the sum of $28,694.95, and interest thereon from March 7, 1882, the date of the decree of the district court, together with the costs of the libelants on the appeal; that, to the extent of the $28,694.95, the libelants are entitled to enforce payment of their damages against the claimants of The Manitoba, and their surviving surety, on the stipulation filed in the district court for the appraised value of The Manitoba; and that, by reason of the total loss of The Comet and her cargo, and the provisions as to limited liability, and the fact that one moiety of the damages suffered by the libel- [106] ants far exceeds the damages suffered by the owners of The Manitoba, and interest thereon, the owners of the Manitoba are not entitled to recover any sum whatever from the libelants.

On the 18th of March, 1884, the circuit court made a final decree, entitled in both causes, which fixes the damages at the amounts reported by the commissioner, and declares that both vessels were in fault for the collision; that the damages shall be equally divided; that the owners of both vessels claim and are entitled to the benefit of a limitation of liability; and that the sum of $28,694.95, at which The Manitoba and her pending freight were appraised in the limited liability proceedings and bonded, is less than one moiety of the damages occasioned by the collision; and then proceeds as follows:

"It is, therefore, ordered, adjudged and decreed, that said libelants, Howard M. Hanna and George W. Chapin, do recover of and from said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of said steamer Manitoba, and appellants herein, and of and from the Detroit Dry Dock Company, their surety on the bond or stipulation on appeal, filed in this court, the sum of $28,694.95, and the further sum of $3,895.50, being the interest, at 6 per cent per annum, on the aforesaid sum of 28,694.95, from the 7th day of

March, 1882, the date of the decree of the district court, to the date of the decree of this court herein, in all, the sum of $32,090.45, together also with the costs of said libelants in this court, to be taxed, upon the appeal of said claimants of said steamer Manitoba from the decree of the district court on said libel and cross libel.

"And it further appearing to the court that said Robert J. Hackett, one of the sureties on the bond or stipulation filed in the district court for the appraised value of the steamer Manitoba and her freight, as aforesaid, has deceased, it is therefore, ordered, adjudged and decreed, that said libelants, Howard M. Hanna and George W. Chapin, do recover of and from the said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of the steamer Manitoba, and Frederick B. Sibley, their surviving surety upon the bond for the appraised value of said steamer Manitoba and her [107] freight, pending at the time of the collision mentioned in the pleadings in this cause, the sum of $28,694.95, in case of nonpayment thereof by the claimants and their surety on appeal to this court.

"And that said libelants, Howard M. Hanna and George W. Chapin, have execution for the damages and costs to them adjudged and decreed by the judgment and decree of this court, against said claimants, James Beatty, Henry Beatty, William Beatty, and John D. Beatty, and the Detroit Dry Dock Company, their surety on the bond or stipulation given by said claimants on appeal to this court, for the aforesaid sum of $28,694.95, and said further sum of $3,395.50, as interest thereon, and for the costs of said libelants in this court, to be taxed.

"And it is further ordered, adjudged and decreed, that, for the recovery of the damages decreed to libelants by the decree of the district court and of this court, libelants have execution against James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants, and said Frederick B. Sibley, their surviving surety on the bond or stipulation for the appraised value of said steamer Manitoba and the freight pending as aforesaid, in and for the amount of $28,694.95, the appraised value thereof as aforesaid, provided proceedings shall be had on the bond or stipulation given on appeal to this court, by said claimants of said steamer Manitoba, before recourse shall be had for collection on the bond or stipulation filed in the district court for the appraised value of the steamer Manitoba and her freight pending at the time of said collision."

The claimants of The Manitoba have appealed to this court from so much of the decree of the circuit court as decrees The Manitoba to be in fault for the collision, and from so much of it as awards to the original libelants $32,090.45, "without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba." The main question of law arising on the record is as to the liability of The Manitoba.

The circuit court finds, as one of its conclu- [108] sions of law, "that The Manitoba was in fault in ignoring the fact that The Comet was approaching under a port wheel, and that the courses of the two vessels were convergent, and involved risk of collision; and in failing to take proper precaution in time to prevent the collision which afterwards occurred." The expression "risk of collision," found in the third conclusion of law, is not contained in the findings of fact proper; and it is therefore insisted on the part of The Manitoba that it is not found as a fact that the courses of the two vessels involved risk of collision, by the movement of The Comet under a port wheel, in her approach to The Manitoba, prior to the time when she put her wheel hard-a-port and crossed the bows of The Manitoba. But we think this is not a correct view. The findings of fact state that, when the vessels were from one and a half to two miles apart, The Manitoba had The Comet's green light about three quarters of a point on her starboard bow, and that The Manitoba then starboarded her wheel half a point and continued her course without change until just before the collision. This starboarding would bring the green light of The Comet further on the starboard bow of The Manitoba; but, in the meantime, The Comet ported her wheel half a point; and it is not found that the green light of The Comet continued to open wider to the view of The Manitoba. On the contrary, the findings state that the fact that the two vessels were moving on nearly parallel, opposite, buts lightly converging, lines, was apparent to the officers of both vessels for some considerable time before The Comet ported her wheel, and displayed her red light to The Manitoba, and suddenly sheered across the course of The Manitoba. The findings also state that, from the relative courses of the two vessels, and the bearing of their lights, there was manifest uncertainty as to the intentions of The Comet, and that this called for the closest watch, and the highest degree of diligence, on the part of The Manitoba, with reference to the movements of The Comet, and that it behooved those in charge of her to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. The findings further state that neither of the vessels sounded any signal of the whistle indicating the [109] side it intended or desired to take, nor did either of them reverse its engine or slacken its speed until the collision was inevitable; and that, if the requisite precautions, meaning the precautions just mentioned, had been observed by both or either of the vessels, the collision would not have happened.

In addition to the facts thus found, the answer of the claimants of The Manitoba to the original libel charges as a fault in The Comet, that she did not stop and reverse, but kept up a reckless speed in her approach to The Manitoba, "when there was risk of collision." This allegation is repeated in the cross libel of the owners of The Manitoba. If there was risk of collision in the approach of The Comet towards The Manitoba prior to the sudden sheer of The Comet, it was a risk affecting The Manitoba equally with The Comet, and imposing upon her the same duties of slackening her speed, or, if necessary, stopping and reversing, under Rule 21 of section 4233 of the Revised Statutes, which it imposed on The Comet.

On the facts, the circuit court found, as a conclusion of law, and we think correctly, that The Manitoba was in fault in not indicating her course, by her whistle, and in not slow-

ing up, and in failing to reverse her engine until it was too late to accomplish anything thereby.

The facts in this case are very much like those in *The Stanmore*, 10 Prob. Div. 184, where one of two steam vessels, under like circumstances with those of The Manitoba, was held in fault for not stopping and reversing, although the collision was mainly caused by the fault of the other vessel, which was also condemned.

A few words are necessary on the question as to whether, in the amount decreed to the original libelants, by the circuit court, allowance is made to the owners of The Manitoba on account of the damages to her. The findings of fact state that the owners of both vessels are entitled to the benefit of a limitation of liability, and that the owners of The Comet are entitled to recover from the owners of The Manitoba and their sureties on appeal, by reason of the proceedings for a limitation of liability, only $28,694.95, and interest thereon from March 7, [110] 1882, the date of the decree of the district court. The decree of the circuit court states that the value of The Manitoba and her freight pending at the time of the collision was duly appraised, in the proceedings for a limitation of liability, at the sum of $28,694.95, and that she was duly bonded for that sum, "which sum," the decree states "is less than one moiety of the damages occasioned by said collision." Those damages, with interest at 6 per cent per annum from the date of the collision to the date of the decree of the circuit court, amounted to $93,288.16. One half of that is $46,644.08. On the ground that the amount of the appraised value of The Manitoba and her pending freight was "less than one moiety of the damages occasioned" by the collision, the circuit court adjudged that the owners of The Comet should recover from the claimants of The Manitoba, and from their surety on appeal, the Detroit Dry Dock Company, the sum of $28,694.95, with interest thereon from the 7th of March, 1882, the date of the decree of the district court; and should recover from the claimants of The Manitoba and the surviving surety on the bond given in the district court for the appraised value of The Manitoba and her pending freight, the sum of $28,694.95, in case of nonpayment thereof by the claimants and the Detroit Dry Dock Company.

We had occasion to consider this subject at length in the case of *The North Star*, 106 U. S. 17 [27:91], in which *Mr. Justice* Bradley delivered the opinion of the court. In that case there was a collision between two steam vessels, The Ella Warley and The North Star. The circuit court held both vessels in fault, The Ella Warley being sunk and lost and The North Star damaged. There was a libel *in rem* against The North Star and a libel *in personam* against the owners of The Ella Warley. The circuit court rendered a decree in favor of the owners of The Ella Warley for so much of the damage to her (it being greater than that sustained by The North Star), as exceeded one half of the aggregate damage sustained by both vessels. The owners of The Ella Warley had claimed the benefit of a limitation of liability. On appeals to this court by both parties, it was contended on behalf of The Ella Warley, that, [111] as she was a total loss, the half of the damage to her must be paid in full, without any deduction for the half of the damage sustained by The North Star. This court, after a full examination of the subject, held that the proper rule was, that, as each vessel was liable for one half of the damage done to both, if one suffered more than the other the difference should be equally divided, and the one which suffered least should be decreed to pay one half of such difference to the one which suffered most, so as to equalize the burden. In other words, as both parties were in fault, the damage done to both vessels should be added together in one sum and equally divided, and a decree be pronounced in favor of the owners of the vessel which suffered most, against those of the vessel which suffered least, for one half of the difference between the amounts of their respective losses. The House of Lords established the same rule in *Stoomvaart Maatschappy Nederland* v. *Penins. & Oriental Steam Nav. Co.* 7 App. Cas. 795.

Applying this rule to the present case, the amount of the aggregate damage to both vessels, computed with interest to the date of the decree of the circuit court, was $93,288.16, being for The Comet, $85,818.16, and for The Manitoba, $7,470. One half of this was $46,644.08. The loss of the owners of The Comet and of her cargo and pending freight was greater than that of the owners of The Manitoba by the sum of $78,348.16. One half of that difference was $39,174.08. That was the amount of the liability of The Manitoba to The Comet, at the date of the decree of the circuit court, on a division of the damages, after a proper allowance to The Manitoba for the damage to her, and without reference to the limitation of liability. As the amount of the bond of The Manitoba, $28,694.95, with interest at 6 per cent per annum, from the date of the decree of the district court to the date of the decree of the circuit court, was only $32,090.45, The Manitoba had the proper limitation of liability allowed to her by the decree of the circuit court, and was entitled to that limitation.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*, [501]

v.

MUSKEGON NATIONAL BANK.

(See S. C. Reporter's ed. 501-513.)

Life insurance—"habitually intemperate"—construction—question for jury—instructions—court not bound to repeat, where it has correctly and fully laid down the law—evidence.

1. Where, in instructing the jury in regard to any particular subject or point pertinent to the case, the court has laid down the law correctly and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat its instructions in terms varied to suit the wishes of either party.

2. In an action to recover on a policy of life insurance, the issues being upon allegations of habitual intemperance before and after its issue, it is *held*: that the questions whether the insured was

of intemperate habits at the time the policy was issued, and whether he became habitually intemperate after its issue, were for the jury; that the instructions given were fair and full; that certain instructions asked by the defendant were properly refused because unnecessary and improper in form; that the opinions of witnesses as to the effect on the health of the insured, at the date of the policy, of intemperance four and five years before, are inadmissible.

[No. 268.]

Argued May 4, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Edward Salomon,** for plaintiff in error.

Mr. **John E. Parsons,** for defendant in error:

Whether Comstock was habitually intemperate was a question of fact to be decided by the jury. For the court to tell them that a spree once a year, or a certain number of sprees in a given period, made a man habitually intemperate was to take from the jury the very question upon which they were to pass.

Mowry v. *Home L. Ins. Co.* 9 R. I. 346; *Swick* v. *Home L. Ins. Co.* 2 Ins. L. J. 415; *Union Mut. L. Ins. Co.* v. *Reif*, 10 Ins. L. J. 428; *Brockway* v. *Mut. Benefit L. Ins. Co.* 10 Ins. L. J. 762; *Holteroff* v. *Mut. Benefit L. Ins. Co.* 4 Big. Life & Acc. Ins. R. 396; *Knickerbocker Life Ins. Co.* v. *Foley*, 11 Fed. Rep. 766.

A party has no right to dictate the language in which the court shall instruct the jury, or, after the court has charged fully and properly upon the subject, to require it to repeat its instructions in different terms.

Kelly v. *Jackson*, 31 U. S. 6 Pet. 622 (8:523); *Laber* v. *Cooper*, 74 U. S. 7 Wall. 565 (19:151); *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291 (23:898); *R. Co.* v. *McCarthy*, 96 U. S. 258 (24:693); *Raymond* v. *Richmond*, 88 N. Y. 671.

The whole of the specific request must be accurate or it is not error to refuse it.

Hamilton v. *Eno*, 81 N. Y. 116-127; *U. S.* v. *Hough*, 103 U. S. 71 (26:305).

[502] *Mr. Justice* **Miller** delivered the opinion of the court:

The Muskegon National Bank recovered a judgment, in the Circuit Court of the United States for the Southern District of New York, against the Northwestern Mutual Life Insurance Company, upon a policy of insurance on the life of Erwin G. Comstock for $23,717.04, and to this judgment the present writ of error is directed.

The Bank had an insurance upon the life of Comstock, its debtor, for the sum of $20,000. On the trial before the jury, although some other issues were made in the pleadings, the contest turned, so far as the assignments of error are presented here, on the condition of Comstock in regard to the habit of drinking alcoholic liquors. The policy and the application for it, the answers to which were signed [503] both by Comstock and the Bank through its president, present the foundation of the controversy. The sixteenth interrogatory is as follows: "Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants?" The answer to this was "Yes, occasionally." The twenty-second interrogatory, "Have you read and assented to the following agreement?" was answered "Yes.' This agreement, so far as it touches the present issue, reads as follows: "It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium." The body of the policy declared that if Comstock shall become intemperate, so as to impair his health or induce *delirium tremens*, or if any statement in the application, on the faith of which the policy is made, shall be found to be in any material respect untrue, the policy is void.

Upon this language in the application and the policy, the defendant founded two separate pleas or defenses.

First. That "At the time of making and presenting said application as aforesaid, and of the issuing of said policy, the said Erwin G. Comstock was and prior thereto had been habitually intemperate, and that the said statement in said application contained, that said Erwin G. Comstock was not then habitually intemperate, was untrue, and fraudulently made, and a suppression of facts material to the risk assumed by said policy of insurance."

Second. That "said policy was issued by this defendant and accepted by said plaintiff upon the express condition, amongst others contained therein, that if said Erwin G. Comstock should become either habitually intemperate or so far intemperate as to impair health or induce *delirium tremens*, the said policy should be null and void; that in fact, as this defendant is informed and believes, the said Erwin G. Comstock did, after the issuing of said policy, become habitually intemperate, and so far intemperate as to impair his health and induce *delirium tremens*, and that thereby the said policy became and is null and void."

The issues were tried upon the two allegations of habitual intemperance before and [504] after the issue of the policy. The Company, discarding other issues, assumed the affirmative on these two pleas, and on a plea of suicide, which seems to have been abandoned, and thereby obtained the opening and the conclusion to the jury. The assignments of error raise objections to the action of the court in excluding answers to questions propounded to witnesses for the defendant Company on the trial, as well as its refusal to give certain instructions prayed for by the defendant to the jury.

A witness for the defendant, named Torrent, testified that he knew Comstock at Muskegon from 1868 to 1875. The policy of insurance was taken out in New York in 1879. The witness further stated that he was well acquainted with Comstock in Muskegon, and knew that he was addicted to the use of intoxicating liquors during the period of their acquaintance; had seen him drunk; knew of his being on prolonged sprees, and gave other testimony to the effect that he did use intoxicating liquors to excess. He was then asked this question: "Up to the time your acquaintance with him ceased, what would you say as to whether his drinking

had affected his health or impaired his vital powers in any respect?" To this he answered: "I think it had affected him materially; I think it had affected his nerves and impaired his health generally, general debility; the symptoms of that were his general looks, and that at the time he went away, or just before, he was taken very sick, and they didn't know whether he was going to be alive or die; that was the general impression." The court excluded this answer, and the defendant excepted. The witness also testified that he saw him during that sickness, and that he was then sick for about three weeks, adding: "I think he had the *delirium tremens.*" This expression of opinion was also excluded.

It is to be observed that the witness had testified to all the facts which he knew, without objection, that tended to establish a habit of intemperance in Comstock prior to 1875. What he was next asked, and what he then testified to, was his opinion in regard to the effect of this intemperance upon the health of the assured. It will be noted that all this occurred between four and five years before the execution [505] of the policy. We are of opinion that while the facts recited by this witness and received in evidence might have some remote tendency to show Comstock's habits in regard to temperance at the time to which they related, his opinion of their effect upon his health at the date of the policy, four years later, was inadmissible as to that or his habits, as he knew nothing of these during that period.

The exception to the testimony of Barney, who undertook to detail conversations with a doctor attending Comstock prior to 1875, as to whether Comstock was threatened with *delirium tremens* or not, and the statement of the witness that *he* was afraid Comstock was going to have *delirium tremens*, which was excluded by the court, depend upon the same principle and are otherwise incompetent. We see no error in those rulings.

The remaining assignments of error have regard to prayers for instructions by the court to the jury, which were refused. No assignment of error is founded on any exception taken to the charge of the judge who tried the case, which seems to have been eminently fair and very full, and in our opinion embraced all that was necessary to be said to the jury on the subject. The questions which the jury had to respond to were whether Comstock was of intemperate habits at the time the policy was taken out, and whether he became habitually intemperate after that period. The whole case turned, so far as the jury was concerned, upon the true definition of the words "habitually intemperate," taken in connection with the testimony on the subject, at these two different periods. The plaintiff was not bound to prove that the assured was temperate, or that he was a temperate man, but the defendant was bound to prove not only that Comstock was intemperate at those periods, but that he was habitually so. This it was bound to do by such a preponderance of testimony as should satisfy the jury that at one of these periods or the other he was habitually intemperate. We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject is as good as another [506] of equal capacity and opportunities, their true meaning and signification would seem to be a question addressed rather to the jury than to the court. While there may be on the one hand such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or on the other such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury; and the question on this submission must be decided by them.

The testimony in this case is all embodied in the record, and is contradictory. It must be divided into its relations to the two periods, before and after the execution of the policy. It is seen from the testimony that Comstock left Muskegon, where many of these witnesses resided who testify as to his excessive use of intoxicating drinks, prior to 1875, and that they know nothing of his habits after that. The policy was taken out in 1879. It is also quite clear that, under a pledge made to one of his partners in business, he had refrained from the use of intoxicating drinks from the first of June, 1878, up to the time of taking out this policy, and continued so to refrain up to March, 1880. There are several witnesses who testify that after his removal to New York in 1875, he was drunk, had sprees once in a while, and perhaps several of them up to the time when he made made this pledge to his partner. There are others who testify that after March, 1880, he was again seen intoxicated and had spells of confinement on account of those sprees. On the other hand, there were four or five witnesses examined, some of whom were in the same building in which Comstock was employed in New York, who saw him daily, and transacted business with him for the two or three years prior to his death, which was in 1881, who testify that they never saw him drunk, or under the influence of liquor, and did not suppose that he was addicted to drinking, but that he was a prompt, efficient business man, and that they had no suspicion that he was intemperate or indulged in the excessive use of stimulants. [507] Among these, Mr. Samuel Borrow, Vice President of the Equitable Life Assurance Society, in whose building Comstock was a tenant, says that he saw him almost daily for two or three years prior to his death, that he struck him as a very energetic, active man, and that he never saw him under such circumstances as to suggest that he had been drinking.

Under these circumstances, and in view of this conflicting testimony, the following language of the judge in his charge to the jury in this case seems to contain all that was necessary for him to say by way of assisting them to arrive at a just verdict:

"I think that there is no rule of law which says that in order to make a man a drunkard he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing fre-

quency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard. But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was at the time of the application, or became afterwards, the victim of such a habit."

"If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant."

At the request of the defendant, he also gave to the jury the following instructions:

[508] "If the jury find from the evidence that Erwin G. Comstock was habitually intemperate when the application for the policy of insurance was made, then they must find for the defendant.

"If the jury find from the evidence that Erwin G. Comstock became habitually intemperate after the issuing of the policy, then they must find for the defendant.

"If the jury find from the evidence that, after the making of the policy, Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant."

Exceptions were taken and errors assigned in regard to the following instructions, which were asked and refused by the court:

First. "To be habitually intemperate it is not necessary that a person should be addicted to the excessive use of intoxicating liquors continually, or without interruption; but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical 'sprees' of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the 'spree,' comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time."

Second. "If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical 'sprees,' when for several days and sometimes for a week or more in succession he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time."

Third. "It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that, for six or seven years immediately prior to the first day of June, 1878, [509] Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer, even, at a time; and their failure to disclose such facts to the defendant avoids the policy, and the jury must find for the defendant."

Fourth. This includes two charges which amount to very much the same thing. They are in the following words:

"If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months or thereabouts; that on the first day of June, 1878, after the termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant.

"If the jury find from the evidence that after the making of the policy of insurance, during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more, each time, when he would use intoxicating liquors to such excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the [510] month of August, 1880, again on or about the first of January, 1881, again in or about the month of February, 1881, and again in or about the month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober; then they must find for the defendant."

The first, second, and third of these prayers for instruction do not differ much from the substance of the charge of the court at its own instance. The language of that charge embodies the real principles upon which these three prayers are based, and in terms much more apt and just to both parties than that used by counsel. The court said, among other things: "Neither does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency and

with increasing frequency and violence in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness." This is the substance, and in very strong language, of the three prayers above referred to for instruction which were refused by the court.

It has been often said by this court, and we repeat it now with emphasis, that if in regard to any particular subject or point pertinent to the case the court has laid down the law correctly and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party. *Kelly* v. *Jackson*, 31 U. S. 6 Pet. 622 [8: 523]; *Laber* v. *Cooper*, 74 U. S. 7 Wall. 565 [19: 151]; *Indianapolis R. R. Co.* v. *Horst*, 93 U. S. 291 [23: 898]; *R. Co.* v. *McCarthy*, 96 U. S. 258 [24: 693]. If the charge of the judge, made at his own suggestion, covers the point in question, it is much more likely to be impartial, and correctly stated than it will be by counsel.

[511]

These requests, however, are inadmissible, as we think, for other reasons. They all, as near as they dare, attempt to define approximately for the jury the number of times a man must get drunk, or have a spree, or how closely such excesses must succeed each other, to constitute "habitual intemperance." They also attempt to say how long a time a man must have abstained from drunkenness or sprees in order to relieve him from that charge. And especially are the requests obnoxious in saying that, under such circumstances, a person comes within the definition of being habitually intemperate, although he might remain sober for a month, three or six months, or longer, at a time; one of them says, "or even a year at a time." What effect should be given to an entire abstinence from the use of liquors for a whole year, in connection with occasional drunken sprees, before or after, is not for the court to determine. But if it were, it does not seem to us, in view of this testimony, that sufficient force was given to it in the rejected prayers. This reference to periods of abstinence from drink is still more objectionable when it is seen from the testimony that, during a continuous period, just before and after the taking out of this policy, Comstock was admitted to have been entirely sober, if not entirely abstinent from the use of ardent spirits, for a period of nearly two years. It would be rather harsh for a court to instruct a jury, as a matter of law, that a man who was sober nearly two years was at a period near the middle of that time "habitually intemperate." It was certainly a question to be left to the jury, on all the testimony, to draw their own conclusions in regard to the subject.

The two other requests are still more liable to these objections, inasmuch as they constitute an attempt to recite the various occasions on which the jury might infer that Comstock had been drunk, together with some vague description of the intervals between certain sprees, with an account of his struggles against his thirst for liquor; in fact they are a history of his life for six or seven years prior to the making of the contract for insurance down to the time of his death; from all of which there is sought to be deduced a positive instruction to the jury that they must find for the defendant. We do not think there was anything in the case which would have justified the court in thus taking the determination of it from the jury. The court had no right in this summing up to ignore the testimony of four or five respectable and intelligent gentlemen who knew Comstock well during the most important part of this period, during several years of it, who saw him almost daily, and who testify that they never had any reason to suppose that he used ardent spirits at all, much less to excess. It was for the jury to weigh all these circumstances, and to determine, in view of them all, whether he was habitually intemperate.

[512]

There are very few decisions by courts of high character relating to this question. The principal one which has been brought to our attention is *Insurance Co.* v. *Foley*, 105 U. S. 350 [26: 1055]. In that case the insured, in answer to the question "Is the party of temperate habits; has he always been so?" answered "Yes," whereas, the defendant company alleged that in fact he was a man of intemperate habits. The court, through *Mr. Justice* Field, said:

"The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. * * * When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. * * * The court did not, therefore, err in instructing the jury that, if the habits of the insured, 'in the usual, ordinary, and everyday routine of his life, were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have an attack of *delirium tremens* from an exceptional over indulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate."

[513]

We think this language eminently applicable to the case before us.

The questions presented by these requests do not rise to the dignity even of mixed law and fact, but are questions the answers to which are governed by no settled principle or rule of law, established either by statute or by a recognized course of judicial decision. They are emphatically questions of fact, which it is the province of a jury to decide, and in regard to which they are or ought to be as capable of making a decision as the court or anybody else.

The judgment of the Circuit Court is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[176] **WILLIAM H. M. SANGER,** *Appt.*,
v.
WILLIAM NIGHTINGALE ET AL.

(See S. C. Reporter's ed. 176-188.)

Bill to foreclose mortgage—foreclosure of prior mortgage—collateral attack—Statute of Limitations—Georgia Act of March 16, 1869—construction of by Supreme Court of the State, followed—right to plead Statute of Limitations personal—fraud.

1. The right to plead the Statute of Limitations is a personal privilege of which the debtor can avail himself or not, as he may choose.
2. Section 6 of the Georgia Act of March 16, 1869, is held by this court, following the construction by the Supreme Court of Georgia, to be an ordinary Statute of Limitations.
3. The mortgagee of real estate in Georgia does not take the title to the property; and a mortgagee in that State, who is not in possession, cannot plead the Statute of Limitations as a defense to a debt secured by a prior incumbrance on the property.
4. In a proceeding to foreclose his own mortgage such mortgagee cannot set up the Statute of Limitations to set aside and annul the decree of a court of competent jurisdiction, with proper parties before it, which foreclosed a mortgage prior in time and equal in equity to his, under which the property was sold and passed into other hands. The statute could have been pleaded, if at all, only in the former proceeding and by the mortgagor.
5. The charge in the present bill, that the proceeding to foreclose the prior mortgage, resulting in the transfer of title to the children of the mortgagor, was fraudulent, is held not to be sustained, though the transaction is not free from circumstances of suspicion. The original debt was a just debt. The decree was an honest decree, and the present complainant cannot complain of the disposition of the proceeds.

[No. 228.]

Argued and submitted April 15, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia. See, 4 Woods, 488. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. Henry B. Tompkins, for appellant.

Messrs. **A. R. Lawton** and *Rufus E. Lester*, for appellees.

[177] *Mr. Justice* **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Southern District of Georgia.

The decree from which this appeal is taken dismissed a bill brought by William H. M. Sanger, the appellant, to foreclose a mortgage. The bill was brought against William Nightingale, as executor of Phineas M. Nightingale, his father, Mrs. Ellen D. Nightingale, the widow, and John K. Nightingale, and others, children of Phineas, deceased, the maker of the original mortgage.

Sanger, the plaintiff below, was a citizen of New York, and the other parties were mainly citizens of the State of Georgia.

This mortgage was made in the City of New York, on December 6, 1869, by Phineas M. Nightingale, who was a resident of Georgia. It conveyed to Sanger, the appellant, certain property in the State of Georgia, known as Camber's Island, in the Altamaha River. Three notes of $10,000 each accompanied the mortgage, payable respectively in one, two, and three years, with semi-annual interest at the rate of 7 per cent per annum. It was to secure the payment of these notes that the mortgage was made, and it was duly recorded January 28, 1870, after having been properly acknowledged.

No money was ever paid upon this mortgage either by way of principal or interest. Nightingale, the mortgagor, died in April, 1873, and William Nightingale became the executor of his will.

There were several mortgages on this property prior to the one to the plaintiff, which were properly recorded so as to constitute notice to Sanger, as well as to all other subsequent purchasers or incumbrancers. [178] When Sanger came to file his bill to foreclose his mortgage, which he did April 8, 1883, it became necessary for him to bring these mortgages to the attention of the court. The principal, and only one of them, as the case presents itself to us, which is necessary to be considered, was one made by Nightingale, on January 30, 1855, to Charles Spalding, which included Camber's Island and a very large amount of landed estate beside, as well as some one hundred and twenty slaves residing upon the estate so mortgaged. This mortgage had been assigned, for the consideration of $100,000, by Spalding to Edmund Molyneux, who afterwards died, and his widow and heirs had removed to England. The executor of the estate of Molyneux had taken judgment against Nightingale before his death, for the sum due on the bonds secured by the mortgage to Spalding, and he had also foreclosed the mortgage of Nightingale to Spalding, the property had been sold, and a deed made by the sheriff under that sale to William Nightingale, son of Phineas.

All this occurred in the lifetime of the latter.

The bill of complaint of Sanger assails this proceeding by which the mortgage to Spalding was foreclosed, and the title of the property came into the hands of William, as the result of a fraudulent combination on the part of Phineas M. Nightingale, his debtor, and William Nightingale, as representing the children of Phineas M. Nightingale, Mrs. Molyneux, and the executor of Molyneux, to defraud him of his just claims under the mortgage of December, 1869. In reciting the means by which this fraud was carried out he says that Phineas M. Nightingale, the mortgagor in both mortgages, conveyed on July 21, 1870, to Mrs. Molyneux, the widow and real party in interest as heir or devisee of Molyneux, then dead, a tract of land known as "Dunginess," which was received by Mrs. Molyneux and intended by Nightingale to be a complete satisfaction of the Spalding mortgage. He further asserts that the Spalding bonds and mortgage were then turned over to P. M. Nightingale, either by a written assignment, or accompanied with an indorsement showing that they were satisfied; that P. M. Nightingale aft- [179] erwards procured this mortgage to be foreclosed and Camber's Island sold under it and bought in by his son William without any consideration being paid for it, and solely for the purpose of cutting off the right of Sanger under his mortgage.

The answer of the Nightingales denies this combination and fraud, and by way of explanation says that Dunginess was received by Mrs. Molyneux at the sum of $25,000 credited on the Spalding mortgage; that a question at that time existed as to how far the loss of the slaves who had been emancipated, which were included in the mortgage of Nightingale to Spalding, and the consideration of which was the land and negroes mortgaged, would be treated as a failure of consideration; that this question was also settled at the time that Dunginess was conveyed to Mrs. Molyneux, and that an adjustment of that matter was made by which, after the receipt of the deed of conveyance of Dunginess, it was agreed that the sum of $51,250 remained due upon that mortgage. They denied all combination to defeat the plaintiff in his mortgage; they asserted that the foreclosure of the mortgage was a *bona fide* attempt to enforce the collection of the remaining sum of $51,250, and that William Nightingale gave his note for the sum of $30,000, for which the property was sold.

The plaintiff afterwards filed an amended bill, in which he adopted the version of the settlement between Mrs. Molyneux and Phineas M. Nightingale, by which Dunginess was received as part payment only, and the mortgage was foreclosed for the remaining sum, after deduction for the loss of the slaves, the balance of the bonds remaining unpaid. But in regard to the foreclosure proceedings on that mortgage he says that, at the time they were instituted, the debt was barred by the Limitation Law of March 16, 1869, of the General Assembly of Georgia, and that at the time the bonds and mortgage on which that proceeding was instituted, were taken by the children of said Phineas M. Nightingale, by the assignment and transfer of the executor of the Molyneux estate, the said bonds and mortgage were all past due and barred by said Act of 1869. [180] He further avers that the failure of said Phineas to plead the Statute of Limitations in bar of the foreclosure does not, and cannot, affect the right of the complainant to now avail himself of said Statute of Limitations. He then requests the court to decree the said foreclosure void, by virtue of said Limitation Law, against the claim and right of complainant.

Two questions are thus presented for consideration on the pleadings in the case. The first [183] of these may be said to be this plea of the Statute of Limitations; the second, the question of actual fraud in the foreclosure of the Spalding mortgage, and the transfer of title thereby to the children of Phineas M. Nightingale.

As regards the Statute of Limitations, it is observable that the foreclosure suit was brought in the name of Spalding, the original mortgagee, for the use of Johnston, administrator of the estate of Molyneux, for reasons explained by the attorneys who brought it. The suit was against Phineas M. Nightingale himself, who lived until the whole proceeding was ended and the property sold, and who died a few months afterwards. The proper, if not the only, time and place that this Statute of Limitations could have been pleaded was in that suit. Nightingale himself, who was the debtor and was in possession, had no equitable defense against the debt for which a judgment at law had been already obtained against him in one of the courts of Georgia, did not plead the Statute of Limitations. It would hardly be insisted by anybody that he was under any personal, legal or moral obligation to plead that statute. He had obtained from Mrs. Molyneux a very favorable settlement of a debt of over $100,000. Dunginess, which was accepted at the price of $25,000, is stated in the oral testimony to have been sold not long afterwards for $15,000. The value of the slaves was adjusted on some fair basis, and corresponding deduction was made on that account, so that the sum of $51,250, which was yet due on the mortgage, was in every sense an honorable and just debt which Nightingale owed to the estate of Molyneux, and a plea of the Statute of Limitations to that debt, if it could have been sustained after the payments made upon it, within the period of limitation, would have been an unjust exercise of his right to make such a plea which could only result in favor of the plaintiff Nightingale.

The right to plead the Statute of Limitations has been always held to be a personal privilege, of which the debtor could avail himself or not, as he might choose. See *Pittman's Admrx.* v. *Elder*, in the Supreme Court of Georgia, March Term, 1886.

It is true there are some authorities which go [184] to show that a purchaser with the legal title, whose right accrued subsequent to the debt which may be barred by the statute, can also avail himself of the statute when he is sued to foreclose this equity of redemption. While this proposition is not undisputed, the cases in which this privilege has been sustained by the courts of Georgia are those in which the party setting it up has become the owner of the title or the entire equity of redemption, or has been found in possession of the mortgaged property.

And in the case of *Ewell* v. *Daggs*, 108 U. S. 143 [27: 682], this court said that, though the subsequent purchaser might set up the plea of the statute, the plea must show that the action is barred as *between the parties to the debt*, because as the owner of the equity of redemption it is *that* debt he has to pay.

The Statute of Limitations applicable to this case is section 6 of the Act of March 16, 1869 (Pamph. Laws Ga. 1869, p. 183), which reads as follows:

"That all other actions upon contracts, express or implied, or upon any debt or liability whatsoever to the public, or a corporation, or a private individual or individuals, which accrued prior to 1st June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and right of action to enforce it shall be forever barred."

This being a law of the State of Georgia, we must follow its construction by the courts of that State, so far as it has been construed. It is said in the argument in this case, but not much insisted upon by the plaintiffs, that this is a peremptory discharge of the debt, and is not a mere Statute of Limitations, which, to be available, must be pleaded, as is the case with other limitation Acts. The proposition is that the statute in effect destroys the right of action; but this doctrine has been overruled repeatedly by the Supreme Court of Georgia, in which it has been held to be an ordinary Statute of Lim-

itations. See *George* v. *Gardner*, 49 Ga. 441, 449; *Harris* v. *Gray*, 49 Ga. 585. In *Parker* v. *Irwin*, 47 Ga. 2, it was decided that the pleading of the statute was only a personal privilege of the debtor, and that to avail himself of the statute [185] he must plead it. See also *Baker* v. *Bush*, 25 Ga. 594.

The mortgagee of real estate in Georgia does not take the title to the property. The mortgage is only a security for the debt for which it is made. The title remains in the mortgagor. The cases in that State, as already intimated, go no further than to hold that a purchaser of the legal title, or possibly a mortgagee in possession, may when sued, plead the Statute of Limitation as a defense to a prior debt, or mortgage, or incumbrance, made by the holder of the legal title.

In the case before us Sanger never had the possession, never had the legal title, and, as he was no party to the foreclosure proceedings, which he now contests, he simply stands upon such rights as his mortgage lien gives him against Nightingale. It is difficult to see from what standpoint he, in this suit, in which he is complainant, seeking to foreclose his own mortgage, can set up the Statute of Limitation, not as a defense, for he is not sued and nobody is troubling him about his claim, but as a positive weapon to set aside and annul in this collateral proceeding the decree of a court of competent jurisdiction, with proper parties before it, which foreclosed a mortgage prior in time and equal in equity to his, under which the property was sold and passed into other lands. Certainly the court which rendered that decree had jurisdiction of the property and of Nightingale, the defendant, who was in possession, and who had the legal title. It is equally as certain that whether Nightingale ought to have pleaded the statute or not, he did not do so, and it is now too late to set it up as a defense to that suit. If Nightingale himself had made that plea, it is difficult to perceive how he could have avoided the effect of part payment by the transfer of Dunginess and an acknowledgment of the debt by the settlement under which it was adjusted at $51,250, as a sufficient answer to the plea of the Statute of Limitations. We suppose, though no authorities are cited on the subject, that the law of Georgia, like that of other States, admits of such evidence as payment, acknowledgment of the debt, and agreement to pay, as being a sufficient reply to the Statute [186] of Limitations. How Nightingale could have pleaded the statute successfully under such circumstances we do not see. In short, we see no way, in accordance with any known principles of dealing with the Statute of Limitations, that the plaintiff can, in this collateral proceeding, make use of the statute as a positive weapon of attack to set aside a decree rendered by a court of competent jurisdiction, with proper parties before it, under which the title has passed by a judicial sale to third persons.

In regard to the other proposition, that the whole proceeding was the result of a fraudulent combination to cut off and defeat the claim of the plaintiff, we have a little more difficulty.

There are many circumstances of suspicion [illegible] the transaction. There is no very satisfac[illegible]ry account of anything being paid by the [illegible]ightingales for the purchase of Camber's Island under that decree of foreclosure. There is no very clear account of how the bonds and mortgage, under which that decree was made, came into the possession of William Nightingale and his brothers and sisters. When the purchase was made, William Nightingale gave his note for $30,000, payable to the order of the attorneys who foreclosed the mortgage. It is nowhere shown that this note was ever paid. It is not claimed that it was ever paid in fact; nor is it shown what became of it. It is stated by the attorneys that the mortgage was foreclosed in the name of Spalding, for the use of George H. Johnston, administrator of Edward Molyneux, and that the note for the purchase money was taken to the solicitors as a means of distributing it to those who might be entitled to it. The attorneys seem to have been satisfied that the transfer of the original mortgage and bonds to the Nightingales, the children of Phineas M. Nightingale, extinguished this note; and if there were any clear and satisfactory account of how the junior Nightingales became possessed of the bonds and mortgage this might explain the whole matter.

The attempt to do this is rather a lame affair. It is said that the title of Phineas M. Nightingale to Dunginess was brought into doubt by an examination of some papers under which he held it; which raised a question whether he had anything more than a life estate in that property, the title of which after his death descended [187] to his children, and therefore Mrs. Molyneux would have no title to Dunginess when he died. A paper is produced which professes to be a quitclaim conveyance by the children of Nightingale to Mrs. Molyneux. This conveyance is set up as the consideration on which Mrs. Molyneux, or the administrator of her husband's estate, transferred the remaining part of the debt due on the original mortgage to the children of Phineas M. Nightingale.

But it must be confessed that the whole of this proposition is involved in obscurity. Where this paper came from, whether it was ever delivered to anybody, or how it came to be executed, are questions which are wholly unexplained by any part of the paper or by anybody who seems to know anything about it. If the other defenses to the charges of fraud and conspiracy in the foreclosure of the Spalding mortgage and the purchase of the estate were not better sustained than this, we should be very much inclined to reverse the decree on that branch of the subject. But it is very clear that the settlement and adjustment by which the elder Nightingale conveyed Dunginess at a consideration of $25,000 to Mrs. Molyneux, and by which an adjustment was at the same time made of the claim for the failure of consideration by reason of the emancipation of the slaves, and the sum of $51,250 found to be due and unpaid on the mortgage, was a fair and honest transaction; nor is anything to be found which impeaches the proceedings for the foreclosure of the mortgage for the remainder of the debt. The proceedings in this case were fair and open and according to the laws of the State of Georgia. Nothing hindered the attorneys who conducted these proceedings from accepting William's note for $30,000 as a proper consideration for the purchase money and for the sheriff's deed, which was made to him. It

is nowhere asserted that the property was worth more than this $30,000. Up to this point there is no reason to complain of any improper exercise of power on the part of the owners of the mortgage, or of the conduct and proceedings for its foreclosure in the courts of Georgia.

[133] Now, whatever arrangement may have afterwards been made between Mrs. Molyneux, or the administrator of the Molyneux estate, and the Nightingales, by which this note was either satisfied by the quitclaim conveyances referred to of Dunginess, or was absolutely remitted as a gratuity to the children of the senior Nightingale, is a matter of which Sanger had no right to complain. The debt was a just debt. The decree was an honest decree, and the proceeds of it belonged to the estate of Molyneux, either to the widow, the administrator, or devisees, if there was a will.

It is stated here, and it seems the most probable solution of the matter, that, in addition to this quitclaim of the heirs of Nightingale of Dunginess, Mrs. Molyneux, who was the principal if not the sole devisee under her husband's will, had become attached to the family of the Nightingales while they resided in this country, and was willing that the debt due to her should be used as a means of securing to the children the family homestead. She had a right to do this. It was her property. She had the right to select whether she would give it to Sanger or to these children. In no event, that we can see, was Sanger injured by the transaction. If, however, he had any right to complain, if there was any wrong done him, it was not in the proceedings by which the decree was obtained, and that decree must be held to remain valid under all circumstances.

If Sanger had brought his bill to merely set aside the *sale* under that decree, and proposed to redeem or pay the amount of the decree, there might be some reason to consider his claim, because up to the rendition of the decree everything was fair and right. If the sale was set aside, the decree would remain; and he could not under such a bill do anything but pay the money due on that decree, and then proceed to sell for his own debt. This he does not seem to have contemplated; perhaps for the reason that the property is not worth the debt, or half the debt for which that decree was rendered.

On the whole case we are of opinion that the decree of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD WARREN ET AL., *Appts.*,
[132] *v.*
FRANK S. MOODY ET AL., Assignees in Bankruptcy of BAUGH, KENNEDY & Co. ET AL.

(See S. C. Reporter's ed. 132-138.)

Bankruptcy—bill by assignees to set aside deed by bankrupt to his daughter as an advancement—absence of fraud.

An assignee in bankruptcy cannot maintain a bill to set aside a deed made by the bankrupt as an advancement to his daughter, on the occasion of her marriage, without fraud or intent to defraud his creditors, the grantor being at the time in prosperous circumstances, and having left ample resources with which to pay all indebtedness.

[No. 216.]

Submitted April 22, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Middle District of Alabama. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Mr. **John T. Morgan**, for appellants:

The conveyances annulled by section 14 of the Bankrupt Act are such as are made "by the bankrupt in fraud of his creditors;" not such as defraud others who are not creditors, nor such as defraud certain creditors, and being honest in fact and intent, are valid as to all other creditors; nor such as are not affected with any fraud or covin, and are good between the parties.

As the assignee holds the same legal relation to every creditor who may prove his debt, and is the representative alike of all of them to collect and distribute the estate of the bankrupt, a fraudulent conveyance by the bankrupt, which the assignee can disregard, is one that is void as to all persons who belong to the class of creditors of the bankrupt. All conveyances tainted with actual fraud are void by statute, as it respects certain persons, and are good as to all others.

The law does not by its own operation make these deeds void, so as to vest the property conveyed by them in the assignee of a bankrupt.

Stewart v. *Platt*, 101 U. S. 731 (25: 816).

The definition by this court of the rights which pass to the assignee of a bankrupt do not seem to include rights as unsubstantial as those set up in the bill of complaint in this case.

Stewart v. *Platt, supra; Dudley* v. *Easton*, 104 U. S. 103 (26: 669); *Yeatman* v. *Savings Inst.* 95 U. S. 766 (24: 590); *McHenry* v. *La Société Française*, Id. 58 (24: 370); *Hauselt* v. *Harrison*, 105 U. S. 406 (26: 1076).

Messrs. **M. L. Woods** and **William S. Thorington**, for appellees:

A voluntary deed is void as to existing creditors, independent of all motives of fraud, and independent of the condition of the grantor as to solvency.

Cato v. *Easley*, 2 Stew. (Ala.) 214; *Miller* v. *Thompson*, 3 Port. (Ala.) 196; *Moore* v. *Spence*, 6 Ala. 506; *Thomas* v. *Degraffenreid*, 17 Ala. 602; *Foote* v. *Cobb*, 18 Ala. 585; *Gannard* v. *Estava*, 20 Ala. 732; *Stiles* v. *Lightfoot*, 26 Ala. 443; *McAnally* v. *O'Neal*, 56 Ala. 299; *Hubbard* v. *Allen*, 59 Ala. 283; *Anderson* v. *Anderson*, 64 Ala. 403.

The case last cited contains a full and clear exposition of the law of Alabama on this subject. These authorities leave no room for doubt as to the settled law of Alabama and the law of Alabama governs in this case.

There are two reasons why this court will follow the Alabama decisions on this subject. The first is that these decisions are a construction of a state statute, section 2124, Code of Alabama; and the federal courts will adopt the construction given to a state statute by the highest court of the State.

Pratt v. *Curtis*, 6 Bank. Reg. 142; *Thatcher* v. *Powell*, 19 U. S. 6 Wheat. 119 (5: 221); *Polk's Lessee* v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665);

Elmendorf v. *Taylor*, 35 U. S. 10 Wheat. 152 (6:289).

In the next place the decisions of Alabama on this subject have become a rule of property in that State; and in such cases the federal courts, sitting there, will apply the rule as though they were state courts.

Lloyd v. *Fulton*, 91 U. S. 485 (23:365); *Christy* v. *Pridgeon*, 71 U. S. 4 Wall. 196 (18:322).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a bill in equity, filed in the District Court of the United States for the Middle District of Alabama, on the 25th of July, 1878, by Frank S. Moody and Richard C. McLester, as assignees in bankruptcy of Baugh, Kennedy & Co. and John S. Kennedy against John S. Kennedy and his wife, Mary E. Kennedy, and Edward Warren and his wife, Vernon L. Warren. The bill alleges that, on the 7th of July, 1876, the defendant John S. Kennedy, as one of the partners in the late firm of Baugh, Kennedy & Co., and as an individual, was adjudged a bankrupt by the said district court, on a petition filed by that firm and each of its individual members; that the plaintiffs were appointed on July 28, 1876, assignees in bankruptcy of the estate, rights and credits of the firm, and of each of its individual members, including the defendant Kennedy; that they received the usual assignment from the register in bankruptcy, on the 11th of August, 1876; that, on the 31st of December, 1866, Kennedy and his wife were seised and possessed of a tract of land in Sumpter County, Alabama, containing 1,056 acres; that, on that day, without any other consideration than that of natural love and affection, they undertook to convey the land to their daughter, the de- [133] fendant Vernon L. Warren, but the deed was not acknowledged by the grantors until the 7th of October, 1867, and was not recorded until the 29th of March, 1872; that, as the deed had no attesting witnesses, it did not become operative as a deed of conveyance, as against existing creditors, for any purpose, until the date of its recording, or at least until it was acknowledged; that none of the defendants have been in the actual possession of the land since the date of the deed; that, at the time the deed was executed, Kennedy owed six debts, which are specified in detail in the bill, and amount in the aggregate to $6,442.62, four of them, amounting to $4,871.92, having been proved in bankruptcy, two of those proved having been due to two minors, wards of Kennedy, named Harrison, and one of those not proved having been due to a Mrs. Herbert, and three of the debts having been due by the said firm, of which he was a member.

The bill alleges that the said deed, being wholly voluntary, was, under the laws of Alabama, absolutely void, as against those debts and as against the plaintiffs, who, as such assignees, represent those debts for the purposes of this suit. The bill prays that the deed may be declared null and void and be set aside, and vacated, and that the land may be sold by the plaintiffs, and its proceeds be administered by them as part of the estate of Kennedy in bankruptcy.

The deed, a copy of which is annexed to the bill, sets forth that it is made "in consideration of the love and affection we bear to our daughter, Vernon L. Warren, and the sum of ten dollars." It conveys the land to her and to her heirs and assigns forever, and contains a covenant of warranty and this clause: "The foregoing conveyance is intended as an advancement to our said daughter."

The answer of Kennedy and his wife avers that love and affection for their daughter was part of the consideration for the conveyance, and that the sum of $10 was also paid as part of the consideration, as stated in the deed; that the defendant Warren and his wife were married on the 20th of December, 1866; that the deed was executed and delivered to the daughter on the day it bears date; that the daughter and her husband took immediate and [134] actual possession of the land; that the husband rented the land for the year beginning January 1, 1867; that he has had the sole control and management of the land, as agent and husband of his wife, paying taxes thereon, directing and superintending the repairs, and receiving the entire rent thereof for his wife, from the date of the deed to the day of making the answer, April 21, 1879; and that Warren and his wife are still in the actual possession of the land. The answer avers that all the debts of any moment which Kennedy owed at the date of the deed, on his own individual account, being the debts to the two minors, and the debt to Mrs. Herbert, amounted to nearly $3,400; that the same debts were substantially all the debts he owed at the date of his bankruptcy, on his own private account; and that, as a member of the old firm of Baugh, Kennedy & Co., he owed, at the time of making the deed and at the date of his bankruptcy, jointly with his partners, debts amounting to about $3,071.

The answer avers that the deed was not made with the intent to hinder, delay or defraud the creditors named in the bill, or any other creditors, or that it necessarily did so; that, at the time of making the conveyance, Kennedy and his wife were in prosperous circumstances, and possessed of ample means to pay all debts, and were able to withdraw the value of their donation to their daughter from their estate without the least hazard to their creditors; that they owed, in their individual capacity, at that time, very little money, the debts above named in the answer, amounting to nearly $3,400, being their chief and almost their only individual debts; that, at the time of making the deed, Kennedy owned, in his own right, free from all liens or incumbrances, real and personal property and choses in action, a schedule of which is annexed to the answer, amounting in value at that date to $91,400; that he was never sued for an individual debt, and never gave any incumbrances on his property, until some twelve months before his failure; and that he would long since have paid the three individual debts due to the minors and Mrs. Herbert, but the last named debt was so fixed by will that Mrs. Herbert could only use the interest during [135] her life, and, at her death, without heirs, she being childless, the property was to go back to other parties, and the two minors were under age until three or four years before the filing of the answer, and could not lawfully receive the money.

The answer of the defendants Warren and wife adopts, as their answer, the answer of Kennedy and his wife, and pleads the facts set forth in the latter answer, as a bar to the plaintiff's suit. There was a replication to these answers, and three witnesses were examined on behalf of the plaintiffs. The only point of any materiality in their testimony is as to the value of the property in December, 1866, which one of them puts at $6 an acre, another at from $8 to $10 an acre, and the third knows nothing about.

In June, 1880, the solicitors for the plaintiffs signed a stipulation, entitled in the suit, admitting "that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause."

The case was brought to a hearing on the pleadings and the three depositions: the deed to Mrs. Warren, the stipulation, and the schedule to the answers of the defendants; and the district court on the 9th of July, 1880, made a decree setting aside the deed, and directing that the land covered by it be sold by the plaintiffs as assignees in bankruptcy, and that the net proceeds of the sale be held by the assignees subject to distribution among the creditors of the bankrupt under the orders and directions of the district court, according to the respective rights and priorities of such creditors and of the defendants Warren and his wife. The decree also referred it to a master to ascertain and report the amounts due from Kennedy on the several demands set forth in the bill, and which should, up to the time of holding the reference, have been proved against the estate of Kennedy in bankruptcy. The defendants Warren and wife appealed from that decree to the circuit court, which, in December, 1881, affirmed the decree of the district court, from which latter decree Warren and his wife have appealed to this court.

[136] It will be noticed that the bill does not attack the deed on the ground of fraud. It does not allege that it was made with any intent to delay, hinder, or defraud the creditors named in the bill, or any other creditors of Kennedy. It does not allege that there are any other credit-
[137] ors than those named in the bill, or any creditors who became such after the making of the deed. The sole ground on which it proceeds is that the deed was a voluntary deed, and is void as against the persons who were creditors of Kennedy prior to the making of the deed. It claims that the plaintiffs, as assignees in bankruptcy, represent the debts of those creditors, for the purposes of the suit.

The alleged right of action of the plaintiffs is asserted under section 14 of the Bankruptcy Act of March 2, 1867, chap. 176, 14 Stat. at L. 522, which provides that "all the property conveyed by the bankrupt in fraud of his creditors" "shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and he may sue for and recover the said estate, debts, and effects." This provision is also found in sections 5046 and 5047 of the Revised Statutes.

The deed in question was a valid instrument between the grantors and the grantees. The stipulation on which the case was heard, containing an admission "that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause," makes the allegations of fact contained in the answer of Kennedy and his wife evidence in the cause. When the deed was made, Kennedy was, as the answer alleges, in prosperous circumstances, and possessed of ample means to pay all debts, and was able to withdraw the value of the donation to his daughter from his estate, without the least hazard to his creditors; and the amount of his individual debts was very small as compared with the amount of his property. The deed of the daughter being honest in fact and in intent, and being, on the evidence, a proper provision for her, as an advancement on the occasion of her marriage, and being valid as between her parents and herself, and no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which these plaintiffs can set aside the deed, as being a deed of "property conveyed by the bankrupt in fraud of his creditors," even though the conveyance may have been invalid, under the Statute of Alabama, as against the creditors named in the bill, because it was a voluntary conveyance. Those credit- [138]
ors, whatever remedies they may have had to collect their debts, are not represented by the plaintiffs, as assignees in bankruptcy, for the purposes of this suit, on the facts developed.

The case of *Pratt* v. *Curtis*, 2 Lowell, 87, cited by the plaintiffs, was a case of two bills in equity by the assignee of a bankrupt to set aside conveyances of land made by the bankrupt, one being a voluntary deed of settlement for the benefit of his children, and the other being a like deed for the benefit of his wife. Each bill alleged that, at the time of the settlement, the bankrupt was indebted to persons who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. On demurrer, the bill was sustained, on the view that the assignee in bankruptcy, and he only, had the right to impeach the deeds, in the interest of creditors. That decision, based on a case of intent to delay and defraud creditors, on the part of a person embarrassed in his circumstances, has no application to the present case.

The decree of the Circuit Court is reversed, and the case is remanded to it, with a direction to dismiss the bill, with costs to the defendants in the Circuit Court and in the District Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN A. TOPLIFF ET AL., *Appts.*, [121]
v.
ISAAC N. TOPLIFF.

(See S. C. Reporter's ed. 121-131.)

Contracts—construction—practical interpretation by parties, followed—rescission—infringement of patent.

1. In the construction of a contract, where the language used by the parties is indefinite or ambiguous, and of doubtful construction, the practi-

cal interpretation by the parties themselves is entitled to great, if not controlling, influence.

2. Upon a bill to restrain the alleged infringement of a patent, it is *held*: that a certain contract between the parties, by virtue of which the defendant is entitled to use the improvements covered by said patent, without royalty and without being charged with liability as an infringer, continued in force, notwithstanding a certain attempt made by the complainants to rescind it for an alleged failure of consideration; and that if there were any doubt or ambiguity arising upon the words employed in said contract they would be effectually removed by the practical construction by the parties.

[No. 286.]

Argued May 3, 4, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry S. Sherman** and **W. Bakewell**, for appellants.

Messrs. **W. W. Boynton, M. D. Leggett** and **S. Burke**, for appellee.

[122]

Mr. Justice **Matthews** delivered the opinion of the court:

The appellants, complainants below, on the 28th of February, 1880, filed their bill in equity to restrain the alleged infringement by the defendant of letters patent No. 166950, granted August 24, 1875, to John A. Topliff, for a new and useful improvement in bow sockets for buggy tops. As stated in the specification, "This invention has relation to bow sockets for buggy tops, and consists in placing a filling of wood in the tubes of the bow sockets to strengthen the same; also in extending the strip of steel which is inserted in the wood filling far enough down to enable it to be welded or otherwise fastened to the slat iron."

Among other grounds of defense, the defendant in his answer sets out the following: He alleges that some time prior to the 2[illegible] day of December, 1870, he invented a new and useful invention denominated an improvement in carriage bows, consisting in the main in constructing the straight part of carriage bows out of tapering tubes made of sheet iron with soldered seams and lower ends flattened, forming a part of the hinge, in conjunction with the bows made of wood, shaped and fitted into the upper ends of the tubes; that this invention was secured to him by letters patent dated December 27, 1870, No 110513; that this patent was reissued as reissued letters patent No. 9026, January 6, 1880; and that he obtained another patent, No. 114885, dated May 16, 1871, for a new and improved carriage bow cover and slat iron combined. That soon after he invented his first improvement in carriage bows, for which he obtained the patent dated December 27, 1870; and pending the application therefor, a contract in writing was entered into on or about the first day of September, 1870, between himself and the complainants, as follows:

"This agreement, made and concluded this —— day of —— A. D. 1870, by and between Isaac N. Topliff, of the first part, and John A. Topliff and George H. Ely, of the second part, witnesseth: 1. The said party of the first part [123] is the sole owner of a certain patent for tubular iron bows used in manufacturing carriage and buggy tops, which patent was issued the —— day of ——, A. D. ——. Now, in consideration of the agreements of said party of the second part to be by them performed, the said party of the first part hereby gives, grants, sells and conveys to the said party of the second part, the exclusive right of manufacturing and of selling the above mentioned article throughout the United States, for five years from the date of this agreement; it being understood that, at the expiration of five years the said party of the first part shall have the right to have the above named articles manufactured at not more than two other places, to be sold at prices adopted by said party of the second part, but in all other respects the rights and privileges of the said party of the second part shall continue during the entire life of the patent.

"2. The parties mutually agree that they will share the expense of maintaining the right of the patent against infringements and other patents in the following proportion: the first party to pay one third and the second party to pay two thirds. It is also further agreed that any improvement made on these articles by either party shall be for the mutual benefit of the parties.

"3. In consideration of the above grant the said party of the second part hereby agrees to pay to the said party of the first part 15 per cent on the wholesale selling prices of above named articles, as royalty on all sold by them, it being understood that these prices shall at all times be settled by mutual agreement between both parties. The said party of the second part further agree that they will advertise thoroughly the above named article in such ways as may seem best, and do all in their power to introduce and extend the sale of said articles. They also agree that they will make them of quality and finish to meet the approbation of said party of the first part.

"In witness whereof the parties have set their hands and seals to duplicates the day and year first above written.

"I. N. TOPLIFF. [SEAL.]
"J. A. TOPLIFF. [SEAL.]
"GEORGE H. ELY. [SEAL.]"

That, in pursuance of this agreement, the [124] complainants entered upon the manufacture and sale of carriage bows, the defendant being in their employment as traveling salesman, and as such devoted his time largely to the introduction and sale of said carriage bows throughout the United States, and also his time, thought and attention to making improvements therein, knowledge of which was communicated by him to the complainants from time to time. That some of these improvements made by him were covered by the patent bearing date May 16, 1871. That the business was carried on by the complainants in this way under said contract for more than eight years, to their great gain and profit.

The defendant further alleges that "After the issuing to him of the last mentioned letters patent, he made some slight changes and improvements in the manufacture of carriage bows, and communicated the same to said complainants, especially to said John, and requested that, in the manufacture of carriage bows

under his patent aforesaid, the said complainants should construct and manufacture them in accordance with his said suggestions and improvements, which improvements were communicated by this defendant to the said complainants on or about the first day of June, 1873. That thereupon his said suggestion and invention was adopted by the said complainants in the manufacture of carriage bows by the said complainants; and afterwards the said John A Topliff for the purpose of securing the same to the complainants and to this defendant for their mutual use and benefit, in accordance with the terms of said contract, made application for a patent thereon, and secured the alleged patent in the complainants bill of complaint described. And this defendant alleges and says that, if in reality there is anything new or useful embraced in the said letters patent, issued to the said John A. Topliff, that he was and is the true inventor and rightful owner thereof; and that the said John A. Topliff was not and is not the true and original inventor and discoverer thereof. And this defendant alleges that whether said patent, so issued in the name of said complainants, is or is not valid, that he, by the terms of his said contract entered into with said complainants, is entitled [125] to use the same to the same extent that the complainants are entitled to use the same. That, by the terms of said contract, such right is expressly granted and conveyed to him, and that the complainants have so interpreted said contract, and have had upon their part the free use and benefit of the invention, discovery, and improvement made by this defendant and secured to him by letters patent dated May 16, 1871, as aforesaid, and other considerations therefor, as agreed; and that, relying upon said contract, he communicated to the said complainants the information and instructions in regard to manufacturing under his said patents and other improvements above named, upon which the said John A. Topliff made the application and secured to the said complainants the letters patent said to be owned by them. And this defendant denies that he has made other use of the letters patent issued to the complainants than such as he was authorized to make by the terms of the contract aforesaid between the complainants and himself."

The defendant further says that he has established a manufactory of carriage bows in the City of Cleveland, but not in any other place or places; and that by the terms of his contract with the complainants he is entitled so to do, and in said business to use the alleged improvements covered by the patent described in the bill.

The case was heard on the pleadings and proofs when, the circuit court being satisfied that under the contract set up in the answer each party had a right to use, without the payment of royalty, the patent issued to the complainants, a decree was entered dismissing the bill. The complainants took the present appeal.

It is now contended, on the part of the appellants: 1, that at the time when the bill was filed the contract set up in the answer was not in force, having been previously rescinded by the parties; and 2, that if the contract is in force, it does not secure to the appellee the right to the use of the improvement covered by the patent to John A. Topliff of August 24, 1875, belonging to the appellants.

The circumstances which, according to the contention of the appellants, constitute the rescission of the contract are claimed to be as [126] follows:

They allege that when the contract in question was entered into, the application of the appellee for his patent was pending; that a sample specimen of the carriage bow intended to be covered by the patent was shown by the appellee to the appellants; that the appellee represented to them that the patent would cover the use of tubular carriage bows; that in point of fact the original application made the following claims:

"1. The upright part of carriage bows, constructed of tubular sheet metal A, in combination with the wooden bow B, put together in the manner and for the purposes set forth and described.

"2. The tube A, with elongated flat portion *e*, to form a solid joint with the bow socket D in the manner described.

"3. The scallop edged sheet iron bow socket D to be used in connection with the tubes A and A′, in the manner described."

That these claims were rejected in the Patent Office, and in lieu of them the claim of the patent as issued on December 27, 1870, was substituted, as follows:

"The straight part of the bow A, tubular and flattened at the lower end, the bow socket D, consisting of two concave scalloped pieces, and the bent part of the bow B, all combined, constructed, and arranged as and for the purposes set forth"

That the appellants were not aware of the rejection of the original claims until some time in the year 1879; that during that period they acted under the impression that they were secured in the exclusive right to use carriage bows containing the tubular uprights, that they had no knowledge to the contrary until the fact was disclosed by an examination of the records of the Patent Office; that immediately upon discovering it they gave notice to the appellee that the consideration for the contract between them had thus failed, the patent being of no avail to them, and that they would no longer regard it as obligatory, and that thereupon the appellee acquiesced in this rescission of the contract by them, and resumed his ownership of the original patent, surrendered the same, and obtained a reissue thereof on January 6, 1880, the claims of which are as follows:

"1. A carriage bow, the side or upright portions A A of which are tubular, substantially as and for the purpose shown.

"2. A carriage bow consisting of the bent wooden section B and the tubular sections A A, the latter constituting the vertical sides or arms of the bow; the opposite ends of the bent por- [127] tion B being secured to the upper ends of the tubular sections A A, substantially as set forth.

"3. A carriage bow consisting of the bent wooden sections B and the metallic tubular sections A A, the latter constituting the straight or vertical sides of the bow, substantially as set forth.

"4. A carriage bow consisting of the bent wooden section B and the tubular sections A A, the latter constituting the straight or vertical sides of the bow, and constructed at their lower ends to be attached to a socket or carriage seat, substantially as set forth."

On the other hand, it appears from the testimony in the case, that the manufacture of the carriage bows, as contemplated under the application for the original patent, was abandoned by the parties before the patent was in fact issued, experience showing that the bows so made were not practically useful in the trade; that the original patent of December 27, 1870, soon after it was issued, was delivered to the appellants, and kept in their possession until it was lost or destroyed in December, 1873, and that thereby they had abundant opportunity of knowing, from an examination of its contents, the actual extent of its claims; and that subsequently a patent of May 16, 1871, was issued to the appellee for a new and improved carriage bow cover and slat iron combined, which embodied important improvements on the carriage bow as previously made.

Under this patent all the parties continued to carry on the business of making and selling carriage bows, the articles of manufacture being from time to time improved and rendered more valuable and salable by the suggestion and adoption of improvements made from time to time by both parties. To cover some of the improvements thus invented and adopted, the [128] appellant, John A. Topliff, applied for and obtained his patent of August 24, 1875. The claims of that patent are as follows:

"1. In combination with the back tubes of bow sockets and wood bows or fillings, a steel or other hard metal plate, welded or otherwise fastened within the tube to the slat iron, substantially as and for the purpose specified.

"2. The combination, with the metal tubes of bow sockets, of a wooden filling, substantially as and for the purpose set forth."

John A. Topliff states, as a witness in the case, that his improvement consisted "in placing a filling of wood in the tubes of the bow sockets to strengthen the same, and also in extending the strip of steel, which is inserted in the wood filling, far enough down to enable it to be welded or otherwise fastened to the slat iron." After the issue of this patent, the business was continued by the parties as before, the carriage bows and bow sockets being made with all the improvements added; the appellants continuing regularly to account to the appellee, according to the terms of the contract between them, for his share of the proceeds of the sales of the manufactured articles, being 15 per cent of the wholesale selling prices of all actually sold. These sums amounted in the aggregate to $40,000 or $50,000, and the payments were made regularly until in August or September, 1879.

In reference to John A. Topliff's patent of August 24, 1875, the appellee claimed that the idea of a wooden filling in the tubes of the bow sockets was suggested by him, and that of welding the steel plate to the slat iron was suggested by his brother. On that point he says in his testimony:

"Some time in 1874 or 1875, I think it was, I came home, and my brother said that they had concluded to patent that device of welding the steel to the slat iron, and he said that he thought that they had better take out a patent or make one claim for the filling also. I told him that the filling, of course, was my improvement, and I did not know that it would be right to insert it into his patent. He said it would make no difference, as our contract would cover it all. He said that it would make no difference which took out the patent, whether it was in his name or my name, and I made [129] no further objection to it; but I always claimed, and he never disputed it at that time, that the device was mine as far as the filling was concerned."

This statement of the appellee as a witness is not contradicted by the testimony of either John A. Topliff or George H. Ely, the appellants, the only other witnesses examined in the cause.

In 1879 the appellee left the employment of the appellants, and made preparations to establish a business of his own in the manufacture of carriage bows and bow sockets in Cleveland, claiming the right to do so under the terms of his contract, when the present controversy arose between them. In explanation of their continuing to pay royalty under the contract as late as in 1879, John A. Topliff states in his testimony, as follows:

"We paid royalty from the fact that we supposed that we were working under his original patent; we did not know to the contrary. The original patent was somewhere, perhaps, in our office, and was burned up in 1873, I think —I think that was the time of the fire—and we had not seen it for a long time, and supposed that we were working under the original patent until we finally received the file wrappers from Washington informing us to the contrary; and when we received them, together with the patent, we found out that we were not working under his patent and refused to pay further royalty."

This explanation cannot be accepted. It is inconsistent with the facts testified to by the same witness, as well as others, that the manufacture of the bows and bow sockets under the original patent ceased early in 1870, before, in fact, that patent was issued; and that the business was actually carried on under Isaac N. Topliff's patent of May 16, 1871, and the subsequent improvements patented to John A. Topliff under the patent of August 24, 1875. The fact, therefore, that the patent of December 27, 1870, was of no practical value in the business was well known and perfectly understood from a very early period in its prosecution, and the patent of May 16, 1871, was accepted by the parties as a substitute for it. [130] The appellants, therefore, cannot claim that they made the first discovery of its inutility in 1879, and had a right by reason thereof to rescind the contract for a failure of consideration. It was equally immaterial that Isaac N. Topliff subsequently thereto, in 1880, surrendered that patent, and obtained the reissue. If the reissue is void, the situation of the parties is not changed; if it is valid and useful it inures to the benefit of the appellants as well as to that of the appellee, by virtue of the express terms of the agreement between them.

The second proposition of the appellants is

that if the contract set up in the answer is in force, it does not secure to the appellee the right to the use of the improvement covered by the patent sued on. The language of the agreement is this: "It is also further agreed that any improvement made on these articles by either party shall be for the mutual benefit of the parties."

It is contended by the appellants that the articles referred to in this clause of the contract are those mentioned in the former part of the agreement as meaning articles to be manufactured under the original patent of Isaac N. Topliff of December 27, 1870, and that the improvement which is to inure, by virtue of the clause quoted, to the mutual benefit of the parties must be an improvement upon the patented article. This, however, it seems to us, is too narrow and restricted a meaning to be placed on the language of the parties, and fails to secure their actual intention. The subject of the contract is the manufacture and sale of bows and bow sockets for carriage and buggy tops, in which the parties were to have mutual interests, as defined in the contract. It was supposed, and this undoubtedly was the original basis of the agreement, that the appellee had secured the exclusive right to a valuable improvement in the manufacture of this description of articles. His application for the patent was then pending; the patent was in fact subsequently issued. In the meantime the article as proposed was manufactured and put on sale, and ascertained by experience not sufficiently to answer the purpose. By mutual suggestion and assent improvements in the [131] manufacture were adopted, and some of them embraced in the second patent to the appellee of May 16, 1871. The article made under that patent was treated as the article intended by the contract. Other improvements were subsequently devised and adopted for perfecting the same article, and these were embraced in the patent to John A. Topliff of August 24, 1875. The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself; and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50, 54 [19: 594, 596], per *Mr. Justice* Nelson.

In our opinion, the contract between the parties set up in the answer continued in force, notwithstanding what was done by the appellants in 1879 with the intention to put an end to it; and, by virtue of its terms, the appellee is entitled to manufacture, in Cleveland, carriage bows and bow sockets, using therein the combinations covered by the patent to John A. Topliff of August 24, 1875, without royalty, and without being charged with liability as an infringer.

The decree of the Circuit Court in dismissing the bill, which is its whole legal effect, was therefore right, and is hereby affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LIZZIE TUTTLE, Admrx. of ORSON TUTTLE, Deceased, *Plff. in Err.*,

v.

DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

(See S. C. Reporter's ed. ——.)

Master and servant—latter assumes risks of employment—contributory negligence—railroads—curves in side track.

1. Where one enters the service of another in a particular employment he assumes the risks incident to such employment.
2. The courts are not required to restrict the right of a railroad company to construct its side tracks in its freight depots and yards with such curves as it may deem expedient and proper.
3. In the case presented, it is *held:* that the plaintiff's intestate entered the employment of the defendant as a brakeman with full knowledge of the form of the defendant's side tracks, the construction of its cars, and the hazards incident to the service; that he assumed the risks of such employment; that he was guilty of contributory negligence, and that the court below properly directed a verdict for the defendant.

[No. 186.]

Argued and submitted April 4, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **O. M. Springer** and *F. A. Baker*, for plaintiff in error:

It was the duty of the defendant to construct and keep in repair a proper, sufficient and safe roadbed and track; and it is liable to an employee for negligence in the performance of this duty.

Northern Pacific R. R. Co. v. *Herbert*, 116 U. S. 642 (29: 755); *Broderick* v. *Detroit Co.* 56 Mich. 261.

In addition to the authorities cited by *Mr. Justice* Field, in *Northern Pacific R. R. Co.* v. *Herbert*, we refer to the following instances where the employer has been held liable for negligence in constructing or in not repairing the instrumentalities the servant was required to use in the performance of his duties, viz:

Want of repair in the roadbed of a railroad.

Snow v. *Housatonic R. R. Co.* 8 Allen, 441.
Insufficiently supported derrick, at side of railroad.
Holden v. *Fitchburg R. R. Co.* 129 Mass. 268.
Defective construction of trestle work.
Elmer v. *Locke*, 135 Mass. 575.
Failure to repair a telltale or bridge guard.
Warden v. *Old Colony R. R. Co.* 137 Mass. 204.
Improperly constructed culvert under a railroad.
Davis v. *Central Vt. R. R. Co.* 55 Vt. 85; *Chicago etc. R. R. Co.* v. *Swett*, 45 Ill. 197.
Machinery negligently set up.
Wilson v. *Willimantic Linen Co.* 50 Conn. 433.
Defective platform or scaffold.
Benzing v. *Steinway*, 101 N. Y. 547; *Behm* v. *Ormond*, 58 Wis. 1.
Permitting car ladder to remain out of order.
Richmond, etc. R. R. Co. v. *Moore*, 78 Va. 93.
Negligently constructed railroad.
Trask v. *Cal. S. R. R. Co.* 68 Cal. 96.
Rotten ties on the roadbed of a railroad.
Houston, etc. R. Co. v. *McNamara*, 59 Tex. 255.
Uneven and improperly constructed side track.
Porter v. *Hannibal & St. Jo. R. R. Co.* 60 Mo. 160.
Buffers on two cars so placed that they went by each other, and crushed employee between the cars.
Ellis v. *N. Y. etc. R. R. Co.* 95 N. Y. 546.
Defective machinery for operating a circular saw.
Indiana Car Co. v. *Parker*, 100 Ind. 181.
Side track with too short a curve, and an improper connection with main track.
Patterson v. *Pittsburgh, etc. R. R. Co.* 76 Pa. 389.
The question of contributory negligence should have been submitted to the jury.
Spicer v. *South Boston Iron Co.* 138 Mass. 426; *Mulvey* v. *R. I. Locomotive Works*, 14 R. I. 204.

In the case at bar, it was apparent that there was quite a sharp curve, but that it was so very sharp or irregular that the draw heads would pass each other, could only be known by actual experiment, or by the use of instruments. The defect was a latent one in every sense of the word.

But even if the deceased had known of the defect, it would not necessarily follow that he was guilty of contributory negligence, because, in the busy and prompt performance of his work, he did not remember the exact locality of the point of danger.

Snow v. *Housatonic Co.* 8 Allen, 441; *Greenleaf* v. *Ill. Cent. R. R. Co.* 29 Iowa, 14.

Mr. E. W. Meddaugh, for defendant in error:

It was not negligence in the defendant Company, in respect of its employees having to use the railroad track in question, to lay the track on any curve practicable for the operation of cars upon it. There is no possible rule of safety in the radius of a track's curve. It is always only a question of degrees and danger. Nor is there any common rule of practice. To refer the matter to a jury in every case—that most incompetent of bodies for such a question—would be in effect to make railway companies insurers of the safety of such tracks; for there would be no escape from liability.

Randall v. *Baltimore & O. R. R. Co.* 109 U. S. 478 (27: 1003).

In *Day* v. *Toledo, etc. R. R. Co.* 42 Mich. 523, there was an exceptional danger in the work of coupling. The man was experienced in the business. The danger was apparent and not hidden. In all essential particulars it was like the case at bar. The same principle is applicable.

See also *Lovejoy* v. *Boston, etc. R. R. Co.* 125 Mass. 79; *Baylor* v. *Delaware, etc. R. R. Co.* 40 N. J. L. 23; *Wells* v. *R. R. Co.* 56 Iowa, 520; *Sweeney* v. *Central P. R. R. Co.* 57 Cal. 15; *Naylor* v. *Chicago & N. W. R. R. Co.* 53 Wis. 661; *Sullivan* v. *India Mfg. Co.* 113 Mass. 396; *Rains* v. *St. Louis, etc. R. R. Co.* 71 Mo. 164; *Baltimore & O. R. R. Co.* v. *Stricker*, 51 Md. 47; *Holden* v. *Fitchburg R. R. Co.* 129 Mass. 268; *Burke* v. *Witherbee*, 98 N. Y. 562.

Even in the matter of tools and machinery, the servant cannot recover damages he may suffer from defects of which he had no knowledge, save under exceptional circumstances.

Frazier v. *Pa. R. R. Co.* 38 Pa. 104; *Griffiths* v. *Gidlow*, 3 Hurl. & N. 648; *Assop* v. *Yates*, 2 Hurl. & N. 768; *Leary* v. *Boston, etc. R. R. Co.* 139 Mass. 580.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action for negligence resulting in the death of plaintiff's husband and intestate, Orson Tuttle, a brakeman in the defendant's employment. The declaration contained three counts, the first of which charged that on or about the 30th of October, 1882, the said Tuttle was in the employ of the defendant in the City of Detroit at the "Detroit, Grand Haven and Milwaukee yards," and in the course of his ordinary employment was ordered to couple some cars standing on a certain track known as "bootjack siding;" that said siding is a double curve track containing a very sharp curve; that in compliance with the order he proceeded to couple certain cars on said siding, which were near a certain boat slip, and while he was endeavoring to couple said cars the "draw heads" of the cars failed to meet and passed each other, allowing the said cars to come so close together that he was crushed to death; that there were no bumpers nor other device on either of the said cars to prevent them from going together, in case said draw heads failed to meet and passed each other; and that the only device on said cars for the purpose of keeping them apart and to receive the concussion in coupling was the draw heads aforesaid. The charge of negligence was that the defendant, disregarding its duty, neglected, in the construction of its said cars, to provide any means to prevent injuring its said employé in case the draw heads of its cars so constructed should fail to meet or pass each other under circumstances set forth; and that the said defendant, in the construction of said "bootjack siding," so called, negligently and unskillfully constructed the same with so sharp a curve that the draw heads of the said cars failed to meet and passed each other, thereby causing the death of the said Orson Tuttle while in the act of coupling said cars as aforesaid, without fault or negligence on his part.

The third count was substantially the same

as the first; the second count, which charged a defective construction of the car, in not supplying it with bumpers, or other means of preventing the draw heads from passing each other, was abandoned at the trial As stated in the brief of the plaintiff's counsel, "the first and third counts allege that the bootjack siding was negligently and unskillfully constructed by the defendant, with so sharp a curve that the draw heads of the cars in use by it would pass each other and cause the cars to crush any one who attempted to make a coupling thereon;" and this alleged faulty construction of the track was the principal matter of contest on the trial; the plaintiff contending that the defendant was bound, in duty to its workmen and employés, to construct a track that would not expose them to the danger which existed in this case; whilst the defendant contended, and offered evidence to prove, that the track was constructed according to the requirements of the situation, a sharp curve being necessary at that place in order to place the cars, when loading, alongside of the dock or slip; that such curves are not uncommon in station yards; that in such conditions the draw heads of cars quite often pass each other when the cars come together; that this must be presumed to have been well known to Tuttle, the deceased, who was an experienced yard man; that he accepted the employment with the full knowledge of its risks, and must be held to have assumed them; and that it was negligence on his part to place himself in such a situation as to incur the danger and suffer the injury complained of. It appeared by the evidence that, when trying to make the coupling, the deceased stood on the inside of the curve where the corners of the cars come in contact when the draw heads pass each other, and will crush a person caught between them; whereas, on the outside of the curve they are widely separated, and there is no danger. The defendants contended that the position thus taken by Tuttle was contributory negligence on his part. On the other hand, the plaintiff offered evidence tending to show that it was usual for the brakeman in coupling cars on a curve to stand on the inside, so as to see the engineer and exchange signals with him for stopping, backing or going forward. The defendants contended, and offered evidence tending to show, that this was not necessary, as there were always the yard master or others standing by and co-operating, by whom the signals could be given.

This statement of the pleadings and of the leading issues raised on the trial is sufficient for properly understanding the question of law presented to the court. Upon the evidence adduced, the judge directed the jury to find a verdict for the defendant; holding that Tuttle wantonly assumed the risk of remaining upon the inside of the draw bar, when he should have gone on the other side, and that the defendant ought not to be held in this action.

We have carefully read the evidence presented by the bill of exceptions, and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see *Richards* v. *Rough*, 53 Mich. 213; *Hayden* v. *Smithville Mfg. Co.* 29 Conn. 558. The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers, and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employés. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. For the views of this court in a cognate matter, see *Randall* v. *Baltimore & O. R. R. Co.* 109 U. S. 478, 483 [27: 1003, 1005], where it was said: "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another; and anyone who enters the service of a railroad company connected with the moving of trains, assumes the risk of that condition of things." It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employés have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen in the course of his employment, under such conditions as existed here.

Without attempting, therefore, to give a summary of the evidence, we have no hesitation in saying that the judge was right in holding that the deceased, by voluntarily assuming the risk of remaining on the inside of the draw bar, brought the injury upon himself; and the judge was right, therefore, in directing a verdict for the defendant. We are led to this conclusion, not only on the ground that the deceased, by his own negligence, contributed to the accident, but on the broader ground, already alluded to, that a person who enters into the service of another in a particular employment assumes the risks incident to such employment. *Judge* Cooley announces the rule in the following terms: "The rule is now well settled," says he, "that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks

incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is that the servant when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk, 'he must be supposed to have contracted that, as between himself and the master, he would run this risk.'" The author proceeds to show that this is also a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but it would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct and negligence of others in the same service; and in exercising such diligence and caution he would have a better security against injury to himself than any recourse to the master for damages could afford.

This accurate summary of the law supersedes the necessity of quoting cases, which are referred to by the author and by every recent writer on the same subject. Its application to this case is quite clear. The defendant, as we have seen, had a right to construct its side track with such curves as its engineers deemed expedient and proper; and as to the draw heads, and the absence of bumpers, the plaintiff herself abandoned all claim founded upon any supposed misconstruction of the cars in relation thereto. Then, it was clearly shown to be a not uncommon accident, especially on sharp curves, for the draw heads of cars to slip by and pass each other. Tuttle, the deceased, entered into the employment of the defendant as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things—the form of the side tracks, the construction of the cars, and the hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business, and his representative has no recourse for damages against the Company.

This view of the subject renders it unnecessary to examine the various particular instructions which the plaintiff's counsel requested the court to give to the jury. The only one that need be noticed is the following, namely:

"If the jury find that Tuttle had no notice or knowledge of the fact that the draw heads would pass on a portion of this siding, and that the fact itself would not be noticed or discovered by a careful and prudent man while engaged in coupling cars on said siding, then it cannot be said that he was guilty of contributory negligence, unless it had already come to his knowledge that the draw heads would pass."

On this point the judge stated, in his charge, that "he (the deceased) knew, as he was an experienced man, that draw bars do slip sometimes, even upon a straight track, as it has been testified to, and the sharper the curve the greater was the danger of their slipping." In making this statement the judge was fully borne out by the testimony, and there was no evidence to contradict it.

We find no error in the judgment, and it is therefore affirmed.

Mr. Justice **Miller**:

I dissent from this judgment, and especially the proposition that the Railroad Company owed no duty to its employés in regard to the sharpness of the curves of the track in the yards in which they are employed.

Mr. Justice **Harlan** unites in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MARCUS A. HANNA ET AL., *Plfs in Err.*, [24]
v.
JOHN B. MAAS ET AL.

(See S. C. Reporter's ed. 24-27.)

Practice—bill of exceptions—requirements—Rule 4—affirmance for failure to reduce expenses to proper form.

1. This court can only determine the validity of exceptions duly framed and presented.

2. A bill of exceptions which, instead of stating distinctly those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law, is insufficient.

3. In the case presented, this court affirms the judgment of the court below, without passing on the merits, the plaintiffs in error having failed to reduce their exceptions to proper form.

[No. 271.]

Argued Apr. 28, 29, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan. *Affirmed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **E. J. Estep**, for plaintiffs in error.

Messrs. **Daniel H. Ball, Walter H. Smith,** *A. T. Britton* and *A. B Browne,* for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought by Maas and others, citizens of Marquette in the State of Michigan, against Hanna and others, commission merchants and citizens of Cleveland in the State of Ohio, upon this contract, signed by the defendants and addressed to the plaintiffs' agent:

"Marquette, Mich., August 22, 1874. We will advance $25.25 per ton on 500 to 1000 tons" (increased by supplemental contract to 2000 tons) "Michigan charcoal pig iron, when delivered at Cleveland."

At the trial the plaintiffs introduced evidence tending to prove that such iron, on which the plaintiffs had advanced $20 a ton, was delivered by them to the defendants on the faith of

this contract, and was afterwards sold by the
[25] defendants for less than the amount of the plaintiffs' advances; and the plaintiffs recovered a verdict for the difference, amounting to $9,120.52. A motion by the defendants for a new trial was overruled, and judgment entered on the verdict, and the defendants sued out this writ of error.

The bill of exceptions signed by the presiding judge begins by stating that the parties respectively introduced the evidence shown in an exhibit annexed and marked A. That exhibit appears to contain a report of all the evidence introduced at the trial, with minutes that certain parts of it were objected to. The bill of exceptions then, without even stating that exceptions were taken to the admission of any of the evidence, proceeds and concludes as follows:

"And neither party having offered or given further testimony, the cause was argued by counsel; and thereupon the court charged the jury as set forth in the annexed exhibit, marked 'Charge,' and refused to charge as therein set forth; to which charges and refusals to charge the defendant at the time excepted, as set forth in said exhibit; and thereupon, after verdict and within the time fixed by the court, the defendant filed his motion for a new trial, which was heard and overruled by the court; to which ruling the defendant at the time excepted, and the court entered judgment upon the said verdict. Thereupon the defendant requested the court to sign and seal this his bill of exceptions, which is here accordingly done within the time limited by the court."

The exhibit marked "Charge," in the transcript sent up to this court, consists of three closely printed pages setting forth the whole charge of the judge, followed by as many more pages containing what appear to be a stenographer's notes of a conversation ensuing between the judge and the counsel of both parties as to the meaning and effect of the charge already given to the jury, but interspersed with remarks of either counsel that he "excepted," or "desired to note" or "to preserve" an exception to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested by counsel in the course of that conversation.

The object of a bill of exceptions is to put on
[26] record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains. 2 Inst. 426; Steph. Pl. 1st Am. ed. 111; *Turner* v. *Yates*, 57 U. S. 16 How. 14, 29 [14:824, 831]; *Insurance Co.* v. *Sea*, 88 U. S. 21 Wall. 158 [22:511]. If the exceptions so drawn up by the party in writing are found to be true, they are sealed, or often, in the practice of the federal courts, merely signed by the presiding judge. *Herbert* v. *Butler*, 97 U. S. 319 [24:958]; Rev. Stat. § 953. Minutes of the judge or clerk, or notes of a stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up. *Pomeroy* v. *Bank of Indiana*, 68 U. S. 1 Wall. 592 [17:688]; *Thompson* v. *Riggs*, 72 U. S. 5 Wall. 663 [18:704]; *Young* v. *Martin*, 75 U. S. 8 Wall. 354 [19:418]; *Insurance Co.* v. *Lanier*, 95 U. S. 171 [24:383]. The exceptions must be drawn up and settled in proper form in the court below, and cannot be amended or redrafted in this court. *Stimpson* v. *Westchester R. Co.* 44 U. S. 3 How. 552 [11:722].

This bill of exceptions has been framed and allowed in disregard of the settled rules of law upon the subject. No ruling upon evidence is open to revision, because none appears to have been excepted to; *Scott* v. *Lloyd*, 34 U. S. 9 Pet. 418, 442 [9:178, 186]; and the overruling of the motion for a new trial is not a subject of exception. *R. Co.* v. *Heck*, 102 U. S. 120 [26:58]. The bill of exceptions, instead of stating distinctly, as required by law and by the 4th Rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law. [27]

But to assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented.

The defendants having failed to reduce their exceptions to such a form that this court can pass upon them, the judgment must be affirmed. *Suydam* v. *Williamson*, 61 U. S. 20 How. 427 [15:978]; *Insurance Co.* v. *Sea*, above cited.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS W. BARTRAM ET AL. *Plffs. in Err.*, [116]

v.

WILLIAM H. ROBERTSON, Collector of of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 116-121.)

Duties—Treaties with Denmark and Hawaiian Islands—sugar imported from dominions of Denmark, not free from duty.

1. The Treaty between the United States and Denmark does not require the former to extend to the latter without compensation, privileges which it has conceded to the Hawaiian Islands in exchange for valuable concessions.

2. Sugar imported from the dominions of Denmark is not entitled to exemption from duty under the treaty with that country, because of the exemption from duty of sugar imported from the Hawaiian Islands; such exemption being in consideration of reciprocal commissions.

[No. 275.]

Argued April 29, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. Reported below, 21 Blatchf. 211. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry E. Tremain** and **A. J. Willard**, for plaintiffs in error:

In the case at bar this court is called upon to interpret and to apply the Treaty, and to determine, in disposing of the resistance of the Executive Department to its application, whether that resistance is by proper authority, and whether either Congress or any governmental authority has in any wise intruded upon the operation of the treaty article in question and upon the co-ordinate obligation on the part of the Judiciary Department of the United States Government to enforce this Treaty as part of the municipal law of the land.

A peculiarity of the judicial powers of the courts of this country in regard to treaties is thus alluded to by *Chief Justice* Marshall in the Supreme Court of the United States: "A treaty is in its nature a contract between two Nations, not a legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. * * * *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253-314 (7: 415, 435). * * * The courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty."

U. S. v. *Rauscher*, 119 U. S. 408 (*ante*, 425).

This court will take the treaty provision as municipal law and apply it to the case in hand unless insurmountable obstacles intervene. In the entire absence of any congressional action since the treaty provision became operative, no obstacle, and no reason for one, is presented.

The following are some of the notable instances where this court has expounded treaties or determined rights claimed under treaty provisions:

U. S. v. *The Peggy*, 5 U. S. 1 Cranch, 103 (2: 49); *Society Prop. Gospel* v. *New Haven*, 21 U. S. 8 Wheat. 464 (5: 662); *Orr* v. *Hodgson*, 17 U. S. 4 Wheat. 462 (4: 615); *Fairfax* v. *Hunter's Lessee*, 11 U. S. 7 Cranch, 627 (3: 461); *Blight's Lessee* v. *Rochester*, 20 U. S. 7 Wheat. 544 (5: 518); *Chirac* v. *Chirac*, 15 U. S. 2 Wheat. 271 (4: 237); *Prevost* v. *Greneaux*, 60 U. S. 19 How. 7 (15: 574); *Foster* v. *Neilson*, 27 U. S. 2 Pet. 314 (7: 435); *Garcia* v. *Lee*, 37 U. S. 12 Pet. 518 (9: 1179); *Comegys* v. *Vasse*, 26 U. S. 1 Pet. 193 (7: 108); *The Amiable Isabella*, 19 U. S. 6 Wheat. 71 (5: 208); *Oldfield* v. *Marriott*, 51 U. S. 10 How. 146 (13: 364).

Read as a statute in 1882, existing at all events since September 9, 1876, the Danish Treaty operates, of itself, *proprio vigore*, to limit the rate and amount of duties on Danish products to such rate and amount of duties as may be at any time payable on the like products of any other foreign country.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiffs are merchants doing business in the City of New York, and in March and April, 1882, they made four importations of brown and unrefined sugars and molasses, the produce and manufacture of the Island of St. Croix, which is a part of the dominions of [117] the King of Denmark. The goods were regularly entered at the custom house at the Port of New York, the plaintiffs claiming at the time that they should be admitted free of duty under the Treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were, under the Treaty with their King, and the Act of Congress of August 15, 1876, to carry that Treaty into operation, admitted free of duty. The defendant, however, who was the Collector of the Port of New York, treated the goods as dutiable articles, and, against the claim of the plaintiffs, exacted duties upon them under the Acts of Congress, without regard to those Treaties, amounting to $33,222, which they paid to the Collector under protest, in order to obtain possession of their goods. They then brought the present action against the Collector to recover the amount thus paid. The action was commenced in a court of the State of New York, and, on motion of the defendant, was transferred to the Circuit Court of the United States.

The complaint sets forth the different importations; that the articles were the produce and manufacture of St. Croix, part of the dominions of the King of Denmark; their entry at the custom house, and the claim of the plaintiffs that they were free from duty by force of the Treaty with the King of Denmark and of that with the King of the Hawaiian Islands; the refusal of the Collector to treat them as free under those Treaties, his exaction of duties thereon to the amount stated, and its payment under protest; and asked judgment for the amount. The defendant demurred to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action against him. The circuit court sustained the demurrer, and ordered judgment for the defendant with costs (21 Blatchf. 211); and the plaintiffs have brought the case to this court for review.

We are thus called upon to give an interpretation to the clause in the Treaty with Denmark which bears upon the subject of duties on the importation of articles produced or manufactured in its dominions, and the effect upon it of the Treaty of the Hawaiian Islands for the admission without duty of similar articles, the produce and manufacture of that Kingdom.

The existing commercial Treaty between the United States and the King of Denmark, [118] styled "General Convention of Friendship, Commerce, and Navigation," was concluded on the 26th of April, 1826. It was afterwards abrogated, but subsequently renewed, with the exception of one article, on the 12th of January, 1858.

The first article declares that "The contracting parties, desiring to live in peace and harmony with all the other Nations of the earth,

by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other Nations in respect to commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely made, or upon allowing the same compensation if the concession were conditional."

The fourth article declares that "No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States, than are or shall be payable on the like articles being the produce or manufacture of any other foreign country."

The Treaty, or Convention as it is termed, between the King of the Hawaiian Islands and the United States, was concluded January 30, 1875, and was ratified May 31 following. Its first article declares, that "For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands," and "as an equivalent therefor," the United States agree to admit all the articles named in a specified schedule, the same being the growth, produce, and manufacture of the Hawaiian Islands, into all the ports of the United States free of duty. Then follows the schedule, which, among other articles, includes brown and all other unrefined sugars and molasses.

The second article declares that "For and in consideration of the rights and privileges granted by the United States of America in the preceding article," and "as an equivalent therefor," the King of the Hawaiian Islands agrees to admit all the articles named in a specified schedule which were the growth, manufacture, or produce of the United States of America, into all the ports of the Hawaiian Islands free of duty. Then follows the schedule mentioned. [119]

By the fourth article it is also agreed on the part of the Hawaiian King, that so long as the Treaty remains in force he will not lease or otherwise dispose of, or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privileges, or rights of use therein, to any other power, State or government, nor make any treaty by which any other Nation shall obtain the same privileges, relative to the admission of any articles free of duty, thereby secured to the United States.

The fifth article declared that the Convention should not take effect until a law had been passed by Congress to carry it into operation. Such a law was passed on the 15th of August, 1876. 19 Stat. at L. 200, chap. 290. It provided that whenever the President of the United States should receive satisfactory evidence that the Legislature of the Hawaiian Islands had passed laws on their part to give full effect to the Convention between the United States and the King of those Islands, signed on the 30th of January, 1875, he was authorized to issue his Proclamation declaring that he had such evidence, and thereupon, from the date of such Proclamation, certain articles, which were named, being the growth, manufacture, or produce of the Hawaiian Islands, should be introduced into the United States free of duty, so long as the Convention remained in force. Such evidence was received by the President, and the Proclamation was made on the 9th of September, 1876.

The duties for which this action was brought were exacted under the Act of the 14th of July, 1870, as amended on the 22d of December of that year. 16 Stat. at L. 262, 397. The Act is of general application, making no exceptions in favor of Denmark or of any other Nation. It provides that the articles specified, without reference to the country from which they come shall pay the duties prescribed. It was enacted several years after the Treaty with Denmark was made. [121]

That the Act of Congress, as amended, authorized and required the duties imposed upon the goods in question, if not controlled by the Treaty with Denmark, after the ratification of the Treaty with the Hawaiian Islands, there can be no question. And it did not lie with the officers of customs to refuse to follow its directions because of the stipulations of the Treaty with Denmark. Those stipulations, even if conceded to be self executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties upon goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The Treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods, the produce or manufacture of that country, imported into the United States. It stipulates for the exemption from duty of certain goods thus imported, in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the Treaty with Denmark, and if the exemption is deemed a "particular favor," in respect of commerce and navigation, within the first article of that Treaty, it can only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into [12

the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions, which she has never proposed to make.

Our conclusion is that the Treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the Treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[21] STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS, *Plff. in Err.*,

v.

ST. LOUIS RAIL FASTENING COMPANY.

(See S. C. Reporter's c.l. 21-23.)

Practice—certificate of division in opinion—office of — general question — recovery upon checks drawn by clerk of district court.

The office of a certificate of division in opinion between the judges of the circuit court is to submit to this court one or more points of law, and not the whole case, nor the general question whether upon all the facts, as agreed by the parties in a case stated, or specially found by the court when a trial by jury has been waived, the judgment should be for one party or the other.

[No. 268.]

Submitted April 28, 1887. Decided May 23, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. *Dismissed.*

Statement by *Mr. Justice* **Gray**:

This was an action of assumpsit, brought by a corporation of Missouri against a National Bank established in Illinois, to recover the amount of certain checks drawn on the Bank in favor of the corporation. Plea, non-assumpsit. A jury was duly waived and the circuit court, held by two judges, found and stated in detail certain facts, which may be summed up as follows:

About March 1, 1878, the Bank was appointed depository for the United States District Court for the Southern District of Illinois, and was informed of the appointment. Shortly afterwards the clerk of that court began to deposit with the Bank funds belonging in the registry of the court, and by his direction the Bank opened an account with the court. These de-
[22] posits were at first made to the credit of the particular case to which the funds belonged, by name and number; but subsequently by the clerk's direction the name was dropped and only the number was entered on the ticket accompanying each deposit, as well as in the books of the Bank and in the clerk's deposit book, the Bank understanding that the numbers referred to the cases in the court.

During the years 1879, 1880 and 1881 case No. 2105 was pending on the bankruptcy side of the court, and deposits of moneys realized from the estate of H. Sandford & Co., and belonging in that case, amounting to $38,300, were so made and entered.

In May, 1881, four checks, for $2,653.41 in all, drawn by the clerk and countersigned by the judge of the district court, and in the form adopted by the court in its dealings with the Bank, were given by the clerk to the plaintiff for dividends on its claims proved in case No. 2105, and were afterwards presented to the Bank, and refused payment, and on July 8, 1881, were protested for nonpayment.

The funds belonging to case No. 2105 that had been deposited with the Bank would have been more than sufficient to pay these and all other checks drawn in that case; but the account of the court had been overdrawn to the amount of $43.13, by the Bank's having paid checks in the usual form, including many checks drawn in cases, as indicated by the numbers, in which no deposit had ever been made. The Bank always treated the account as an entirety, and paid out of it all the checks drawn against it until the deposits were exhausted.

The Bank never was furnished with a copy of Rule 28 in bankruptcy, and had no actual knowledge of that rule. The clerk never presented to the court the account and vouchers required by the Revised Statutes, section 793, and never made or was required to make the monthly report provided for in that rule.

The two judges certified to this court that upon these facts they were "opposed in opinion as to the legal right of the plaintiff to recover on the checks in controversy." The presiding justice being of opinion that the law of the case was with the plaintiff, judgment was entered accordingly in the circuit court, and the defendant sued out this writ of error.

Mr. **Henry S. Greene** and **Milton Hay**, for plaintiff in error.

Messrs. **George Hunt** and **C. C. Brown**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of [23]
the court:

The matter in dispute being less than $5,000, the jurisdiction of this court depends upon the certificate of division of opinion, in which the only question certified is whether, upon all the facts found by the court, the plaintiff has the legal right to recover upon the checks in controversy.

But the office of a certificate of a division of opinion between two judges in the circuit court is to submit to this court one or more points of law, and not the whole case, nor the general question whether upon all the facts, as agreed by the parties in a case stated, or specially found by the court when a trial by jury has been waived, the judgment should be for the one party or the other.

In *Harris* v. *Elliott*, 35 U. S. 10 Pet. 25 [9: 338], one of the questions certified was "upon the facts stated, whether the plaintiffs have any right or title to the lands taken for streets, in which the trespass is supposed to have been committed, and can maintain their said action."

This court held that it could express no opinion upon that question, because, as said by *Mr. Justice* Thompson in delivering judgment, it "is too general, embracing the merits of the whole case, and does not present any single point or question; and it has been repeatedly ruled in this court that the whole case cannot be brought here, under the Act of 1802, upon such a general question."

The subsequent decisions under the successive Acts of Congress upon this subject are uniformly to the same effect. *U. S.* v. *Briggs*, 46 U. S. 5 How. 208 [12: 119]; *Nesmith* v. *Sheldon*, 47 U. S. 6 How. 41 [12: 335]; *Waterville* v. *Van Slyke*, 116 U. S. 699 [29: 772]; *Williamsport Nat. Bank* v. *Knapp*, 119 U. S. 357 [*ante*, 446].

The necessary conclusion is that the question certified cannot be answered, and that the *writ of error must be dismissed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[112]

EDWIN PARSONS, *Appt.*, *v.* WILLIAM M. ROBINSON.

(See S. C. Reporter's ed. 112-121.)

Railroads—foreclosure proceedings—what is final decree for purposes of appeal.

A decree entered in proceedings to foreclose a railroad mortgage, which ascertains the amount due and orders its payment by a day certain, but which does not fully identify the property, nor determine the extent and amount of prior liens, what the order of sale shall contain, nor what shall be the form of advertisement for the sale, is not final for purposes of an appeal. Until the particulars of the prior liens are ascertained, the property identified and the time, place and manner of sale determined, the litigation between the parties on the merits of the case will not be determined.

[No. 1888.]

Submitted April 27, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On motion to dismiss. *Granted.*

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Richard C. Dale** and **Samuel Dickson,** for appellee, in support of motion:

The decree is not final. Under well settled rules relating to appeals, a decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance by this court, the court below will have nothing to do but to execute the decree it has already entered.

Daineese v. *Kendall*, 119 U. S. 53 (*ante*, 305); *Grant* v. *Phœnix Ins. Co.* 106 U. S. 429 (27:287); *R. R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 405 (23:136).

Messrs. **D. H. Chamberlain** and **Francis A. Lewis,** for appellant, *contra:*

The decree here appealed from is a final decree, and the appellant is entitled to appeal therefrom.

Wabash & Erie Canal v. *Beers*, 66 U. S. 1 Black, 54 (17: 41); *Bronson* v. *R. R. Co.* 67 U. S. 2 Black, 524 (17: 359); *R. R. Co.* v. *Sautter*, 69 U. S. 2 Wall. 440 (17:860); *Thompson* v. *Dean*, 74 U. S. 7 Wall. 342 (19:94); *Grant* v. *Phœnix Ins. Co.* 106 U. S. 429 (27:287); *St. Louis, I. M. & S. R. R. Co.* v. *Southern Exp. Co.* 108 U. S. 24 (27:638); *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180 (27:898).

R. R. Co. v. *Swasey*, 90 U. S. 23 Wall. 405 (23:136), is an apt illustration of what is not a final decree.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss an appeal, because the decree appealed from is not a final decree, and also because the value of the matter in dispute does not exceed $5,000.

The suit was originally brought by William M. Robinson, the holder of general mortgage bonds, so called, of the Philadelphia and Reading Railroad Company, to the amount of $5,000, [113] to foreclose the mortgage given for their security. Afterwards Edwin Parsons, the present appellant and the holder of $100,000 of the same issue of bonds, intervened by leave of the court, and became a party complainant in the suit.

On the 6th of October, 1886, a decree was entered, finding that the railroad company had made default in the payment of the interest, and that the complainants were "entitled to have a sale of the mortgaged premises, in accordance with the provisions in said mortgage contained, upon the failure of the defendant to pay, within a time to be hereafter fixed, the amount of the bonds and coupons now outstanding entitled to the security of the said mortgage;" and for the purpose of finding this amount the cause was referred to masters to ascertain and report "the amount due upon the bonds, principal and interest, which are entitled to the security of said mortgage; and also to report what liens, if any, are prior to the bonds, or to any and what bonds secured by said mortgage; and also to ascertain and report the extent of the lien of the said mortgage upon the railroad, branches, leasehold interests, franchises, and other property of the Philadelphia and Reading Railroad Company, including not only the property owned by said company at the time of the execution of said mortgage, but also that which has since been acquired."

Afterwards the masters filed their report, setting forth: 1, the amount due on the bonds entitled to the security of the general mortgage; 2, the liens which were prior to that mortgage; and 3, by general description, the property covered. Exceptions were taken to this report, and, on consideration thereof, the court ordered, March 7, 1887, that the company pay, on or before June 7, 1887, the amount found due by the masters for interest, and also $1,694,250 for "general mortgage scrip," with interest from July 1, 1886, and in default thereof, "that the defendants, the Philadelphia and Reading Railroad Company, Samuel W. Bell, trustee, the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees, and all persons claiming under them, be absolutely barred and foreclosed of and from all right and equity of redemption in and to the premises in said mortgage described; and, in default of [114] such payment as aforesaid, the court do further order and decree the defendant, the Fidelity Insurance, Trust and Safe Deposit Company, trustee in said mortgage mentioned, to sell the

railroads, estates, real and personal, corporate rights and franchises and premises in said mortgage mentioned, at such time and place and in such manner as the court may hereafter determine; and it is further ordered that this cause be referred to the masters heretofore appointed, with instructions to report to the court, on or before the 10th day of July, 1887, the extent and amount of all liens prior to said general mortgage upon the properties thereby covered, and also to report to the court full and detailed statements of the several properties, real and personal, of the Philadelphia and Reading Railroad Company subject to the lien of said general mortgage, in accordance with the principles stated in the report of the masters heretofore filed, and also to report what liens, if any, are upon the several properties of the said Philadelphia and Reading Railroad Company and the Philadelphia and Reading Iron and Coal Company junior to said general mortgage, and the order of their priority; and it is further ordered that said masters do prepare and report to the court an order of sale of said mortgaged properties, and form of advertisement therefor."

From that decree this appeal was taken by Parsons alone; and the first question we will consider is whether it is a final decree within the meaning of that term as used in the statutes which provide for appeals to this court from the final decrees of the circuit courts in cases of equity jurisdiction.

That "a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal," is no longer an open question in this court. *Grant* v. *Phœnix Ins. Co.* 106 U. S. 429, 431 [27:237,238], and cases there cited. Here, however, there is as yet no decree of sale. As was said in *R. R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 409 [23:137], "To justify such a sale, without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until [115] this is done, the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified."

In this case the amount due upon the debt has been ascertained and its payment by a day certain ordered; but "the extent and amount of all liens prior to said general mortgage upon the property thereby covered" have not been determined, and "full and detailed statements of the several properties * * * subject to the lien of said general mortgage" have not been furnished to the court. Neither has it been determined what "the order of sale of said mortgage properties" shall contain, nor what shall be the "form of the advertisement therefor." The court has, indeed, declared its intention of hereafter directing such a sale; but, as it requires further information to enable it to act understandingly in that behalf, has sent the case again to the masters with instructions to inquire and report upon the matters in doubt. All this is necessarily implied from the provision that the sale is to be "at such time and place and in such manner as the court may hereafter determine," coupled, as it is, with directions to the masters to "prepare and report to the court an order of sale of said mortgaged properties and form of advertisement therefor," together with a statement in detail of the property to be sold and its exact condition as to prior incumbrances. No order of sale can issue on this decree until these questions are settled and the court has given its authority in that behalf. Further judicial action must be had by the court before its ministerial officers can proceed to carry the decree into execution. Until the particulars of the prior liens are ascertained, the property identified, and the time, place, and manner of sale determined, the rights of the parties will not have been sufficiently settled to make it proper, in the opinion of the court, as expressed in its present decree, to direct that the sale go on. All these matters still remain for adjudication, and the decree, as it now stands, has not "terminated the litigation between the parties on the merits of the case." [116] Consequently it is not final. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [27:73], and the cases there cited.

As the motion to dismiss must be granted on this ground, it is unnecessary to consider whether the amount in dispute is sufficient to give us jurisdiction.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD F. BULLARD, *Plff. in Err.*, [167]
v.
DES MOINES AND FORT DODGE RAILROAD COMPANY, AND CHARLES E. WHITEHEAD, Trustee of SAID COMPANY.

(See S. C. Reporter's ed. 167-176.)

Des Moines River Grant—history of—order of Secretary of Interior—Joint Resolution of March 2, 1861—effect of.

1. The Joint Resolution of March 2, 1861, relinquishing the title of the United States to certain lands, situated along the Des Moines River above the Raccoon Fork, and then held by *bona fide* purchasers under the State of Iowa, did not operate to terminate the order of the Secretary of the Interior, withdrawing said lands from public sale, settlement or preemption.

2. It is therefore held in the case presented, that a claim based upon settlements made on such lands before and after the passage of the Act of July 12, 1862, granting them to the State of Iowa for the original purposes of the grant of 1846, is invalid.

[No. 287.]

Argued and submitted May 4, 1887. Decided May 23, 1887.

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Edward F. Bullard**, in person, for plaintiff in error.

Mr. John F. Duncombe, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

The case originated in a suit in equity, brought in the District Court of that State for the County of Humboldt by Edward F. Bullard, who is the appellant here. The object of [169] the bill was to quiet or remove clouds upon the title of the plaintiff to certain lands in that State, to which the defendant filed an answer and cross bill, asking that its own title might be declared to be good and established by the decree of the court. The district court of that county made a decree in favor of the defendant, which on appeal to the Supreme Court of the State was affirmed.

There were many questions considered in the state courts of which this court can take no jurisdiction. But the main question raised there, and the only one here, has relation to a subject which has been often considered by this court. It arises out of what is called the Des Moines River Land Grant, which was originally made by the Congress of the United States to the then Territory of Iowa. A short history of the matters growing out of that grant, with some references to the decisions of this court, will simplify the complex record presented in this case.

By the Act of Congress of August 8, 1846, 9 Stat. at L., p. 77, there was "granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork (so called), in said Territory, one equal moiety, in alternate sections, of the public lands, remaining unsold, and not otherwise disposed of, encumbered, or appropriated, in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Soon after the passage of this statute the State of Iowa created a board of public works, to take charge of this river improvement under a system of slack water navigation on that stream. The contract for the execution of the work came into the hands of a corporation called the Des Moines Navigation Company. The work progressed for a number of years, several dams and locks being built from the mouth of the river upwards, the means for paying the contractors coming solely from the sales of the lands granted to the State for that purpose. These lands, as the work went on [170] and the money was needed, were certified to the State by the Secretary of the Treasury, and by it either sold to purchasers or conveyed to the contractors who did the work. The State made no appropriations and furnished no means from any other source than this for the prosecution of the enterprise.

So long as no request on the part of the State for the certification of lands lying above the mouth of the Raccoon Fork was made of the Secretary of the Treasury, no question arose as to the extent of the grant. Afterwards, however, when a demand was made upon that officer that such lands should be certified, he objected on the ground that the grant of lands did not extend beyond that point; that, as by the language of the statute making the grant it was "for the improvement of the Des Moines River from its mouth to the Raccoon Fork," it was not intended to grant lands lying above that point, although the same river ran through the entire length of the State, from near its northwestern corner, in the Territory of Minnesota to the southeast corner, where it flows into the Mississippi River.

This question became the subject of active negotiations and controversy between the State of Iowa, through its Governor and members of Congress, and the Treasury Department, as well as the Interior Department, which was created during this time and succeeded to the charge of this subject. Meanwhile one of the secretaries certified to the State a part of the land in dispute, running to a certain range of townships above the Raccoon Fork. It may as well be stated here that the lands now in controversy were not among the lands so certified, but are among the odd sections lying north of those thus certified and within five miles of the Des Moines River.

On April 6, 1850, Secretary Ewing, while concurring with Attorney-General Crittenden in his opinion that the grant of 1846 did not extend above the Raccoon Fork, issued an order withholding all the lands then in controversy from market "until the close of the then session of Congress," which order has been continued ever since, in order to give the State the opportunity of petitioning for an extension of the grant by Congress. This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from [171] sale, purchase, or preemption all the lands in controversy; and unless the case we are about to consider constitutes an exception, it has never been revoked.

In 1856 Congress granted to the State of Iowa, for the purpose of aiding in the construction of several railroads across that State from the Mississippi to the Missouri River, every alternate section, as shown by odd numbers, of the lands on each side of said roads, each of which, when the line was fixed, crossed the Des Moines River and ran through the lands which the State claimed had been granted to it for the purpose of improving the navigation of that stream.

Pending this controversy between the State of Iowa and the authorities of the United States as to the extent of the grant, a suit was brought by one of these railroad companies, that the question might be decided by this court. The case is reported as the *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 [16: 500] decided in 1860, and it was held that the grant did not extend above the Raccoon Fork. As soon as this decision was made, the State, through its congressional delegation, sought the action of the Congress of the United States to obtain the passage of an Act which would secure the grant to the State and its grantees in the full extent which they believed Congress had originally intended by the Act of 1846. That the propriety of some action by Congress, and the demand for it was pressing, is obvious when we consider that the Des Moines Navigation Company, under contract with the State, had spent large sums of money beyond what they had received from the State, and beyond the value of the lands certified to the State by the secretary. The work, with all the materials and implements on hand, was suspended, and the danger of the works being

swept away and ruined by floods in the river was imminent. The whole subject was before Congress; but, without waiting to dispose of it entirely, that body, by way of immediate relief, passed the following Joint Resolution, approved March 2, 1861, 12 Stat. at L. 251.

"That all the title which the United States still retain in the tracts of land along the Des [172] Moines River, and above the mouth of the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior, as part of the grant by Act of Congress approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be and the same is hereby relinquished to the State of Iowa."

At the next session of Congress a Statute was passed, approved July 12, 1862, which provided as follows:

"That the grant of lands to the then Territory of Iowa for the improvement of the Des Moines River made by the Act of August 8, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said State; such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines and Minnesota Railroad, in accordance with the provisions of the Act of the General Assembly of the State of Iowa, approved March 22, 1858, etc." 12 Stat. at L. 543.

By this Joint Resolution and this Act of Congress the United States relieved so far as it could the misfortune of the construction of the grant to the Territory of Iowa of 1846, made by this court, and ratified the construction which had always been claimed by the State.

During all this controversy there remained the order of the department having control of the matter, withdrawing all the lands in dispute from public sale, settlement or preemption. This withdrawal was held to be effectual against the grant made by Congress to the railroad companies in 1856, because that Act contained the following proviso:

"That any and all lands heretofore reserved to the United States, by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation [173] of this Act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States." 11 Stat. at L. 9.

See *Wolcott* v. *Des Moines Co.* 72 U. S. 5 Wall. 681 [18:689], and *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 [21:561], in which cases is also to be found a very full and clear recital of the history of this Des Moines grant controversy.

On May, 1860, the Commissioner of the General Land-Office sent to the registers and receivers of that office at Des Moines and Fort Dodge the following printed notice:

"Notice is hereby given that the land along the Des Moines River, in Iowa, within the claimed limits of the Des Moines grant, in that State, above the mouth of the Raccoon Fork of said river, which has been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the supreme court against the claim. This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

"JOHN S. WILSON,
"*Commissioner of the Gen. Land-Office*
"Gen. Land-Office, May 18, 1860."

It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land-office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the State of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the preemptions under which the plaintiff claims could not have been made. But it is argued that the Joint [174] Resolution of 1861 terminated this condition of suspense, and in and of itself ended the withdrawal of these lands which had been established and continued since the controversy originated between the State and the Federal Government as to the extent of the grant. This is the only foundation on which plaintiff's title to the land in controversy in this case rests.

We do not think the Joint Resolution had the effect to end the reservation of these lands from public entry. Whether we consider the purpose of the original order, its long continuance, and that it has been held, in the face of an Act of Congress granting lands for public purposes to the railroads already mentioned, to constitute such a withdrawal as that Act excepts from the operations of the grant, and that up to the present time no preemptions or sales have been finally recognized as valid by the department or by the courts, it would be very extraordinary if the Joint Resolution should have that effect. It does not purport to act upon all the matters which were in controversy between the State and the General Government. It certainly did not act upon all the claims and matters in question then pending before Congress in regard to these lands. It was, indeed, a very limited disposition of a part of the matter, which Congress supposed might then be acted upon with safety without further investigation. It was simply the recognition of the title which had passed to the grantees of the State of Iowa in regard to the lands which had been certified by the proper authorities of the General Government to the State under the Act of 1846, and which, by the decision in *Dubuque and Pacific R. R. Co.* v. *Litchfield* [*supra*], had been held to be unwarranted by the statute. Congress, urgently pressed by parties who were innocent purchasers under the State, passed the

resolution which went to this extent, in the last days of the session, securing to such purchasers, so far as the United States could do so, their title to the lands that they had bought under the sanction of this action of the department.

The broader and larger question of the title to the lands within five miles of the Des Moines [175] River, above Raccoon Fork, which had not been certified to the State, and which were declared by the decision of *Dubuque & Pacific R. R. Co.* v. *Litchfield* not to be included within the grant of 1846, Congress retained for further consideration, and, at its next session after this Joint Resolution was passed, it completely disposed of the whole subject, so far as it was within its power to do so, by validating the grant of 1846 to the full extent of the construction claimed by the State of Iowa. If the order of the Commissioner of the General Land-Office of May 18, 1860, was in force up to the passage of the Joint Resolution, it is not possible to perceive why it terminated then. It was declared by the commissioner that the order or notice was made to protect these lands from location by any species of scrip or warrant, notwithstanding the decision of the supreme court to afford time for Congress to further consider the case.

This is not the way in which a reservation from sale or preemption of public lands is removed. In almost every instance, in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It cannot be seen, from anything in the Joint Resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it; that the reason for this withdrawal or reservation continued as strongly as before, and it cannot be doubted that the subject was before Congress, as well as before its committees, and that the Act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned.

The title of the plaintiff, therefore, rests upon settlements upon odd sections of land within five miles of the Des Moines River, which were reserved from sale or preemption at the time the settlements were made. Two of the settlements, which are the foundation of plaintiff's title, were made in May, 1862, only a few days before the passage of the Act of July in the same year; and one of the settlements under [176] which the plaintiff claims was made after the passage of that Act. The title was transferred by that Act to the State of Iowa for the original purposes of the grant of 1846.

The object of this bill is to have a declaration of the court that the title of the plaintiff under those settlements and preemptions is superior to the title conferred by Congress on the State of Iowa and her grantees under the Act of July 12, 1862. If the lands were at the time of these settlements and preemption declarations effectually withdrawn from settlement, sale or preemption, by the orders of the department, which we have considered, there is an end of the plaintiff's title, for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the Act of 1862, and no title could be initiated or established, because the Land Department had no right to grant it. This proposition, which we have fully discussed, will be found supported by the following decisions, which are decisive of the whole controversy. *Dubuque & Pac. R. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 [16:500]; *Wolcott* v. *Des Moines Co.* 72 U. S. 5 Wall. 681 [18:689]; *Homestead Co.* v. *Valley R. R.* 84 U. S. 17 Wall. 153 [21:622]; *Williams* v. *Baker* and *Cedar Rapids R. R. Co.* v. *Des Moines Nav. Co.* Id. 144 [21:561]; *Wolsey* v. *Chapman*, 101 U. S. 755 [25:915]; *Dubuque etc. R. R. Co.* v. *Des Moines V. R. E. Co.* 109 U. S. 334 [27:954].

The judgment of the Supreme Court of the State of Iowa, founded on the same view of the subject as above set forth, is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY F. BEAN ET AL., *Appts.*, [496]
v.
WILLIAM L. PATTERSON ET AL.

(See S. C. Reporter's ed. 496-501.)

Husband and wife—transactions between—right of husband to settle property upon wife—conveyance by husband when insolvent to secure indebtedness to wife—consideration.

1. The right of a husband to settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud, is indisputable.

2. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties.

3. An indebtedness from the husband to the wife, arising upon the application of the proceeds of real estate, purchased for the wife by the husband when solvent, to the payment of the husband's debts, is a sufficient consideration to support a conveyance by him, when insolvent, to secure such indebtedness.

[No. 233.]

Argued April 18, 19, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Western Division of the Western District of Missouri. Opinion below, 12 Fed. Rep. 739. 4 McCrary, 179. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **James S. Botsford** and *M. T. C. Williams*, for appellants.

Mr. **George G. Vest**, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit in equity to set aside as fraudu- [497] lent and void, as against the plaintiffs and other creditors of the defendant William Miller, a deed of 920 acres of land in Atchison County, Missouri, executed by him and Mary Miller, his wife, to William L. Patterson, as

trustee, to secure to her an alleged debt of $16,000. The deed bears date on the 10th of November, 1878, and recites the indebtedness to her of William Miller in the amount stated with interest from June 25, 1871, "being the sum realized and received by said William Miller from the sale of the individual property of the said Mary Miller, and used by him in payment for the real estate hereinbefore mentioned and described, and to secure the indebtedness [498] of the said William Miller on account thereof, which said sum of $16,000, with interest thereon, is due and payable on the 25th day of June, A. D. 1876."

It appears that William Miller was, in 1857, and for some years afterwards, a merchant in Catasauqua [Lehigh] County, Pennsylvania, and was successful in business there. Subsequently he became a contractor for the raising of mineral ores in that State, and at a later period was engaged in building the Lehigh and Susquehanna Railroad. In 1868 he was a contractor on the Union Pacific Railroad. In this business he made large sums of money. In 1878 he had a contract for building the whole or part of the Chicago and Atlantic Railway in Ohio, and, on the 20th of August of that year, he sublet to the plaintiffs the construction of twelve miles of the road. By the terms of his contract with them he was to pay for the work of each month during the following month, after the receipt of the estimate of the work by the engineer in charge. The work as thus estimated for the months of September and October of that year, amounted to $7,158, and the subsequent work in that and the following year carried this amount to about $14,000. For the indebtedness thus incurred the plaintiffs brought suit in the Circuit Court of Atchison County and sued out a writ of attachment, which was levied upon the land embraced in the trust deed to William L. Patterson. Judgment was recovered in that suit for $14,000, but to the enforcement of the attachment the trust deed to Patterson was in the way, and, in order that the attachment might be enforced by a sale of the land, the present suit was commenced to set the deed aside.

The truth of the recital, that the indebtedness, to secure which the deed was executed, was for sums realized and received by William Miller from the sale of the individual property of Mary Miller, is assailed, and the statement averred to be false, and the instrument charged to have been executed to defraud the plaintiffs and other creditors of Miller.

In support of the truth of the recital, several deeds of valuable property to Mrs. Miller, executed and delivered in 1865, 1866 and 1868 were produced, and the property shown to have been [499] afterwards used to pay the debts of William Miller. Thus, on the 9th of November, 1865, she received a deed from one Thomas and wife of a certain tract of ground in Catasauqua, Pennsylvania, reciting a consideration of $8,050. On February 26, 1866, she received a deed from Horn and wife of another tract of land in the same place, for the alleged consideration of $1,200. On April 1, 1868, she acquired a further piece of property in that place by deed from one Koons and wife, reciting a consideration of $6,000. These three deeds were for "her only proper use and behoof."

It is conceded that William Miller, the husband, furnished the money with which these several tracts were purchased. That fact does not affect the validity of the deeds, nor the right of the wife to hold the property for her own use. He was at the time possessed of ample means, beyond any claim against him. Indeed, it does not appear that he was then in debt at all, and, as we said in *Jones* v. *Clifton*, 101 U. S. 225 [25: 908], "The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by *Chief Justice* Marshall, in *Sexton* v. *Wheaton*, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others." 21 U. S. 8 Wheat. 229 [5: 603]. And in *Moore* v. *Page*, 111 U. S. 117 [28: 378], we said: "It is no longer a disputed question that a husband may settle a portion of his property upon his wife if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit."

On the 14th of February, 1870, Mrs. Miller also received a deed of a tract of land in Atchison County, Missouri, from Ramsay and wife, [500] containing, as represented, about 520 acres, and called the Ramsay farm. The consideration of this deed is stated to have been $11,000.

In this case it appears that a portion of the claim of the plaintiffs, amounting to $7,158, was due when the deed of trust was executed, and also that William Miller was at that time insolvent. If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities of the future, it could not be sustained. It must find its support in the fact alleged in the recital, that the amount secured was a sum realized from the sale of her individual property, and used by him. It is not material whether the recital be accurate in stating that the sum received from the sale of her property was used in payment of the real estate covered by the deed; it is sufficient if Miller was indebted to his wife in the amount mentioned. That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay or secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon full consideration. Had it been given to a third party for a like debt it would not be open to question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon

full consideration from one to the other, or when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties.

In reaching this conclusion we do not treat the Ramsay farm in Missouri as having become the separate property of Mrs. Miller by the conveyance being taken in her individual name; and therefore have no occasion to consider whether, under the decisions of the Supreme Court of that State, it could be protected from the creditors of her husband.

This conclusion, with reference to the deed of trust, renders it unnecessary to consider the [501] numerous transactions of William Miller in the purchase and sale of property, and in his dealings with his creditors. They are not always as susceptible of explanation as would be desirable. It is enough, however, that they do not weigh down the considerations we have mentioned.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[1] WILLIAM BARNES, Trustee, *Appt.*,
v.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(See S. C. Reporter's ed. 1-21.)

Railroads—bill to foreclose mortgage of the La Crosse and Milwaukee Railroad Company—former foreclosure—bondholders, bound by—estoppel—decree upon creditors' bill—limitation of.

1. Upon a bill to foreclose the mortgage executed by the La Crosse and Milwaukee Railroad Company, June 21, 1858, it is *held:*

a. That the holders of the bonds secured by said mortgage consented in law to the foreclosure of February 11, 1859, made by the Trustee under the Wisconsin Act of February 8, 1859, and are bound thereby;

b. That the Milwaukee and Minnesota Railroad Company, organized to take the title of the property for the benefit of the bondholders, upon said foreclosure, represented the mortgage and the holders of the bonds secured thereby in the suits to enforce prior liens to which it was a party;

c. That the Trustee and the bondholders are bound by the decrees in said suits;

d. That the silence of the holders of the bonds, represented by the complainants, and which were not surrendered upon the organization of the Minnesota Company, during all the time said company was acting in their behalf, is equivalent to actual consent to the sale under which the company acquired the right to represent their interests in the litigation with prior lienholders;

e. That the decree in a certain suit by judgment creditors of the La Crosse Company to set aside the mortgage in question and the foreclosure thereunder, although broader in its terms, must be held to mean only that the foreclosure was voidable as to such creditors;

f. That said decree did not dissolve the Minnesota Company; and that said company still owned the property, subject only to the inferior liens of the creditors whose rights had been established.

2. Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided.

[No. 168.]

Argued March 22, 23, 24, 1887. Decided May 23, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Francis Fellowes, and William Barnes,** for appellant.

Mr. **John W. Cary,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court: [2]

This is a suit by William Barnes to foreclose a mortgage made to him, as Trustee, by the La Crosse and Milwaukee Railroad Company, hereinafter designated as the La Crosse Company. The record shows that this company was incorporated by the Legislature of Wisconsin on the 11th of April, 1852, to build and operate a railroad in that State between La Crosse, on the Mississippi River, and Milwaukee, on Lake Michigan, a distance of about 200 miles. The road was originally regarded by the company and treated as consisting of two divisions—one, called the Eastern Division, extending from Milwaukee to Portage City, a distance of 95 miles; and the other, called the Western Division, extending from La Crosse to Portage City, a distance of 105 miles.

The Eastern Division was incumbered by three mortgages, as follows: 1, the Palmer mortgage, so called, to secure an issue of bonds to the amount of $922,000; 2, a mortgage to Greene C. Bronson and James T. Soutter, to secure bonds to the amount of $1,000,000; and 3, a mortgage to the City of Milwaukee, to secure about $314,000. The Western Division was likewise incumbered: 1, by a mortgage to Greene C. Bronson, James T. Soutter and Shepherd F. Knapp, known as the land grant mortgage, to secure bonds to the amount of $4,000,000; and 2, by a mortgage to Albert Helfenstein, to secure bonds for $200,000.

Judgments had also been rendered against [3] the company prior to June 21, 1858, as follows:

1. One in favor of Selah Chamberlain, in the Circuit Court of the United States of the District of Wisconsin, on the second of October, 1857, for $629,089.72; (2) another in the same court, on the 7th of October, 1857, in favor of Newcomb Cleveland for $111,727.31; (3) another in the Circuit Court of Milwaukee County, in the spring of 1858, in favor of Sebra Howard for $25,000; and (4) another in the last named court in favor of the Mercantile Bank of Hartford, Conn., on the 12th of June, 1858, for $25,000.

On the first of June, 1858, the company, being embarrassed by a large floating debt, and by its obligations to persons who had mortgaged their farms to aid in building its road, determined to issue other bonds to the amount of $2,000,000, and secure them by another mortgage on its entire line of road between La Crosse and Milwaukee, subject to the prior mortgage incumbrances. Accordingly, the mortgage now in suit was executed to William Barnes, Trustee, on the 21st of June, 1858, to secure such an issue. It covered "All the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has been already acquired, together with all the rights, liberties, privileges and franchises of said railroad company in respect to said railroad from Milwaukee to La Crosse,"

except its land grant, but subject to all the prior mortgages above referred to. Afterwards, on the 11th of August, 1858, a mortgage supplemental to this was executed by way of further assurance. The mortgages thus executed contained a provision that if there should be default in the payment of interest for the space of fifteen days the principal should become due and the Trustee, on the request of the holders of bonds to the amount of $100,000, should advertise and sell the mortgaged property.

Afterwards the following judgments were recovered against the company; namely, 1, one in favor of Edwin C. Litchfield, in the District Court of the United States for the District of [4] Wisconsin, October 5, 1858, for $26,858.51; 2, another in the same court, April 5, 1859, in favor of Nathaniel S. Bouton for $7,937.37; 3, another in favor of Philip S. Justice and others, in the Circuit Court of the County of Milwaukee, for $2,085.33; and 4, another in the last named court, in favor of E. Bradford Greenleaf, September 10, 1858, for $840.86.

At the time when the mortgage to Barnes was executed, the Revised Statutes of Wisconsin, section 33, chapter 79, provided that, in case of any sale of a railroad "On or by virtue of any trust deed, or on any foreclosure of any mortgage thereupon, the party or parties acquiring the title under any such sale, and their associates, successors, and assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter all and the same rights, privileges, grants, franchises, immunities, and advantages in and by said mortgage or trust deed enumerated and conveyed which belonged to and were enjoyed by the company," so far as they relate to the property bought, in all respects the same as "such company might or could have done therefor had no such sale or purchase taken place; such purchaser or purchasers, their associates, successors, and assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such variations in manner and form of organization as their altered circumstances and better convenience may seem to require."

Afterwards, on the 8th of February, 1859, an Act supplementary to chapter 79 of the Revised Statutes was passed, by which it was provided that in case of any sale of a railroad in the State under a deed of trust, or on a foreclosure, if no one bid an amount equal to 75 per cent of the mortgage debt, the trustee might bid that amount or more, in his discretion, to the full amount of the debt and interest due, if competition should make it necessary; and that the estate so acquired by the trustee should "be held in trust for the holders of the outstanding bonds or obligations in the same manner as if they had become the purchasers, in proportion to the amount of such bonds or obligations severally held by them." Laws of [5] Wis. 1859, chap. 10, p. 13.

On the 11th of the same month of February holders of the bonds secured by the mortgage in favor of Barnes, to the amount of more than $100,000, presented to him their request in writing that he proceed to sell under his trust, and that he purchase the property at the sale for the bondholders at the price of 75 per cent of the outstanding bonds and past due interest, and more if necessary, not exceeding the full amount of the debt, principal and interest. Accordingly he advertised the property for sale pursuant to the provisions of his mortgage, and on the 21st of May, 1859, bought it under the authority of the Act of February 8, 1859, and the request which had been made, at the price of $1,593,333.33, for the benefit of the bondholders. Two days afterwards he united with certain persons representing themselves to be the owners of bonds to the amount of $1,802,850 in the organization of the Milwaukee and Minnesota Company, hereafter called the Minnesota Company, under section 33, chapter 79, of the Revised Statutes, to own and operate the railroad, and by the same instrument he transferred his purchase to the company. The capital stock was fixed at $2,500,000, and the articles of organization contained the following provisions in reference thereto:

"Article IV. The stockholders of the said Milwaukee and Minnesota Railroad Company are the holders of the said bonds, secured by the said mortgages or trust deeds, for whose benefit the said sale and purchase was made by the said William Barnes, and such other persons as shall hereafter associate themselves with them by subscription to the said capital stock or other proper means.

"Each holder of the said bonds, upon surrendering his bonds to the proper officer of the said Milwaukee and Minnesota Railroad Company, shall be entitled to receive a certificate of stock in the company hereby organized of an equal amount with the principal of the bonds so surrendered by him, subject, nevertheless, to the payment in money of the *pro rata* share of the costs, charges, and expenses of the said sale [6] and of the organization, and of carrying the same into effect, being the proportion of the whole of such costs, charges, and expenses as the amount of stock so to be issued shall bear to two millions of dollars.

"Article V. The payment of the said *pro rata* share of such costs, charges, and expenses is hereby declared to be a charge and lien upon the stock to which each holder of the said bonds is entitled. And the board of directors of the said Milwaukee and Minnesota Railroad Company shall have power to declare the right to such stock forfeited by the nonpayment of such *pro rata* share of such costs, charges and expenses, in such manner as the said board of directors shall determine."

On the 5th of December, 1859, a bill was filed in the District Court of the United States for the District of Wisconsin, by Bronson and others, trustees, against the La Crosse Company, the Minnesota Company, Helfenstein, trustee, and Cleveland and Chamberlain, judgment creditors, to foreclose the land grant mortgage on the Western Division, and on the 9th of the same month a like bill was filed in the same court against the same parties by Bronson and Soutter, trustees, to foreclose the mortgage to them on the Eastern Division. Under the bill for the foreclosure of the land grant mortgage, the Western Division was sold April 25, 1863, to purchasers who organized themselves, pursuant to section 33, chap. 79 of

the Revised Statutes, into a corporation by the name of the Milwaukee and St. Paul Railway Company, to which the property so purchased was duly conveyed. This company will be hereafter referred to as the St. Paul Company.

In the suit for the foreclosure of the mortgage on the Eastern Division such proceedings were had, that a receiver was appointed, who took possession of the mortgaged property, under an order of the court, and caused it to to be operated by the St. Paul Company, in connection with the Western Division. Afterwards, on the 18th of July, 1865, it was adjudged in this suit that the Minnesota Company, upon the payment of the amount ascertained to be due on the Bronson and Soutter mortgage for interest, be permitted to redeem and take possession of the Eastern Division and the rolling stock which belonged to it. On the 28th of September, 1865, a decree was entered [7] finding due upon the mortgage $1,000,000 of principal and $454,937.39 of interest, and ordering a sale of the mortgaged property for its payment, but saving the right of the Minnesota Company to redeem in the manner specified in the order of July 18. On the third of January, 1866, this company paid into the registry of the court the amount of money required to make the redemption. Thereupon all further proceedings under this suit for foreclosure were stopped, and on the 20th of January, 1866, the Eastern Division and its rolling stock were handed over by the receiver to the possession of the Minnesota Company.

On the 18th of April, 1866, Frederick P. James, claiming to be the assignee of the judgment against the La Crosse Company in favor of Newcomb Cleveland for $111,727.71, which had been recovered prior to the execution of the mortgage to Barnes, commenced a suit in equity in the Circuit Court of the United States for the District of Wisconsin against the Minnesota Company, to enforce the lien of that judgment on the Eastern Division, as being superior to the title acquired by the company through the sale under the Barnes mortgage. Such proceedings were had in this suit that, on the 11th of January, 1867, a decree was entered finding due to James on this judgment $98,801.51, and ordering a sale of the Eastern Division for its payment, subject, however, to the liens of the mortgages prior to that of Barnes and to the lien of the Chamberlain judgment. Under this decree the property was sold and conveyed to the St. Paul Company, March 2, 1867, for $100,920.94, and from that time that company has been in possession, claiming title adversely to the Minnesota Company and to the Barnes mortgage.

On the 20th of April, 1863, while the suit for the foreclosure of the Bronson and Soutter mortgage was pending, and a few days before the sale of the Western Division under the foreclosure of the land grant mortgage, Frederick P. James and Abram M. Brewer, claiming to be the assignees of the judgments in favor of Edwin C. Litchfield and Nathaniel S. Bouton, against the La Crosse Company, which had been recovered after the execution of the Barnes [8] mortgage, and Philip S. Justice and others, and E. Bradford Greenleaf, also judgment creditors, brought suit in the Circuit Court of the United States against the La Crosse Company, the Minnesota Company, and Selah Chamberlain, to set aside the mortgage to Barnes, and his foreclosure thereunder, and to have the property sold free of that incumbrance for the payment of their judgments. In that suit a decree was rendered July 9, 1868, in accordance with the prayer of the bill, save only that the mortgage was adjudged to be valid to the extent of the bonds that had been actually negotiated by the company to *bona fide* holders. No further proceedings have been had in that suit, and no attempt has ever been made to carry the decree into execution.

Such being the conceded facts, Barnes, as Trustee, brought this suit in the Circuit Court of the United States for the Eastern District of Wisconsin, on the 6th of June, 1878, against the St. Paul Company, which had changed its name to that of the Chicago, Milwaukee and St. Paul Railway Company, the La Crosse Company, and the Minnesota Company, for the foreclosure of his mortgage. In his bill he alleges, as to the first foreclosure: 1, that it had been actually adjudged, in the suit of James and others, to have been fraudulent and null and void, and that the St. Paul Company is estopped from asserting to the contrary, because that suit was brought by its procurement and was in fact prosecuted by it and in its behalf, although in the names of James and his associates; and 2, because the bondholders insist that the deeds of trust, "and the powers in trust conferred thereby, remain unimpaired and as they were before said proceedings for sale were had, * * * because they say:

"1. The said estate was a trust, and a trust can never be terminated without the consent of the *cestuis que trust* except by its due execution.

"2. Because the powers of sale granted by said deeds to your orator are powers in trust, and, not having been executed in conformity with the requirements of the deeds by which they were granted, remain unexecuted.

"3. Because the said Act, chapter 79, being repugnant to the Constitution of the United States, no proper and legal execution of said [9] powers could be made under its authority.

"4. Because the terms and conditions prescribed by the Act were not complied with, and therefore, even if the Act were valid, the said powers still remain powers in trust unexecuted;" and it was insisted "that no number of bondholders less than the whole number entitled to the estate granted to your orator by said deeds of trust as security could, under section 33 of the statute laws of Wisconsin aforesaid, legally organize a corporation and vest in it the title to said estate, and so deprive bondholders not consenting thereto of their security, and that, inasmuch as bondholders to a large amount did not consent to the said sale and organization, the same were null and void."

As to the proceedings in the suits for the foreclosure of the land grant mortgage, and for the enforcement of the lien of the Cleveland judgment under which the St. Paul Company acquired title, the material averment, in the view we take of the case, is that "the said Minnesota Company, so called, had no title to said estate, called the third mortgage, conveyed to him (Barnes) by said deeds of trust, which could be barred by said decree of foreclosure of said land grant mortgage, or by said decree of fore-

closure, in the name of said James, upon the said Cleveland judgment; and that, your orator retaining his title to said estate, and not being a party to said foreclosure sales, the said estate has ever remained, and now remains, in him, for the benefit of said *cestuis que trust*, said decrees and said pretenses of the said defendants notwithstanding."

To this bill the St. Paul Company filed a plea, setting up the original foreclosure, "with the knowledge, consent, and approval, and at the request of the bondholders;" the purchase at the sale by Barnes in trust for the bondholders, in accordance with the provisions of the Act of February 8, 1859; the organization of the Minnesota Company for the purposes and with the powers above stated; and the transfer of the property thereto. The plea then proceeds as follows:

"That thereupon said bondholders surrendered their bonds to said corporation to be canceled, and the same were so canceled, and the [10] said corporation thereupon issued to said several bondholders in exchange for their said bonds the corporate stock of said Milwaukee and Minnesota Railroad Company to an amount equal to the principal of said bonds so surrendered in pursuance of said articles of organization, and which said stock was so received by said bondholders in full satisfaction and payment of their said bonds, and that all of the bonds issued by said La Crosse and Milwaukee Railroad Company under said mortgages or trust deeds were then, at the organization of said Milwaukee and Minnesota Railroad Company, or subsequently thereto, so surrendered to said corporation to be canceled, and were canceled, and stock of said company issued therefor.

"That by the proceedings aforesaid the said mortgages or trust deeds so as aforesaid given to said William Barnes were foreclosed and the right of redemption theretofore existing in the said La Crosse and Milwaukee Railroad Company to redeem said property from the lien of said mortgagees or trust deeds was thereby barred and foreclosed, and the said mortgage interest, so as aforesaid conveyed by said mortgages or trust deeds to said William Barnes, became an absolute estate in fee simple to all of the property covered by said mortgages or trust deeds in the said Milwaukee and Minnesota Railroad Company, subject to the prior liens thereon, and that thereby the trust relation to said property created by said mortgages or trust deeds between the said William Barnes and the holders of the bonds issued under said mortgages or trust deeds ended, and that no trust relation in respect to said property now exists, or has existed since the filing of said articles of organization, between said William Barnes and said bondholders."

It is then alleged that the Minnesota Company was made a party to the several suits under which the St. Paul Company claims title; that it appeared therein and "was recognized and treated as the owner of the equity of redemption of said property by virtue of the aforesaid proceedings;" and that, "By means of the proceedings aforesaid, the said William Barnes ceased to have any right, title, or interest as Trustee as aforesaid in, to, or upon or under [11] the said alleged mortgages or trust deeds, and his said bondholders ceased to have any right, title, or interest in, to, or upon the premises described therein and purporting to be affected thereby, and at the time of filing said bill of complaint the said William Barnes had no right, title, estate, lien, claim, demand or equity of redemption, as Trustee or otherwise, of, in, to, or upon the premises described in the said mortgages or trust deeds."

This plea was set down for argument and sustained by the court; whereupon a replication was filed and proofs taken. After hearing, an interlocutory decree was entered April 21, 1882, finding that $1,010,400 of the bonds had been actually exchanged for stock in the Minnesota Company; that $693,000 had either been canceled by the company before their issue, or had been surrendered by their owners for cancellation, and had actually been canceled, after being issued; and that $37,400, belonging to the St. Paul Company, were then in court, and for which no claim was made under the trust. The total amount thus accounted for was $1,740,880; and as to these, it was adjudged that they constituted no valid claim against the La Crosse Company under the mortgage, and that so far as they were concerned, the plea of the St. Paul Company was sustained, and Barnes was entitled to no relief. As to the remaining $259,200 of bonds provided for in the mortgage, a reference was made to a master to inquire and report what, if any, were justly due and in equity entitled to payment out of the mortgage security. Under this reference the master took testimony and reported in favor of the following persons and for the following amounts:

1. Matthew H. Robinson, one bond, $100, on which was due for principal and interest	$417 55
2. Frederick Van Wyck, assignee of William H. Sisson, 2 bonds, $1,000, on which was due for principal and interest	4,175 50
3. A. S. Bright and A. C. Gunnison, 22 bonds, $10,900, on which was due for principal and interest	45,512 95 [12]
4. Andrew J. Riker, 8 bonds, $800, on which was due for principal and interest	3,340 40
5. August F. Suelflohn, 4 bonds, $800, on which was due for principal and interest	3,340 40
6. M. M. Comstock, 2 bonds, $200, on which was due for principal and interest	835 10
7. Mary Christie Emmons, 2 bonds, $200, on which was due for principal and interest	835 10
8. Reid & Smith, 19 bonds, $6,400, on which was due for principal and interest	26,723 20
9. J. H. Tesch, 11 bonds, $1,100, on which was due for principal and interest	4,593 05
In all, bonds $21,500—due	$89,773 35

To this report exceptions were filed, which the court, after hearing, "being of opinion that said claims do not constitute under the mortgages * * * a valid lien upon the property," sustained and dismissed the bill. From a decree to that effect this appeal was taken.

The ultimate question for determination is

whether Barnes, the Trustee, and the bondholders secured by the mortgage to him, are bound by the decrees in the suits for the enforcement of the prior liens; namely, the land grant mortgage, and the Cleveland judgment, to which the Minnesota Company was a party. That depends on the legal effect of what was done by Barnes in 1859, for the purpose of foreclosing his mortgage and organizing the Minnesota Company to take the property, under his purchase at that sale, in trust for the bondholders. It is now alleged that this was all null and void: 1, because it has been so adjudged in the suit brought by James and others; and 2, because the Act of February 8, 1859, under which Barnes acted in buying at his own sale and organizing the company, was unconstitutional in its application to his mortgage, which was executed before its passage, and the bonds secured thereby. The claim is that a purchase by Barnes himself at his own sale, without the payment of his bid in money, could not operate as a fore-
[13] closure of the mortgage, except with the consent of all the bondholders, which was never given.

The sufficiency of the first of these objections is to be determined by the averments in the bill, taken in connection with the exhibits to which they relate. As to the second, the St. Paul Company pleads in substance that Barnes, in foreclosing his mortgage and in organizing the Minnesota Company after his purchase, acted "with the knowledge, consent, and approval, and at the request of the bondholders."

1. As to the decree in the suit of James and others. The copy of the bill in that suit, which is one of the exhibits in this case, shows that it was filed by certain judgment creditors of the La Crosse Company to collect their judgments. It is a creditor's bill, pure and simple, brought by James and his associates, "on their own behalf, and in behalf of all the creditors of the La Crosse and Milwaukee Railroad Company, who have or claim a lien upon the railroad of said company," and "who shall come in and seek relief by and contribute to the expenses of this suit," to obtain a sale of "all of the property, real and personal, franchises and privileges of the La Crosse and Milwaukee Railroad Company, or which was theirs at the time of said sale by Barnes, May 21, 1859," "subject to the prior claims" described in the mortgage to Barnes, "and that the proceeds of said sale be brought into court, to be divided according to the legal priorities of your orators and the other claimants thereto." It alleges, in substance, that the mortgage to Barnes was executed "for the purpose and with the design of bringing about a speedy sale of said road and its franchises, and cutting off the stockholders in said company, and to hinder, delay and defraud the creditors of the said La Crosse * * * Company, and passing the property in or to the road and its franchises to some of the directors of said company and their friends." The La Crosse Company, although nominally a party to the suit, did not appear and did not ask relief, and there is no pretense that the com-
[14] plainants either did or could prosecute the suit in behalf of the stockholders. If, as is alleged, the St. Paul Company was the promoter as well as the real prosecutor of the suit, it is bound only to the extent it would be if it had been actually the complainant. The most that can be claimed in this behalf is that it stands in the place of the complainants named in the bill, and is bound as they are bound; no more, no less.

The decree—which, with the opinion of *Mr. Justice* Nelson announcing the judgment of this court in *James* v. *R. R. Co.* 73 U. S. 6 Wall. 753 [18: 886], is one of the exhibits in this case—adjudges that the mortgage to Barnes was good and valid "As a security for the bonds issued under it in the hands of *bona fide* holders for value, without notice," which, it was found, did not exceed $200,000; that the foreclosure and sale be "set aside, vacated and annulled," and the Minnesota Company be "perpetually restrained and enjoined from setting up any right or title under it," because it was made in pursuance of a notice claiming that $2,000,000 of bonds had been issued, and there was default in the payment of $70,000 of interest when less than $200,000 had ever been negotiated to *bona fide* holders, and the foreclosure proceeding was in other respects irregular and fraudulent; and that all the right, title, interest, and claim which the La Crosse Company had in the railroad from Milwaukee to Portage City be sold to pay the judgments in favor of the complainants, "unless prior to such sale the defendants pay to said complainants" the amounts due thereon.

Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham* v. *R. R. Co.* 70 U. S. 3 Wall. 704 [18:247]. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them; and also that, if they undertook to sell their property to pay their judgments, the mortgage to Barnes should [15]
stand only as security for such bonds as had been actually negotiated by the La Crosse Company to *bona fide* holders.

Such also was the judgment of this court in *R. R. Co.* v. *Soutter*, 80 U. S. 13 Wall. 517 [20: 548], which was a suit brought by the Minnesota Company, June 4, 1869, to recover back the money it had paid to redeem the mortgage to Bronson and Soutter on the Eastern Division, for the reason that the foreclosure of the mortgage to Barnes was fraudulent and it had been so adjudged in the James suit. In announcing the opinion of the court, *Mr. Justice* Bradley said, p. 523 [545]: "Who are the complainants? Are they not the very bondholders, self incorporated into a body politic, who, through their trustee and agent, effected a sale which was declared fraudulent and void as against creditors, and made the purchase which has been set aside for that cause? * * * But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase

was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse Company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their property when they paid into court the money which they are now seeking to recover back."

This being the extent of the legal effect of the James decree, it follows that, if the proceedings by Barnes in 1859 for the foreclosure of his mortgage were sufficient in form, the Minnesota Company represented that mortgage, and the holders of the bonds secured thereby, in the suits to which it was a party brought to enforce the prior liens under which the St. Paul Company claims title, and that both Barnes, the Trustee, and the bondholders are bound by the decrees therein. The La Crosse Company has [16] never disputed the title of the Minnesota Company, and the prior lienholders recognized it as good when they proceeded against the company to enforce their respective rights. The property has been lost, not because the foreclosure was invalid, but because it was all needed to satisfy liens which were prior in right to that of the Barnes mortgage, under which alone the company claims title. When the creditors in the James suit undertake to carry their decree into execution it will be time enough to consider how far they are bound by the decrees in the suits for the enforcement of the prior liens which were all obtained and executed pending their litigation with the company. We are now dealing only with Barnes and the bondholders claiming under him.

2. As to the plea. The bill in effect concedes, as is necessarily true, that if all the bondholders consented to a foreclosure under the Act of February 8, 1859, the purchase of the property by the Trustee for their benefit, and the transfer of title by him to the Minnesota Company as their representative, would be good, even though without such consent it might be bad. The plea alleges such a consent, and also an actual exchange of all the bonds for stock in the company. The material question thus presented is whether the bondholders consented to what was done by the Trustee in their behalf. If they did, it matters not that some have omitted to surrender their bonds for cancellation, and take certificates of stock in exchange. If they assented to what was done they became in law purchasers at the foreclosure sale, and, as such, stockholders in the company which was organized under the statute in their behalf to take the property from their Trustee, and that, too, without any formal surrender of their bonds. Their stock was bound for the payment in money of their respective *pro rata* shares of the costs, charges, and expenses of the sale, and of the organization of the company and of carrying the same into effect. If they wanted certificates of stock, they were required to surrender their bonds and pay what was due from them on this account, but as bondholders, purchasing through their Trustee, they became, by the express terms of the articles of organization, stockholders in the new [17] Corporation, with a lien on their shares for their proportion of the expenses, etc. The averment in the plea of an actual surrender of bonds for cancellation, and an issue of stock in exchange therefor, presents an immaterial issue. The voluntary exchange of bonds for stock would show a positive assent to the foreclosure, but a failure to do so would not necessarily imply dissent.

The exact issue to be tried, therefore, is whether the necessary consent was actually given. The enabling statute was approved February 8, 1859, and on the 11th of the same month, only three days afterwards, the requisite amount of bondholders presented their request to Barnes that he proceed to foreclose the mortgage and buy the property for the bondholders under the authority thus conferred on him for that purpose. In accordance with this request, he advertised the sale, and made the purchase May 21, 1859. Two days afterwards he organized the company, under the statute, to take the title from him as trustee for those in whose behalf he bought. From that time forward, during all the protracted litigation which ensued, this company claimed to own the property, subject only to the incumbrance of prior liens, and neither Barnes nor any bondholder, so far as this record discloses, ever asserted the contrary until after the James suit was decided, when the St. Paul Company was in possession under its purchases upon decrees for the enforcement of the prior liens in suits to which the company was a party. During all this time the Minnesota Company was active in asserting its title, and its litigation with the prior incumbrancers was constant and energetic, as the records of this court show in *Bronson* v. *La Crosse R. R. Co.* 68 U. S. 1 Wall. 405 [17: 616]; *S. C.* 69 U. S. 2 Wall. 283 [17: 725]; *R. R. Co.* v. *Soutter*, Id. 440, 510 [17: 860, 900]; *Graham* v. *R. R. Co.* [*supra*]; *R. R. Co.* v. *Soutter*, 72 U. S. 5 Wall. 660 [18: 678]; *R. R. Co.* v. *Chamberlain*, 73 U. S. 6 Wall. 748 [18: 859]; *R. R. Co.* v. *James*, Id. 750 [18: 854]; *James* v. *R. R. Co.* Id. 752 [18: 885.]

The amount of bonds authorized by the mortgage was $2,000,000. The proof is abundant that of this amount $1,010,400 were actual- [18] ly converted into stock, and that $780,400 had either been surrendered for cancellation because they had never been issued, or because the holders made no claim against the La Crosse Company on their account. The findings of the court below show the particulars as to the whole of these two amounts, and we are entirely satisfied with the correctness of the conclusions there reached. Some of the holders claim that they were persuaded against their own judgment, and, perhaps, against their will, to make the exchange, but still their bonds were actually surrendered and certificates of stock taken in exchange therefor. They kept silent during all the time the litigation with the Minnesota Company was going on, and uttered no complaints until after the James suit was decided against their interest then represented by that company.

There remained, however, at the time of the rendition of the interlocutory decree below,

$259,200 of bonds unaccounted for; and a reference was made to a master to receive claims therefor, and to take testimony and report thereon. Under this reference bonds to the amount of $21,500 were presented to and allowed by the master. None of these bonds had been actually surrendered to the company and exchanged for stock; but after a careful examination of the testimony we have no hesitation in deciding that, at the time of the foreclosure, they were held and owned by parties who in law consented thereto, and that the present holders took them with full notice of that fact.

Of the amount allowed by the master, Bright and Gunnison alone represent $17,300, although Reid & Smith have a claim on $6,400 thereof for money advanced. Both Bright and Gunnison were officers in the Minnesota Company, and at times very active in the management of its affairs. Of the bonds which they represent, $7,500 were owned by William E. Cramer at the time of the foreclosure, and he signed the request to Barnes that he sell the property and buy it for the bondholders under the statute. These bonds were bought by Bright and Gunnison, or some person whom they represent, after this suit was begun, [19] Cramer receiving for them $900. The rest of the bonds which they present were undoubtedly owned by them while they were acting as officers of the company, and as such defending the suits for the enforcement of the prior liens, if not at the time of the original foreclosure by Barnes.

Suelflohn, who presents a claim for $800, actually owned his bonds at the time of the foreclosure, and signed the request that was presented to Barnes. Robertson, who claims $100, was a clerk in the office of Barnes when the bonds were issued, during the foreclosure, and for many years afterwards. He received his bond for services in connection with this business. Mary Christie Emmons claims $200 for bonds she got from her father, one of the original organizers of the company, and named in the articles of organization as one of the directors, a position which he occupied for several years afterwards. Maria M. Comstock's claim is for bonds she got from her father, Leander Comstock, who held them at the time of the foreclosure, and who then did and ever since has resided in Milwaukee, and presumably had knowledge of what was being done. Frederick Van Wyck, who claims $1,000, is a son-in-law of Bright; and the bonds he presents were bought by him at the suggestion of his father-in-law from William H. Sisson for a small sum, after they had been filed as a claim by Sisson himself. Sisson was a lawyer in Chicago, but whether he owned the bonds or held them for others does not appear. Andrew J. Riker, who claims $800, was a broker in New York at the time of the foreclosure and before and after. He owned the bonds he now presents at that time, and must have been familiar then with all that occurred, for he held land grant bonds also, and says that after the foreclosure of that mortgage he laid them aside as of no value, because he "thought the thing was all closed up." John H. Tesch, who claims $1,100, held his bonds at the time of the foreclosure. He resided then and since in Milwaukee, and was familiar in a general way with all that was done. He knew of the Barnes foreclosure, though he says: "I did not know that my bonds had anything to do with it; I did not follow that up. It was a common report mentioned in the newspapers, but did not know it concerned me." But before that he had [20] been informed by his counsel that they were good for nothing and would not be paid.

Under these circumstances we cannot do otherwise than decide that the silence of the holders of these few bonds, during all the time the Minnesota Company was acting in their behalf, is equivalent to actual consent to the sale under which the company got the right to represent their interests in the litigation with the prior lienholders. They are the only persons, so far as the record discloses, who did not actually surrender their bonds and take certificates of stock therefor; and it is now too late for them to say that what their Trustee did in their behalf was without authority. There cannot be a doubt that they knew of the foreclosure at or near the time it took place. If the purchase was not made for their benefit under the Act of 1879, the Trustee was accountable to them in money for their proportion of what he bid for the property. For this they never applied, and it must, therefore, be assumed that he bought for their account, as well as that of the other bondholders, and that they assented thereto.

It follows that the plea has been sustained by the evidence, and this necessarily disposes of all the other questions in the case. The sale by Barnes to the company under the foreclosure devested him of title and of his right to bring suit in behalf of bondholders. The decree in the James suit did not dissolve the Minnesota Company. It simply established the right of the judgment creditors who brought that suit to redeem the Barnes mortgage, by paying the amount due for bonds that had been actually negotiated by the La Crosse Company to *bona fide* holders, and to have the mortgaged property sold subject to such a lien. The company still continued in existence and still owned the property that had been bought, subject only to the inferior liens of the creditors whose rights had been established.

Neither can Barnes now take advantage of the alleged frauds or irregularities in the foreclosures of the prior liens. He not only has no title under which he could proceed for that purpose, but all such questions were settled and finally disposed of in the decrees to which [21] the Minnesota Company was a party.

So, also, of the claim which was made before the master to recover back the money paid to redeem the Bronson and Soutter mortgage. That money was paid by the Minnesota Company, and that company alone can sue for its recovery. Such a suit was once brought and a decree rendered against the company.

The decree of the Circuit Court dismissing the bill was right, and it is consequently affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[561] CHICAGO, BURLINGTON AND KANSAS CITY RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE OF MISSOURI, *ex rel.* JOHN F. GUFFEY, Collector of Revenue of PUTNAM COUNTY.

(See S. C. Reporter's ed. 561-575.)

Constitutional law—railroads—immunity from taxation does not pass upon a sale under Missouri Act of 1870—obligation of contract—impairment of.

1. The Missouri Act of March 24, 1870, subjects to state taxation any railroad in that State, or such part thereof as is located therein, if a railroad corporation of another State purchases, leases, or makes arrangements for operating it.

2. The absolute sale by the St. Joseph and Iowa Railroad Company of its road, with its property, rights, privileges and franchises, under the authority of the Act of 1870, passed them to its grantee, the Burlington and Southwestern Railway Company, subject to the condition that its road, in Missouri, so sold, should thereafter be subject to taxation, notwithstanding the immunity from taxation contained in the charter of 1857 of said former company.

3. The Act of 1870 does not impair the obligation of any contract, which the St. Joseph and Iowa Railroad Company had, by its charter, with the State of Missouri, touching the right of said company to sell its road.

[No. 1244.]

Submitted April 4, 1887. Decided May 23, 1887.

IN ERROR to the Supreme Court of the State of Missouri. On petition for rehearing. *Denied.*

The history and facts of the case sufficiently appear in the opinion of the court. See the opinion of this court at the former hearing, *ante*, 732.

Messrs. **L. T. Hatfield** and **A. W. Mullins**, for plaintiff in error.

Messrs. **B. G. Boone**, *Atty-Gen. for Missouri*, and **S. P. Huston**, for defendant in error.

[569] *Mr. Justice* **Harlan** delivered the opinion of the court:

The opinion heretofore delivered in this case is reported in 120 U. S. 569 [*ante*, 732]. We are now asked by the plaintiff in error to grant a rehearing; chiefly, upon the ground that this court assumed that the only question necessary to be determined was as to "The liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph and Iowa Railroad, more recently named the Linneus Branch of the Burlington and Southwestern Railway Company, and now owned by the Chicago, Burlington and Kansas City Railroad Company, a corporation organized under the laws of Missouri." The property, upon which the assessment in question was made, is described in the pleadings in such general terms that it is impossible to ascertain how much of it belongs to what is called the Linneus Branch, and how much to what is described in the petition for rehearing as the "main line" of the company.

The Supreme Court of Missouri, as appears from its opinion in the record, after referring to the purchase made in 1871 by the Burlington and Southwestern Railway Company, an Iowa corporation, of the main line and the property, rights, privileges, and franchises of the St. Joseph and Iowa Railroad Company, said: "Afterwards, and in 1872, the directors [570] of the Burlington Company, acting by the direction of the stockholders of the branch road, then called the Linneus Branch, placed upon the branch road a mortgage to secure certain bonds. The main line had been previously mortgaged. The defendant purchased the branch road through a foreclosure sale had upon the mortgage thereon. The taxes in suit were assessed upon this branch road property." Again; "If, as we have seen, the Burlington Company does not acquire the immunity from taxation, it is difficult to see how any branch built by it could take on the exemption."

Assuming, from the language of the court below, that the only taxes in suit were those assessed upon the branch road property, we restricted our decision to the single question as to the liability to taxation of branch roads established under the Act of March 21, 1868, entitled "An Act to Aid in the Building of Branch Roads in the State of Missouri;" holding that roads constructed under that statute came, so far as taxation was concerned, under the operation of the clause of the Missouri Constitution of 1865, which declares that "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to the State, to counties, or to municipal corporations."

It is now claimed—and we understand the Attorney-General of Missouri, in effect, to concede—that the taxes in question were in fact laid, not only upon the Linneus Branch lying in Putnam County, but upon that part of the defendant's "main line" which extends from Unionville, in the same county, to the boundary line between Missouri and Iowa. We are, therefore, asked to determine whether or not the last described part of the defendant's road is not exempt from taxation for state and county purposes. To this request we yield, not only because it is now, in effect, conceded that that question is covered by the pleadings, but because of the suggestion that other cases are pending in the courts of the State which, by stipulation of the parties, are to abide the determination of the one now before us.

This claim of immunity from taxation, in respect to the road between Unionville and the [571] Iowa line, is upon these grounds: 1, that, by the charter of the St. Joseph and Iowa Railroad Company, granted in 1857, it is provided that "The stock of said company shall be exempt from all state and county taxes;"* 2, that such exemption, in law, extends to the property of that corporation, as represented by its stock; 3, that the defendant, a corporation of Missouri, and the successor of the Burlington and Southwestern Railway Company, is enti-

*Act of Jan. 22, 1857, incorporating the St. Jo. and Iowa R. R. Co. Mo. Sess. Laws, 1856-7, p. 107, § 3; Act of Feb. 16, 1847, incorporating the Hannibal and St. Jo. R. R. Co. Mo. Acts of 1847, p. 156, § 7; Act of 1837, incorporating the Louisiana and Columbia R. R. Co., Mo. Acts of 1837, p. 240, § 24; State, ex rel. St. Jo. and Iowa R. R. Co. v. Sullivan Co. 51 Mo. 522; Cooper v. Sullivan Co. 65 Mo. 542.

tled to the benefit of the exemption granted to the St. Joseph and Iowa Railroad Company by its charter of 1857.

Conceding, for this case, that the exemption from taxation of the stock of the St. Joseph and Iowa Railroad Company necessarily embraced the property of the corporation, the question still remains, whether that immunity passed to the Burlington and Southwestern Railway Company by its purchase in 1871. The determination of that question depends upon the construction and effect to be given to the second section of an Act of the General Assembly of Missouri approved March 24, 1870. That section became section 57 of article 2, chapter 37, of Wagner's Statutes of Missouri of 1872, and is as follows:

"Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad, within or without the State, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company, which may have built its road to the boundary line of the State, may extend into the adjoining State, and for that purpose may build, or buy, or lease a railroad [572] in such adjoining State, and operate the same, and may own such real estate and other property in such adjoining State as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other State, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned, or leased by any other company, if the lines of the said road or roads of said companies are continuous or connected at a point either within or without the State, upon such terms as may be agreed upon between said companies respectively; or any railroad company, duly incorporated and existing under the laws of an adjoining State, or of the United States, may extend, construct, maintain and operate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities, and provisions of the laws of this State concerning railroad corporations as fully as if incorporated in this State; *Provided*, That no such aid shall be furnished, nor any purchase, lease, subletting, or arrangements perfected, until a meeting of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sublet, or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State; *And provided, further*, That if a railroad company of another State shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same as provided in this Act, or shall extend its railroad into this [573] State, or through this State, such part of said railroad as is within this State shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State, and a corporation in this State leasing its road to a corporation of another State shall remain liable as if it operated the road itself, and a corporation of another State, being a lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this State might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another State, being the lessee as aforesaid, or extending its railroad as aforesaid, into or through this State, shall establish and maintain an office or offices in this State, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this State."

As the proposed lines of the Burlington and Southwestern Railway Company and the St. Joseph and Iowa Railroad Company would, when constructed, make a connected or continuous line from Burlington, Iowa, to St. Joseph, Missouri, the authority of the former corporation, under the Act of 1870, to purchase or lease the road of the latter, cannot be doubted.

But, as we have seen, the Act expressly declares that if a railroad corporation of another State leases a railroad, the whole or part of which is in Missouri, or makes arrangements for operating the same as provided in that Act, such part of that railroad, as is within the latter State, "shall be subject to taxation." Great stress is laid by counsel on the fact that, while the Act authorizes a foreign corporation to "lease *or* purchase" a railroad, the whole or part of which is in Missouri, the word "purchase" is not used in the proviso relating to taxation. It is therefore argued that, while the Legislature intended to subject to taxation railroads in Missouri which were *leased*, after the passage of the Act of 1870, to corporations of other States, it did not intend to tax railroads, [574] in that State, which were *purchased* outright by corporations of other States. That construction of the Act is inadmissible. If supported by the mere letter of the statute, it is inconsistent with the manifest object which the Legislature had in view; namely, to subject to taxation railroad property in Missouri which passes under the control of a corporation of another State, whether by purchase or by lease, or by "arrangements for operating the same, as provided" in the Act of 1870. The State had the right to prescribe, as a condition upon which the road, property, franchises, and privileges of the St. Joseph and Iowa Railroad Company might be placed, by any of those modes, under the control of a railroad corporation of another State,

that such property, after being so transferred, should be subject to taxation. Whether such a condition could be imposed upon a corporation having the right, by its charter, before the Act of 1870, to make an absolute sale of its road, privileges, and franchises, and to pass to the purchaser whatever immunities from taxation it then enjoyed, we do not decide. No such question is now presented.

It is, however, claimed—such we think is the effect of the argument in behalf of the company—that the St. Joseph and Iowa Railroad Company, for the purpose of enabling it "to construct, equip, and operate said road," had the power, by its charter, as amended November 5, 1857, "to pledge the said road, rolling stock, machinery, depots, and any other property they may possess, together with the franchises of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road." Mo. Acts, 1857, p. 73 § 8. This power to pledge, it may be insisted, could not legally be affected or modified by the Act of 1870, although that Act took effect before any mortgage was put upon the main line. In answer to such suggestions, it is sufficient to say that the restricted power of the company thus to pledge its property and franchises for the liquidation of indebtedness incurred in the construction of its road, did not authorize it to make, in the first instance, an absolute sale of its property, rights, privileges, and franchises, to a corporation of another State. The power to make the absolute deed [575] of 1871 to the Burlington and Southwestern Railway Company was given by the Act of 1870, and does not appear to have existed before that time. In no view of the case, therefore, were the conditions prescribed by that Act in violation of any right possessed by the St. Joseph and Iowa Railroad Company under its charter. If that corporation elected to make an absolute sale of its road, with its property, rights, privileges, and franchises, under the authority given by the Act of 1870, they passed to its grantee, subject to the condition that its road, in Missouri, so sold, should thereafter be subject to taxation.

Without pursuing the subject further, we are satisfied with the construction we have heretofore given to the Act of 1868. And we are also of opinion that the Act of 1870, as in this opinion interpreted, does not impair the obligation of any contract, which the St. Joseph and Iowa Railroad Company had, by its charter, with the State of Missouri.

The rehearing is denied, and the judgment of affirmance, heretofore entered, must, upon the grounds stated in this and the original opinion, stand as the judgment of this court.

Denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[583] SUN MUTUAL INSURANCE COMPANY OF NEW ORLEANS, ET AL., *Appts.*,

v.

THE KOUNTZ LINE, The H. C. YEAGER TRANSPORTATION COMPANY, ET AL.

(See S. C. Reporter's ed. 583-597.)

Partnership—when one not a partner may be charged as such—steamboats owned by different corporations under one management—joint liability of owners—practice.

1. A person who is not in fact a partner, who has no interest in the partnership business, and does not share in its profits, and is sought to be charged for debts because of having held himself out, or permitted himself to be held out, as a partner, may be so charged generally if the holding out has been so public and so long continued as to justify the inference, as matter of fact, that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect.

2. In the case presented, certain transportation companies, each owning a steamboat, placed their boats, or permitted them to be placed, before the public as being engaged in the same trade, and as constituting, together, the "Kountz Line," that being the name of another corporation which acted as agent of said owners of the boats, fully authorized to represent them, and each of them, in respect to matters connected with such business. Upon a libel *in personam*, filed by certain insurance Companies, which had become subrogated to the rights of the owners of merchandise lost by the sinking of one of said boats, to charge said companies jointly for the value of said merchandise, it is *held:* that said Companies held themselves out as united in a joint enterprise, under the name of the "Kountz Line," and that they are jointly liable for the default or negligence of those placed in charge of any of the boats of that line.

[No. 136.]

**Argued Jan. 17, 18, 1887. Decided May 23, 1887.*

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. See 4 Woods, 268. *Reversed, but petition for rehearing allowed to be filed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **John A. Campbell** and *O. B. Sansum*, for appellants.

Messrs. **Richard H. Browne** and *Charles B. Singleton*, for appellees.

Mr. J. R. Beckwith, of counsel for intervening libelants.

Mr. Justice **Harlan** delivered the opinion [584] of the court:

This is a libel in admiralty and *in personam*. The libelants are Insurance Companies, which issued policies covering certain produce and merchandise delivered May 21, 1880, on board the steamboat Henry C. Yeager, at St. Louis, Missouri, for transportation to the City of New Orleans and other ports on the Mississippi River; which cargo was lost by the sinking of the boat the day succeeding its departure from St. Louis. The Yeager was unseaworthy, both at the commencement of her voyage and at the time of the loss. The sinking and the loss were the direct consequence of such unseaworthiness.

The libelants having paid to the owners of the cargo the damages sustained by them—$31,720.10—and having been subrogated to all the rights and claims of the latter on account of such loss, brought this suit against the appellees jointly to recover the amount so paid. In the district court, the attachments sued out by

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*NOTE.—On the last day of the term, May 27th, upon a petition filed by William J. Kountz, praying that the case be retained on the docket and assigned for argument again at some pr per day of the next term, or that time be allowed him to present at the next term a motion for a rehearing in the case, the court ordered that the mandate be withheld until the next term, and granted leave to file a petition for rehearing.

the libelants were discharged, and the libel dismissed. In the circuit court, it was adjudged that there was no joint liability on the part of the respondents, or any of them, and that liability for the loss of the cargo was alone upon The Yeager, and her owner, the H. C. Yeager Transportation Company. As to all the other respondents, the libel was dismissed. Of that decree the libelants complain, the principal assignment of error being that the court erred in not holding the respondents, or some of them, jointly liable for the loss of the cargo.

The general ground upon which this contention is placed is that the shipment of May 21, 1880, on The Henry C. Yeager was a part of the general business of transportation in which the H. C. Yeager Transportation Company, the C. V. Kountz Transportation Company, the K. P. Kountz Transportation Company, and the M. Moore Transportation Company, were jointly engaged under the name of the "Kountz Line," and, consequently, that said Companies were jointly liable for the loss and damages in [585] question. The decree below proceeded upon the ground that said Companies were not jointly engaged in business, and that the loss must be borne entirely by the Company owning The Henry C. Yeager. *Citizens' Ins. Co.* v. *Kountz Line*, 4 Woods, 268.

The determination of the question of joint liability depends upon the facts set out in the finding by the circuit court. Those facts—preserving, in our statement of them, substantially, the language of the court below—are as follows:

In June, 1872, William J. Kountz, John W. King, W. W. Atex, and Charles Scudder, organized, under the laws of Missouri, a Corporation by the name of the Kountz Line, of which they were to be, and did become, directors for the first year; and of which Kountz was president, and King general agent. Its capital stock was fixed at $15,000, divided into shares of $100 each. The declared object of the Corporation was to build or purchase, use or employ, one or more wharf boats for the use of steamboats and other vessels belonging to the stockholders of the Company; to build, purchase, or charter steamboats, towboats, etc., for transporting freight and passengers on the Mississippi River and its tributaries; and to do a general river business. It does not appear that the Kountz Line Corporation owned, at the time of the shipment on The Yeager, or at any time during the year 1880, any steamboat or other water craft, except a wharfboat at St. Louis.

In a few months after the organization of that Corporation; to wit, on the 13th of November, 1872, Kountz, King, and one Sheble, organized, under the laws of Missouri, the four Transportation Companies above named, of each of which Kountz and King were chosen directors, and King treasurer and secretary. Kountz, King, and Sheble, Charles H. Seaman, H. K. Haslitt, and W. P. Braithwaite, having interests, as owners, respectively, in the steamboats Henry C. Yeager, Carrie V. Kountz, Katie P. Kountz, and Mollie Moore, transferred the same, by bills of sale, as follows: The Henry C. Yeager, to the H. C. Yeager Transportation [586] Company; The Carrie V. Kountz, to the Carrie V. Kountz Transportation Company; The Katie P. Kountz, to the K. P. Kountz Transportation Company; and The Mollie Moore, to the M. Moore Transportation Company; the vendors receiving, in consideration of said transfers, stock in the respective Transportation Companies.

Of the stock of the Kountz Line Corporation, on the 6th day of July, 1874, William J. Kountz owned two shares; King, D. C. Brady, Van Hook, and C. H. Seaman, one share each; the steamboats John F. Tolle, Henry C. Yeager, Mollie Moore, and Carrie V. Kountz, 36 shares each. There was no change in the ownership of such stock by those steamboats up to the commencement of this suit, except that the shares held by The John F. Tolle belonged to the steamboat J. B. M. Kehlor, when, on September 14, 1878, the latter was transferred to the M. Moore Transportation Company. W. J. Kountz never, at any time, owned more than two shares in the Kountz Line Corporation, and was a stockholder in all of the Transportation Companies.

On the 15th of January, 1873, W. J. Kountz owned 398 shares, and King and Sheble each one share of the stock of the M. Moore Transportation Company. But, on December 19, 1879, the stock of that Company was held as follows: Katie P. Kountz, a daughter of W. J. Kountz, 397 shares, and Kountz, King and Rogers, each one share. November 4, 1878, Katie P. Kountz held 241¼ shares, her father and King each one share, and Braithwaite 56¼ shares, in the K. P. Kountz Transportation Company. December 19, 1879, Katie P. Kountz held 379 shares, and her father, King and Rogers, each one share in the H. C. Yeager Transportation Company. On the 21st of May, 1880, of the stock of the C. V. Kountz Transportation Company, Katie P. Kountz held 328 shares; Clement Seaman 74 shares; and her father, King and C. H. Seaman, each one share. No subsequent transfers of stock in any of these Companies were made, and, at the time of the shipment on The Yeager, "the stock in no two of said Companies was held by the same person."

It thus appears that, at the time of the shipment on The Yeager, almost all the stock of these Transportation Companies stood in the name of a daughter of William J. Kountz.

It was further found by the court below that the steamboats Carrie V. Kountz, Katie P. [587] Kountz, Henry C. Yeager and Mollie Moore "were employed by the respective Transportation Companies, to which they were conveyed, under the direction of the officers of said Companies, in carrying freight and passengers on the Mississippi and its tributaries," the Kountz Line Corporation being the "common agent" of said Companies, and charging the latter "for the services rendered to them respectively, from one hundred to one hundred and fifty dollars per trip." Its office, as well as the business offices of the Transportation Companies, was in the same room on its wharfboat at St. Louis. It—the Kountz Line Corporation—collected the dues of the Transportation Companies, keeping a separate account with each, and paying to each the earnings of its own steamboat. By means of advertisements in newspapers, placards, handbills, and cards, the Kountz Line Corporation advertised the "Kountz Line," set-

ting forth the advantages offered by the boats of that line, their low rates of freight, etc., and "announced that it was ready to contract for the carrying of goods and passengers by the Kountz Line boats." In those advertisements, placards, and handbills, usually one, but sometimes two or more of the boats belonging to the Transportation Companies, were mentioned "as belonging to said Kountz Line." The Kountz Line Corporation made out bills of freight upon blanks headed "Kountz Line, St. Louis and New Orleans Packet," the bills being "in the name of the particular steamboat to which the freight was due, and the dray tickets of shippers indicating on what boat the goods were to be shipped." The bills of lading were usually signed "John W. King, ag't Kountz Line, St. Louis," the signature thereto being made by a stamp; but the bills were sometimes signed by the clerk of the steamboat on which the goods were shipped. Some of the bills of lading for the produce and merchandise shipped May 21, 1880, on The Yeager, recited "that the same were received from John W. King on board the steamboat Henry C. Yeager, to be delivered to the consignee at New Orleans. In witness whereof, the master, clerk, or agent of said boat [588] hath affirmed to three bills of lading," etc., and were signed, some of them, "John W. King, ag't Kountz Line, St. Louis," and some by E. B. McPherson, clerk. Others of said bills of lading recited the shipping of produce by other shippers on board The Henry C. Yeager, and were signed by King in the manner aforesaid, and others by E. B. McPherson, clerk.

In order that the boats belonging to said Transportation Companies might have freight, the Kountz Line Corporation sometimes purchased produce and merchandise for the purpose of its being shipped upon them, the sum paid for such produce and merchandise being charged to the particular Company in whose interest the purchase was made. The goods so purchased were usually bought and paid for by the Kountz Line Corporation. Against such shipments it made drafts, in its own name, on the consignees. All moneys, whether received for freight carried by said several steamboats or for goods shipped and sold for their account, were remitted to Wm. J. Kountz or John W. King, as the agents of said Kountz Line, the cost of the goods being charged to the individual boat on which they were shipped. After deducting costs and charges, the net proceeds, although "deposited in bank to the credit of said Kountz Line, were placed in the books of account to the credit of the boat carrying the goods, and were her separate profits."

The circuit court found that the Kountz Line and the said Transportation Companies "owned no property in common," and that "there was no community of profits or property between said Companies, including the Kountz Line, or any two or more of them." But it also found that "none of said steamboats were ever advertised by the name of the corporations that owned them," and that from the date of the incorporation of said Transportation Companies to the date of the said shipment on the Henry C. Yeager, "none of said Transportation Companies ever transacted any commercial business by their several and respective names, but the same was done by the name of the Kountz Line, or in the name of the individual boats belonging to said Transportation Companies."

Such, in substance, is the case made by the finding of facts.

It is not claimed that the four Transportation Companies, organized in 1872, can be held jointly liable for the loss of the produce and merchandise shipped on The Yeager by reason of their being, in fact, partners, having a right to participate in the profits of the business conducted by and in the name of the "Kountz Line." They did not share or agree to share the profits or to divide the losses of that business, as a unit. On the other hand, it is not disputed that, according to well settled principles of law, a person not a partner or joint trader may, under some circumstances, be held liable as if he were, in fact, a partner or joint trader. "Where the parties are not in reality partners," says Story, "but are held out to the world as such in transactions affecting third persons," they will be held to be partners as to such persons. Story, Part. § 64. And in Gow on Partnership (p. 4) it is laid down as an undeniable proposition that "Persons appearing ostensibly as joint traders are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition." And so it was adjudged in *Waugh* v. *Carver*, 2 H. Bl. 235, 246, where it was said by *Lord Chief Justice* Eyre that if one will lend his name as a partner he becomes, as against all the world, a partner, "not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable." We do not mean to say that such liability exists in every case where the person sought to be charged holds himself out as a partner or joint trader with others. The qualifications of the general rule are recognized in *Thompson* v. *First National* [594] *Bank of Toledo*, 111 U. S. 529 [28: 507], where it was held, upon full consideration, that "A person who is not in fact a partner, who has no interest in the business of the partnership, and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such partnership." At the same time, the court observed that there may be cases in which the holding out has been so public and so long continued as to justify the inference, as matter of fact, that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect.

As there is no evidence of any direct representation by these Transportation Companies, or any of them, to the shippers of the cargo in question, as to their relations in business with each other, or as to their relations respectively with the Kountz Line Corporation, or the Kountz Line, the inquiry in this case must be whether they so conducted themselves, with reference to the general public, as to induce a shipper, acting with reasonable caution, to believe that they had formed a combination in the nature of a partnership, or were engaged as joint traders, under the name of the Kountz Line.

In our judgment, this question must be answered in the affirmative. It could not, we think, be otherwise answered, consistently with the inferences which the facts reasonably justify.

The finding of facts, as we have seen, show that the steamboats Henry C. Yeager, Katie P. Kountz, Carrie V. Kountz, and Mollie Moore were employed in the business of transporting freights and passengers on the Mississippi and its tributaries. They were placed by their owners, or were permitted by their owners to be placed, before the public as being engaged in the same trade, and as constituting, together, the "Kountz Line." They had a common [595] agent, which was invested with, or was permitted during a series of years to exercise, unlimited authority in their general management, and in respect to rates of transportation. That agent—the Kountz Line Corporation—with the knowledge of the Transportation Companies, publicly announced that it was ready to contract for the carrying of goods and produce by the "Kountz Line boats." We say this was done with the knowledge of the owners of the boats, because the persons conducting the entire business of the Kountz Line boats were officers, with plenary authority of the Transportation Companies and of the Kountz Line Corporation. The court below finds that the Transportation Companies used and employed their several boats in carrying freight and passengers on the Mississippi River and its tributaries. But with the intent, or with the effect, to mislead shippers, they took care, never, by their respective corporate names, to make, or to allow others in their behalf to make, any contracts, or to enter into any engagements, touching such business. It is expressly found that during the whole period from the organization, on the same day in the year 1872, to the date of the shipment on The Yeager in 1880—a period of nearly eight years—they did not transact any commercial business whatever by their respective corporate names. They severally empowered or permitted the Kountz Line Corporation, their common agent, to do business for them, using, in their discretion, when making transportation contracts, either the name of the Kountz Line, composed of all the Companies, or the names of the respective boats of that line. In no instance was business transacted by the Kountz Line Corporation, *as representing the particular transportation company owning the boat on which the shipment was made.* Those Companies, therefore, stood before the world as having united for the purpose of engaging, in the same trade, under the name and style of the Kountz Line, having a common agent—the Kountz Line Corporation—fully authorized to represent them, and each of them, in respect to matters connected with such business. They held themselves out as united in a joint enterprise, under the name of the Kountz Line, and they are jointly liable for the default or negligence of those placed in charge of any of the boats of that line. That the Transportation Companies owned no property in common, and that [596] each was entitled, as between it and the others, to receive the net earnings of its own boat, is immaterial in view of the fact that they held themselves out, or permitted themselves to be held out, as jointly engaged in the business of transporting freights and passengers, in the same trade, on the Mississippi and its tributaries. So far as the public was concerned, that which was done by their common agent, the Kountz Line Corporation, in the prosecution of the business of the several boats constituting the Kountz Line, is substantially what would have been done had the Transportation Companies entered into a formal agreement to conduct the transportation business jointly, under the name of the "Kountz Line," through an agent having full authority to represent that line, and the several boats composing it, in the making of contracts with shippers. The latter had the right to infer, from all the circumstances, that the boats constituting that Line were jointly engaged in such business.

As there is no serious conflict in the adjudged cases as to the general propositions of law to which we have referred, it would serve no useful purpose to review the authorities to which our attention is invited by counsel. Whether, in a particular case, there has been such a "holding out" as to create joint liability, must always depend upon its special facts. No one of the cases cited resembles the one before us in its facts. This case seems to be unlike any found in the books in the peculiar relations existing between these Transportation Companies, the Kountz Line Corporation, and the stockholders of each of them. We decide nothing more than that, under the facts of this case, the H. C. Yeager Transportation Company, the K. P. Kountz Transportation Company, the Carrie V. Kountz Transportation Company, and the M. Moore Transportation Company, were and are jointly liable for the loss of the produce and merchandise shipped May 21, 1880, on the steamboat Henry C. Yeager. The circuit court erred in not so adjudging.

The decree is reversed, and the cause is remanded, with directions to that court to set aside all [597] *orders inconsistent with, and to enter such orders and decree as may be in conformity to the principles of this opinion. Reversed.*

Mr. Justice **Gray**, not having heard the whole argument, took no part in this decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ARGENTINE MINING COMPANY, *Plf.* [478]
in Err.,
v.
THE TERRIBLE MINING COMPANY.

(See S. C. Reporter's ed. 478-486.)

Mining law—location of lode or vein—crossing the course of—end and side lines—patents—exception—instructions—practice.

1. Section 2320, R. S., contemplates that the location of a lode or vein shall be along its course. It is not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. When a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode. The side lines are those which measure the extent of the

claim on each side of the middle of the vein at the surface.

2. In the case presented it is *held:* that the lines which separate the location of the plaintiff from the location of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and as a consequence, could not touch the premises in dispute, which are outside of those lines and outside of the vertical planes drawn downward through them; that the exception contained in the patents relied on by the defendant seem to exclude its pretensions; and that the refusal of a certain instruction, which was sound in law, did not prejudice the defendant.

3. The absence of a replication to a new answer cannot be made in this court, for the first time, a ground of objection to the subsequent proceedings.

[No. 250.]

Argued and submitted April 21, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

See 5 McCrary, 639. *Affirmed.*

Statement of the case by *Mr. Justice* **Field:**

This is an action to recover certain mining ground, being part of what is known as the Adelaide Lode in Lake County, Colorado, lying within the California Mining District. It was originally brought in the name of Frederick S. Van Zandt, who claimed to be the owner of the lode. Subsequently he transferred his interest to a corporation, created under the laws of New York, known as the Terrible Mining Company; and by consent of parties that Company was substituted as plaintiff in the action. To the [479] original complaint an answer was filed by the defendant, the Argentine Mining Company, a corporation created under the laws of Missouri, to which a replication was made. To the complaint, amended by the substitution of the Terrible Mining Company as plaintiff, a new answer, substantially the same as the one to the original complaint, was filed, but it does not appear from the record that any replication was made to it. The parties seem to have considered the replication to the original answer as sufficient, for the trial was had without any reference to this omission. Its absence cannot be made in this court, for the first time, a ground of objection to the subsequent proceedings. Nor do we consider counsel of the plaintiff in error as making any point upon the omission, although he calls our attention to it.

The plaintiff below, defendant in error here, is the owner of the Adelaide mining claim. The defendant below, plaintiff in error, is the owner of three other mining claims, called, respectively, the "Camp Bird," the "Pine" and the "Charlestown" lode claims. All these claims lie in the same mining district. The Adelaide claim was located in 1876. The other claims were located in 1877. The Adelaide claim occupies on the surface longitudinally a northeast and southwest direction. The Pine, Camp Bird and Charlestown claims occupy a position nearly north and south, with end lines practically east and west, thus crossing diagonally the Adelaide claim. During the summer of 1880, the defendant below carried its mining operations through its own ground into the Adelaide claim, and it justifies its action in this respect by asserting that in doing so it followed a vein which has its outcrop, or apex, within the surface of its own locations. It cites section 2322, Revised Statutes, in support of its position. That section provides that locators of mining claims, previously or subsequently made, on any mineral vein, lode or ledge on the public domain, to which no adverse right existed on the 10th of May, 1872, "so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, [480] lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

And the defendant requested the court to instruct the jury as follows:

"The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location.

"The defendant here claims that the lode in controversy originates in its patented territory, by its top or apex, and descends upon its dip through and under the ground in controversy. If, from the preponderance of evidence, you believe that the top or apex of the lode in controversy does, in fact, originate within the patented territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant."

This instruction the court refused to give, and the defendant excepted.

The court instructed the jury substantially as follows: 1, that a statute of the State requires that the discoverer before filing a location certificate shall first locate his claim by sinking a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper if necessary, to show a well defined crevice; 2, shall post at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the location, and the date of [481] the discovery; 3, shall mark the surface boundaries of the claim by six substantial posts; that to recover a mining claim the plaintiff must show a good location in compliance with this statute, and that means "that he shall show in his discovery shaft a vein or lode of valuable ore in rock in place;" that the miner is not bound to make the first shaft or opening which he may sink his discovery shaft; he can make

anyone he may sink such shaft, only he must have in it a lode or vein. It is not sufficient for him to find minerals which would yield something, in a fragmentary condition, in the slide or loose tuff on the surface of the mountain, but he must find it within enclosing rocks in the general mass of the mountain; and that the question here is whether the parties who made the Adelaide location found such a lode or vein in what they denominated the discovery shaft or opening, and that this was a matter to be determined by the jury; and if they find that the locators made such a discovery, the next question was whether the vein extended to the point in dispute, and that the location was valid only to the extent of the lode included within it. The court added: "The question turns upon the validity of the Adelaide location. As I have explained it to you, if you believe it to be a valid location, well made, according to the law as given in the statute, you will find for the plaintiff. If you think it was not so made, you will find for the defendant." To this charge the counsel of the defendant excepted, pointing out the particulars to which he objected. Upon the argument before us, he adhered to his exception to the closing part of the charge, because it was not accompanied by the further instruction, "that if the jury believe from the evidence that the location of the Adelaide claim was made upon the dip of a vein or lode whose top or apex was then in and extended through the patented territory of the defendant, such location of the Adelaide claim would, to the extent that it was on the dip of said vein whose top or apex was so in the defendant's patented territory, be invalid."

[482] The jury rendered a verdict for the plaintiff upon which judgment for the possession of the demanded premises was entered, and the defendant has brought the case to this court for review.

Messrs. **Walter H. Smith**, *A. T. Britton* and *A. B. Browne*, for plaintiff in error.

Messrs. T. M. Patterson and *C. S. Thomas*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The instruction, as requested by the defendant, as a proposition of law is undoubtedly sound. It is substantially a brief repetition of the language of the statute. Its refusal, however, did not prejudice the defendant; for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked, applied to that claim, cut off the right asserted by the defendant. If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that Company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the same vein there were surface outcroppings within the boundaries of both [485] claims, the one first located necessarily carried the right to work the vein.

But there are other grounds equally conclusive against the contention of the defendant below. The instruction asked assumes that the longest sides of its claims were their side lines. Such would, undoubtedly, be the case if the locations of the claim were along the course or strike of the lode. The statute undoubtedly contemplates that the location of a lode or vein claim shall be along the course of the lode or vein. Its language is: "A mining claim located after the 10th of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length *along the vein or lode;* but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other." R. S. 2320.

When, therefore, a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface Such is the purport of the decision in *Mining Co.* v. *Tarbet*, 98 U. S. 463 [25: 253]. The court there said, referring to the Statute of 1866, 14 Stat. at L. 251, and that of 1872, 17 Stat. at L. 91: "We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon, lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode." And again, that the end lines of the claim, properly so called, are "those which are crosswise of the general course of the vein on the surface."

Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them.

The defendant relied on the trial upon pe-

tents of the United States issued for its several claims; but those patents contain an exception which would also seem to exclude its pretensions. It is as follows, after the habendum clause: "Excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also excepting and excluding all veins, lodes, or deposits, the tops or apexes of which lie inside of the exterior lines of said Adelaide survey at the surface, extended down vertically, or which have been therein discovered or developed."

From a consideration of the whole case we are unable to perceive any error which would justify a reversal of the judgment below.

It is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[441] GEORGE W. PAXTON ET AL., *Plffs. in Err.*,
v.
CHARLES GRISWOLD ET AL., Children and Heirs at Law of JOHN GRISWOLD, Deceased.

(See S. C. Reporter's ed. 441-450.)

Ejectment—Pennsylvania land titles—return of survey—lapse of more than 130 years, without return, conclusive against title—rules of 1765—review of authorities.

1. The fact that no survey has ever been returned to the land-office is a conclusive objection to the title to lands in Pennsylvania, based on a survey alleged to have been made more than 130 years ago.
2. The rule adopted by the land-office in 1765 made no alteration in the practice of requiring returns of surveys. The duty of having the surveys returned was always the same; and the manifest inconvenience of outstanding secret titles led the courts, in process of time, to adopt a rule that a survey would be regarded as abandoned unless returned in a reasonable time, which was finally fixed at seven years.

[No. 298.]

Argued May 5, 6, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Samuel Hepburn, Jr.**, for plaintiffs in error:

If the title offered by the defendants below had been called in question before the Revolution, or in the early days of the Commonwealth, there can be no doubt it would have been approved and confirmed.

The learned judges of the circuit court applied the tests of the present time to a title perfected before the rules now in force were known.

At present a junior survey returned takes precedence of an elder one not returned.

Now it is the duty of a warrantee to see that the survey is duly returned; and the failure to make return is punished as his neglect.

In early times exactly the opposite of this was the law.

Jones, Law, p. 61, § lvii; *M'Kinzie* v. *Crow*, 2 Binn. 106; *Lauman* v. *Thomas*, 4 Binn. 59; *Boyles* v. *Johnston*, 6 Binn. 125; *Lilly* v. *Paschal*, 2 Serg. & R. 398; *Watson* v. *Gilday*, 11 Serg. & R. 340; *Biddle* v. *Douval*, 5 Binn. 152; *Boyles* v. *Kelly*, 10 Serg. & R. 214; *Gonzalus* v. *Hoover*, 6 Serg. & R. 125.

Messrs. **Samuel Hepburn** and **James Ryon**, for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court: [442]

This is an action of ejectment for 405 acres of land in Cumberland County, Pennsylvania, brought by the heirs at law of John Griswold, the defendants in error, against George W. Paxton and others, plaintiffs in error, to which the defendants below pleaded not guilty. The cause was tried at Philadelphia before *Judge* McKennan, and the jury, by direction of the court, found a verdict for the plaintiffs below, and judgment was entered accordingly. That judgment is now before us for review. The questions of law in the case arise upon a bill of exceptions taken at the trial, which shows the following proceedings. The plaintiffs, besides showing by certain depositions, that they were the heirs at law of John Griswold, adduced in evidence, 1, a warrant granted to him, dated May 28, 1848, for 400 acres of land, adjoining lands surveyed to other persons named, situate in the Townships of Dickinson and South Middleton, in the County of Cumberland, acknowledging payment for the same to the treasurer of the Commonwealth; 2, a survey made on said warrant, dated December 26, 1853, containing 405 acres 138 perches, returned into the land-office; 3, a patent to John Griswold for the said land, describing the same according to the plot of the survey; 4, the writ of ejectment issued in the cause, for the purpose of proving that the defendants were in possession of the land claimed in the writ.

The defendants then made the following offer: A. Warrant to Thomas Cookson, dated 26th August, 1751; B. Certificate of payment of purchase money by Cookson on 27th August, 1751. [443]

They also offered to prove that a survey was actually made immediately after the date of the warrant and 1264 acres located upon it.

That this location and survey was known to the proprietaries, and recognized and approved by their officers.

That a subsequent warrant was issued by the proprietaries, calling for this location in favor of Cookson.

That this land was assessed for taxes in 1765, in 1770, and subsequently.

That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse and Kropff, who mortgaged it to the Farmers and Mechanics Bank of Philadelphia, to secure part of the purchase money.

That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse and Kropff, and made an application in 1848 for this land, and therein set out that it was for the use of Geisse and Kropff.

That Griswold left the State immediately af-

ter that date, 1848, and never returned, and the title by return of survey and by patent was completed by the defendants in the name of Griswold, because it was the custom of the land officer at that day to issue the patent in the name of the applicant, Griswold having died in 1860.

This offer was objected to by the plaintiffs, on the following grounds, to wit: that no survey was ever made upon it by any proof that is adduced before this court in any shape or form by any official; that the offer does not propose to show an official survey, or survey made by direction of the proprietaries; that any other survey is immaterial and irrelevant in this case; that finding lines of an old survey upon the ground does not prove that they are made by official authority, or that they were any more than trespasses upon the land of the proprietaries; that such a survey unreturned gives no right to a warranty under the proprietaries claiming land by virtue of a warrant issued under the proprietary system; that under the Act of 1784 no more than 400 acres could be surveyed upon one warrant, and that a survey made prior to the Act of 1779 was never returned into the land department. Conceding that they had the right to perfect their title under the Act of Assembly, they could not have surveyed or patented under that survey more than 400 acres.

[444]

Further, that the defendants cannot set up an equitable title in this action.

The court admitted A and B; the rest of the offer was rejected.

For the rejection of the rest of their offer, the defendants excepted.

The defendants then put in evidence (A) the warrant to Thomas Cookson, which was as follows:

A.

By the Proprietaries. Pennsylvania, *ss:*

Whereas, Thomas Cookson, of the County of Cumberland, hath requested that we would grant him to take up one hundred and fifty acres of land on a branch of Yellow Breeches, in the said County of Cumberland, for which he agrees to pay to our use at the rate of fifteen pounds ten shillings, current money of this Province, for one hundred acres, and the yearly quitrent of one half penny sterling for every acre thereof:

These are, therefore, to authorize and require you to survey, or caused to be surveyed, unto the said Thomas Cookson, at the place aforesaid, according to the method of townships appointed, the said quantity of 150 acres, if not already surveyed or appropriated, and make return thereof into the secretary's office in order for further confirmation, for which this shall be your sufficient warrant. Which survey, in case the said Thomas Cookson fulfill the above agreement within six months from the date hereof, shall be valid; otherwise void.

Given under my hand and the seal of the land-office, by virtue of certain powers from the said proprietaries, at Philadelphia, this twenty-sixth day of August, anno Domini one thousand seven hundred and fifty-one.

[445]

JAMES HAMILTON. [Seal.]

To Nicholas Scull, Surveyor-General.

The defendants also put in evidence (B) the following evidence of payment of purchase money by Cookson, to wit:

B.

(*Certified extract from Ledger of Department of Internal Affairs of Pennsylvania.*)

1751.	Thomas Cookson, Dr.		
Aug. 27.	44. To land (2 W. S.) on Yellow Breeches Creek		42
1874.			
Aug. 31.	216 a's 31 p's pat. to the Mt. Holly Paper Co., at vo		86119
1751.	*Contra* Cumberland, Cr.		
Aug. 27.	44. By cash ten pounds & £7 10	54	£17 10

This being all the evidence in the case, the court, as before stated, charged the jury to find a verdict for the plaintiffs for the land embraced in the warrant, survey, and patent given in evidence in their behalf; to which instruction the defendants excepted.

It will be perceived that the case turned upon the failure of the defendants to show that any official survey had ever been made under the vague and indescriptive warrant granted to Thomas Cookson, or that any survey had ever been returned to the land-office. Their offer did not propose proof of any such survey or return, and they contended, both at the trial and in this court, that no such proof was necessary under warrants granted prior to 1765, provided they could prove, by any means whatever, that an actual survey had been made by somebody, and that it was known to, and recognized by the proprietaries, in the manner stated in the offer.

It is admitted that no case precisely in point can be found in the books; but it is argued by the counsel of the defendants that their title may be supported by the course of practice pursued by the proprietaries with regard to titles in the Province in the early part of last century.

[446]

We have examined with some diligence the Pennsylvania Reports, especially the cases cited by the counsel for the plaintiffs in error, to see if we could find any support for his position, and we have been unable to do so. We can find no case in which a private survey has been received as having any efficacy in making out a title, even though it may have been referred to in other surveys. All the cases have reference to official surveys. Parol and circumstantial evidence has been received to establish them, and no others.

The conclusive objection, however, to the title set up by the plaintiffs in error, is the fact that no survey has ever been returned to the land-office, though more than one hundred and thirty years have elapsed since the alleged survey was made. And, indeed, none could ever have been returned if the survey was a private one. This great lapse of time, without any return, and without occupation of the lands, is proof of abandonment. If taxes were paid on them, it was more than a hundred years ago. Passing of deeds from one hand to another, and even recording them, can have no effect on the question. It seems to us that the case is covered by the decision in *Conkling* v. *Westbrook*, 32 P. F. Smith, 81. In that case, the

defendants set up title in part of the lands under a descriptive warrant to one Kellam, dated in 1793, but no survey made or returned until 1851, a lapse of fifty-eight years; and for another part they claimed under an indescriptive application of one Shaler, made in 1768, but no survey made or returned on it until 1851, a lapse of over eighty years. Evidence was offered by the defendants to show that Kellam had claimed to be owner of the lands for thirty years, and had exercised acts of ownership by cutting timber on them; that the lands were assessed to him on the assessment list from 1842, and he paid taxes thereon; that the lines of the Kellam tract had marks as far back as seventy [447] years, and those of the Shaler tract as far back as forty years; but there was no evidence to show who made the marks, or that a deputy surveyor ever made an official survey of either tract, until 1851. The court held that the defendants and those under whom they claimed having for so long a time neglected to have these surveys made and returned, and the plaintiff's title having in the meantime intervened, the law presumed an abandonment; and the court directed the jury to find a verdict for the plaintiff. The Supreme Court of Pennsylvania unanimously sustained this ruling.

It will be observed that the inception of one of these titles went back to 1768. The counsel for the plaintiffs in error contends, however, that a great change took place in the rules and practice of the land-office in 1765, and that the case of *Conkling* v. *Westbrook* does not rule the present case, because the title of his clients originated in 1751, before the establishment of the new rules, and not subject to them. But an examination of the rules adopted in 1765 shows that they related principally to the adoption of a new mode of procuring titles, by a simple application, without a warrant, and without payment until the survey was returned; but they made no alteration in the practice of requiring returns of surveys, though they established new sanctions for the enforcement thereof. It had always been the rule that surveys should be returned to the land-office, in order that it might appear by the records of that office what lands were alienated and what not. And although indulgence was exercised towards those who had procured their lands to be regularly surveyed and had paid for them, and they were held to have title from the time of such survey, and even from the time of their warrants when descriptive, so as to maintain ejectment thereon; yet, as against the proprietaries, and, after them, the State, the title was only an equitable one. The duty of having the surveys returned was always the same; and the manifest inconvenience of outstanding secret titles led the courts, in process of time, under the influence of certain statutes passed after the Revolutionary War, and the manifest dictates of public policy and convenience, to adopt a rule that a survey would be regarded as [448] abandoned unless returned in a reasonable time. This reasonable time was finally fixed at seven years. In *Chambers* v. *Mifflin*, 1 Penr. & W. 74, 78, where the warrant was dated in April, 1768, and therefore prior to the new rules of 1765, and where the survey was not returned until 1797, the Supreme Court of Pennsylvania by *Justice* Huston said: "The doctrine of our courts has not been well understood, for when it is said a precisely descriptive warrant gives title from its date, a vague one from the time of survey, etc., it is sometimes added and always understood, *provided it is otherwise followed up with reasonable attention.* It is not, and never was, the law that on taking out a warrant, and procuring a survey, and then neglecting or refusing to pay the surveyor's fees, which was always necessary to procure a return, that a man could hold the land without attending to it in anyway for an indefinite length of time. Although a warrant has been surveyed, yet if not returned, the owner may change its lines, or change its place altogether and lay it on any other vacant land anywhere near; until it is returned, the State has no power to collect arrears of purchase money. It never can be that a man can wait thirty or forty years, and all that time be able to say, this is my land if I please, and not mine unless I please." The court adds: "We have full and ample provision on this subject by our Legislature. The Act of 9th April, 1781, for establishing a land-office, provides, in section 9, that all surveys heretofore made shall be returned into the Surveyor-General's office within nine months, and prescribes a penalty on any deputy surveyor to whom his fees shall be paid, who neglects to return. This continued till 5th April, 1782, when it was enacted, 'It shall be lawful for the Surveyor-General of this State to receive returns of such surveys, as shall appear to him to have been faithfully and regularly made, from the said late deputy surveyors, their heirs or legal representatives, for such further period as to him shall seem just and reasonable.'" After citing other Acts passed in 1785, relating to surveys under the Act of 1784, but showing the sense of the Legislature on the necessity of a return of survey in due time, and the evils incident on neglect in this particular, the judge proceeds: [449] "Then came the Act of 4th September, 1793, which provides that 'All returns of surveys which have been actually executed since the 4th July, 1776, by deputy surveyors, while they acted under legal appointments, shall be received in the land-office, although the said deputy surveyors may happen not to be in office at the time of the return or returns being made; *Provided, That no returns be admitted, that were made by deputy surveyors, who have been more than nine years out of office.*' This short law is in some respects obscure when closely examined, but it further shows strongly the sense of the Legislature on the subject of keeping titles in this uncertain and unfinished state. It lays down a rule which is not easily gotten over by the courts. Independent of this law, who will say that the Act of 1782, which allows returns to be received until such period as the Surveyor-General shall deem just and reasonable, would keep the office open forever? I am aware that there are cases where plaintiffs have recovered on surveys not returned since 1793. They will, however, be found very special cases, where the owner has proved great exertions on his part to procure returns, and fraud or accident in preventing them. I am also aware that the owners of many tracts, who have taken possession and

occupied them, or transmitted them to their descendants, have found no returns in the office. In such cases the land officers issue orders and have returns made yet, and rightly, for no injury is done to any one. So, if land has been surveyed, and no adverse claimant, as improver, or by warrant, has any claim to the land, returns are received, and may be received, from the present deputy surveyors; but where, as in the present case, a vague or removed warrant has been surveyed, and then neglected thirty years, or even a less time, and no excuse shown, it was not within a 'just and reasonable time' to receive the return, after another had bought and paid for it, as derelict." This case was decided in 1829.

The principles of this case were followed up in the subsequent cases of *Addleman* v. *Masterson*, 1 Penr. & W. 454; *Starr* v. *Bradford*, 2 Penr. & W. 398, and *Strauch* v. *Shoemaker*, 1 Watts & S. 166. In the last case a "just and reasonable time" for the return of a survey was [450] settled at seven years, as had been suggested in the previous case of *Starr* v. *Bradford*.

We think that these authorities reach the present case, notwithstanding the inception of title took place prior to the year 1765, and that *the decision of the Circuit Court was right; and it is therefore affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[597] DENVER AND RIO GRANDE RAILWAY COMPANY, *Plff. in Err.*,
v.
JAMES HARRIS.

(See S. C. Reporter's ed. 597-610.)

Railroads—taking forcible possession of a railroad—personal injuries—action for damages—compensatory and punitive damages—liability of corporation for torts committed by its servants.

1. A corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act.

2. A railroad company is liable for personal injuries resulting to the person or persons in the peaceable possession of property, from its employment of force and violence in disturbing such peaceable possession, without reference to the question of legal title or right of possession.

3. Where a corporation, by its controlling officers, has wantonly disturbed the peace of the community, and by the use of violent means has endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals, the doctrine of punitive damages applies in an action to recover for personal injuries to the plaintiff.

4. Where one of the consequences of a wound, caused by the defendant's wrong, is to render the plaintiff impotent, evidence thereof is admissible, although the declaration does not in terms so specify; and the jury may consider such impotency in estimating compensatory damages.

5. In the case presented, the evidence furnishes no basis for the suggestion that the plaintiff voluntarily joined an illegal assembly for the purpose, if necessary, of committing murder, or any other criminal offense.

[No. 290.]

Argued May 5, 1887. Decided May 27, 1887.

IN ERROR to the Supreme Court of the Territory of New Mexico. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Charles M. Da Costa,** *Clarence A. Seward, John M. Waldron* and *Edward O. Wolcott,* for plaintiff in error.

Mr. **Jno. H. Knaebel,** for defendant in error:

Corporate responsibility is the correlative of corporate power; and a corporation whose force and funds are employed unlawfully to effectuate some corporate design, however illegal, is responsible forensically in as high a degree as the humblest citizen.

Salt Lake City v. *Hollister*, 118 U. S. 256 (*ante*, 176); *Baltimore & P. R. R. Co.* v. *Fifth Bap. Church*, 108 U. S. 330 (27:744); *Nat. Bank* v. *Graham*, 100 U. S. 702 (25:751); *Merchants Bank* v. *State Bank*, 77 U. S. 10 Wall. 604 (19:1008); *Phila. W. & B. R. R. Co.* v. *Quigley*, 62 U. S. 21 How. 209 (16:75); *Lynch* v. *Met. Elev. R. Co.* 90 N. Y. 77; *Ramsden* v. *Boston & A. R. R. Co.* 104 Mass. 117; *Frost* v. *Domestic Sewing M. Co.* 133 Mass. 563; *St. Louis, C. & A. R. R. Co.* v. *Dalby*, 19 Ill. 353; *Chicago & N. W. R. Co.* v. *Peacock*, 48 Ill. 253; *Eastern Counties R. Co.* v. *Broom*, 6 Exch. R. 314; *Pa. R. R. Co.* v. *Vandiver*, 42 Pa. 365; 2 Wood's Ry. Law, 1374.

The trespass being willful, wanton and cruel, and manifesting extraordinary turpitude, exemplary damages were proper.

Day v. *Woodworth*, 54 U. S. 13 How. 363 (14:181); *Milwaukee & St. P. R. Co.* v. *Arms*, 91 U. S. 489 (23:374); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 521 (29:466).

The plaintiff in error has suffered no substantial prejudice from anything here alleged as error. The extremely serious injury suffered by the defendant in error, and the enormity of outrage attending its commission, suggest that the damages awarded are even less than justice might demand.

Decatur Bank v. *St. Louis Bank*, 88 U. S. 21 Wall. 294 (22:560); *Walbrun* v. *Babbitt*, 83 U. S. 16 Wall. 577 (21:489); *Marine Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 252 (17:785); *Union Con. S. Min. Co.* v. *Taylor*, 100 U. S. 37 (25:541).

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by James Harris, [598] the defendant in error, against the Denver and Rio Grande Railway Company, a corporation of the State of Colorado, to recover damages for injuries which, he alleges, were sustained by him, in his person, by reason of an illegal and wrongful assault made by that Company, acting by its servants and agents. The plea was not guilty. There was a verdict and judgment in favor of the plaintiff for $9,000. The judgment was affirmed in the Supreme Court of the Territory, and has been brought here for review.

The defendant introduced no evidence, although its officers were the chief actors on the occasion when the plaintiff was injured. The case made by the latter and other witnesses testifying in his behalf is stated by the Supreme Court of the Territory, in the following extract from its opinion:

"The record discloses the fact that there was evidence on the trial in the lower court to the

effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka and Santa Fé Railway Company was in peaceable possession, by [599] its agents and employés, of a certain railroad in the State of Colorado, running from Alamosa to the City of Pueblo, in that State; that at or about that date, and while the Atchison, Topeka and Santa Fé Railway Company were so in possession of said railroad, the plaintiff in error, the Denver and Rio Grande Railway Company, by an armed force of several hundred men, acting as its agents and employés, and under its vice president and assistant general manager, attacked with deadly weapons the agents and employés of said Atchison, Topeka and Santa Fé Railway Company having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof; that there was a demonstration of armed men all along the line of the railroad seized; and while this was being done, and the seizure was being made, the defendant in error, who was an employé of the Atchison, Topeka and Santa Fé Railway Company, on said line of railroad, and while on the track of the road, and on a hand car thereon, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured; that immediately upon the seizure of the railroad as aforesaid the plaintiff in error accepted it, and at once entered into possession thereof, and commenced and for a time continued to use and operate the same as its own."

[605] One of the propositions advanced by counsel for the Company is this: That it appears from the plaintiff's case, and by his evidence, that he voluntarily armed himself, and taking the law into his own hands, joined an illegal assembly for the purpose, if necessary, of committing murder; that, in the course of the riot and rout, he received a wound at the hands of those whom he had sought by violence to destroy; that, under such circumstances, the law will not permit him to recover for an alleged assault, but conclusively presumes his assent thereto; nor will the law permit him to recover through the medium and by the aid of an illegal transaction, to which he was a party, and which constitutes the foundation of his case.

The same proposition was stated in another form in argument: that the plaintiff engaged voluntarily, and not for his necessary self defense, in a physical combat with others, and cannot, upon principle, maintain a civil action to recover damages for injuries received in such combat at the hands of his adversary, unless the latter beat him excessively or unreasonably; this, upon the ground that, "Where two parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party."

These propositions have no application in the present case. The evidence, taken together, furnishes no basis for the suggestion that the plaintiff voluntarily joined an illegal assembly for the purpose if necessary, of committing murder, or any other criminal offense. Nor does it justify the assertion that he voluntarily engaged in a physical combat with others. All that he did on the occasion of his being injured was by way of preparation to protect himself, and the property of which he and his co-employés were in peaceable possession, against organized violence. It appears in proof, as stated by the court below, that the Atchison, Topeka, and Santa Fé Railroad Company was [606] in the actual, peaceable possession of the road when the other Company, by an armed body of men, organized and under the command of its chief officers, proceeded, in a violent manner, to drive the agents and servants of the former company from the posts to which they had been respectively assigned. It was a demonstration of force and violence, that disturbed the peace of the entire country along the line of the railway, and involved the safety and lives of many human beings. It is a plain case, on the proof, of a corporation taking the law into its own hands, and, by force and the commission of a breach of the peace, determining the question of the right to the possession of a public highway established primarily for the convenience of the people. The courts of the Territory were open for the redress of any wrongs that had been, or were being, committed against the defendant by the other company. If an appeal to the law, for the determination of the dispute as to right of possession, would have involved some delay, that was no reason for the employment of force—least of all, for the use of violent means under circumstances imperiling the peace of the community and the lives of citizens. To such delays all—whether individuals or corporations—must submit, whatever may be the temporary inconvenience resulting therefrom. We need scarcely suggest that this duty, in a peculiar sense, rests upon corporations which keep in their employment large bodies of men, whose support depends upon their ready obedience of the orders of their superior officers, and who, being organized for the accomplishment of illegal purposes, may endanger the public peace, as well as the personal safety and the property of others besides those immediately concerned in their movements.

These principles, under somewhat different circumstances, were recognized and enforced by this court at the present term. One Johnson was in the actual peaceable possession of eighteen miles of a railroad built by him for a railroad company, and was running his own locomotives over it. He claimed the right to hold possession until he was paid for his work. But the company, disputing his right to possession, ejected him by force and violence. He brought [607] his action of forcible entry and detainer. This court said that the party "so using force and acquiring possession may have the superior title, or may have the better right, to the present possession; but the policy of the law in this class of cases is to prevent the disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are *in status quo*, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance." *Iron Mountain & H. R. R. Co.* v. *Johnson*, 119 U. S. 608 [*ants*, 504]. When this language was used in a case arising under

a local statute, relating to actions of forcible entry and detainer, it is not without force in cases like this, where the peaceable possession of property is disturbed by such means as constitute a breach of the peace. If, in the employment of force and violence, personal injury arises therefrom to the person or persons thus in peaceable possession, the party using such unnecessary force and violence is liable in damages, without reference to the question of legal title or right of possession.

Reference was made in argument to those portions of the charge that refer to the liability of corporations for torts committed by their employés and servants.

In *Philadelphia, W. & B. R. R. Co.* v. *Quigley*, 62 U. S. 21 How. 207 [16:74], this court held that a railroad corporation was responsible for the publication by them of a libel, in which the capacity and skill of a mechanic and builder of depots, bridges, station houses, and other structures for railroad companies, were falsely and maliciously disparaged and undervalued. The publication, in that case, consisted in the preservation, in the permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors, in relation to the administration and dealings of the plaintiff as a superintendent of the road. [608] The court, upon a full review of the authorities, held it to be the result of the cases, "that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." In *State* v. *Morris & Essex R. R. Co.* 23 N. J. L. 369, it was well said that, "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. * * * The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act." See also *Salt Lake City* v. *Hollister*, 118 U. S. 256, 260 [*ante*, 176, 178]; *New Jersey Steamboat Co.* v. *Brockett*, present term, 121 U. S. 637 [*ante*, 1049]; *National Bank* v. *Graham*, 100 U. S. 699, 702 [25: 750, 751]. The instructions given to the jury were in harmony with these salutary principles. Whatever may be said of some expressions in the charge, when detached from their context, the whole charge was as favorable to the defendant as it was entitled to demand under the evidence.

One of the consequences of the wound received by the plaintiff at the hands of the defendant's servants was the loss of the power to have offspring—a loss resulting directly and proximately from the nature of the wound. Evidence of this fact was therefore admissible, although the declaration does not, in terms, specify such loss as one of the results of the wound. The court very properly instructed the jury that such impotency, if caused by the defendant's wrong, might be considered in estimating any compensatory damages to which the plaintiff might be found, under all the evidence, to be entitled. *Wade* v. *Leroy*, 61 U. S. 20 How. 44 [15:816].

The court also instructed the jury that they [609] were not limited to compensatory damages, but could give punitive or exemplary damages if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff, causing him incurable and permanent injury; always bearing in mind that the total damages could not exceed the sum claimed in the declaration. This instruction, the Company contends, was erroneous. Its counsel argue that while a master may be accountable to an injured party to the extent of compensatory damages for the wrongful acts of his servant—provided the servant is acting within the general scope of his employment in committing the injury—even though the master may not have authorized or may have even forbidden the doing of the particular act complained of, yet he cannot be mulcted in exemplary damages unless he directed the servant to commit the special wrong in question in such manner as to personally identify himself with the servant in the perpetration of the injurious act.

The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court. In *Day* v. *Woodworth*, 54 U. S. 13 How. 371 [14:185], which was an action of trespass for tearing down and destroying a milldam, this court said that in all actions of trespass, and all actions on the case for torts "A jury may inflict what are called exemplary, punitive, or vindictive damages, upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff;" and that such exemplary damages were allowable "in actions of trespass where the injury has been wanton or malicious, or gross and outrageous." The general rule was recognized and enforced in *Philadelphia, W. & B. R. R. Co.* v. *Quigley* [*supra*], which, as we have seen, was an action to recover damages against a corporation for a libel; in the latter case, the court observing that the malice spoken of in the rule announced in *Day* v. *Woodworth* was not merely the doing of an unlawful or injurious act, but the act complained of must have been conceived "in the spirit of mischief or of criminal indifference to civil obligations." [610] See also *Milwaukee & St. P. R. R. Co.* v. *Arms*, 91 U. S. 492 [23:375]; *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512, 521 [29: 463, 466]; and *Barry* v. *Edmunds*, 116 U. S. 550, 562-3 [29:729, 733].

The court, in the present case, said nothing to the jury that was inconsistent with the principle as settled in these cases. The jury were expressly restricted to compensatory damages, unless they found from the evidence that the defendant acted with bad intent and in pursuance of an unlawful purpose to employ force to dispossess the other company. The doctrine of punitive damages should certainly apply in a case like this, where a corporation, by its controlling officers, wantonly disturbed the

peace of the community and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country. That the defendant, within the meaning of the rule holding corporations responsible for the misconduct of their servants in the course of its business and of their employment, directed that to be done which was done, is not to be doubted from the evidence, the whole of which is given in the bill of exceptions. Its governing officers were in the actual command and directing the movements of what one of the witnesses described as the "Denver and Rio Grande forces," which were avowedly organized for the purpose of driving the other company and its employés, by force, from the possession of the road in question.

Other questions were discussed by counsel, but they do not, in our judgment, deserve consideration. Substantial justice has been done without violating any principle of law in the admission of evidence, or in the granting or refusing of instructions.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[211] CHARLES BENZIGER ET AL., *Plfs. in Err.*,
v.
WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 211-214.)

Duties—"Rosaries," subject to 50 per cent ad valorem, *the duty imposed on beads.*

"Rosaries," composed of beads with steel, silver and other metals, the beads being the component material of chief value, are dutiable at the rate of duty imposed on beads, under section 2499, R. S. which provides that "On all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of the component parts may be chargeable."

[No. 280.]

Argued and submitted May 2, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **R. D. Mussey**, for plaintiffs in error.

Mr. G. A. Jenks, Solicitor-Gen. for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, commenced in a court of the State of New York, and removed into the Circuit Court of the United States for the Southern District of New York, brought by the firm of Benziger Brothers against the Collector of the Port of New York, to recover back duties alleged to have been illegally exacted on importations made into the Port of New York, in 1881, of articles which were entered as "rosaries." The duty exacted was 50 per cent *ad valorem*, under schedule "M" of section 2504 of the Revised Statutes, 2d ed. p. 478, which provides for that rate of duty on "all beads and bead ornaments." At the trial, the court directed the jury to find a verdict for the defendant. The plaintiffs excepted to this direction and, after such a verdict and a judgment accordingly, brought this writ of error. [212]

The component materials of the rosaries in question were: 1. Beads, glass; chain and cross, metal. 2. Beads, wood; chain and cross, metal. 3. Beads, chain, and cross all of steel. 4. Beads, bone; chain and cross, metal. 5. Beads, ivory; chain and cross, metal. 6. Beads, chain, and cross all of silver. 7. Beads, mother-of-pearl; chain and cross, metal. It was proved at the trial that the rosaries are composed of beads, a metal chain, and a cross, the beads being fastened on the chain at regular intervals; that a rosary is not complete without a cross; that they are used by Roman Catholics in counting their prayers; that they are carried in the pocket when not so in use, and are never used for ornament; that, in all cases, the beads are the component material of chief value; that they are dealt in only by dealers in religious and devotional articles pertaining to the Catholic Church, and are not dealt in by those who deal generally in beads and bead ornaments, and are not known to them; and that the expression "I say the beads," is sometimes applied to the devotional exercises which are performed on rosaries. The witnesses for the plaintiffs testified that the articles in question are known to importers and wholesale dealers as rosaries, and are dealt in under that name, and are not dealt in under the name of beads; that dealers in rosaries also deal in the beads not made up into rosaries, but fastened together on a cotton string, which they sell to parties to be made up into rosaries; that an order for beads would be understood to mean these beads and not the ones made up into rosaries; and that the people who use rosaries sometimes call them "beads" and sometimes "rosaries." The witness for the defendant testified that they are called beads or rosaries, and are bought and sold under the name of beads; that, in point of fact, they are made of beads, and are called beads and rosaries, irrespective of the material of which the beads are composed. On cross examination he testified as follows: "Q. What class of people call them beads? A. Well, I think people in New York. Q. What class of people in New York? A. A great many Catholics call them beads, and a great many call them rosaries. Q. Don't the dealers call them rosaries, and so catalogue them? A. Yes, sir." [213]

The plaintiffs claim that the rosaries were not dutiable under the head of "beads and bead ornaments," but were dutiable under various provisions of the Revised Statutes, at 35 per cent, as manufactures of wood, bone, ivory, and shells; at 40 per cent, as manufactures of glass and silver, and at 45 per cent as manufactures of steel.

The principle adopted by the Treasury Department in directing the Collector to assess a duty of 50 per cent on these rosaries was that, as they were not enumerated as "rosaries" in the Tariff Act, and were composed of beads with steel, silver and other metals, the beads being the component material of chief value, although they might not be "bead ornaments,"

they were dutiable at the rate of duty imposed on beads, by virtue of the provision of section 2499 of the Revised Statutes, which enacts that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." This provision does not apply to any enumerated articles, but applies only to nonenumerated articles. The articles in question were known to importers and dealers as "rosaries." As such, they were not an enumerated article, but were dutiable, under the above provision of section 2499, at the duty imposed on "beads."

The cases of *Lottimer* v. *Lawrence*, 1 Blatchf. 613, and *Arthur* v. *Sussfield*, 96 U. S. 128 [24: 772], cited by the plaintiffs, have no application to the present case. In the former case, the article in question, thread lace, was enumerated in the tariff by that name. In the second case, the article was spectacles, made of glass and steel. A duty of 45 per cent was exacted on the spectacles, as being "manufactures of steel, or of which steel shall be a component part." It was held by this court that the article was dutiable at only 40 per cent under the head of "pebbles for spectacles and all manufactures of glass, or of which [214] glass shall be a component material." The ground of the decision was that, as there could be no spectacles without pebbles or glass, the duty of 40 per cent was imposed on the pebbles or glass as materials to aid the sight, the steel being incidental merely, and that, in fact, spectacles were designated under the description of "pebbles for spectacles."

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[363] EMMA C. WHITSITT, Sole Devisee and Heir at Law of RICHARD E. WHITSITT, Deceased, *Appt.*,

v.

UNION DEPOT AND RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 363-365.)

Practice—dismissal of appeal taken nearly four years after the decree was rendered.

This court dismisses, upon its own motion, an appeal taken nearly four years after the decree was rendered, there being no suggestion of disability to bring the appellant within the proviso of section 1008, R. S.

[No. 309.]

Submitted May 11, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Dismissed.*

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **E. T. Wells**, for appellant.

No counsel appeared for appellees.

[364] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This was a suit in equity begun by Richard E. Whitsitt, then in life, and James Meakew, to quiet their possession of certain lots in Denver, Colorado. A decree was entered October 6, 1880, dismissing the bill. From that decree the complainants took an appeal to this court, which was dismissed at October Term, 1880, because it did not appear that the value of the matter in dispute exceeded $5,000. *Whitsitt* v. *R. R. Co.* 103 U. S. 770 [26: 337]. On the 20th of July, 1881, Emma C. Whitsitt appeared in the circuit court, and, suggesting the death of Richard E. Whitsitt, asked to be made a party to the suit in his stead, as sole heir and devisee. An order to this effect was made, and she, on the 30th of August, 1881, filed in the circuit court an affidavit showing that the value of the matter in dispute did exceed $5,000. On the same day she took another appeal, which was docketed in this court September 24, 1881, and dismissed, under Rule 16, April 5, 1884, for want of prosecution. The mandate from this court under this appeal was filed in the circuit court September 9, 1884, and the next day, September 10, Mrs. Whitsitt presented to the District Judge for the District of Colorado another appeal bond in the suit, which he accepted; and he also signed a citation that was duly served on the same day. This last appeal was docketed in this court September 23, 1884. When the case was reached in its regular order on the docket at the present term, it was submitted by the appellant on printed brief, no one appearing for the appellee.

Section 1008 of the Revised Statutes provides that "No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order; *Provided*, That where a party entitled to prosecute a writ of error or take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."

This decree was rendered October 6, 1880. [365] and the present appeal was not taken until September 24, 1884, nearly four years afterwards. There is no suggestion of disability such as would bring the appellant within the proviso. The appeal should therefore be dismissed; *Scarborough* v. *Pargoud*, 108 U. S. 567 [27: 824]; *and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TEXAS TRANSPORTATION COMPANY, [519] ALEXANDER C. HUTCHINSON ET AL., *Appts.*,

v.

GEORGE SEELIGSON, Admr. of HENRY SEELIGSON, Deceased.

(See S. C. Reporter's ed. 519-522.)

Removal of causes—separable controversy—discontinuance—cause, properly remanded.

Where a cause could only have been removed, because of an alleged separate cause of action against one of the defendants, the cause should be

remanded upon the entry of a discontinuance as to him.

[No. 841.]

Submitted April 25, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **T. N. Waul,** for appellants:

The circuit court had jurisdiction at the time it was removed. The question of jurisdiction was considered, adjudged and determined by the circuit judge on the motion awarding a repleader and the overruling of two motions to remand. Being established, no act of the complainant thereafter, either by discontinuing as to one of the parties defendant, or either of the causes of action, would authorize the court to remand, although the court should dismiss the case at the cost of complainants.

Phelps v. *Oaks*, 117 U. S. 236 (29: 888); *Clarke* v. *Mathewson*, 37 U. S. 12 Pet. 164 (9:1041); *Roberts* v. *Nelson*, 8 Blatchf. 74; *Carrington* v. *R. R. Co.* 9 Blatchf. 467.

Messrs. **William E. Earle** and **W. W. Boyce,** for appellee:

In this case the circuit court expressly holds in its order remanding the cause that, except as against the noncitizen Huntington, the entire controversy otherwise set up in said petition is wholly within the exclusive jurisdiction of the state court. When, therefore, this ligament was cut by the dismissal of the bill as to Huntington, the cause was necessarily remanded to the state court.

Hyde v. *Ruble*, 104 U. S. 407 (26: 823), *Barney* v. *Latham*, 103 U. S. 205 (26: 514).

It cannot be pretended there was any ground for hearing the case in the circuit court after the bill was dismissed as to Huntington; because no one else petitioned for removal, and because there was no separable controversy. The record discloses none, even whilst Huntington was a party, notwithstanding his petition; and none of the parties have suggested that there was after he was eliminated.

Case of Sewing M. Cos. 85 U. S. 18 Wall. 553 (21: 914); *Blake* v. *McKim*, 103 U. S. 336 (26: 563).

[520] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, from an order of the circuit court remanding a suit which had been removed from a state court. The suit was begun December 18, 1883, in the Circuit Court of Harris County, Texas, by Henry Seeligson, a citizen of that State, and [521] the owner of twenty shares of the capital stock of the Texas Transportation Company, a Texas corporation, against that Company, and A. C. Hutchinson, Charles Fowler, E. W. Cave, and L. Megget, its directors and principal officers, for an account of the affairs of the Company; and to annul and set aside a note of the Company for $335,000 to Charles Morgan, together with a deed of trust given for its security. Hutchinson is a citizen of Louisiana, but all the rest of the defendants are citizens of Texas. On the 9th of February, 1884, a supplemental petition was filed in the suit, alleging that C. P. Huntington had become the owner of the note given to Morgan, and bringing him in as a defendant. Citation was served on him March 13, 1884, and on the 31st of the same month, he, being a citizen of New York, presented his petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of Texas, on the ground "that there is a controversy in said suit which is wholly between citizens of different States, and which can be fully determined as between them; to wit, a controversy between said Seeligson, plaintiff, and your petitioner, and a controversy between your petitioner on one side, and in which the interests of the said Seeligson, the Texas Transportation Company, and the other defendants, officers of said Company, are on the other side." Upon this petition an order of removal was made, and the suit entered in the circuit court on the 16th of October, 1884, when the defendants appeared, and, on the first of December, filed a joint and several demurrer to the bill. On the 5th of January, 1885, this demurrer was sustained as to Huntington, but overruled as to the rest of the defendants. The bill was then amended, and afterwards, on the 9th of March, it was ordered that the "complainant do recast and amend his bill so as to conform to the equity rules of the supreme court, and that in so amending and recasting his pleadings, he have leave to bring in two or more bills, as counsel may advise, so as to save to complainant all the causes of action contained in his original bill," and that, "if this order is not complied with by the rule day in May next, the complainant's bill shall stand dismissed with costs." On the second of May, Seeligson made a motion to remand the suit, and this being overruled, on the [522] 4th of May he filed an amended bill, to which the defendants demurred June 1. This demurrer was set down for argument on the first Monday in November. Other motions were filed by the defendants, but, before any of them were disposed of, Seeligson, on the 19th of November, dismissed the suit as to Huntington, and at once moved to remand. This motion was granted January 9, 1886, and from that order this appeal was taken.

As the suit could only have been removed because of the alleged separate cause of action against Huntington, it was right to remand it as soon as the discontinuance was entered as to him. The express provision of section 5 of the Act of 1875 is, that if "it shall appear to the satisfaction of said circuit court at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." The court was not required to keep the suit after the discontinuance, simply because it might have been removed when Huntington was a party. As soon as he was out of the case it did appear that "the suit did not really and substantially involve a dispute or controversy properly within" its jurisdiction.

The order to remand is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[306]

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN, *Plff. in Err.*,

v.

COUNTY COURT OF KNOX COUNTY, AND THE JUSTICES Thereof.

(See S. C. "*Harshman* v. *Knox County*," Reporter's ed. 306-320.)

Municipal bonds—mandamus *to compel levy of special tax to pay judgment—estoppel by judgment—extends to all facts involved—default.*

Upon an application for a *mandamus* to compel the levy of a special tax to pay a judgment recovered upon municipal bonds, it is *held:*

1. That the respondents are estopped by the judgment to deny that the bonds were issued in pursuance of section 17 chapter 63, of the General Statutes of Missouri of 1866;
2. That the averment to that effect, being material and traversable, was confessed by default;
3. That it was part of the plaintiff's case to show, not merely the execution of the bonds, but their issue in pursuance of a law making them the valid obligations of the County;
4. That the estoppel is not confined to the judgment, but extends to all facts involved therein;
5. That the judgment is none the less conclusive because rendered by default;
6. That the bar is all the more perfect and complete in this proceeding because it is not a new action, but a remedy in the nature of an execution;
7. That the *mandamus* can be limited in its mandate only by that which the judgment itself declares;
8. That the original contract cannot be shown to determine the extent of the remedy provided by law for its enforcement, the matter having been adjudged in the original action;
9. That the judgment determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment; and
10. That the findings of the judgment on that point are conclusive and bind the respondents in their official capacity, as well as the County itself.

[No. 258.]

Submitted April 28, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. Reported below, 5 McCrary, 76. Opinion below, 15 Fed. Rep. 705. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **T. K. Skinker and J. B. Henderson,** for plaintiff in error.

Messrs. **George D. Reynolds and James Carr,** for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a proceeding by *mandamus* against the Justices of the County Court of Knox County to compel them to levy a tax sufficient to pay a judgment for $77,374.46, obtained by the relator, Harshman, on the 28th of March, 1881, against that County, in the Circuit Court for the Eastern District of Missouri.

The information alleges that "said judgment was recovered upon bonds and coupons issued by the said County in part payment of a subscription made by the said County on the 9th day of June, 1867, to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of the State of Missouri; that said subscription was authorized by a vote of the people of said County at a special election held pursuant to an order of the County Court of said County, on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two thirds of the qualified voters of said County voted in favor of and assented to the making of said subscription; that relator has requested the said County Court and the Justices thereof to levy a special tax upon all the property in said County made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said County, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said County Court and the Justices thereof have refused and neglected to levy the said tax; that the said County has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law."

[307]

The respondents made return to the alternative writ substantially as follows: they admit that the judgment of the relator was recovered upon bonds and coupons issued by the County of Knox in part payment of two subscriptions made by said County to the capital stock of the Missouri and Mississippi Railroad Company; but they deny that said subscriptions or either of them were authorized by a vote of the people of that County at either a general or special election held pursuant to an order of the County Court of said County on the 12th day of March, 1867, or at any other time, under the 17th section of chapter 63 of the General Statutes of Missouri, then in force. They deny that two thirds of the qualified voters of Knox County ever voted in favor of or assented to making any subscription to the capital stock of the Missouri and Mississippi Railroad Company. They aver that, in point of fact, on the 18th of May, 1867, the County Court of said County made a subscription to the capital stock of said company in the sum of $100,000, and on the 2d of May, 1870, the said Court made a further subscription to the capital stock of said company in the sum of $55,000. That in payment of both of these subscriptions, the said Court issued bonds in the denominations of $500 and $50; that fifty-eight of the relator's said bonds are of the first of these issues, and sixty are of the second; that both of these subscriptions were made without the assent of two thirds of the qualified voters of the County, and, indeed, without any vote being taken at all, and against the will of said qualified voters; that they were made by authority only of section 13 of the charter of the Missouri and Mississippi Railroad Company, being an Act of the General Assembly of the State of Missouri, entitled "An Act to Incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865; that each of relator's said bonds contains a recital that it is issued under and pursuant to orders of the County Court of Knox County to the Missouri and Mississippi Railroad Company, for subscription to the capital stock of said company, as authorized by said Act, to incorporate the Missouri and Mississippi Railroad Company approved February 20, 1865; and that said court has each year since the issue of said bonds levied a

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tax of one twentieth of one per cent upon the assessed value of all the taxable property in said County, and has caused the same to be extended on the tax books of said County for each year, and has had said tax collected for the purpose of paying said bonds and coupons; that Knox County has no money in its treasury with which to pay the relator's judgment, and that the Judges of Knox County have no legal authority to levy any other or greater taxes than the taxes as hereinbefore stated, and no legal authority or power to levy or cause to be collected the special tax which the relator seeks to have imposed.

On the coming in of this return the relator moved the court to quash the same, on the ground that the matters and things therein set forth were inconsistent with and contradictory to the record of the judgment in the case. This motion was overruled by the court, to which ruling an exception was taken.

An answer to the return was filed by the relator, in which were set forth the various steps and proceedings taken, as therein alleged, by the authorities and people of the County of Knox, in respect to the issue of the bonds on which the judgment was founded, claiming that an election was duly had by an order of the County Court under the authority of the general laws of Missouri, in virtue of which the subscription to the stock of the railroad company was made and the bonds in question issued. To this answer a replication was filed, and the case was submitted to a jury. [309]

On the trial, as appears by a bill of exceptions duly taken, the relator offered to read in evidence the petition, summons, marshal's return, and judgment referred to in the information. On objection made by the respondents, the court ruled that these papers could not be read unless the relator would also read the bonds filed with said petition, to which ruling the relator excepted. The relator then put in evidence the said papers and also the said bonds.

The petition in the original action sets out "That on the 9th day of June, 1867, defendant subscribed to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of this State, the sum of one hundred thousand dollars; that said subscription was authorized by a vote of the people of said County of Knox at a special election held pursuant to an order of the County Court of said County on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two thirds of the qualified voters of said County voted in favor of and assented to the making of said subscription; that in part payment of said subscription defendant, by its County Court, executed and issued divers bonds with coupons for interest attached; that by each of said bonds defendants promised to pay to bearer, at the National Bank of Commerce, in the City of New York, on the first day of February, 1878, the sum of five hundred dollars, with interest at the rate of 7 per cent per annum; that said coupons for interest were made and are payable on the first day of February of each year between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached. That, in further payment in part of said subscription, defendant executed and issued divers other bonds with coupons for interest attached; that [310] by each of said bonds defendant promised to pay to bearer, at the National Bank of Commerce, in the City of New York, on the first day of February, 1880, the sum of five hundred dollars, with interest at the rate of 7 per cent per annum; that said coupons for interest were made payable on the first day of February of each year, between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay to bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached."

The petition also sets out that the plaintiff is the bearer and owner of divers of said bonds and coupons, designated by numbers. The return of the summons shows that the writ was duly served, and judgment was rendered thereon March 28, 1881, by default, which sets forth that "This action being founded upon certain bonds and coupons for interest thereon, issued by said defendant, and described in the petition, the court finds that the plaintiff has sustained damages by reason of the nonpayment thereof in the sum of $77,374.46. It is, therefore, considered by the court that the plaintiff, George W. Harshman, have and recover of the defendant, the County of Knox, as well the said sum of $77,374.46, the damages aforesaid by the court assessed, as also the costs herein expended, and have thereof execution."

Each of the bonds contains the following recital: "This bond being issued under and pursuant to order of the County Court of Knox County for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an Act of the General Assembly of the State of Missouri, entitled 'An Act to Incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

The issues of fact submitted to the jury were as follows:

"First. Was there an election held under the orders of the County Court read in evidence, and did two thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the County Court to the stock mentioned in said orders?

"Second. Was the subscription to stock of the railroad company actually made, not, as [311] recited in said bonds, under the charter of the M. & M. R. R. Co., but under the general law, whereby the authority to make such subscription and issue bonds therefor was dependent on the vote of the people? In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence?"

At the conclusion of the evidence the court instructed the jury "That to overcome the recitals in the bonds issued by the County Court under its seal, the evidence must be clear and positive, full and explicit, and that the burthen of proving the alleged mistake, so as to overthrow the said recitals, is upon the relator in this case," and "that the evidence to overcome said recitals is insufficient."

In answer to these questions, the jury found in the affirmative on the first, and in the negative on the second; and thereupon the court entered a judgment in favor of the respondents, in which it is recited that it appeared to the court "That there was an election held under orders of the County Court of Knox County, and that two thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the said Court to the stock mentioned in its orders, but that the subscription to the stock of the Missouri and Mississippi Railroad Company was actually made and the bonds issued, not as alleged in the petition and alternative writ in this case, under the general law of the State of Missouri, but solely under and by virtue of an Act of the General Assembly of the State of Missouri, entitled 'An Act to Incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

The charter of the Missouri and Mississippi Railroad Company, referred to, incorporates it with power to construct a railroad from the Town of Macon, in the County of Macon, in the State of Missouri, through the Town of Edina, in the County of Knox, in said State, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, Missouri. The 13th section is as follows:

[312] "Sec. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company; and may issue bonds therefor, and levy a tax to pay the same, not to exceed one twentieth of one per cent upon the assessed value of taxable property for each year."

On the other hand, sections 17 and 18 of the General Railroad Law, Gen. Stat. Mo. 1865, page 338, provide as follows:

"Sec. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company, duly organized under this or any other law of the State; *Provided* That two thirds of the qualified voters of such county, city or town, at a regular or special meeting to be held therein, shall assent to such subscription."

"Sec. 18. Upon the making of such subscription by any county court, city or town, as provided for in the previous section, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town, making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town, to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription."

It is not denied, and has been so decided by [316] the Supreme Court of Missouri, that, under section 17 of the General Railroad Law, just cited, the county court of a county was authorized to subscribe to the stock of railroad companies, though created by special charter, provided the requisite assent of the qualified voters was duly obtained. *Cape Girardeau, etc. Co.* v. *Dennis*, 67 Mo. 438; *Chouteau* v. *Allen*, 70 Mo. 290.

It is also not denied that, by virtue of section 18 of the General Railroad Law, the special tax therein provided may be levied for the purpose of paying bonds issued in pursuance thereof, and that without limit as to its amount. *U. S.* v. *County of Macon*, 99 U. S. 582 [25: 331]. As the limit of taxation prescribed and permitted under section 13 of the Act incorporating the Missouri and Mississippi Railroad Company, to be levied in payment of bonds issued thereunder, was not to exceed one twentieth of one per cent upon the assessed value of the taxable property for each year, the contention of the respondents in the circuit court was that they were entitled to show by the recitals in the bonds themselves, in contradiction to those contained in the judgment founded upon them, that they were in fact issued under the charter of the corporation, and not under the general law. On this point the judgment of the circuit court was in their favor, denying to the relator the peremptory writ of *mandamus*, and this decision is now alleged as error, for which the judgment should be reversed.

The question is whether the respondents below are estopped in this proceeding by the judgment in favor of the relator against the County of Knox on the bonds, to deny that the bonds were issued in pursuance of section 17, chapter 63, of the General Statutes of Missouri of 1866. The averment to that effect in the petition in [317] the action, if material and traversable, was confessed by the default. The judgment recites that the action is founded upon certain bonds and coupons for interest thereon issued by said defendant and described in the petition. The averment as to the character of the bonds, and the grounds and authority upon which they were founded, so as to constitute them legal obligations of the County of Knox, contained in the petition, was clearly material to the plaintiff's cause of action. If the defendant had denied it by a proper pleading, the fact would have been put in issue, and the plaintiff would have been bound to prove it.

It was part of the plaintiff's case to show, not merely the execution of the bonds by the county authorities, but that they were issued in pursuance of a law making them the valid obligations of the county. The power to issue such securities does not inhere in a municipal corporation, so as to be implied from its corporate existence; it must be conferred, either in express words or by reasonable intendment; and if the authority to issue them in a given case is challenged by a proper denial, the plaintiff is put to the proof. What it is necessary for him to prove, it is proper for him to allege, and the allegation must be proven as made. It follows,

therefore, that if a denial had been made in the action on the bonds in question, the averment that they were issued under section 17, chapter 68, of the General Statutes of Missouri of 1866, would have been material and traversable; and proof of the fact would have been necessary to support the recovery. In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth by the defendant. It is quite true that the judgment would have been the same whether the authority to issue the bonds was derived under the general statutes or under the charter of the railroad company, but good pleading required that the fact, whichever way it was, should be stated, and when stated the averment must be proved as laid.

As this is a direct proceeding upon the judgment, its effect as an estoppel is determined by the first branch of the rule as laid down in *Cromwell* v. *County of Sac*, 94 U. S. 351 [24: 195]. That is: "It is a finality as to the claim or [318] demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And as stated in *Burlen* v. *Shannon*, 99 Mass. 200, 203: "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded." It is none the less conclusive because rendered by default. "The conclusiveness of a judgment upon the rights of the parties does in no wise depend upon its form or upon the fact that the court investigated or decided the legal principles involved; a judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict." *Gifford* v. *Thorn*, 9 N. J. Eq. 722. The bar is all the more perfect and complete in this proceeding because it is not a new action. *Mandamus*, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment. *Riggs* v. *Johnson County*, 73 U. S. 6 Wall. 166 [18: 768]; *Supervisors* v. *Durant*, 76 U. S. 9 Wall. 417 [19: 733]; *Thompson* v. *U. S.* 103 U. S. 484 [26: 523]. Certainly nothing that contradicts the record of the judgment can be alleged in a proceeding at law for its collection by execution.

In *Ralls County Ct.* v. *United States*, 105 U. S. 733 [26: 1220], the Chief Justice said: "In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained as obligations of the county. As to these defenses, it is sufficient to say it was conclusively settled by the judgment, which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri in *State* v. *Rainey*, 74 Mo. 229, and the principle on which the decision rests is elementary."

As the execution follows the nature of the judgment, and its precept is to carry into effect [319] the rights of the plaintiff as declared by the judgment, with that mode and measure of redress which in such cases the law gives, so the *mandamus* in a case like the present can be limited in its mandate only by that which the judgment itself declares.

It was said, however, in *Ralls County Ct.* v. *United States* [*supra*], that "While the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all proper ways, notwithstanding the change in the form of the debt." It is argued from this that, as the remedies to be resorted to for the purpose of enforcing the judgment are those given by the original contract, it is necessary to ascertain from the contract itself what those remedies are; but that is the very matter which has been already passed upon in the judgment which decides, in the present case, by its recital, the character and extent of the obligation created by the law of the contract. It may well be that in a case where the record of the judgment is silent on the point, the original contract may be shown, notwithstanding the merger, to determine the extent of the remedy provided by the law for its enforcement; but that is not admissible where, as in this case, the matter has been adjudged in the original action. Indeed, in view of the nature of the remedy by *mandamus*, as the means of executing the judgment, it is all the more material and important that the judgment itself should determine the nature of the contract and the extent of its obligation. The averment in the original petition that the bonds were issued under the authority of a particular statute becomes, therefore, an additional element in the plaintiff's case in that action for the purpose of showing with certainty what is the mode and measure of redress after judgment. By the terms of the judgment in favor of the relator it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of the bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the County itself, because, as was said in *Labette Co. Comrs.* v. *Moulton*, 112 U. S. 217 [28: 698], "They are the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast [320] the duty of providing for its satisfaction. They are not strangers to it as being new parties on whom an original obligation is sought to be charged, but are bound by it as it stands without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment."

The return of the respondents, therefore, to the alternative writ of *mandamus* is insufficient in law; and the circuit court erred in not awarding to the relator a peremptory writ of *man-*

damus. For that error the judgment is reversed, and the cause remanded, with directions to award a peremptory mandamus.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[231] ALEXANDER R. SHEPHERD, *Plf. in Err.*,

v.

JOHN W. THOMPSON.

(See S. C. Reporter's ed. 231-241.)

Statute of Limitations—new promise—consideration—express or implied promise—construction of instrument—reversal—refusal to enter judgment on verdict at former trial.

1. The Statute of Limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose.
2. The original debt is a sufficient legal consideration for a subsequent promise to pay it, made either before or after the bar of the statute is complete.
3. In order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay the debt or else an express acknowledgment of the debt from which his promise to pay it might be inferred. A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor.
4. In the case presented, it is *held*: that an instrument which contains no promise of the defendant personally to pay the debt, and no acknowledgment or mention of it as an existing liability, but merely provides for the application of certain pledged property to its payment, does not amount to a new promise, express or implied.
5. Upon the reversal of a judgment of the court below this court cannot direct the entry of judgment upon a former verdict. When the second trial was ordered the case stood as if it had never been tried before; and this court can only review the rulings at the second trial.

[No. 264.]

Argued Apr. 25, 26, 1887. Decided May 27, 1887.

[232] IN ERROR to the Supreme Court of the District of Columbia. *Reversed, Remanded.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action brought March 11, 1880, by John W. Thompson against Alexander R. Shepherd, upon two promissory notes, dated March 10, 1878, made by the defendant and payable to the plaintiff, the one for $7,000 in two years, and the other for $8,000 in three years, with interest at the yearly rate of 8 per cent. The defendant pleaded the Statute of Limitations.

The record transmitted to this court showed that the case was tried twice, and that at each trial the plaintiff put in the following evidence: 1, The notes sued on. 2, A deed of trust of the same date, in the usual form of mortgages of real estate in the District of Columbia, and recorded in the land records for the District, liber 712, folio 128, by which the defendant conveyed to the plaintiff certain land described, in trust to secure the payment of these and one other note. 3, A deed, dated November 15, 1876, by which the defendant conveyed his property and choses in action, including a claim against the United States for the use and occupation of the premises No. 915 E Street Northwest in the City of Washington, to George Taylor and others, in trust to apply for the benefit of his creditors. 4, An instrument signed by the defendant and A. C. Bradley, assented to in writing by Taylor and his cotrustees, the body of which was as follows:

"In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10, 1878, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E Street Northwest, and all the proceeds thereof and the moneys derived therefrom, are [233] hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of 8 per cent per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay. Witness our hands this 21st day of June, 1877."

At the first trial, the judge ruled that this instrument was insufficient to take the case out of the Statute of Limitations, and a verdict and judgment were rendered for the defendant, which, upon a bill of exceptions of the plaintiff, were set aside at the General Term. 1 Mackey, 385.

At the second trial, the judge, against the objection and exception of the defendant, instructed the jury that this instrument was evidence of a new promise, which took the notes sued on out of the Statute of Limitations. A verdict and judgment were rendered for the plaintiff, and a bill of exceptions to this instruction was tendered and allowed. This judgment was affirmed in General Term, and the defendant sued out this writ of error.

Messrs. **A. C. Bradley** and **Wm. P. Mattingly**, for plaintiff in error:

The extrinsic evidence tended to rebut and repel any implication of a new promise. The very notes secured by the deed of trust were payable solely out of the property and created no personal liability.

Wood, Lim. Ac. 168, § 93, and p. 217; *Morrill* v. *Frith*, 3 Mees. & W. 402; *Wetzel* v. *Bussard*, 24 U. S. 11 Wheat. 309 (6:481); *Barreda* v. *Silsbee*, 62 U. S. 21 How. 168 (16:93); *West* v. *Smith*, 101 U. S. 270 (25:812); *White* v. *Jordan*, 27 Me. 370; *Wainman* v. *Kynman*, 1 Exch. 118.

The assignment is remarkable in not naming the plaintiff, in not assigning directly to him, in providing that the proceeds of the claim shall go to the trustee named in the deed of trust, and be by him applied, thereby indicating with sufficient force to justify, if not compel, the inference that the proposition had reference, not to the personal liability of the defendant, but solely to the liability of the property under the deed of trust.

Messrs. **M. P. Morris** and *H. H. Wells*, for defendant in error:

The assignment distinctly acknowledges and recognizes the indebtedness by reference to another paper, in which that indebtedness is specifically described, and which is in evidence in the case. It distinctly promises to pay that indebtedness; and it distinctly gives security for the payment of it. If this paper is not evidence of a new promise, it is impossible to draw a paper that would be.

Moore v. *Bank of Columbia*, 31 U. S. 6 Pet. 86 (8:329); *Bell* v. *Morrison*, 26 U. S. 1 Pet. 352 (7: 175); *Randon* v. *Toby*, 52 U. S. 11 How. 493 (13: 784); *Walsh* v. *Mayer*, 111 U. S. 31 (28:338).

Mr. Justice **Gray**, after stating the case as above reported, delivered the opinion of the court:

[234] The Statute of Limitations in force in the District of Columbia is the Statute of Maryland, which, so far as applicable to this case, closely follows the language of the English Statute, 21 Jac. I, chap. 16, § 3, but bars an action on a promissory note or other simple contract in three years after the cause of action accrues. Maryland Stat. 1715, chap. 23, § 2, 1 Kilty, Laws; Dist. Col. Laws, 1868, p. 284.

The promissory notes sued on were payable respectively on March 10, 1875, and March 10, 1876; and the action was brought March 11, 1880. The question is therefore whether the instrument signed by the defendant on June 21, 1877, is evidence of a sufficient acknowledgment or promise to take the case out of the statute.

The principles of law by which this case is to be governed are clearly settled by a series of decisions of this court. The Statute of Limitations is to be upheld and enforced, not as resting only on a presumption of payment from [235] lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor.

In *King* v. *Riddle*, 11 U. S. 7 Cranch, 168 [3: 304], a deed, dated July 15, 1804, by which the defendant recited that certain persons had become his sureties for a certain debt and had paid it, and that he was desirous to secure them as far as he could, and assigned to one of them certain bonds in trust to collect the money and distribute it equally among them, was admitted in evidence in an action by one of them against him for money paid, to take the case out of the Statute of Limitations of Virginia. The exact form of the deed is not stated in the report, but that it expressly recognized the debt to the plaintiff to be still due is evident from the opinion, in which *Chief Justice* Marshall said: "Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion that the cases on that point have gone too far, yet this is not a casual or incautious expression; the deed admits the debt to be due on the 15th of July, 1804, and five years had not afterwards elapsed before the suit was brought." P. 171 [305].

In *Clementson* v. *Williams*, 12 U. S. 8 Cranch, 72 [3: 491], in an action on an account against two partners, one of whom only was served with process, a previous statement of the other, upon the account being presented to him, "that the said account was due, and that he supposed [236] it had been paid by the defendant, but had not paid it himself, and did not know of its being ever paid," was held insufficient to take the account out of the statute; and *Chief Justice* Marshall said: "The Statute of Limitations is entitled to the same respect with other statutes, and ought not to be explained away. In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The Statute of Limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not then sufficient to take the case out of the Act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." P. 74 [492].

Chief Justice Marshall afterwards pointed out that in that case, although the partnership had been dissolved before the statement was made, the case was not determined upon that point, but upon the insufficiency of the acknowledgment; and added that, upon the principles there expressed by the court, "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." *Wetzell* v. *Bussard*, 24 U. S. 11 Wheat. 309, 315 [6: 481, 483].

In *Bell* v. *Morrison*, 26 U. S. 1 Pet. 351 [7: 174], *Mr. Justice* Story fully discussed the subject, and, after dwelling on the importance of giving the Statute of Limitations such support as to make it "what it was intended to be, emphatically, a statute of repose," and "not designed merely to raise a presumption of payment of a just debt, from lapse of time;" and repeating the passages above quoted from the opinions in *Clementson* v. *Williams* and *Wetzell* [237] v. *Bussard*, said: "We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that

promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action." P. 362 [179].

Again, in *Moore* v. *Bank of Columbia*, 31 U. S. 6 Pet. 86 [8: 329], the court, speaking by *Mr. Justice* Thompson, after referring to the previous cases, reaffirmed the same doctrine, and said: "The principle clearly to be deduced from these cases is that in addition to the admission of a present, subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed." P. 93 [331].

In *Randon* v. *Toby*, 52 U. S. 11 How. 493 [13: 784], cited for the plaintiff, the agreement, which was held to take a case out of the statute, contained not only a pledge of property to secure the notes sued on, but an express stipulation that the notes should remain in as full force and effect as if they were renewed.

In *Walsh* v. *Mayer*, 111 U. S. 31 [28: 338], in answer to a letter from the holder of a note secured by mortgage, calling attention to the want of insurance on the mortgaged property, and saying: "The amount you owe me on the $7,500 note is too large to be left in such an unprotected condition, and I cannot consent to it," the mortgagors wrote to him that they expected to insure in about four months for twice that amount, and added: "We think you will run no risk in that time, as the property would [238] be worth the amount due you if the building was to burn down." This was held to be a sufficient acknowledgment, upon the ground that the words, both of the plaintiff's letter and of the defendant's reply, were in the present tense, and designated a subsisting personal liability, and that the unconditional acknowledgment of that liability, without making any pledge of property or other provision for its payment, carried an implication of a personal promise to pay it. The case was decided upon its own facts, and no intention to modify the principles established by the previous decisions was expressed or entertained by the court.

Within a year afterwards, in the latest case on the subject, the court expressly reaffirmed those principles. *Fort Scott* v. *Hickman*, 112 U. S. 150, 163, 164 [28: 636, 640].

In full accord with these views are the decisions in England under Stat. 9 Geo. IV, chap. 14, known as Lord Tenterden's Act, which only restricts the mode of proof by requiring that, in order to continue or revive the debt, an "acknowledgment or promise shall be made by or contained in some writing to be signed by the party chargeable thereby."

The English judges have repeatedly approved the statement of Mr. (afterwards *Chief Justice*) Jervis, that the writing must either contain an express promise to pay the debt, or be "in terms from which an unqualified promise to pay it is necessarily to be implied." *Everett* v. *Robertson*, 1 El. & El. 16, 19; *Mitchell's Claim*, L. R. 6 Ch. 822, 828; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493, 497; citing Jervis' New Rules, 4th ed. 350, note. And it has been often held that when the debtor, in the same writing by which he acknowledges the debt, without expressly promising to pay it, agrees that certain property shall be applied to its payment, there can be no implication of a personal promise to pay. *Routledge* v. *Ramsay*, 8 Ad. & El. 221; *S. C.* 3 Nev. & P. 319; *Howcutt* v. *Bonser*, 3 Exch. 491; *Cawley* v *Furnell*, 12 C. B. 291; *Everett* v. *Robertson*, above cited.

The law upon this subject has been well summed up by *Vice Chancellor* Wigram, as follows: "The legal effect of an acknowledgment [239] of a debt barred by the Statute of Limitations is that of a promise to pay the old debt; and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Philips* v. *Philips*, 3 Hare, 281, 299, 300; *Buckmaster* v. *Russell*, 10 C. B. N. S. 745, 750.

In the most recent English case that has come under our notice, *Lord Justice* Bowen said: "Now, first of all, the acknowledgment must be clear, in order to raise the implication of a promise to pay: An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear, within the meaning of the definition," "because the words express the lesser in such a way as to exclude the greater." *Green* v. *Humphreys*, 26 Ch. D. 474, 479, 480; *S. C.* 53 L. J. N. S. Ch. 625, 628.

In the light of the principles established by the authorities above referred to, it is quite clear that the instrument signed by the defendant on June 21, 1877, did not take the plaintiff's debt out of the statute.

This instrument contains no promise of the defendant personally to pay that debt, and no acknowledgment or mention of it as an existing liability. It begins with a reference, by way of consideration only, to the original debt, designating it as "the indebtedness described in the deed of trust" executed to the plaintiff at the time when that debt was contracted. Then

[240] follows a pledge of a certain claim of the defendant against the government, and its proceeds, to secure the payment of "said indebtedness, with interest thereon at the rate of 8 per cent per annum until paid." This interest is mentioned, not as part of the consideration, or of the original debt, or as anything for which the defendant is liable, but only as something to the payment of which the claim pledged shall be applied. And the instrument concludes with a promise of the defendant that the proceeds of the claim pledged shall "be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay."

Although the old debt is expressly called, as it is in law, the consideration for the new agreement, this agreement, and not the old debt, is the measure of the plaintiff's right. The provisions for the payment of the debt and interest out of a particular fund exclude any implication of a personal promise to pay either. The whole instrument clearly evinces the defendant's intention in executing it to have been that the property pledged should be applied, so far as it would go, to the payment of the debt and interest, and not that his own personal liability should be increased or prolonged in any respect.

To imply from the terms of this instrument a promise of the defendant to pay the debt himself would be, in our opinion, to construe it against its manifest intent, and to fritter away the Statute of Limitations.

The result is that the judgment below must be reversed, and the verdict against the defendant set aside. It was contended by his counsel that this court should now direct judgment to be entered upon a former verdict, which was returned for him under a correct ruling on the question of acknowledgment, and set aside by the court in General Term upon a different view of the law. In support of this contention was cited *Coughlin* v. *District of Columbia*, 106 U. S. 7 [27: 74]. But the reason for ordering judgment upon the first verdict in that case was not that the court in General Term had wrongly decided a question of law upon a bill of exceptions allowed at the first trial; but that, as appeared of record, independently of any bill of exceptions, the question had not [241] been legally brought before it at all, thus leaving the first verdict in full force. In the present case, it had authority to entertain and pass upon the exceptions taken by the plaintiff at the first trial; when, in the exercise of that authority, it had sustained those exceptions and ordered a second trial, the case stood as if it had never been tried before; and only the rulings at the second trial, and no rulings, whether similar or different, at the former trial, could be brought to the General Term by the exceptions of the defendant, or to this court by his writ of error.

Judgment reversed, and case remanded to the Supreme Court of the District of Columbia, with directions to set aside the verdict and to order a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[513] BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, *Plff. in Err.*,

v.

CHARLES L. DUNN, by ELLIS STONE GORMAN, His Guardian *ad litem.*

(See S. C. Reporter's ed. 513-517.)

Removal of causes—when jurisdiction of state court ceases—issues of fact to be tried in circuit court—Acts of March 3, 1875, and March 3, 1887.

1. All issues of fact made upon the petition for removal must be tried in the circuit court; but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected; and if it decides against the removal, its action will be reviewable in this court, after final judgment.

2. The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court the pure question of law whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record that the petitioner is entitled to a removal of the suit.

[No. 977.]

Submitted May 12, 1887. Decided May 27, 1887.

IN ERROR to the Supreme Court of the State of Minnesota. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Eppa Hunton** and **Jeff. Chandler**, for plaintiff in error.

Messrs. **C. D. O'Brien** and **Enoch Totten**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [514]

This suit was brought in the District Court of Ramsey County, Minnesota, by Charles L. Dunn, a minor, to recover damages for personal injuries which he had received while traveling as a passenger on the railroad of the Burlington, Cedar Rapids and Northern Railway Company. The Company answered the complaint in the action, and then filed a petition under section 639 of the Revised Statutes, verified by the oath of its president, for the removal of the suit to the Circuit Court of the United States for the District of Minnesota, on the ground of prejudice and local influence. The petition was accompanied by the necessary security. It set forth that the Railway Company was an Iowa corporation, and consequently, in law, a citizen of that State, and Dunn, the plaintiff, a citizen of Minnesota. Under section 639 a suit cannot be removed from a state court to a Circuit Court of the United States, except it be one between a citizen of the State in which the suit was brought and a citizen of another State, and then only by the citizen of the latter State. Immediately on the presentation of the petition for removal, the attorney for the plaintiff filed a counter affidavit to the effect that the plaintiff was not a citizen of Minnesota, but of the Territory of Montana. No further proof being offered on this point, the court ruled that a case for removal had not been made out, and that the suit must be retained for trial. Accordingly a trial was afterwards had in the state court,

which resulted in a judgment against the Company. An appeal was then taken to the Supreme Court of the State, where the judgment of the district court was in all respects affirmed, including the rulings on the question of removal. To reverse that judgment this writ of error was brought.

[515] The assignment of errors presents but a single question, and that is whether, as after the petition for removal had been filed the record showed on its face that the state court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit because on that issue the Railway Company had not shown by testimony that the plaintiff was actually a citizen of Minnesota.

It must be confessed that previous to the cases of *Stone* v. *South Carolina*, 117 U. S. 432 [29: 962], and *Carson* v. *Hyatt*, 118 U. S. 279 [*ante*, 167], decided at the last term, the utterances of this court, on that question, had not always been as clear and distinct as they might have been. Thus, in *Gordon* v. *Longest*, 41 U. S. 16 Pet. 97 [10: 900], in speaking of removals under section 12 of the Judiciary Act of 1789, it was said, p. 104 [902], "It must be made to appear to the satisfaction of the state court that the defendant is an alien, or a citizen of some other State than that in which the suit was brought;" and in *Railway Co.* v. *Ramsey*, 89 U. S. 22 Wall. 328 [22: 824], that, "If upon the hearing of the petition it is sustained by the proof, the state court can proceed no further." In other cases expressions of a similar character are found, which seem to imply that the state courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the state courts, and to some extent in the circuit courts; and so, in deciding *Stone* v. *South Carolina*, we took occasion to say, "All issues of fact made upon the petition for removal must be tried in the circuit court; but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected." It is true, as was remarked by the Supreme Judicial Court of Massachusetts in *Amy* v. *Manning*, 144 Mass. 153, that this was not necessary to the decision in that case; but it was said on full consideration and with the view of announcing the opinion of the court on that subject. Only two weeks after that case was decided *Carson* v. *Hyatt* came up for determination, in which

[516] the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone* v. *South Carolina*, and decided that it was error in the state court to proceed further with the suit after the petition for removal was filed, because the circuit court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson* v. *Dunham*, 121 U. S. 421 [*ante*, 992], and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds it is the true rule and calculated to produce less inconvenience than any other.

The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case, and the highest court of the State affirms its decision, this court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. *Stone* v. *South Carolina*, 117 U. S. 432 [*supra*], and cases there cited.

But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the circuit court, and have the suit docketed there. If the circuit court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. *R. R. Co.* v. *Koontz*, 104 U. S. 5, 15 [26: 643, 646]. In that case, the same as in the writ of error to the state court, the question will be decided on the face of the part of the record of the state court which ends with the [517] petition for removal; for the circuit court can no more take a case until its jurisdiction is shown by the record than the state court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record; namely, that in the state court ending with the petition for removal. The record remaining in the state court will be the original; that in the circuit court an exact copy.

But, inasmuch as the petitioning party has the right to enter the suit in the circuit court, notwithstanding the state court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other, and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the circuit court. The case can be docketed in that court on the first day of the next term, and the issue tried at once. If decided against the removal, the question is now, by the Act of March 3, 1887, chap. 373, 24 Stat. at L. 552, put at rest, and the jurisdiction of the state court established in the appropriate way. Under the Act of

March 3, 1875, chap. 137, 18 Stat at L. 470, such an order could have been brought here for review by appeal or writ of error; and to expedite such hearings our Rule 32 was adopted.

Upon this record as it now stands the state court was wrong in proceeding with the suit, and for that reason *the judgment of the Supreme Court is reversed and the cause remanded for further proceedings in conformity with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[360] ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Plff. in Errr.*,

v.

ELIAS R. VICKERS.

(See S. C. Reporter's ed. 360-363.)

Practice—charge to jury—State Constitution.

A State Constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.

[No. 282.]

Argued and submitted May 2, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas. *Affirmed.*

The writ of error in this case brings up for review a judgment upon a verdict in the court below for $6,000 damages for personal injuries sustained by Vickers, the plaintiff below, while a passenger on a mixed passenger and freight train of the St. Louis, Iron Mountain and Southern Railway Company, the defendant below.

[361] The Constitution of Arkansas, article VII, section 23, provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law; and in jury trials shall reduce their charge or instructions to writing on the request of either party."

In this case the matters of fact in issue were the alleged negligence of the defendant and contributory negligence of the plaintiff; and the question whether this constitutional provision should be followed by the federal courts sitting as courts of the common law in the State of Arkansas is presented.

Mr. **John F. Dillon**, for plaintiff in error.

Mr F. W. Compton, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is affirmed on the authority of *Vicksburg & M. R. R. Co.* v. *Putnam*, 118 U. S. 545 [*ante*, 257]; *Nudd* v. *Burrows*, 91 U. S. 426, 441 [23:286, 290]; *Indianapolis etc. R. R. Co.* v. *Horst*, 93 U. S. 291, 299 [23:898, 900]. A State Constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES M. SEIBERT, Collector of CAPE GIRARDEAU COUNTY (Mo.), *Plff. in Errr.*, [284]

v.

UNITED STATES, *ex rel.* JAMES L. LEWIS, Admr. of Estate of ELISHA FOOTE, Deceased.

(See S. C. "*Seibert* v. *Lewis*," Reporter's ed. 284-300.)

*Constitutional law—contracts—impairment of obligation—municipal bonds—provision for levy of special tax—whether new provision is equivalent to the old—Missouri Statutes—*mandamus *to enforce collection of—injunction issued by state court.*

1. The remedy subsisting in a State, when and where a contract is made and is to be performed, is a part of its obligation; and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.

2. In a proceeding by *mandamus* to require the Collector of taxes to collect a special tax levied by the County Court of Cape Girardeau County, Missouri, to pay a judgment founded upon municipal obligations of said County, issued under the Missouri Act of March 23, 1868, to facilitate the construction of railroads in that State, it is *held:* that the provisions for levying and collecting such a tax, contained in sections 6798, 6799 and 6800, Revised Statutes of Missouri of 1879, are not a legal equivalent for the provision contained in said Act of March 23, 1868; that the right of the relator to have a special tax levied from to time, "in the same manner as county taxes" are levied, is part of the obligation of his contract which is impaired by a change in his remedy making it less efficacious than that provided at the same time for the collection of the general revenue of the County; that the laws of Missouri, in force for the collection of the tax to pay the judgment of the relator at the time it was rendered, continue to be and are still in force for that purpose; and that the respondent is not justified in his refusal to collect said special taxes by said statutory provisions relied upon by him, nor by an injunction issued by a state court.

3. Where a statute authorizing the issue of municipal bonds provides for the levy and collection of the special tax, "in the same manner as county taxes" are levied, for their payment, the obligation of the contract is impaired by any change in the remedy whereby it is rendered less efficacious than that which is at the time provided for securing the revenues of the county.

[No. 299.]

Argued May 10, 11, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **D. A. McKnight**, *E. John Ellis* and *John Johns*, for plaintiff in error:

The primary defense of the respondent is that the writ of *mandamus* has commanded him to do an illegal act, and this is sufficient in law.

State v. *Perrine*, 34 N. J. L. 254; *Johnson* v. *Lucas*, 11 Humph. (Tenn.) 307; *State* v. *Judge of Orphans Ct.* 15 Ala. 740; *Knox Co. Comrs.* v. *Aspinwall*, 65 U. S. 24 How. 376 (16:735).

The federal courts will lean towards an agreement with the decisions of the state courts in the matter of the construction of their statutes.

Burgess v. *Seligman*, 107 U. S. 33 (27:365); *Anderson* v. *Santa Anna Township*, 116 U. S. 356 (29:633); *Norton* v. *Shelby Co.* 118 U. S. 425 (*ante*, 178).

Where this court has ignored certain preliminary requirements of the statutes of the State,

in the matter of levying and collecting taxes, it has been where they were nonessentials, and not where they were commanded under penalty of criminal punishment.

Hawley v. *Fairbanks*, 108 U. S. 543 (27: 820); *Labette Co. Comrs.* v. *U. S.* 112 U. S. 217 (28: 698).

In directing the plaintiff in error by this writ of *mandamus* to do an unlawful act, expressly forbidden, the circuit court exceeded its jurisdiction.

Knox Co. Comrs. v. *Aspinwall, supra; Supervisors* v. *U. S.* 85 U. S. 18 Wall. 71 (21: 771); *Barkley* v. *Levee Comrs.* 93 U. S. 258 (23: 893); *U. S.* v. *Clarke Co.* 95 U. S. 769 (24: 545); *Memphis* v. *U. S.* 97 U. S. 293 (24: 920); *U. S.* v. *Macon Co.* 99 U. S. 582 (25: 331); *Meriwether* v. *Garrett*, 102 U. S. 472 (26: 197); *Ex parte Rowland*, 104 U. S. 604 (26: 861).

The writ of the circuit court, directing the plaintiff in error to collect the taxes illegally levied under the statute, was in effect a levy and collection by the circuit court, and was, therefore, beyond its power.

Rees v. *Watertown*, 86 U. S. 19 Wall. 107 (22; 72); *Heine* v. *Levee Comrs.* Id. 655 (22: 223); *Meriwether* v. *Garrett, supra; People* v. *Chicago & A. R. R. Co.* 55 Ill. 96; *Williams* v. *County Comrs.* 35 Me. 345.

A writ of *mandamus* cannot compel a levy in any other time or manner than that provided by law.

Supervisors v. *Klien*, 51 Miss. 807; *People* v. *Westford*, 53 Barb. 555.

When this court has held the legislative action of a State, enacted subsequently to the issue of the bonds, to be void, it has been in cases where the new law substantially prevented the satisfaction of the judgment.

Board of Liquidation v. *McComb*, 92 U. S. 531 (23: 623); *Cass Co.* v. *Johnston*, 95 U. S. 360 (24: 416); *Murray* v. *Charleston*, 96 U. S. 432 (24: 760); *Memphis* v. *U. S. supra; U. S.* v. *Mayor etc. of N. O.* 103 U. S. 358 (26: 395); *Ralls Co. Ct.* v. *U. S.* 105 U. S. 733 (26: 1220); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Louisiana* v. *Police Jury*, 116 U. S. 131 (29: 587).

In the following tax cases, where the court held the subsequent legislation void, it was because the satisfaction of the judgment, in whole or in part, was absolutely prevented.

U. S. Quincy, 71 U. S. 4 Wall. 535 (18: 403); *Galena* v. *U. S.* 72 U. S. 5 Wall. 705 (18: 560); *Butz* v. *City of Muscatine*, 75 U. S. 8 Wall. 575 (19: 490); *Broughton* v. *Pensacola*, 93 U. S. 266 (23: 896); *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514 (25: 699); *Ex parte Rowland, supra; Louisiana* v. *Pilsbury*, 105 U. S. 278 (26: 1090); *County Comrs.* v. *Wilson*, 109 U. S. 621 (27: 1058); *Quincy* v. *U. S.* 118 U. S. 332 (28: 1001); *Mobile* v. *Watson*, 116 U. S. 289 (29. 620).

But here a substantial equivalent for the original manner of levying the tax has been furnished, by which the judgment may be fully satisfied, and hence the obligation of the contract is unimpaired.

U. S. v. *Mayor etc. of N. O.* and *Ralls Co. Ct.* v. *U. S. supra; Antoni* v. *Greenhow*, 107 U. S. 769 (27: 468); *Port of Mobile* v. *Watson*, 116 U. S. 289 (29: 620); *U. S.* v. *Mobile*, 12 Fed. Rep. 768; *Curtis* v. *Whitney*, 80 U. S. 13 Wall. 68 (20: 513).

The new method of levying the tax prescribed in the Revised Statutes of 1879 was simple and efficacious, and the circuit court's writ of *mandamus* to the county court was a perfect means of setting the machinery in motion.

State v. *Rainey*, 74 Mo. 229.

This court has recognized the right of the State of Missouri to amend the Act of 1868, under which these bonds were issued, in matters within its discretion.

Cape Girardeau Co. Ct. v. *U. S.* 118 U. S. 68 (*ante*, 73).

It is within the discretion of the Legislature of a State to change the form of levying and collecting taxes; and of this the bondholders cannot complain.

U. S. v. *Quincy, supra.*

The States has the right to determine the manner of assessing and levying taxes; and the decision of its courts on these questions is binding on the federal courts.

Witherspoon v. *Duncan*, 71 U. S. 4 Wall. 210 (18: 339); *Bailey* v. *Magwire*, 89 U. S. 22 Wall. 215 (22: 850).

In this case the validity of the judgment on these bonds, and the obligation of the *mandamus* to the county court, are not denied. But the Collector, an officer of the State, has, at the suit of the State, been enjoined from violating a positive law of the State, and the injunction has been sustained by its supreme court. In the case below, and other cases, the injunction, which this court has said could not be set up as a defense against a writ of *mandamus* from a federal court, issued at the suit of the defaulting debtor.

Riggs v. *Johnson Co.* 73 U. S. 6 Wall. 166 (18: 768); *Mayor of Davenport* v. *U. S.* 76 U. S. 9 Wall. 409 (19: 704); *Supervisors* v. *Durant*, Id. 415 (19: 732); *Hawley* v. *Fairbanks*, 108 U. S. 546 (27: 821).

Messrs. **J. B. Henderson** and *James M. Lewis*, for defendant in error:

The relator, as a matter of right, is entitled to a writ of *mandamus* subjecting both real and personal property to the payment of his judgment. The amendatory Act was not repealed until March 24, 1885. The judgment was obtained during its existence as a law.

Cape Girardeau Co. Ct. v. *Hill*, 118 U. S. 68 (*ante*, 73); *U. S* v. *Johnson Co.* 5 Dill. 208.

The state courts cannot interfere by injunction to defeat the writ of the federal courts or to restrain state officers from the performance of ministerial duties enjoined on them in pursuance of and in obedience to such writs.

Riggs v. *Johnson Co.* 73 U. S. 6 Wall. 166 (18: 768); *State* v. *Rainey*, 74 Mo. 229; *M'Kim* v. *Voorhies*, 11 U. S. 7 Cranch, 279 (3: 342); *Slocum* v. *Mayberry*, 15 U. S. 2 Wheat. 9 (4: 171); *Beers* v. *Haughton*, 34 U. S. 9 Pet. 359 (9: 157); *Ableman* v. *Booth*, 62 U. S. 21 How. 516 (16: 173); *Peck* v. *Jenness*, 48 U. S. 7 How. 612 (12: 841); *U. S.* v. *Peters*, 9 U. S. 5 Cranch, 115 (3: 53).

The laws which subsist at the time and place of making a contract enter into and form a part of it; and the rule embraces all Acts that affect the validity, the construction, the enforcement, or the discharge of the contract.

Von Hoffman v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Planters Bank* v. *Sharp*, 47 U. S. 6 How. 301 (12: 447); *Green* v. *Biddle*, 21 U. S. 8 Wheat. 1 (5: 547); *U. S.* v. *Johnson Co.* 5 Dill. 208.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a proceeding by *mandamus* in the Circuit Court of the United States for the Eastern District of Missouri. The alternative writ recites that in 1883 a peremptory writ of *mandamus* was issued by the court, commanding the County Court of Cape Girardeau County and the judges thereof to make a levy on all the real estate and personal property in Cape Girardeau Township subject to taxation, including statements of merchants and manufacturers doing business in said township, and that thereupon the county court, in obedience to the command of said writ, on the 23d day of May, 1883, during a regular term of said county court, made an order on their records, whereby it was ordered that, for the purpose of paying the judgments of Elisha Foote, the Ninth National Bank of New York, John T. Hill, Valentine Winter, and George W. Harshman, amounting to $14,288.20, and interest and costs, a tax of 2 per cent be levied on all the real estate and personal property in Cape Girardeau Township subject to taxation, including statements of merchants and manufacturers doing business in said township, and the clerk of the county court was ordered to extend said tax in a separate column on the tax book of said county for the year 1883. That, in obedience to said order, the special tax ordered to be levied as aforesaid was, by the clerk of said court, entered upon and extended in a separate column of the regular tax book of Cape Girardeau County for the year 1883; and, upon the completion of said tax book, the same was delivered in the time and in the manner required by law for the year 1883 to James M. Seibert, Collector, who was then and there the Collector of taxes, duly elected and qualified as such, and acting therein for the year 1883; and the said Collector was then and there ordered by the county court to proceed and collect the said special tax in the same manner as other taxes, state and county, were authorized to be collected for the said year 1883 in said county; and that after the receipt of the said tax book, the said Collector, claiming to be prevented from proceeding in the collection of said tax by an injunction issued by the judge of the 10th Judicial Circuit of the State of Missouri, upon a petition therefor, filed in the name of the State of Missouri upon the relation of the prosecuting attorney of that county, announced his determination to abstain from all efforts to demand, sue for, or collect any part of said special tax, and refused to proceed farther therein.

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The return of the respondent, Seibert, to the alternative writ admits the facts therein stated, and sets out at length the petition for injunction referred to therein, filed on the 29th of December, 1883. The petition, filed in the name of the State of Missouri by the prosecuting attorney of the county, prays for an injunction against the collection of the tax, on the ground that it was not a state tax, nor a tax necessary to pay the funded or bonded indebtedness of the State, nor a tax for current county expenses or schools, or either, and "that said county court, before making the levy and order as aforesaid, did not make or cause to be made an application to the circuit court of said county, nor to the judge thereof, in vacation, for an order to have assessed, levied and collected said 2 per cent tax; nor was any such order in fact made by such court or the judge thereof, in vacation. That, on the contrary, said county court, in violation of the statutes in such cases made and provided and in usurpation of their power, have assessed and levied, and are now trying to have collected, said 2 per cent tax at its assessed valuation of all the taxable property of said township, without said permission or order of said court, in violation of their duties and without authority of law."

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And further, that the levy of the 2 per cent tax was made for the purpose of paying off a portion of a bonded debt contracted in behalf of Cape Girardeau Township by virtue of the Act of the General Assembly of the State of Missouri, approved March 23, 1868, in aid of railroads, and is in violation of that Act because levied on the personal property within said township as well as on the real estate therein.

The return further sets out that the injunction as prayed for was granted, and the respondent says that, in obedience to the said writ of injunction, he has ceased to collect or to endeavor to collect said special tax, the said injunction being still in force.

The respondent in his return further states "that he is ready and willing to do and perform every duty devolved upon him as Collector as aforesaid, so far as he legally may, but submits whether he ought to be required to collect the said special tax so as aforesaid levied by the said County Court of Cape Girardeau County, because, as he is informed by counsel, the same was not levied in the mode and manner required by the laws of the State of Missouri, as set forth in sections 6798 and 6799 of the Revised Statutes, concerning the assessment and collection of the revenue, and it is made a criminal offense, punishable by fine of not less than $500 and forfeiture of office, for any officer in the State of Missouri to collect or attempt to collect any tax or taxes other than those specified and enumerated in section 6798 of the Revised Statutes of Missouri, without being ordered so to do by the Circuit Court of the County, or the judge thereof in vacation, in the manner provided and directed in section 6799 of said Revised Statutes. And respondent submits that the said special tax is not a tax specified and enumerated in section 6798 of the Revised Statutes of Missouri, and that no order was made by the Circuit Court of Cape Girardeau County directing the said county court to have assessed, levied and collected such special tax as required by section 6799 of the Revised Statutes of Missouri, and that he is informed by counsel that the said levy of such special tax so as aforesaid made by said county court is illegal and void, and that respondent cannot collect or attempt to collect the same without violating the criminal laws of the State of Missouri."

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To this return the relator demurred generally. The demurrer was sustained and a peremptory writ ordered to issue, and thereupon the respondent sued out the present writ of error.

It is conceded that the relator's judgment, which he is now seeking to collect, was founded upon municipal obligations of Cape Girardeau County, issued under the authority of an Act to facilitate the construction of railroads in

the State of Missouri, which took effect March 23, 1868. Mo. Laws of 1868, p. 92. The second section of that Act is as follows:

"Sec. 2. In order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription in accordance with the valuation then last made by the county assessor for county purposes."

It will be observed that the tax authorized by this section of the Statute of 1868, under which [291] the bonds were issued, is to be levied on the real estate within the township only, and not upon the personal property, including statements of merchants and manufacturers doing business in the township. But this levy upon personal property and merchants' licenses, in addition to real estate, is authorized by an amendment passed March 10, 1871. 1 Wag. Stat. 1872, p. 318, § 52. As thus amended, the section reads as follows:

"In order to meet the payments on account of the subscription to the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate and personal property, including all statements of merchants doing business within said * * * township, * * * lying and being within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes," etc.

That the relator was entitled to a tax levied in pursuance of this amended section, his judgment having been obtained while it was in force, was adjudged in his favor by the circuit court when he obtained his peremptory *mandamus* against the judges of the county court, requiring them to levy the tax, the collection of which he is now seeking to enforce by the present proceeding. The question was also directly adjudged in his favor by this court in the case of *Cape Girardeau County Ct.* v. *Hill*, 118 U. S. 68 [*ante*, 78]. In that case it was said: "The township having legally incurred an obligation to pay the bonds in question, it was competent for the Legislature at any time to make provision for its being met by taxation upon any kind of property within the township that was subject to taxation for public purposes."

Having obtained his judgment while that Act remained in force, and having obtained by the judgment of the circuit court an actual levy of a tax according to its provisions, his right thereto became thereby vested so as not to be affected by a subsequent repeal of the statute. But on March 8, 1879, the General Assembly of the State of Missouri passed an Act, found in sections 6798, 6799, and 6800 of the Revised [292] Statutes of Missouri of 1879, which read as follows:

"Sec. 6798. *Taxes, how assessed, levied and collected.*—The following named taxes shall hereafter be assessed, levied, and collected in the several counties in this State, and only in the manner and not to exceed the rates prescribed by the Constitution and laws of this State, viz.: the State tax and the tax necessary to pay the funded or bonded debt of the State, the tax for current county expenditures, and for schools.

"Sec. 6799. *Procedure, limitations and conditions.*—No other tax for any purpose shall be assessed, levied, or collected, except under the following limitations and conditions, viz.: the prosecuting attorney or county attorney of any county—upon the request of the county court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy, and collection of other taxes than those enumerated and specified in the preceding section—shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied, and collected; and such circuit court, or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the Constitution and laws of this State, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such other tax or taxes, and shall enforce such order by *mandamus* or otherwise.

"Sec. 6800. *Assessment, levy and collection not to be made except as provided.*—Any county court judge, or other county officer in this State, who shall assess, levy, or collect, or who shall attempt to assess, levy, or collect, or cause to be assessed, levied, or collected, any tax or taxes other than those specified and enumerated in section six thousand seven hundred and ninety-eight, without being first ordered so to do by the circuit court of the county or the judge thereof, in the express manner provided and directed in section six thousand seven hundred and nine-[293] ty-nine, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not less than five hundred dollars, and, in addition to such punishment, his office shall become vacant; and the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in section six thousand seven hundred and ninety-eight, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected."

By these provisions, it appears that the state tax and the tax necessary to pay the funded or bonded debt of the State, the tax for the current county expenditures, and for schools, are to be assessed, levied, and collected in the several counties of the State as a matter of positive duty by the county courts of the several counties, according to their previous practice, without the intervention of any other authority. All other taxes, which include the tax sought to be collected in this proceeding, can be assessed, levied and collected only under the limitations and conditions therein prescribed; that is to say, the county court being first satisfied that there exists a necessity for

the assessment, levy and collection of such other tax, shall request the prosecuting attorney for the county to present a petition to the circuit court of the county, or to the judge thereof in vacation, setting forth the facts, and specifying the reasons why such other tax or taxes should be assessed, levied and collected. In pursuance of that request the prosecuting attorney is required to present such a petition, and the circuit court, or judge thereof, to whom such petition is presented, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such tax, "upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the Constitution and laws of this State." Section 6800 provides that any county court judge, or other county officer, who shall assess, levy or collect, or attempt so to do, or cause to be assessed, levied or collected, any tax, without being first ordered so to do by the circuit court of the county, in the express manner provided and directed [294] in the preceding section, shall be guilty of a misdemeanor, to be punished, on conviction, by a fine of not less than $500 and a forfeiture of his office; and it is therein declared that "The method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in section 6798, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied or collected."

It is because of these provisions of the law that the respondent herein, as he sets out in his return, has been restrained by an injunction from the Circuit Court of Cape Girardeau County from further proceeding in the collection of the tax heretofore levied by the county court by virtue of a writ of *mandamus* from the Circuit Court of the United States.

The question presented for our determination is whether, by virtue of this statute of the State, he is justified in his disobedience to the judgment and mandate of the Circuit Court of the United States. It is well settled by the decisions of this court that "The remedy subsisting in a State, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." *Edwards* v. *Kearsey*, 96 U. S. 595, 607 [24:798, 798].

It had been previously said upon a review of the decisions of the court, in *Von Hoffman* v. *Quincy*, 71 U. S. 4 Wall. 535, 553 [18: 403, 409]: "It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the Act is within the prohibition of the Constitution, and to that extent void."

In *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 [11:143], *Chief Justice* Taney said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in [295] the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Louisiana* v. *New Orleans*, 102 U. S. 203, 206 [26:132, 133], *Mr. Justice* Field, in the opinion of the court, said: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court. It is therefore not denied in argument in the present case that section 2 of the Act of March 23, 1868, under which the municipal obligations of the relator which had passed into judgment were issued, constitutes a part of the contract to the benefit of which he is entitled. That section, it will be remembered, provides that to pay the interest and principal on any bond which may be issued under the authority thereof, "the county court shall from time to time levy and cause to be collected, in the same manner as county taxes, a special tax," etc.

The precise question, therefore, for present adjudication is whether the provisions for levying and collecting such a tax, contained in the sections of the Revised Statutes above quoted, are, in view of the doctrine of this court on that subject, a legal equivalent for the provision contained in the Act of March 23, 1868. The affirmative of that proposition is contended for by the plaintiff in error. The argument in support of that position is that the machinery provided for the collection of such a tax in section 6799 is purely formal; that it does not touch the substance of the right to have the tax levied and collected, nor does it embarrass and impede it by any unreasonable hindrance or delay. It is said that, according to its terms, [296] under a judgment upon such municipal bonds and coupons in a Circuit Court of the United States, it would be the duty of the county court to enter of record that it was satisfied of the existence of the necessity for the levy and collection of such a tax, and thereupon to request the prosecuting attorney to file his petition to the circuit court of the county to obtain the proper order therefor; that it would then be the duty of the prosecuting attorney to file such a petition, and that the circuit court, or a judge thereof, on the production of the judgment required to be paid, would be satisfied of the necessity for such tax, and that the assessment, levy and collection thereof would not be in conflict with the Constitution and laws of the State, even although he might be of the opinion that the bonds themselves were not valid according to the laws of the State; and that,

accordingly, the order would be made and directed to the county court, commanding that court to have assessed, levied, and collected the tax, the necessity for the collection of which they had already declared upon their own records.

The point of the argument pressed upon us seems to be that the judgment of the Circuit Court of the United States upon the bonds and coupons would necessarily be conclusive, in the opinion of the county court and of the prosecuting attorney and of the circuit court of the county, upon all matters of law and of fact which otherwise, by this section of the statute, would be committed to the exercise of their judicial discretion; and that, consequently, everything to be done by them under the provisions of that section would thereby become merely ministerial, so that, in case of their refusal to act, they would be subject, at the suit of the judgment creditor, to a proceeding by *mandamus* to compel them to proceed in the assessment, levy, and collection of the tax to which he was entitled.

But the contract which the relator is entitled to insist upon under the Act of March 23, 1868, is that he shall have a special tax for the payment of the principal and interest due him, to be levied from time to time "in the same manner as county taxes." It may be admitted that the Legislature, from time to time, notwithstanding this provision, might by subsequent [297] legislation change the mode and the means for the assessment, levy and collection of county taxes, as in its judgment the public interests should require. Any such changes, made in view of public interests, not substantially to the prejudice of public creditors, might be considered, in respect to them, as the legal equivalent for the particular mode in force in 1868, and a fair and reasonable substitute therefor. Ordinarily, it would be true that such altered provisions would not be injurious to any private rights, for the creditor would at all times have the guaranty of as prompt and speedy a collection of a tax in satisfaction of his claim as is secured by law for the collection of the revenues of the county most important for the support of its government.

It may, therefore, be considered as a most material and important part of the contract contained in the second section of the Act of March 23, 1868, not perhaps, that the creditor shall always have a right to have taxes for his benefit collected in the same manner in which county taxes were collectible at that date, but that he shall at least always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time may be levied and collected. In other words, the essential part and value of the contract is that he shall always have a special tax to be collected in a manner as prompt and efficacious as that which shall, at the time when he applies for it, be provided by law for the collection of the general revenue of the county. His contract is not only that he shall have as good a remedy as that provided by the terms of the contract when made, but that his remedy shall be by means of a tax, in reference to which the levy and collection shall be as efficacious as the State provides for the benefit of its counties, without any discrimination against him.

It is in this vital point that the obligation of the contract with the relator has been impaired by the section of the law under which the respondent seeks to justify his disobedience of the mandate of the circuit court. Those sections provide one mode for the collection of county taxes by the direct action of the county court; they provide another mode for the collection of the special tax for the payment of [298] obligations such as those held by the relator and merged in his judgment. They expressly declare that he shall not be entitled to a tax collected in the same manner as county taxes, but add limitations and conditions, which, whatever may have been the legislative motive, compared with the original remedy provided by the law for the satisfaction of his contract, cannot fail seriously to embarrass, hinder and delay him in the collection of his debt, and which make an express and injurious discrimination against him.

We are referred by counsel for the plaintiff in error to the case of *Hawley* v. *Fairbanks*, 108 U. S. 543 [27: 820], as an authority in support of his contention. In that case, however, a peremptory *mandamus* was awarded to compel the levy and collection of a tax for the payment of a judgment of the Circuit Court of the United States, notwithstanding an injunction to the contrary issued out of the state court. And it was there held that the judgment of the Circuit Court of the United States against the municipality was a sufficient warrant and authority to the county clerk to make the assessment of a tax for its payment, notwithstanding the omission of the preliminary certificates of the town clerk and the allowance by the board of auditors of the town, which in other cases the law made necessary to the orderly levy and collection of the tax.

We have also been furnished with the opinion of the Supreme Court of the State of Missouri, in the case of *State* v. *Judges of County Court, Cape Girardeau County*, 8 West. Rep. 626, delivered March 21, 1887, affirming the judgment of the Circuit Court of Cape Girardeau County, perpetuating the injunction set up in the return of the respondent in this case as an answer to the alternative *mandamus*. The judge delivering the opinion of the court says: "It has been ruled by this court that taxes of the nature now in question can only be levied and collected in the manner provided in said section (section 6799), and that unless the methods prescribed are pursued, the failure to pursue them, when, as here, they are the conditions essential to the exercise of the power, will render the tax invalid. *State* v. *Hannibal & St. Jo. R. R. Co.* 87 Mo. 236 [7 West. Rep. [299] 236]. Here, those methods, those conditions precedent, were not followed; and hence the county court, having no inherent power to levy a tax, and deriving its only authority from the State, must of necessity pursue the course in this regard marked out by the sovereign authority—by its laws." The court further proceeds to say that the matter is not affected by the mandate of the federal court, in reference to which the opinion proceeds as follows: "If, as already seen, the county court was powerless to act except when acting in conformity to express statutory conditions, it was still the duty of the judges to comply with those conditions while

yielding obedience to the mandate aforesaid; for, outside of those statutory conditions, they were utterly powerless to act. Indeed, under section 6800, they were punishable for a misdemeanor in failing to comply with the provisions of section 6799 before levying the tax. It does not stand to reason that their act could be valid, and at the same time punishable as a crime. *State* v. *Garroutte*, 67 Mo. 445. If the statutory provisions being discussed were of such a nature as to cut off those who obtained the judgments from enforcing the obligations held by them, then the authorities cited on their behalf might apply. I understand that it is within the power of the State to change the remedy, so long as it does not essentially affect the right embodied in the contract; and that such change, thus made, does not infract the rule that forbids the contract to be impaired."

The opinion assumes that the remedy for the collection of the tax provided by the sections of the Revised Statutes of Missouri referred to is legally equivalent to that contained in section 2 of the Act of March 23, 1868, the differences between them not appearing to have been considered. It also assumes, for that reason, that those provisions of the Revised Statutes are the only laws in force for the collection of such a tax—those in force in 1871, when the judgment of the circuit court was rendered, having been repealed.

For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the sections of the Revised Statutes in question impair the obligation [300] of the contract with the relator under the Act of March 23, 1868, and as to him are, therefore, null and void by force of the Constitution of the United States; and that the laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose. They are the laws of the State which are applicable to his case. When he seeks and obtains the writ of *mandamus* from the Circuit Court of the United States, for the purpose of levying a tax for the payment of the judgment which it has rendered in his favor, he asks and obtains only the enforcement of the laws of Missouri under which his rights became vested, and which are preserved for his benefit by the Constitution of the United States. The question, therefore, is not whether a tax shall be levied in Missouri without the authority of its law, but which of several of its laws are in force and govern the case. Our conclusion is that the statutory provisions relied upon by the respondent in his return to the alternative writ of *mandamus* do not apply, and do not therefore, afford the justification which he pleads.

The judgment of the Circuit Court is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

BENJAMIN P. RUNKLE, *Appt.*, [543]
v.
UNITED STATES.

UNITED STATES, *Appt.*,
v.
BENJAMIN P. RUNKLE

(See S. C. Reporter's ed. 543-561.)

Court martial—limited jurisdiction of—sentence—approval by President—his action judicial—form of approval — sufficiency of — sentence dismissing Benjamin P. Runkle—no action by Presidents Grant or Hayes shown—effect of—longevity pay and regular pay.

1. The sentence of a general court martial, in time of peace, to the effect that a commissioned officer be cashiered, is inoperative until approved by the President. The action required of the President is judicial in character, not administrative; and his power to act cannot be delegated to another.

2. The order of the President approving the proceedings and sentence of a court martial is not sufficient in form unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention.

3. In the case presented upon appeal from the court of claims, it is *held*: that it does not positively and distinctly appear from the record that the sentence of the court martial dismissing Benjamin P. Runkle from the Army was approved by President Grant; that it does appear that said sentence was disapproved by President Hayes; that said Runkle was never legally out of the service; and that he is entitled to his longevity pay, as well as his regular pay both before and after the revocation of the order of the Secretary of War, announcing that he was cashiered.

4. A court martial organized under the laws of the United States is a court of special and limited jurisdiction. Its authority is statutory and must be strictly pursued. The facts necessary to show its jurisdiction and that its sentences are conformable to law must be stated positively, and not left to be argumentatively inferred.

[Nos. 259, 260.]

Argued and submitted April 22, 1887. Decided May 27, 1887.

APPEALS from the Court of Claims. Fully reported below, 19 Ct. Cl. 396. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **M. F. Morris**, *George W. McCrary* and *Donn Piatt*, for Benjamin P. Runkle.

Mr. Howard, Assist. Atty-Gen., for the United States, submitted the case on the record.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This record shows that on the 14th of September, 1882, Benjamin P. Runkle filed in the [544] office of the Second Auditor of the Treasury Department a claim, based on the decision of this court in *United States* v. *Tyler*, 105 U. S. 244 [26:985], for longevity pay as an officer in the Army of the United States, "retired from active service," and that on the 27th of June, 1883, the Secretary of the Treasury referred it to the court of claims, under section 2 of the Act of March 3, 1883, chap. 116, 22 Stat. at L. 485, for an opinion upon the following questions:

"1. Was the court martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried?

"2. Were the proceedings and findings of said court martial regular and the sentence duly approved in part by the President of the United States, as required by law?

"3. Was Benjamin P. Runkle legally cashiered and dismissed from the Army of the United States, in pursuance of said court martial and subsequent proceedings?

[545] "4. Was the President of the United States authorized and empowered by executive order to restore said Runkle to the Army, as it is claimed he was restored by the order of August 4, 1877?

"5. Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay under what is known as the Tyler decision?"

Runkle thereupon filed his petition in the court of claims, in accordance with the rules of practice in that court applicable to such cases, and the United States put in a counterclaim for "$23,585.62, moneys paid to the said claimant by the Paymaster-General and his subordinates, without authority of law, being the pay and allowances of a major in the Army upon the retired list, from the 4th day of August, 1877, to January 1, 1884, during which period the said claimant was not a major in the Army, nor in any way authorized to draw pay and allowances as aforesaid."

The facts as found by the court of claims are as follows:

I.

April 22, 1861, the claimant was mustered in as a Captain of the 13th Ohio Volunteer Infantry, and served as such till November 8, 1861, when he was mustered in as major. August 18, 1862, he was honorably mustered out.

August 19, 1862, he was mustered in as Colonel of the 45th Ohio Volunteer Infantry, and honorably mustered out July 21, 1864.

August 29, 1864, he accepted appointment as Lieutenant-Colonel of Veteran Reserve Corps, and was honorably mustered out October 5, 1866.

October 6, 1866, he accepted appointment as Major of 45th U. S. Infantry, became unassigned, March 15, 1869, and was placed on the retired list as Major U. S. Army, December 15, 1870.

II.

At the time he was so placed on the retired list he was on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands for the State of Kentucky, and had been on that duty from April 11, 1867; and [546] continued on it without any new assignment to it, until he was arrested for trial before a court martial, as hereinafter shown.

III.

June 25, 1872, the following Special Order, No. 146, was issued by the War Department:

"1. By direction of the President, a general court martial is hereby appointed to meet at Louisville, Kentucky, on the 5th day of July, 1872, or as soon thereafter as practicable, for the trial of 2d Lieutenant John L. Graham, 13th Infantry, and such other prisoners as may be brought before it."

Before the court martial convened and organized under this order, the said Runkle was arraigned and tried on the following charges:

Charge I. "Violation of the Act of Congress approved March 2, 1863, chapter 67, section 1."

Charge II. "Conduct unbecoming an officer and a gentleman."

The specifications presented under these charges were all based on acts alleged to have been done by the claimant while on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands. There were thirteen specifications under the first charge, and fourteen under the second. All the specifications averred acts done by him in the year 1871, except the first and 5th under charge I, and the first, 5th and 14th under charge II, all of which averred acts done in 1870, before he was placed on the retired list. Of the first and 5th specifications under charge I, and of the 14th under charge II, he was found guilty. He was also found guilty of ten other specifications under charge I, and of five other specifications under charge II, all of which averred acts done by him in 1871. He was also found guilty of both charges, and was sentenced by the court to be cashiered; to pay the United States a fine of $7,500; and to be confined in such penitentiary as the President of the United States might direct, for the period of four years; and in the event of the nonpayment of the fine at the expiration of four years, that he should be kept in confinement in the penitentiary until the fine be paid; the total term of imprisonment, however, not to exceed eight years.

IV.

The proceedings, findings and sentence of [547] said court martial were transmitted to the Secretary of War, who wrote upon the record the following order:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States Army, are approved, with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility; also in unduly restricting the cross examination of the same witness in relation to the motives influencing his testimony.

"Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence.

"The findings and sentence are approved.

"In view of the unanimous recommendation by the members of the court that accused shall receive executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the War Department since his trial, showing that accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of wounds received in battle, and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed.

"WM. W. BELKNAP, *Secretary of War.*"

The said Secretary also issued, January 16, 1878, a General Order of the War Department No. 7, Series of 1878, announcing the sentence of the court martial, and that "Major Benjamin P. Runkle, U. S. Army (retired), ceases to be an officer of the Army from the date of [548] this order."

From the date of this order till after August 4, 1877, the claimant's name was not borne upon the Army Register.

V.

August 4, 1877, R. B. Hayes, President of the United States, made the following order:

"EXECUTIVE MANSION,
Washington, August 4, 1877.

"In the Matter of the Application of Major Benjamin P. Runkle, U. S. Army (retired).

"The record of official action heretofore taken in the premises shows the following facts, to wit:

"First. That on the 14th of October, 1872, Major Runkle was found guilty by court martial upon the following charges, to wit:

"Charge 1. 'Violation of the Act of Congress approved March 2, 1863, chapter 67, section 1.'

"Charge 2. 'Conduct unbecoming an officer and a gentleman.'

"Second. That on the 16th of January, 1873, W. W. Belknap, then Secretary of War, approved the proceedings of said court, and thereupon caused General Order No. 7, Series of 1873, to issue from the War Department, by which it was announced that Major Benjamin P. Runkle was cashiered from the military service of the United States.

"Third. That subsequent to the date of said General Order No. 7, to wit, on the 16th day of January, 1873, Major Runkle presented to the President a petition, setting forth that the proceedings of said court had not been approved by the President of the United States, as required by law; that said conviction was unjust; that the record of said proceedings was not in form or substance sufficient in law to warrant the issuing of said order, and asking the revocation and annulment of the same.

"Fourth. That in pursuance of this petition, the record of the official action theretofore had in the premises was, by direction of the President, Ulysses S. Grant, referred to the Judge-Advocate-General of the United States Army for review and report.

[549] "Fifth. That thereupon the Judge-Advocate-General reviewed the case and made his report thereon, in which it is reported and determined, among other things, that in the proceedings had upon the trial of the case by said court, 'it is nowhere affirmatively established that he (Major Runkle) actually appropriated any money to his own use.'

"It also appears in said report that the conviction of said Runkle, upon charge one as aforesaid, is sustained upon the opinion that sufficient proof of the crime of embezzlement on the part of the accused was disclosed by the evidence before the court. And with respect to charge two, no reference to the same is made in said report, except to deny the sufficiency of the evidence in the case, for a conviction upon the fourteenth specification thereof; and it is to be observed that the thirteen remaining specifications under this charge are identical with the thirteen specifications under charge one.

"The Judge-Advocate-General further finds and determines in said report as follows, to wit: 'For alleged failures to pay, or to pay in full,' on the part of the subagents, 'I am of the opinion that the accused cannot justly be held liable.'

"Sixth. That no subsequent proceedings have been had with reference to said report, and that the said petition of said Runkle now awaits further and final action thereon.

"Whereupon, having caused the said record, together with said report, to be laid before me, and having carefully considered the same, I am of opinion that the said conviction is not sustained by the evidence in the case, and the same, together with the sentence of the court thereon, are hereby disapproved; and it is directed that said Order No. 7, so far as it relates to said Runkle, be revoked.

"R. B. HAYES."

At the time of the issue by President Hayes of this order, the number of officers on the retired list of the Army was 300, and continued so until November 19, 1877. During that period the claimant was carried on the Army records as additional to the number of retired officers allowed by law, until a vacancy occurred on said last named date; since which date he has been borne on the retired list, and up to January 1, 1884, has drawn pay to the [550] amount of $23,585.62. Of this sum $9,195.27 was paid to him August 15, 1877, for the period from January 16, 1873, the date of the order signed by Secretary Belknap, to the 4th of August, 1877, the date of the order of President Hayes.

VI.

August 7, 1877, the claimant addressed a letter to the Paymaster-General of the Army, asserting his legal right to pay as a retired major for the period of time between the dates of those two orders. This letter the Paymaster-General referred to the Secretary of War, with the following indorsement:

"Respectfully forwarded to the Hon. Secretary of War.

"It has been enjoined that questions of payment in such cases shall be submitted to the Secretary of War. See letter of July 7, 1863, from Col. J. A. Hardee, Asst. Adjt.-General, to the Paymaster-General, stating the orders of the War Department, that 'an officer restored to the service either by the revocation of the order of dismissal or discharge, or by simple restoration, is not entitled to pay for the period that he was out of service, unless the same is expressly ordered by the War Department.'

"The language of the Judge-Advocate-General on this point is to the same effect. (See Judge-Advocate's Digest of 1868, p. 266.) 'Where an order of the War Department for the dismissal, discharge, or muster out of an officer is subsequently revoked, and he reinstated in his former rank and position, it is competent for the President, in his discretion, to allow him pay for the interval during which he was illegally separated from the service under the original order.'

"The course of military administration has,

however, developed no precise rule on this subject, each case of a claim for pay by such an officer having been, in practice, determined by the special circumstances surrounding it.

"BENJ. ALVORD,
"*Paym'r-General U. S. Army.*

"P. M. G. OFFICE, *Aug.* 9, 1877."

[551] The Secretary of War returned the letter to the Paymaster-General, through the Adjutant-General, and when it reached the Paymaster-General it had on it the following indorsements:

"Respectfully returned (through the Adjutant-General) to the Paymaster-General.

"By the order of the President, of Aug. 4, 1877, the approval of the proceedings and sentence in the case of Major B. P. Runkle, of date January 16, 1873, was revoked, the said proceedings and sentence were disapproved, and the order of dismissal was set aside.

"This order of the President must be accepted by this department as revoking said order of dismissal from its inception and as annulling all its consequences. As Major Runkle was at the time of his trial and sentence, an officer of the retired list, the fact that he has not been on duty in the interim can make no difference, since a retired officer is not subject to duty.

"He will, therefore, be paid, whenever funds are available for that purpose. This indorsement has been submitted to and is approved by the President.

"GEORGE W. MCCRARY,
"*Secretary of War.*

"WAR DEPT. *Aug.* 13, '77.

"Noted and respectfully forwarded.

"E. D. TOWNSEND,
"AUG. 14, '77. *Adj't-Gen'l.*"

Upon receiving back the said letter with said indorsements, the Paymaster-General made thereon this indorsement:

"Respectfully referred to Major Alexander Sharp, P. M., U. S. A., Present. Maj. Runkle was last paid to include Jan. 15, 1873.

"CHAS. T. LARNED,
"*Acting Paym'r-Gen'l U. S. Army.*

"C. T. L., P. M. G. O., *Aug.* 15, 1877."

[552] It was in obedience to the order of the President, signified by the above indorsement of the Secretary of War, that the claimant was paid the aforesaid sum of $9,195.27.

Upon the foregoing facts the conclusions of law were as follows:

1. That the claimant is not entitled to recover longevity pay.

2. That the defendants are not entitled, under their counterclaim, to recover the pay received by the claimant as a retired major, which accrued after the 4th of August, 1877, amounting to $14,390.35.

3. That the defendants are entitled, under their counterclaim, to recover of the claimant $9,195.27, being the amount paid him for the time between January 16, 1873, and August 4, 1877. 19 Ct. Cl. 396.

From a judgment entered in accordance with these conclusions both parties appealed.

We will first consider the second of the questions referred to the court of claims; namely, [554] "Were the proceedings and findings of said court martial regular and the sentence duly approved by the President of the United States, as required by law?" [555]

The 65th Article of War, 2 Stat. at L. 367, chap. 29, in force at the time of these proceedings, was as follows:

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts martial, whenever necessary. But no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

Thus it appears that the sentence of a general court martial, in time of peace, to the effect that a commissioned officer be cashiered—dismissed from service—is inoperative until approved by the President. Before then it is interlocutory and inchoate only. *Mills* v. *Martin*, 19 Johns. 7, 30; Simmons, Court Martial, 6th ed. chap. XVII, p. 294.

A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. [556] § 470; *Brooks* v. *Adams*, 11 Pick. 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 Serg. & R. 590, 599. Such also is the effect of the decision of this court in *Wise* v. *Withers*, 7 U. S. 3 Cranch, 331 [2: 457]; which, according to the interpretation given it by *Chief Justice* Marshall in *Ex parte Watkins*, 28 U. S. 3 Pet. 193, 207 [7: 394, 399], ranked a court martial as "one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally." To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 61 U. S. 20 How. 65, 80 [15: 838, 844]; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by *Chief Justice* Marshall in *Brown* v. *Keene*, 33 U. S. 8 Pet. 115 [8: 886], in respect to averments of jurisdiction in the courts of the United States applies. His language is: "The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the facts on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts martial. Their

authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.

As the sentence now under consideration involved the dismissal of Runkle from the Army, it could not become operative until approved by the President, after the whole proceedings of the court martial had been laid before him. The important question is, therefore, whether that approval has been positively shown.

The court of claims has found as a fact in the case that the "proceedings, findings, and sentence of said court martial were transmitted to the Secretary of War," but it has not found [557] that they were laid before the President, or acted on by him, otherwise than may be inferred argumentatively from the orders of the Secretary of War, and the subsequent action of President Grant and President Hayes.

There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498, 513 [10: 264, 271]; *U. S.* v. *Eliason*, 41 U. S. 16 Pet. 291, 302 [10: 968, 972]; *Confiscation Cases*, 87 U. S. 20 Wall. 92, 109 [22: 320, 323]; *U. S.* v. *Farden*, 99 U. S. 10, 19 [25: 267, 269]; *Wolsey* v. *Chapman*, 101 U. S. 755, 769 [25: 915, 920].

Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done; but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney-General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864 (11 Ops. Attys-Gen. 21), are appropriate:

[558] "Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

We go, then, to the record to see whether it shows positively and distinctly that the sentence dismissing Runkle from the service was approved by President Grant. It does appear affirmatively that it was disapproved by President Hayes; and if not approved by President Grant, Runkle was never legally out of the service. It is true that, if it had been approved, the subsequent disapproval would have been a nullity, and could not have the effect of restoring him to his place; but if not approved, he was never out, and the disapproval kept him in, the same as if the court martial had never been convened for his trial. In *Blake* v. *United States*, 103 U. S. 227 [26:462], followed in *United States* v. *Tyler*, 105 U. S. 244 [26: 985], it was decided that the President had power to supersede or remove an officer of the Army by the appointment, by and with the consent of the Senate, of his successor; but here there was nothing of that kind. Runkle was never removed, otherwise than by the sentence of the court martial, and the order of the War Department purporting to give it effect.

Coming then to the order on which reliance is had to show the approval of President Grant, [559] we find it capable of division into two separate parts; one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised. It is signed by the Secretary of War alone, and the personal action of the President in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that "the whole proceedings" had been laid before him for action, or that he personally approved the sentence. The facts found by the court of claims show that the proceedings, findings, and sentence of the court martial "were transmitted to the Secretary of War, and that he wrote the order thereon," but there they stop. What he wrote is in the usual form of departmental orders, and, so far as it relates to the approval of the sentence, indicates on its face departmental action only.

What follows in the order does not, to say the least, clearly show the contrary. It relates to the executive clemency which was exercised, and then, for the first and only time, it appears, in express terms, that the President acted per

sonally in the matter. It is there said: "The President is pleased to remit all of the sentence, except so much thereof as directs cashiering." If all the rest of the order was the result of the personal action of the President, why was it referred to here and not elsewhere? Might it not fairly be argued from this that the rest was deemed departmental business, and that part alone personal which required the exercise of the personal power of the President, under the Constitution, of granting pardons. And besides, according to the order as it stands, this action of the President was had, not on "the whole proceedings," but "in view of the unanimous recommendation of the members of the court," "the former good character" of the accused, and "in consideration of evidence, by affidavits, presented to the War Department since the trial," and "credible representations." If "the whole proceedings" had actually been laid before him, as required by the article of War, it was easy to say so.

Then, again, at the end of the order are these words, "which [the sentence] will be duly executed." [560] That which immediately preceded related to the remission of a part of the sentence, and the Secretary was careful to say that this was done by the President in person. The omission of any such language, or implication even, in the words which were added, leaves the order open to the construction that the Secretary was acting all the time on the idea that the personal judgment of the President was required only in reference to that part of the proceeding which involved the exercise of the pardoning power, and that the rest belonged to the Department.

Still further, it appears, from the order of President Hayes, that "the record of official action" showed that "on the 16th of January, 1873, W. W. Belknap, then Secretary of War, approved the proceedings of said court," and thereupon issued the order from the War Department announcing that Runkle was cashiered, and that after this order was issued, but on the same day, Runkle presented to President Grant a petition setting forth, among other things, "that the proceedings of said court had not been approved by the President of the United States as required by law." This petition was not only received by President Grant, but it was by him referred to the Judge-Advocate-General for "review and report." Upon this reference the Judge-Advocate-General acted and reported on the whole case. President Grant did nothing further in the premises, and the matter remained open when President Hayes came into office. He then took it up as unfinished business, and, acting as though the proceedings had never been approved, entered an order of disapproval.

Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution. Consequently, Major Runkle was never legally cashiered or dismissed from the Army, and he is entitled to his longevity pay, as well as that which he has already received for his regular pay, both before the order of Secretary Belknap was revoked and afterwards.

Such being our view of the case, it is unnecessary to consider any of the other questions [561] which were referred to the court of claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court martial should be; nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only.

The judgment of the Court of Claims is reversed and the cause remanded, for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH SHIPPEN, *Plf. in Err.*, [575]
v.
THOMAS M. BOWEN.

(See S. C. Reporter's ed. 576-583.)

Sales—express warranty—creation of—affirmation of quality or condition—action of tort for breach of an express warranty in municipal bonds—deceit—pleading—scienter—erroneous instruction.

1. Where the seller makes an affirmation of the quality or condition of the thing sold, other than as matter of opinion or belief, at the time of sale, for the purpose of assuring the buyer of the truth of the facts affirmed, and inducing him to make the purchase, such affirmation, if so received and relied on by the purchaser, is an express warranty.

2. In an action to recover damages for the sale of municipal bonds to the plaintiff, alleged to have been forgeries, it is *held*: that the original complaint made a case in tort for the breach of an express warranty in the sale of the municipal bonds; that said cause of action in tort was not obliterated, or removed from the case, because it was joined with a cause of action for deceit; that no particular phraseology or form of words is necessary to create a warranty of the character claimed; that it was error to instruct the jury that the plaintiff could not recover unless he established the *scienter* upon the part of the defendant; and that the plaintiff was entitled to go to the jury upon the issue of express warranty as to the genuineness of the bonds and coupons in question.

[No. 253.]

Submitted April 22, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the District of Colorado. Reported below, 4 McCrary, 59. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George E. Adams** and **J. M. Holmes**, for plaintiff in error:

The rule is well settled that when a party sells, for a valuable consideration, forged paper, the injured party has two remedies: one *ex contractu*, the other an action on the case for deceit.

It is equally well settled that in an action on the case for deceit no *scienter* need be alleged, nor if alleged need it be proved.

Schuchardt v. *Allens*, 68 U. S. 1 Wall. 359 (17:642); Chitty, Pl. 137; *Williamson* v. *Allison*, 2 East. 446; *Adamson* v. *Jarvis*, 4 Bing. 66:

Charnley v. *Dulles*, 8 Watts & S. 353; *People's Bank* v. *Kurtz*, 99 Pa. 344; *Converse* v. *Blumrich*, 14 Mich. 108. See also *Lockridge* v. *Foster*, 4 Scam. 570; *Parham* v. *Randolph*, 4 How. (Miss.) 435; *Roosevelt* v. *Fulton*, 2 Cow. 129; *Miner* v. *Medbury*, 6 Wis. 295; *Lewis* v. *McLemore*, 10 Yerg. 206; *M'Ferran* v. *Taylor*, 7 U. S. 3 Cranch, 270 (2:436); *Glasscock* v. *Minor*, 11 Mo. 655; *Fisher* v. *Mellen*, 108 Mass. 503; *Collins* v. *Denison*, 12 Met. 549; *Elliott* v. *Boaz*, 9 Ala. 772; *M'Cormick* v. *Malin*, 5 Blackf. 509; *Munroe* v. *Pritchett*, 16 Ala. 785.

A vendor by the mere act of selling bonds, notes, etc., without anything more, warrants the title thereto, and the genuineness of the signatures.

Terry v. *Bissell*, 26 Conn. 40; *Shaver* v. *Ehle*, 16 Johns. 201; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Aldrich* v. *Jackson*, 5 R. I. 218; *Webb* v. *Odell*, 49 N. Y. 583; *Litchfield* v. *Hutchinson*, 117 Mass. 195.

It is also undisputed law that an action on the case in tort, for deceit, will lie for a breach of the implied warranty.

Schuchardt v. *Allens, supra; Williamson* v. *Allison*, 2 East, 446; *Adamson* v. *Jarvis*, 4 Bing. 73; *S. C.* 12 Moore, 241; Cooley, Torts, 500.

Our position is that a vendor, by the mere act of sale, affirms, as well as warrants, the genuineness of the signatures; that it is immaterial whether the action is brought upon a false warranty or upon the false representation. The same fact will sustain an action upon either. That an implied warranty without an implied representation is an impossibility. That by the mere fact of offering for sale bonds in his possession, the vendor not only warrants the genuineness of the signatures but distinctly affirms their genuineness; that the implied warranty is a deduction from the antecedent representation. That the vendor, having represented the signatures to be genuine, is held to have thereby warranted them to be genuine. That an implied representation is as binding upon the vendor as an express representation, and that by the mere act of offering bonds or notes for sale the vendor affirms the genuineness of the signatures as fully as he would affirm by an express verbal representation.

Lobdell v. *Baker*, 3 Met. 469; *Polhill* v. *Walter*, 3 Barn. & A. 114; *Medina* v. *Stoughton*, 1 Salk. 210; *Ryall* v. *Rowles*, 1 Ves. 348; *Eichholtz* v. *Bannister*, 17 C. B. N. S. 708; *Morley* v. *Attenborough*, 3 Exch. 500; *Jones* v. *Ryde*, 5 Taunt. 488; *Fuller* v. *Smith*, Ryan & M. 49; *Gurney* v. *Womersley*, 28 Eng. L. & Eq. 256; *Thrall* v. *Newell*, 19 Vt. 203; *Gresham* v. *Postan*, 2 Car. & P. 540.

Mr. **G. G. Symes**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a judgment of the Circuit Court of the United States for the District of Colorado, in an action brought by the plaintiff in error to recover dam-
[576] ages for the delivery to him of certain sheets of written and printed paper, purporting to be the valid and genuine bonds, with interest coupons attached, of the County of Clark, in the State of Arkansas, issued under and in accordance with the provisions of an Act of the General Assembly of that State, approved April 29, 1873, entitled "An Act to Authorize Certain Counties to Fund Their Outstanding Indebtedness;" but which instruments, it is alleged, were "false and spurious forgeries," imposing no legal obligation whatever upon said county. The plaintiff alleges that, in consideration of a certain sum paid by him in cash to the defendant, the latter sold and agreed forthwith to deliver to him valid and genuine bonds of said county, of the above description, but delivered the said spurious and forged bonds in execution of the terms of such sale and agreement; that the defendant, at the time of such delivery, "falsely and fraudulently represented and warranted" said forged bonds "to be genuine and valid bonds and interest coupons of said county;" that the plaintiff, "relying on such representation and warranty, received and accepted the same from defendant, supposing them to be such genuine and valid bonds and interest coupons;" and that, "by said tortious and wrongful act and fraudulent breaches of said agreement and warranty of genuineness, done and committed by defendant in the delivery by him as aforesaid of such spurious, forged and altered instruments, the plaintiff has been subjected to great loss and damage," etc.

The defendant denies that the bonds and coupons delivered by him were spurious or forged, and avers that they were, in law, genuine, valid obligations of the County of Clark, and were delivered by him in the belief that they were of that character. He also denies that "he ever, at any time, expressly or by implication, warranted said bonds and coupons so sold and delivered by him to plaintiff to be genuine bonds and coupons of said County of Clark." He avers that the plaintiff purchased and received them "at his own risk as to the validity and genuineness thereof, and without any warranty on the part of defendant, express or implied, against such defects or infirmities in said bonds and coupons."

The original complaint and answer contain [577]
other allegations; but it is not necessary, in the view we take of the case, to set them out.

The plaintiff amended his complaint, adding all the allegations which are essential, under any system of pleading, to support an action for deceit. These allegations were traversed by the defendant, and, upon a trial before a jury, there was a verdict and judgment in his favor.

The bill of exceptions states that the plaintiff, to sustain the issues on his part, introduced evidence tending to show that at the date mentioned in the complaint defendant sold to him, for $8,000, ninety-one sheets of paper purporting to be Clark County, Arkansas, funding bonds; that said sheets of paper were forgeries, and not genuine bonds, as they purported on their face to be; that defendant, at the time of sale, expressly affirmed their regularity and validity, although he knew, or had reason to suspect, at the time, that they were not genuine and valid; that plaintiff believed and supposed that they were genuine and valid, and relied upon defendant's representations to that effect; and that plaintiff had no notice or knowledge that defendant was acting in said sale as agent for another person.

The defendant introduced evidence tending to show that said papers were genuine and valid Clark County, Arkansas, funding bonds;

that at the time of the sale he made no statement, representation or warranty as to their genuineness or validity, but on the contrary stated that he knew nothing of the circumstances under which they were issued; that he had neither notice nor knowledge of any want of validity or of any defects in said bonds, nor notice of any facts which would have aroused suspicion in reference to them; that, in the sale of said bonds to plaintiff, he was acting as the agent of Charles W. Tankersley, from whom he had received the bonds shortly before their sale, but did not at the time disclose to plaintiff his agency."

The court charged the jury that, upon the facts conceded before them, the bonds, by reason of certain unauthorized alterations of the coupons, were not valid and genuine obligations of the County of Clark. The jury were also [578] instructed that whoever sells such instruments as those delivered to the plaintiff, "if nothing whatever be said in respect to their character, by the act of selling warrants them to be the genuine obligations of the county; that is, that they are not forged or counterfeited, but are the true and proper obligations of the county, such as they purported to be on their face; and upon an action for breach of warranty, or an action upon the contract, the defendant would undoubtedly, beyond all question, be liable for the amount which he received for the bonds; * * * but this action is not of that character, that is, it is not an action upon the contract alone. As I said to you in the outset, it is an action for a false representation, or for a misrepresentation, of fact, and there must be something more to maintain this action than the implied warranty which arises from the act of selling, and which is an inference of law coming from the act of selling." The court said further upon the subject of warranty: "It is not claimed that there were any direct representations in respect to the genuineness of those bonds made at the time of the sale thereof, except in this way: I think Mr. Shippen states that the defendant said he would warrant the title to the bonds. I will not undertake to repeat what the witnesses said in respect to that matter; the only witnesses were the parties to the suit, I believe, as to what was stated at the time." Without giving more of the charge, it is sufficient to say that its scope is indicated by the circuit judge in the opinion delivered by him when denying the plaintiff's motion for a new trial. He said: "The complainant charges that, to induce plaintiff to purchase certain bonds, the defendant represented that they were genuine and valid bonds; whereas, in truth and in fact, they were worthless forgeries. The court charged the jury that it was necessary for plaintiff to show that the defendant, at the time of the sale of the bonds to the plaintiff, misrepresented the facts concerning their genuiness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by defendants [579] and that the bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for plaintiff insists that in such a case as this no *scienter* need be alleged, nor if alleged need be proved. I am unable to concur in the soundness of this proposition."

We are of opinion that it was error to instruct the jury that the plaintiff could not recover, in the present action, unless he established the *scienter* upon the part of the defendant. The original complaint—though, perhaps, not in the most concise language—made a case in tort for the breach of an express warranty in the sale of the bonds. The bill of exceptions states that the evidence, in behalf of the plaintiff, tended to show that, although the defendant knew or had reason to suspect, when the bonds were sold, that they were not genuine and valid, he "expressly affirmed their regularity and validity." These words may not necessarily import an express warranty. But no particular phraseology or form of words is necessary to create a warranty of that character. As was held by the Court of Appeals of Maryland, in *Osgood* v. *Lewis*, 2 Harr. & G. 495, 518, "An affirmation of the quality or condition of the thing sold (not uttered as matter of opinion or belief), made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the facts affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. And in case of oral contracts, on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction." To the same effect are *Henshaw* v. *Robins*, 9 Met. 83, 88; *Oneida etc. Soc.* v. *Lawrence*, 4 Cow. 440; *Cook* v. *Moseley*, 13 Wend. 278; *Chapman* v. *Murch*, 19 Johns, 290; *Hawkins* v. *Berry*, 5 Gilm. 36; *McGregor* v. *Penn*, 9 Yerg. 76, 77; *Otto* v. *Alderson*, 10 Smedes & M. 476. The plaintiff was clearly [582] entitled to go to the jury on the issue as to an express warranty. But he was, in effect, denied that right by the instruction that he could not recover in this action, unless he proved a *scienter*. It is true his pleadings also contained every allegation essential to support an action for deceit, apart from the issue as to express warranty. But the cause of action in tort for the breach of the express warranty was not obliterated, or removed from the case, because it was joined with a cause of action for deceit. In *Schuchardt* v. *Allens*, 68 U. S. 1 Wall. 359, 368, [17: 642, 645], which was an action on the case for a false warranty on the sale of certain goods —the declaration also containing a count for deceit—the court said that it was now well settled, both in English and American jurisprudence, that either case or assumpsit would lie for a false warranty, and that, "Whether the declaration be in assumpsit or tort, it need not aver a *scienter*; and if the averment be made, it need not be proved." It was also said that, "If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action." See also *Dushane* v. *Benedict*, 120 U. S. 636 [*ante*, 810]. In 1 Chitty's Pleadings, 137, the author says that case or assumpsit may be supported for a false warranty on the sale of goods, and that, "In an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the

declaration, nor, if charged, could it be proved." In *Lassiter* v. *Ward*, 11 Ired. 444, Ruffin, *C. J.*, citing *Stuart* v. *Wilkins*, 1 Doug. 18, and *Williamson* v. *Allison*, 2 East, 446, said: "It was accordingly there held that the declaration might be in tort, without alleging a *scienter*, and if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly a half century since the decision, and during that period the point has been considered at rest, and many actions have been brought in tort, as well as *ex contractu*, on false warranties." And so in *House* v. *Fort*, 4 Blackf. 293-4, it was said that [583] "The breach of an express warranty is of itself a valid ground of action, whether the suit be founded on tort or on contract;" and that, "In the action on tort, the forms of the declaration are, that the defendant falsely and fraudulently warranted, etc., but the words falsely and fraudulently, in such cases, are considered as only matters of form." But as to the *scienter*, the court said, "that is not necessary to be laid, when there is a warranty, though the action be in tort; or, if the *scienter* be laid, in such a case, there is no necessity of proving it." See also *Hillman* v. *Wilcox*, 30 Me. 170; *Osgood* v. *Lewis*, 2 Harr. & G. 495, 520; *Trice* v. *Cockran*, 8 Gratt. 450; *Gresham* v. *Postan*, 2 Car. & P. 540.

As the evidence entitled the plaintiff to go to the jury upon the issue of express warranty as to the genuiness of the bonds and coupons, and as the jury were in effect instructed that he could not recover, unless upon allegation and proof of the *scienter*, *the judgment is reversed, and the case is remanded, with instructions to set aside the judgment and grant a new trial.*

Reversed.

Mr. Justice **Field** dissented.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[256] ROBERT IRVINE ET AL., *Appts.*
v.
THE STEAMSHIP HESPER AND CARGO; GEORGE HORSELEY, Claimant, ET AL.

(See S. C. Reporter's ed. 256-267.)

Admiralty—libel to recover for salvage services—what is salvage service of lowest grade—jurisdiction of this court—review of matters of law only—inadequate or excessive decree—trial de novo *on appeal from district court.*

1. A salvage service which does not involve risk of property, peril of life or limb, unusual expense, gallantry, courage or heroism, is a salvage service of the lowest grade.

2. This court may, in cases of salvage as in other admiralty cases, revise the decree appealed from for matter of law, only; and it should not alter the decree for the reason that the amount awarded appears to be inadequate or excessive, unless the difference is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

3. An appeal in admiralty from the district court to the circuit court vacates altogether the decree of the former and the case is tried *de novo* in the circuit court. The award of the district court in favor of the appellant may be decreased on appeal, although the appellee did not appeal.

[No. 295.]

Argued May 6, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas. Opinion below, 18 Fed. Rep. 696. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Eppa Hunton**, for appellants:

"Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for salvage service:

(1) The labor expended by the salvors in rendering salvage service.

(2) The promptitude, skill, and energy displayed in rendering the service and saving the property.

(3) The value of the property employed by the salvors and the danger to which it was exposed.

(4) The risk incurred by the salvors in securing the property from impending peril.

(5) The value of the property saved.

(6) The degree of danger from which the property was rescued."

The Blackwall, 77 U. S. 10 Wall. 13 (19: 874).

It will be found that every one of these circumstances formed ingredients in this case.

The risk was that of wrecking the lighter and steam tug, at the possible risk of life. Risk of life is not a necessary ingredient, but it places the salvors in a higher position of merit and entitles them to a more liberal compensation.

Spencer v. *The Charles Avery*, 1 Bond. 119; *The William Beckford*, 3 C. Rob. 355; *The Emulous*, 1 Sumn. 214; *Tyson* v. *Prior*, 1 Gall. 133; *The Henry Eubank*, 1 Sumn. 400; *Bearse* v. *340 Pigs of Copper*, 1 Story, 326; *Mason* v. *The Blaireau*, 6 U. S. 2 Cranch, 240 (2: 266).

Mr. **John H. Thomas**, for appellees:

Both of the appellants' tugs were employed by the agent of The Hesper, and sent to her assistance. Their right to compensation was not like that of ordinary salvors, contingent on success. They were entitled to compensation for the time and labor they might expend, whether their operations should be successful or otherwise.

The Sabine, 101 U. S. 390 (25: 984); *The Undaunted*, 1 Lush. 90; *The Kellar*, L. R. 6 P. D. 97; *The H. B. Foster*, 1 Abb. Adm. 234.

Even if their right to compensation had been contingent on success, a proper measure of award would have been the amount for which such service would probably have been undertaken, for compensation dependent upon such contingency.

Ehrman v. *The Swiftsure*, 4 Fed. Rep. 467; *Baker* v. *Hemenway*, 2 Lowell, 501; *The James T. Abbot*, 2 Sprague, 101; *The M. B. Stetson*, 1 Lowell, 119, 123.

The award of $4,200 is 4¼ per cent of $100,000, the value of The Hesper. The amount and percentage are both large in comparison with the awards made by the best admiralty courts in this country and England, even to passenger and freight steamers, where human life as well as property was saved, taking into account the duration and character of the services.

Brooks v. *The Adirondack*, 2 Fed. Rep. 387; *Atlas Steamship Co.* v. *The Colon*, 4 Fed. Rep.

469; 18 Blatchf. 277; *The Emily B. Souder*, 7 Ben. 550; *Arnold* v. *Cowie*, L. R. 3 P. C. 589.

The circuit court, on appeals in admiralty, takes up the case *de novo*. It cannot, like other appellate courts, simply affirm or reverse the decree appealed from. It must render its own decree, as the whole testimony before it may render proper. There was no impropriety, therefore, in the circuit court decreeing for a smaller amount than that decreed for by the district court.

The Lucille, 86 U. S. 19 Wall. 73 (22: 64); *The Charles Morgan*, 115 U. S. 75 (29: 318); *The Saratoga* v. *488 Bales of Cotton*, 1 Woods, 75; *The Hesper*, 18 Fed. Rep. 696; *The Gallileo*, 29 Fed. Rep. 538.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a libel *in rem*, in admiralty, brought in the District Court of the United States for the Eastern District of Texas, by Robert Irvine and Charles L. Beissner, owners of the steam lighter Buckthorn and the steam tug Estelle, against the steamship Hesper, in a cause of salvage.

The libel sets forth salvage services rendered to the Hesper by the Buckthorn and the Estelle, in pulling her off from the shore, at Galveston Island, about twenty-five miles from Galveston, Texas, where she had grounded on her voyage from Liverpool to Galveston, with a cargo of salt, in December, 1882.

The answer of the owners of the Hesper avers their readiness to pay a reasonable compensation for the services actually rendered by the two vessels, but denies that more than compensation for actual services and time is due, and denies that the services rendered were salvage services.

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Proofs were taken, and the district court, in April, 1883 (18 Fed. Rep. 692), made a decree adjudging that the libelants were entitled to compensation in the nature of salvage, for the saving of the Hesper and her cargo, and allowing to the libelants, for the services of each of the two vessels, $3,000, and to the owners of the schooner Mary E. Clark, and men who had been employed to load upon her part of the cargo of the Hesper, and to jettison such cargo, $2,000; and, the claims of the owners of that schooner and of those men having been settled by the Hesper, it was ordered that the $2,000 should go to the Hesper.

Both parties gave notice of appeal from this decree to the circuit court. The libelants perfected their appeal, but the claimants of the Hesper did not perfect theirs. Some further proof was taken in the circuit court, and, on the 13th of November, 1883, that court, having heard the cause, filed the following findings of fact and conclusions of law:

"This cause came on to be heard on the transcript and evidence, and was argued. Whereupon, the court, being advised of the evidence, finds the following as the facts of the case:

"1. That, about 5.45, A. M., of the 12th day of December, A. D. 1882, the steamship Hesper, bound on a voyage from Liverpool to Galveston, being out of her course, ran aground at the southwest side of Galveston Island, about twenty miles southwest from Galveston, and nearly opposite the life saving station. The Hesper was an iron propeller, and built in Hartlepool, in England, 1881, at a cost of twenty-two thousand pounds; her registered tonnage is, gross, 1,654 tons; net, 1,069 tons. Her freight capacity is 1,950 tons. She has powerful engines of 750 horse power, with steam windlasses and winches, and on said 12th of December was well found and well manned in every respect. She was laden with a cargo of about 900 tons of salt.

"2. That, when the Hesper went ashore, her engines were slowed down and she was making about four knots per hour. She struck easily without shock and remained upright. Her draft was then thirteen feet nine inches. The sea was smooth and there was very little wind; what there was was from the south, and the ship headed, when she struck, northeast by north. Kedge anchors were immediately put out to the east southeast, and efforts made to get the ship off in that direction, with the ship's engines heaving on those anchors. At the same time, a message was sent overland to Galveston, [258] the nearest port, to the ship's agent, to send assistance.

"3. That the agent of the ship applied to the agent of the tug Estelle, and procured that tug to go to the assistance of the Hesper. The Estelle was a long, narrow, deep boat, drawing about eight feet eight inches, and was the most powerful towboat in Galveston Harbor, and had aboard the usual appliances of such boats. The Estelle reached the Hesper about 5 P. M. of the 12th of December and reported. The master of the Hesper endeavored to bargain with the master of the Estelle as to the cost of pulling the Hesper off, but the master of the Estelle refused to make any agreement, on the ground that he did not know how much labor and time it would take. A line was then given the Estelle, from the stern of the Hesper, which was then more off the shore than the bow, and the Estelle hauled on said line for about two hours, during which time the crew of the Hesper, with some four or five hands from the life saving station, were throwing over cargo. No appreciable result came from this towing of the Estelle, and she desisted on the orders of the master of the Hesper.

"4. That, in the meantime, the sea, which had been smooth, with very little swell, had become more turbulent, and there was a very decided increase in the ground swell from the southeast. No so much, however, but that small boats were flying around the Hesper, and life-boats were running easily to and from shore. At this time of stopping hauling by the Estelle the master of the Hesper requested the Estelle to come alongside and run a heavy anchor out seaward from the Hesper, both to keep the Hesper from drifting further in, and for the Hesper to heave on to pull herself off. This the master of the Estelle refused to do, on the ground that there was too much sea on, and that he would thereby endanger his own boat, and thereupon the Estelle, taking aboard the Hesper's agent, who had come overland, proceeded back to Galveston, to procure more assistance. It was then found that the Estelle was making some water from a leak caused by a defect in the staff of the stuffing box, which was not tight enough, and was worked loose

[259] by the strain in hauling on the Hesper. However, the Estelle proceeded that night (of the 12th) to Galveston Bar, where she laid until morning, reaching Galveston wharves about noon of the 13th of December. The Estelle lay at the wharves repairing until the morning of the 14th of December, when she took the schooner Clark, which had been engaged by the Hesper's agent to lighter cargo, in tow, and towed her down to the Hesper.

"5. That, on the 13th of December, the ship Hesper was lively, though still aground, shifting her position slightly, but not affecting her safety, some 450 tons of water having been pumped into her ballast tanks to put her down and keep her from going nearer in shore, and her crew being engaged in throwing over cargo, while waiting for assistance. And, on the same day, the agent engaged the Buckthorn, a steam lighter, belonging to libelants, of lighter draft and power than the Estelle, to proceed to the Hesper, which she did, taking down a heavy anchor and cables, and two new hawsers (the latter purchased by the Hesper's agent), and a gang of men employed by the Hesper's agent, to help lighter the cargo and generally assist, and also provisions and other necessaries, arriving in the night and lying by until morning.

"6. That, on the morning of the 14th of December, the position and condition of the Hesper was much the same as on the preceding day, the weather being calm and the sea smooth. About nine o'clock in the morning, the gang of men brought down by the Buckthorn, after breakfasting aboard the Hesper, commenced to jettison cargo, and the Buckthorn carried out seaward and dropped the heavy anchor brought down from Galveston in about 18 feet of water connecting the same, by hawsers and cables of about 210 fathoms in length, with the steam winch of the Hesper. The Buckthorn then also took a line from the Hesper, and pulled on her, while the machinery of the Hesper was heaving on the hawsers leading to the heavy anchors, but no relief was given. Towards noon on the 14th the Estelle arrived, with the Clark in tow. The Clark was placed alongside of the Hesper, and cargo was transferred to her by the crew and the gang aforesaid. This [260] lightering was kept up until about four o'clock in the afternoon, when about one third of the cargo was removed, and nearly all the ballast water pumped out, and then the Estelle took a line from the Buckthorn, and a general effort was made by the Buckthorn, the Estelle, and the Hesper's engines, to get the Hesper off, which succeeded, whereupon the Hesper, which was uninjured, steamed to Galveston.

"7. Where the Hesper went aground, the slope of the ground seaward is gradual, and the bottom is sand.

"8. The prevailing and probable winds on that shore, during the month of December, are from the south and southeast, sometimes of great violence.

"9. During the three days the Hesper was aground, there was no wind nor sea of any danger to ships, large or small, and the services rendered to the Hesper, aiding her to get safely off, were not attended with any hazard or danger, or any circumstances unusual to the towage and lighterage business, as carried on in Galveston Roads, when the wind is moderate and the sea smooth.

"10. That the value of the Hesper, which was entirely uninjured by going ashore, was $100,000 and the value of her cargo saved was $6,500. The value of libelants' two boats, the tug Estelle and the lighter Buckthorn, was $35,000.

"11. That the Hesper, when aground as aforesaid, was in a condition of peril and distress, hardly likely to be able to get out of danger by her own efforts, even if the weather had been certain to continue favorable for many days, and certain to be wrecked if the weather should prove to be bad.

"12. That the services rendered the Hesper by the libelants' boats, the Estelle and Buckthorn, were salvage services, but of the lowest grade, involving neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage, or heroism, and the same will be fully compensated by double compensation, on the basis of towage and lighterage services.

"13. The Estelle was engaged in these services three days and one night, and the Buckthorn two days and one night. The outside [261] earnings of either of these boats, with their appliances, is $300 per day, which, allowing as much for night work, would make the sum of $2,100 compensation, and double compensation is the sum of $4,200.

"And the court finds the following as conclusions of law:

"1. The services rendered by the libelants' boats, the Estelle and the Buckthorn, and their respective masters and crews, were salvage services of the lowest grade.

"2. That the court should award for said services the sum of $4,200.

"3. That libelants should have judgment for the sum of $4,200, and costs incurred in the district court.

"4. That the libelants should pay the costs of this court."

Thereupon, a decree was made by the circuit court in favor of the libelants, for $4,200 and the costs of both courts. 18 Fed. Rep. 696. From this decree the libelants have appealed to this court. Their notice of appeal states that they claimed, as their compensation for the salvage services to the vessel and cargo, one fourth of the sum of $106,500, found by the circuit court as the value of the Hesper and her cargo.

It is assigned for error that the circuit court erred in deciding that the services rendered by the Estelle and the Buckthorn were salvage services of the lowest grade. This is found by the circuit court both as a conclusion of fact and a conclusion of law. Regarding it as a conclusion of fact, it is not reviewable here. Regarding it as a conclusion of law, it is based upon the finding of fact that the salvage services involved "neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage or heroism." The Estelle having been engaged in the services three days and one night, and the Buckthorn two days and one night, the court, treating the whole service as a service for seven days, and finding that the outside earnings of either of the boats, with its appliances, was $300 per day, being $2,100 for seven days, doubled the compensa-

[265] tion, and made it $4,200, stating that that would be a full compensation, on the basis of towage and lighterage services.

The circuit court, in its opinion (18 Fed. Rep. 698), says: "Proctor for respondents in this case admits in argument, that, by reason of the service of the extra anchor furnished by the libelants, the service amounts to salvage service. But for this admission I have grave doubts whether I could have found as a fact that the services ranked above towage and lighterage service, to be compensated on the principle of a *quantum meruit*. But salvage services being taken as established, the question is one solely of amount. As a fact in the case, I have found that there was neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage or heroism. The evidence shows there was no enterprise in going out in tempestuous weather, as the weather was moderate and the libelants' tug only went out when called upon and employed so to do. The labor and skill furnished were of the ordinary kind, such as libelants' boats were seeking as ordinary employment. Salvage, then, is to be determined entirely by the distress in which the salved property was. The distress of the Hesper was the salvors' opportunity, and the amount of salvage, on this point, determines the whole case."

The principle upon which the circuit court proceeded, as stated in its opinion, was that, although storms might have come which would have destroyed the Hesper, the services actually rendered to her by the tug and the lighter were ordinary services, and that if storms had come, the tug and the lighter might easily have sought safety.

We recently had occasion to fully consider the question of salvage in the case of *The Connemara*, 108 U. S. 352 [27: 751], where it was contended that the facts found by the circuit court did not constitute salvage service, and that, if a salvage service, it was salvage of the lowest grade, and the amount allowed was exorbitant. Holding the services to have been salvage services, this court, speaking by *Mr. Justice* Gray, said, 359 [753]: "The amount of salvage to be awarded, although stated by the circuit court in the form of a conclusion of [266] law, is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case." It is further there said, that, by the uniform course of decision in this court, during the period in which it had jurisdiction to reverse decrees in admiralty upon both facts and law, the amount decreed below was never reduced unless for some violation of just principles, or for clear and palpable mistake, or gross over allowance; and that, since the Act of Congress of February 16, 1875, chap. 77, restricting the appellate power of this court within narrower bounds, and limiting its authority to revise any decree in admiralty of the circuit court to questions of law, this court may, in cases of salvage as in other admiralty cases, "revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case." The decree appealed from in that case was affirmed, upon the ground that this court could not say, upon the findings of facts, that the amount awarded was so excessive as to violate any rule of law. The same principle was applied in *The Tornado*, 109 U. S. 110, 115 [27: 874, 876].

These views are equally sound in the case of an alleged under allowance. We cannot say, from the facts found in the case at bar, that the circuit court did not properly exercise its discretion in making the allowance it did, even though that amount was less than the amount allowed by the district court.

The claimants not having appealed to the circuit court, it is suggested that they are liable for at least the amount awarded by the district court, and that the circuit court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the district court to the circuit court vacates altogether the decree of the district court, and that the case is tried *de novo* in the circuit court. *Yeaton* v. *U. S.* 9 U. S. 5 Cranch, 281 [3: 101]; *Anon.* 1 Gall. 22; *The Roarer*, 1 Blatchf. 1; *The Saratoga* v. *438 Bales of Cotton*, 1 Woods, [267] 75; *The Lucille*, 86 U. S. 19 Wall. 73 [22: 64]; *The Charles Morgan*, 115 U. S. 69, 75 [29: 316, 318]. We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.

The decree of the Circuit Court is affirmed, with costs, and without interest to the libelants on that decree.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Plf. in Err.*, [457]

v.

CATHERINE L. EDWARDS.

(See S. C. Reporter's ed. 457-469.)

Life insurance—oral notice to local agent, of death of insured—proofs of death—acts of company—waiver of strict performance of requirements of contract.

In an action on a policy of life insurance, it is *held:* that the whole course of dealing by the defendant Company shows that it recognized a local agent as its agent in receiving oral notice and proofs of the death of the insured, and so acted upon his information as to waive a strict performance of the contract, which required written notice of death and proofs thereof within a certain time, the proofs having been retained by the local agent beyond the required time.

[No. 296.]

Argued May 6, 9, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of New York. Opinion below, 22 Blatchf. 225. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Solomon Lincoln**, for plaintiff in error:

The evidence fails to show that the defendant in error complied with the conditions of the policy in respect to notice.

The authority of Phillips to receive notices in behalf of the Company must be proved affirmatively, and there is no evidence that it existed. Phillips' duties, as testified to by himself and by his superior, do not confer or imply it. They are strictly defined and limited, and do not include the authority claimed.

His own declarations, as such, are not competent to prove it; and there is no evidence that any declarations or acts of his in excess of his authority, as strictly defined by himself and by the Company, were ever ratified by the Company, or even brought to its knowledge. The indorsement placed upon the proofs of death at Hartford is purely clerical, and even if assumed to be placed there by direction of the Company, it has no legal significance. It was not communicated to the assured, and was a mere private memorandum. Nothing can be inferred from it prejudicial to the Company; nor can the required authority be inferred from the general scope of employment of Mr. Phillips.

There is no evidence of waiver of the conditions by the Company. They could not be waived for the Company by Mr. Phillips. He was expressly limited in this respect by the premium receipt and by the policy, and this limitation was thus brought to the notice of the assured.

Massachusetts was the *locus contractus*, and the law of Massachusetts should govern the construction of the contract if different principles prevailed in different jurisdictions; but the law herein applicable, as administered by this court and by the courts of Massachusetts and New York, is the same, and, it is submitted, supports the position of the plaintiff in error.

Lohnes v. *Ins. Co.* 121 Mass. 439; *Shawmut* v. *Ins. Co.* 12 Gray, 540; *Harrison* v. *Ins. Co.* 9 Allen, 281; *Markey* v. *Ins. Co.* 103 Mass. 93; *Ins. Co.* v. *Wolff*, 95 U. S. 326 (24:387); *N. Y. L. Ins. Co.* v. *Fletcher*, 117 U. S. 519 (29:934); *Bush* v. *Ins. Co.* 63 N. Y. 531; *Van Allen* v. *Ins. Co.* 64 N. Y. 469; *Walsh* v. *Ins. Co.* 73 N. Y. 5; *Marvin* v. *Ins. Co.* 85 N. Y. 278; *Cole* v. *Ins. Co.* 99 N. Y. 36.

Messrs. **William N. Cogswell** and **William F. Cogswell**, for defendant in error:

The conversation between Bartholomew and Phillips, the agent of the Company, was admissible. His answer, within the apparent scope of his authority, bound the Company.

Goodwin v. *Mass. Mut. L. Ins. Co.* 73 N. Y. 480; *Ins. Co.* v. *Wilkinson*, 80 U. S. 13 Wall. 222 (20:617).

The defense that proofs of death were not served within seven months, as required by the policy, cannot be maintained successfully.

Service upon the agent of the Company was a compliance with conditions of the policy requiring proofs of the death to be "furnished to the Company," entirely irrespective of the peculiar facts of this case.

Kendall v. *Holland Purchase Ins. Co.* 2 Thomp. & C. 375, affirmed in 58 N. Y. 682.

By leaving the proofs with the agent the plaintiff complied literally with his directions, and the Company is estopped from saying that the agent's instructions were unauthorized. They were within the apparent scope of his authority as agent, and the plaintiff relied upon them; and if the agent was remiss in his duties to the Company in not sending the proofs until after the time stipulated in the policy had expired, the defendant should suffer by its negligence, and not the plaintiff.

Goodwin v. *Mass. Mut. L. Ins. Co.* 73 N. Y. 480; *Ins. Co.* v. *Wilkinson*, *supra*.

The defendant, having made no objection that the proofs were not delivered within the time required, has waived the right to interpose any such defense to the plaintiff's claim.

Goodwin v. *Ins. Co. supra*.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of New York.

The defendant in error, Catherine L. Edwards, obtained a judgment in the circuit court for the sum of $5,887.50 against the Travelers Insurance Company of Hartford, Connecticut, on a policy of insurance upon the life of her brother, Frank Edwards. The suit was originally instituted in the Supreme Court for Ontario County, New York, from whence it was removed by the plaintiff in error into the Circuit Court of the United States for that district. [458]

The record of a long trial before a jury is presented to us in a stenographic report of the proceedings there, which has been adopted by the parties and by the judge trying the case, as a bill of exceptions. It is obvious from this paper that the main controversy before the jury was upon a question of suicide set up by the defendant Company; but the brief of the plaintiff in error and its assignment of errors eliminates all this and relies upon the defense stated by the brief in the following language:

"Trial was had before a jury, and a verdict was rendered for the plaintiff; and the questions now arising are whether the plaintiff below complied with those conditions of the policy which required written notice to the Company of the death of the deceased, and proofs of the same within seven months thereafter; whether the action was prematurely brought by reason of the plaintiff's failure to comply with such conditions of the policy before bringing suit; and whether certain details of evidence bearing upon the foregoing questions were properly admitted against the objection of the Company."

The assignments of error correspond with this statement, and are given verbatim as follows:

"The circuit court erred:

"1. In that it admitted testimony relating to the acts and statements of Mr. E. M. Phillips, the local agent of the Insurance Company at Southbridge, Mass., with reference to the notice of death to be given by the defendant in error to the Insurance Company, and the delivery and reception of the proofs of death, as binding the Company and affecting the rights and duties of the parties to the contract of insurance, it not appearing that Phillips had authority to represent or bind the Company in this regard. (Record, pp. 22, 23, 28, 29, 58, 77.)

[459] "2. In that the court charged the jury as follows: 'If upon this evidence you find that upon the third of July, or during the seven months limited by the contract, the proofs of death which have been referred to were served upon Mr. Phillips, who was held out by this Company to be its agent, under the circumstances detailed in this case—that is, if you believe that he stated to the representatives of this assured that the proofs were to be left with him, and served upon him and not upon the Company—then, I say, for the purposes of this case, that that was sufficient service upon the Company, within the provisions of the contract.' (Charge, p. 79.)

"3. In that it refused to rule that the defendant in error had not furnished evidence of the notice of death required by the policy, inasmuch as there was no evidence that any notice in writing was given to the Company after the death of Edwards, or that proofs of death were furnished to or served upon the Company, and within seven months of his death, as required by the policy. (Pp. 29, 77, 78.)

"4. In that the court declined to charge the jury as follows: 'That, under the undisputed evidence in this case, the jury must find a verdict for the defendant under the facts alleged in the second separate answer' (p. 82; second separate answer p. 3.)

"5. In that it refused to rule that the suit was prematurely brought, because the plaintiff below had not at the time furnished due notice and proofs of death, as required by the policy, and ninety days thereafter had not elapsed. (P. 78.)"

The language of the policy upon this point is as follows:

"That in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice in writing to the Company at Hartford, Conn., stating the time, place and cause of death, and shall within seven months thereafter, by direct and reliable evidence, furnish the Company with proofs of the same, giving full particulars, without fraud or concealment of any kind."

The answer of the defendant alleges that the plaintiff did not give to the defendant, at Hartford, or elsewhere, immediate notice in writing of the death of the said insured; and that de- [460] fendant did not receive from said plaintiff notice of the death of the said Frank Edwards until the 10th day of February, 1883, his death occurring on June 19, 1882; and that the plaintiff did not, within seven months after the last mentioned date, give notice in writing to the defendant, at Hartford, or elsewhere, nor in the manner and form as required by the policy, and has not delivered to or furnished the defendant with proofs of the death of said Frank Edwards, with full particulars; but, on the contrary, failed and neglected so to do.

The evidence on this subject shows substantially that Phillips was the agent at Southbridge, Massachusetts, of the defendant Corporation; that the application on which the policy issued was forwarded by Phillips to Hartford, the policy returned to him, and by him delivered to Edwards; that the receipt for the premium, signed by Rodney Dennis, secretary of the Company, declared in the body of it that the policy would not be valid until the above stated premium has been received during the lifetime of said Frank Edwards, and this receipt countersigned by E. M. Phillips, agent of this Company at Southbridge, Mass." On the margin of the receipt was the statement that "The agent who receives the within premium should countersign this receipt, and invariably state over his signature the date at which the payment is made to him." Across its face was written: "The within premium received and this receipt countersigned by me this 24th day of May, 1882. E. M. Phillips, agent at Southbridge, Mass." It was further indorsed: "All policies and agreements made by this Company are signed by its president or secretary. No other person can alter or waive any of the conditions of the policies or issue permits of any kind, or make agreements binding upon said Company. Rodney Dennis, Secretary."

The evidence further shows that on the day after the death of Edwards, a gentleman named Bartholomew, who was a friend, and probably the attorney, of the family, met Mr. Phillips in the street; that Phillips said to him in regard to Edwards, whose death was then just known, that he was insured in the Travelers' Life Insurance Company, and that he (Phillips) was going to Hartford. The witness, Bartholomew, testifies: "I asked him if that was so. I didn't [461] at that time know that he had a policy in that Company. He said he was going to Hartford, and would give to the Company the notice of his death, and would procure the blanks for the proofs of loss. I asked him if it would do as well for him to give the notice to the Company in that way as for any party interested. He said it would, and I think that was all that was said then; saw Mr. Phillips some days after that; met him somewhere in the street—can't tell where—and he told me he had been to Hartford and had procured the blanks, and that if I would come to his office he would deliver them to me."

The other evidence in the case, including that of Mr. Dennis, the secretary of the Company, leaves no doubt of the fact that Mr. Phillips informed him of the death of Edwards, and of all that was known about it at that time, though very little was known in Southbridge, as he died in Boston. Mr. Dennis gave Phillips the blanks for the regular proofs of death, which the Company always required, which blanks contained instructions as to how these proofs should be made out, and what should be contained in the affidavits directed by the Company to be made.

Mr. Phillips delivered these papers to Bartholomew within a day or two after his visit to Hartford, and said to him: "When you get them completed I want you to return them to me." This Bartholomew swears to positively; and Phillips, while he does not recall the direction to return them to him, says that he is not willing to swear to the contrary.

These affidavits were made out and delivered to Phillips on the third day of July. Through some neglect on his part they remained in his office beyond the period of seven months which the policy fixed as the time within which they should have been delivered at the Hartford office. His attention having been brought

to these papers in some manner, not particularly described, he called upon Bartholomew with them and stated that they were not sufficient in regard to the particulars of the death of Edwards. They were afterwards returned to Phillips, who forwarded them to the Company about the 7th day of February, 1883, which the Company now insists was too late.

The whole of the testimony upon this narrow [462] issue turns upon the question whether the absence of a written notice of the death of the insured, when the Company had full notice of it through Phillips, their agent, and whether the delivery of the proofs of death to the Company after the expiration of the seven months, although they had been delivered to the agent Phillips within the time required, shall defeat a recovery.

The opinion of the judge who tried the case, on a motion for a new trial, states the facts as he understood them, and, as we think, with accuracy, together with his view of the law of the subject, so well that we transcribe it here:

"The facts are as follows: The insured died June 19, 1882. A day or two afterwards E. M. Phillips, who is described in the receipt referred to as 'agent of this Company at Southbridge, Mass.' met one of the family of the deceased on the street, informed him that he was going to Hartford and would give the Company the requisite notice, and would procure the necessary blanks for the proofs of death. He did go to Hartford on or about the 21st of June, saw the secretary of the Company, gave him notice of the death, stating all the particulars which he then knew, and obtained the blank proofs. On his return he handed the blanks to one of the plaintiff's representatives, saying at the time, 'When you get them completed I want you to return them to me.' They were filled out and delivered to him July 3, 1882. He retained them for several months, and then returned them to a brother of the plaintiff, saying that they were incomplete, and demanded additional information. On the 29th of January, 1883, they were again delivered to Phillips, and by him sent to the Company on or about the 7th of February. The Company, in acknowledging their receipt, made no objection that they were received too late, and retained them in its possession. They were produced on the trial by the defendant's counsel.

"It must be held that, if the plaintiff has not followed the contract literally in these particulars, it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omission, having waived a strict performance of the contract." See *Edwards* v. *Travelers L. Ins. Co.* 22 Blatchf. 225.

[463] Without deciding whether this notice to Phillips, of the death of Edwards, would have been a sufficient compliance with the contract requiring a written notice of the death to be given to the Company at Hartford, if it had been attempted to comply with the condition in that manner, and without deciding whether, if the proofs of death had been made out and delivered to Phillips, with no more in the case than that, it would have been a sufficient compliance with that provision, we are of opinion that the whole course of dealing by the Company with Phillips and with the plaintiff below establish the proposition that the Company recognized Phillips as its agent for these purposes, and so acted upon his information of the death of Edwards as to accept that as sufficient notice, and to constitute him their agent for the purpose of receiving the proofs of death. Phillips went to the office of the Company in Hartford; he there gave the information of the death of Edwards to the Company, with such particulars as were then known in regard to the incidents of his death. The acting officer of the Company, the man who in his own testimony describes himself as having charge of claims for losses by death, then furnished him with the requisite blanks for the further proof required by formal affidavits of the parties. This officer knew that Phillips was treated by the insured as the agent of the Company for giving this notice, he accepted that notice, he acted upon it, and he entrusted Phillips, who was an agent of the Company and had been so for ten years or more, with the forms of affidavits necessary to show what the Company required to be proved in [467] order to justify them in paying the money upon the policy. Phillips undertook this business, delivered these blank affidavits, and stated to the plaintiff's agent that they were to be returned to him when completed. They were so returned to him, but, without sending them to the Company, after keeping them a long time in his possession, he again gave them to the plaintiff's agent, with the declaration that they were imperfect, and suggested further proofs.

Soon after this they were returned to him, though it is not stated whether any further proofs were made out or not, and he then forwarded them to the Company. He evidently considered himself as the agent of the Company when he required additional proofs. As confirmatory of this, the evidence shows that the Company received the proofs without objection; and when sometime afterwards a brother of the plaintiff made an inquiry of the Company in regard to them, they acknowledged that they had received them on the 10th day of February, but made no objection that it was too late. They also acknowledged thereceipt of "papers in the case of Frank Edwards," in the following letter, dated February 9, 1883:

"E. M. Phillips, Esq., ag't, Southbridge, Mass.

"Dear Sir: Your letter of the 7th inst., with papers in the case of Frank Edwards, at hand. We understand a chemical analysis of his stomach was made. We should like a full report of the analysis certified to by the chemist who made it.

"Yours Truly, Rodney Dennis, Sec'y."

In this there was no hint that the papers were received too late, or that no sufficient notice had been given, but simply the expression of a desire for further information with regard to the actual facts of the case, which would have been useless if the Company intended to rely upon the failure to give this notice in time.

Afterwards, on March 10, 1883, S. K. Edwards, "for Katy L. Edwards," the plaintiff below, wrote to the Company asking for the date of proof of death of Mr. Frank Edwards [468] and when it was received at the office. To this the following reply was made:

"The Travelers Insurance Co.,
Claim Department,
"Hartford, Ct., March 13, 1883.
"S. K. Edwards, Southbridge, Mass.

"Dear Sir: In reply to yours of 10th inst., would say that we received a letter from agent Phillips, dated February 7, 1883, wherein he writes: 'I found the inclosed upon my table on my return home, and forward the same.' The inclosed were incomplete proof papers relating to the death of Mr. Frank Edwards, and we acknowledged the receipt of same Feb'y 9th, asking for a full report of the analysis of Edwards' stomach, the report to be certified by the chemist who made the analysis. We have no further intelligence respecting the matter.

"Yours Truly, Rodney Dennis, Sec'y."

On March 20, S. K. Edwards, on behalf of his sister, again wrote to the Company making inquiry if February 9 was the first time they had the proofs of the death of Frank Edwards, to which the following reply was made:

"March 21, 1883.
'S. K. Edwards, Esq., Southbridge, Mass.

"Dear Sir: Your letter of the 20th inst. is at hand. We received the incomplete proofs of death, to which we alluded in our letter of 13th inst., on the 10th of February for the first and only time. We have only received them once.

"Yours Truly, Rodney Dennis, Sec'y."

During all the correspondence which passed upon this subject, Mr. Dennis, the officer of the Company, nowhere intimates that these proofs came too late, or that they were rejected by the Company; but the only complaint made was that he had not received the chemical analysis of the contents of the stomach.

Under all the circumstances of this case, we are of opinion that the Company treated Phillips as their agent for the purpose of the early [469] notice of the death of Edwards, and also the receipt of the final proofs thereof, and that it is too late for them now to undertake to defeat this action upon the ground that he was not their agent for any of these purposes.

We do not deem it necessary to go into a critical examination of the authorities upon the questions so often raised of the powers of agents of this class. We simply hold that whether, upon the face of the policy, and the receipt with its indorsements, taken alone, Phillips can be held to have been the agent of the Company to whom the notices in question could be properly delivered or not, that the action of the Company upon Phillips' communications to its secretary at Hartford of the information of the death of Edwards, and its delivery to him of the blank affidavits and forms which it required to be filled up, together with the subsequent correspondence, show conclusively that the Company considered Phillips as its agent throughout the transaction with regard to these notices, and it is, therefore, bound by what he did.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [197
v.
CLEMENT A. AUFFMORDT ET AL.

(See S. C. Reporter's ed. 197-210.)

Duties—action to recover value of goods consigned to defendants by the owners—priority of statutes enacted the same day—amendment—object and effect of.

1. Where imported goods are the property of their manufacturer, the invoice need only state the fair market value of the goods at the place of manufacture, and it need not state "the actual cost thereof at the place of exportation." Therefore, an invoice of goods which belong to their manufacturer is not, nor is an entry of such goods, within the purview of section 2839, so as to make the person entering them with design to evade payment of duty liable to a forfeiture of their value.

2. The provision in section 2864, R. S., for the forfeiture of the value of such goods is superseded by the enactment of section 12 of the Act of June 22, 1874, which provides only for a forfeiture of the merchandise, and not for the forfeiture of its value; said Act, although passed on the same day as the Revised Statute, being a subsequent statute thereto.

3. The sole object of the amendment to section 2864, R. S., made by the Act of February 18, 1875, was to make said section read as it should have read in the printed volume, in the shape in which it was in force on December 1, 1873. The Act of February 18, 1875, was in no respect new legislation, nor a new law enacted to take effect from the date of its passage, in such wise as to alter any enactment made since the passage of the Revised Statutes.

[No. 266.]

Argued April 26, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. Reported below, 19 Fed. Rep. 893. *Affirmed.*

The case fully appears in the opinion of the court.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for plaintiff in error.

Messrs. Charles M. Da Costa and *Tremain & Tyler*, for defendants in error.

Mr. Justice **Blatchford** delivered the opin- [198] ion of the court:

This is an action brought by the United States, in the District Court of the United States for the Southern District of New York, against Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, composing the firm of C. A. Auffmordt & Co., to recover the sum of $321,519.29, with interest.

The complaint alleges violations by the defendants of Statutes of the United States in respect to entries of imported merchandise made by the defendants in 1879, 1880, 1881 and 1882, the value of such merchandise being the above named sum, and claims that by reason of the acts of the defendants alleged in the complaint the defendants have forfeited such value to the United States. The defendants put in an answer containing a general denial, and the case was tried in the district court before a jury.

After the case was opened to the jury on the part of the United States, and before any testimony was offered, the defendants moved, upon such opening, that the court direct a verdict for the defendants, on the ground that there was no statute of the United States whereby the value of the merchandise could be recovered

by reason of the acts alleged to have been committed by the defendants as consignees of the goods, which was the capacity in which they received and entered the goods, the goods being the property of the manufacturers of them in Switzerland, and being consigned to the defendants for sale on commission. The facts sought to be proved against the defendants were that they, knowingly and with intent to defraud the revenue, entered the goods at invoice prices lower than their actual market [199] value at the time and place of exportation. The court ruled that there was no existing statute of the United States under which the plaintiff could recover upon any possible proof, and that a verdict must be directed for the defendants. 19 Fed. Rep. 893. The plaintiff excepted to this ruling.

The two sections of the Revised Statutes upon which the United States base their right of recovery in the case are sections 2839 and 2864. Section 2839 was originally enacted as part of section 66 of the Act of March 2, 1799, chap. 22, 1 Stat. at L. 677, and reads as follows:

"Sec. 2839. If any merchandise, of which entry has been made in the office of a collector, is not invoiced according to the actual cost thereof at the place of exportation, with design [203] to evade payment of duty, all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited."

Section 2864 was originally enacted as part of section 1 of the Act of March 3, 1863, chap. 76, 12 Stat. at L. 738, and reads as follows: "Sec. 2864. If any owner, consignee or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise, or the value thereof, shall be forfeited."

The bill of exceptions contains the following statement as to the proceedings after the above ruling of the court: The plaintiff asked leave to prove, successively, that items contained in the invoices mentioned in the complaint and bill of particulars were undervalued, within the meaning of the last clause of section 12 of the Act of June 22, 1874, which reads as follows: "Anything contained in any Act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed;" that the defendants, being consignees of the merchandise mentioned in the complaint, knowingly made entries thereof by means of false invoices; that the defendants, being agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false invoices; that the defendants, being consignees of the merchandise mentioned in the complaint, knowingly made entry thereof by means of invoices which did not contain a true statement of the particulars required in that part of the Act of March 3, 1863, preceding the provision of the Act which was re-enacted as section 2864 of the Revised Statutes; that the defendants, being agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of invoices which did not contain a true statement of the particulars required in that part of the Act of March 3, 1863, [204] preceding the provision of the Act which was re-enacted as section 2864 of the Revised Statutes; that the defendants, being the consignees of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false and fraudulent documents and papers; and that the defendants, being the agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false and fraudulent documents and papers. These requests being successively denied, the plaintiff excepted to each refusal. The jury, under direction of the court, found a verdict for the defendants, to which direction the plaintiff excepted. After a judgment for the defendants, the plaintiff took the case to the circuit court by a writ of error, where the judgment was affirmed; and they have brought the case to this court by a writ of error.

The main contentions on the part of the defendants are that section 2839 relates only to purchased goods, and not to consigned goods, and that section 2864 is superseded by section 12 of the Act of June 22, 1874, chap. 391, 18 Stat. at L. 188. These contentions were sustained by the district court in its opinion.

Section 2839 provides for the forfeiture of merchandise, or the value thereof, "To be recovered of the person making entry," where the merchandise is "not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty." This section, originally enacted in 1799, is applicable only to goods which are required to be invoiced according to their actual cost at the place of exportation. *Alfonso* v. *U. S.* 2 Story, 421, 429, 432. By section 2841 of the Revised Statutes, originally section 4 of the Act of March 1, 1823, chap. 21, 3 Stat. at L. 730, 732, forms of oaths on the entry of goods are prescribed, one for the "consignee, importer, or agent," one for the "owner in cases where merchandise has been actually purchased," and a third for the "manufacturer or owner in cases where merchandise has not been actually purchased." In the first form of oath, the oath is that the invoice "exhibits the actual cost (if purchased), or fair market value (if otherwise obtained)," at the time and place of procurement. In the second form of oath, the oath is that the oath contains "a just and faithful account of the actual cost" In the third form of [205] oath, the oath is that the goods were not actually bought by the importer or consignee, or by his agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice "contains a just and faithful valuation of the same, at their fair market value" at the place of procurement.

Section 2845, originally section 8 of the Act of March 1, 1823, chap. 21, 3 Stat. at L. 738, provides that "No merchandise subject to *ad valorem* duty, belonging to a person not residing at the time in the United States, who has not acquired the same in the ordinary mode of bargain and sale, or belonging to the manufacturer, in whole or in part, of the same, shall be admitted to entry, unless the invoice thereof is

verified by the oath of the owner or of one of the owners, * * * certifying that the invoice contains a true and faithful account of the merchandise, at its fair market value, at the time and place when and where the same was procured or manufactured, as the case may be."

Section 2854, originally a part of section 1 of the Act of March 3, 1863, chap. 76, 12 Stat. at L. 787, provides as follows: "All such invoices" (that is, all invoices of merchandise imported from any foreign country), "shall, at or before the shipment of the merchandise, be produced to the consul, vice consul, or commercial agent of the United States nearest the place of shipment, for the use of the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner or agent, setting forth that the invoice is in all respects true; that it contains, if the merchandise mentioned therein is subject to *ad valorem* duty, and was obtained by purchase, a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon; and that no discounts, bounties or drawbacks are contained in the invoice but such as have actually been allowed thereon; and when obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same was procured or manufactured; and if subject to specific duty, the actual quantity thereof; and that no different invoice of the merchandise, mentioned in the invoice so produced, has been or will be furnished to any one. If the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is the currency which was actually paid for the merchandise by the purchaser."

[206] It is quite clear, from the above provisions, that where imported goods are the property of their manufacturer, the invoice need only state the fair market value of the goods at the place of manufacture, and it need not state "the actual cost thereof at the place of exportation." Therefore, an invoice of goods which belong to their manufacturer is not, nor is an entry of such goods, within the purview of section 2839, so as to make the person entering them with design to evade payment of duty liable to a forfeiture of their value.

The most serious question arises in respect to section 2864, which is alleged to have been superseded by section 12 of the Act of June 22, 1874. The two statutes are here placed in parallel columns:

Section 2864 Revised Statutes (2d ed.)	*Section 12 of the Act of June 22, 1874.*
"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise or the value thereof shall be forfeited."	"That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offense, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which said fraud or alleged fraud relates; and anything contained in any Act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby repealed."

[207]

Assuming that the language of section 2864, declaring that the merchandise or its value shall be forfeited, would authorize a suit *in personam*, without a seizure of the merchandise, and also assuming that the suit for a forfeiture of the value may be brought against the owner, consignee or agent, the question for determination is whether the provision in section 2864, for a forfeiture of the value, is superseded by the enactment of section 12 of the Act of June 22, 1874, which provides only for a forfeiture of the merchandise, and does not provide for any forfeiture of its value.

Section 13 of the Act of June 22, 1874, provides that any merchandise entered by any person violating section 12, but not subject to forfeiture under that section, may, while owned by him or while in his possession, "to double the amount claimed, be taken by the collector and held as security for the payment of any fine or fines incurred as aforesaid." Section 14 provides that the omission, without intent thereby to defraud the revenue, to add, on entry, to the invoice, certain specified charges, shall not be a cause of forfeiture of the goods "or of the value thereof." Section 16 provides that, in suits to enforce the forfeiture of goods, "or to recover the value thereof," no fine, penalty, or forfeiture shall be imposed unless the jury shall find that the alleged acts were done with an actual intention to defraud the United States. Section 26 repeals all Acts and parts of Acts inconsistent with the provisions of that Act. There is not in the Act any other repealing provision, except that contained in the concluding words of section 12, above quoted.

[208]

The Act of June 22, 1874, was passed on the same day with the Revised Statutes, section 5595 of which declares that the Revised Statutes embrace the general and permanent Statutes of the United States which were in force on the first day of December, 1873. Section 5601 declares that the enactment of the revision is not to affect or repeal any Act of Congress passed since the first day of December, 1873;

that all Acts passed since that date are to have full effect, as if passed after the enactment of the revision; and that, so far as such Acts vary from or conflict with any provision contained in the revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. The Act of June 22, 1874, is, therefore, a subsequent statute to the Revised Statutes, and repeals any portion thereof which is inconsistent with such subsequent statute.

On a full review of the above recited provisions of the Act of June 22, 1874, and of its other provisions, it is apparent that, so far, at least, as the acts subject to the penalties denounced in section 2864 are concerned, they are entirely covered by the provisions of section 12 of the Act of June 22, 1874. There is no act denounced by section 2864 that is not embraced, both as to person and character of act, by the provisions of section 12. The latter section adds, as a punishment for the offense, fine [209] or imprisonment or both, and a forfeiture of the merchandise, in addition to the fine. It leaves out a forfeiture of the value of the merchandise; and forfeiture of such value is inconsistent with the terms of section 12, and is therefore repealed by it. The absolute forfeiture of the merchandise, provided for by section 12, is inconsistent, also, with the alternative forfeiture of the merchandise or its value, provided for by section 2864. The provisions of the two statutes cannot stand together. *Norris* v. *Crocker*, 54 U. S. 13 How. 429, 438 [14: 210, 213]; *U. S.* v. *Tynen*, 78 U. S. 11 Wall. 88, 92 [20: 153, 154] *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590, 617 [22: 429, 437]; *U. S.* v. *Claflin*, 97 U. S. 546, 552, 553 [24: 1082, 1085]; *King* v. *Cornell*, 106 U. S. 395, 396 [27: 60]; *Pana* v. *Bowler*, 107 U. S. 529, 538 [27: 424, 428].

The considerations covered by the foregoing views are so well discussed and enforced in the opinion of the district judge in this case that it is not deemed necessary further to enlarge upon them.

Section 2864 of the Revised Statutes, when originally enacted on the 22d of June, 1874, did not contain the words "or the value thereof" after the words "such merchandise." By the Act of February 18, 1875, chap. 80, 18 Stat. at L. 319, entitled "An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States," and which Act states "That, for the purpose of correcting errors and supplying omissions in the Act entitled 'An Act to Revise and Consolidate the Statutes of the United States in Force on the First Day of December, Anno Domini One Thousand Eight Hundred and Seventy-Three,' so as to make the same truly express such laws, the following amendments are hereby made therein," it is provided as follows: "Section two thousand eight hundred and sixty-four is amended by inserting in the last line, after the word 'merchandise,' the words 'or the value thereof.'" Section two of the Act directs the Secretary of State, "if practicable, to cause this Act to be printed and bound in the volume of the Revised Statutes of the United States."

It is contended for the United States that this amendment to section 2864, made by the Act of February 18, 1875, can be reasonably accounted for only upon the theory that, at the date it was made, which was after the passage of the Act of June 22, 1874, chap. 391, Congress regarded section 2864, as thus amended, [210] as a valid existing law, particularly in respect to the amendment, and intended to declare that the value of the merchandise should be forfeited under section 2864, notwithstanding the passage of the Act of June 22, 1874, chap. 391. But we are of opinion that the amendment made by the Act of February 18, 1875, did not have the effect contended for. Its sole object was to correct errors and supply omissions in the text of the Revised Statutes, as its title indicates, so as to make the same truly express the statutes in force on the first of December, 1873, and it made special reference to the printed volume of the Revised Statutes. It was in no respect new legislation, nor a new law enacted to take effect from the date of its passage, in such wise as to alter any enactment made since the passage of the Revised Statutes. The intention was to make section 2864 read as it ought to have read in the printed volume, in the shape in which it was in force on the first day of December, 1873, as a part of section 1 of the Act of March 3, 1863, chap. 76, 12 Stat. at L. 738. It left the the Act of June 22, 1874, chap. 391, to have its full effect in respect to section 2864, in like manner as if the words "or the value thereof" had been contained in that section, in the printed volume of the Revised Statutes. There was a law in force on December 1, 1873, and subsequently thereto, down to June 22, 1874, authorizing a forfeiture of the value of merchandise for the causes stated in section 2864, and the fact that forfeitures of such value might have been incurred during the intervening period between December 1, 1873, and June 22, 1874, was a sufficient reason for the correction made in section 2864.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

R. WALTER & COMPANY, Judgment Creditors of LAKE & AUSTIN, *Plfs. in Err.*, [320]

v.

BICKHAM & MOORE.

(See S. C. Reporter's ed. 320-323.)

Practice—levy of attachment—whether by proper officer—subsequent consent order of sale—subsequent judgment creditors cannot object to regularity of original levy.

Where, after the levy of an attachment, upon the consent of the attachment creditors, the debtors and their assignee, the attached goods have been sold by order of the court, and the proceeds paid to the clerk to be held subject to the order of the court, subsequent judgment creditors cannot be heard to object to the manner in which the property was originally seized and brought into court and made subject to its orders.

[No. 303.]

Submitted May 11, 1887. Decided May 27, 1887.

IN ERROR to the District Court of the United States for the Northern District of Mississippi. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **M. R. Walter,** for plaintiffs in error.

No counsel appeared for defendants in error.

[321] *Mr. Justice* **Harlan** delivered the opinion of the court:

September 29, 1883, Bickham & Moore, creditors of Lake & Austin, sued out from the court below an attachment against the property of said debtors, directed to the Marshal of the United States for the Northern District of Mississippi. The writ came to the hands of that officer for execution. The attorney of the plaintiffs informed him that "he wanted a blank deputization on a writ of attachment to send to Grenada," which was the place of the residence of the debtors. This request was at first denied, but finally the following indorsement was made on the writ: "I hereby appoint ——— ——— my special deputy to execute this writ, the plaintiff not holding me for the acts of such deputy. J. L. Morphis, U. S. Marshal." The writ, so indorsed, was delivered to the attorney of the attaching creditors and he proceeded to Grenada with it.

The marshal testifies that he made the above indorsement with the understanding that the blank should be filled up with the name of a "bonded officer." Application being made to R. A. Hall, Sheriff of Grenada County, to execute the writ, that officer agreed to do so. His name was accordingly inserted in the blank left in the indorsement thereon. He subsequently declined to act. Thereupon, the attorney for the attaching creditors erased the name of Hall and filled the blank with the name of Samuel Ladd, who was a town marshal. The latter executed the attachment on the second of October, 1883, by levying upon certain property belonging to Lake, and to Lake & Austin. At a late hour of the same day, a regular deputy of the marshal appeared at Grenada and [322] took possession of the personal property, which had been previously seized by Ladd under the writ of attachment. The writ was also delivered to him by Ladd.

On the 19th day of October, 1883, the following order of sale was made in the cause:

"Upon the application and consent, by attorneys, of all the creditors who have heretofore sued out attachments in this court against Lake & Austin, defendants, and upon consent of said defendants and A. C. Hebron, claimant, as assignee in the deed of assignment executed by said Lake & Austin, and with the consent of all other and non-attaching creditors of said Lake & Austin, who are this day represented by Messrs. Sullivan & Sullivan and Slack & Longstreet, and it appearing unto the court that an immediate sale of the effects so assigned and attached will best promote and subserve the interests of all and each and every of the creditors of said Lake & Austin; *Therefore,* It is ordered, adjudged and decreed by the court that the marshal of this judicial district shall sell at public auction, for cash, to the highest bidder, in one bulk, all the dry goods, groceries, and all other merchandise assigned by said Lake & Austin and subsequently attached and seized under writs issued from this court as aforesaid, * * * and when so sold, the proceeds of such sale said marshal shall immediately pay to the clerk of this court, and be held subject to the orders of this court. The proceeds of such sale shall stand in all respects in lieu of and represent the goods and effects assigned and attached, and be liable as said property and effects now and to said attachment liens in their order, and not further or otherwise; and the rights of the parties claiming said goods and effects to replevy the same or to reduce the same or any part thereof upon claim made and the execution of bond, as required by law, shall be in no wise prejudiced or affected by said sale; nor shall the consent to said sale in any wise operate as a waiver of or to the prejudice of any right, benefit, or advantage now held, possessed or claimed by said parties or any of them, but all and singular the same shall be preserved, this being simply a consent order, and intended to convert the property into money in order to protect the same from waste and great depreciation, and to let the [323] money represent the property in all respects in the litigation. It is further ordered that said marshal do keep accounts of his said sales, showing the amount of proceeds of the several assets sold in the several bulks."

A sale was had pursuant to that order, and the sum of $24,550—not more than sufficient to satisfy the claim of the plaintiffs and their costs —was realized, and paid over to the clerk of the court. The return of sale shows that so much of the order as required the sale of the books of account and choses in action was rescinded, and the notes levied on were delivered to A. C. Hebron "in accordance with an agreement between counsel for plaintiff and defendants."

On the 20th day of October, 1884, the plaintiffs in error, creditors of Lake & Austin, procured a judgment against the latter for $6,300.26, and obtained thereon a writ of garnishment against the marshal and clerk of the court.

On the second of January, 1884, the same judgment creditors moved the court to discharge the levy made in behalf of Bickham & Moore upon the following grounds:

"1. Because said alleged levy was not made by the U. S. Marshal or any of his deputies, or by anyone duly authorized to execute said writ of attachment.

"2. Because the writ of attachment in this cause was levied and executed by Sam. Ladd, who was not and is not an officer of this court from which said writ emanated and was returnable, said Ladd not being either a regular deputy U. S. Marshal or a special deputy.

"3. Because Mr. H. M. Sullivan, one of the attorneys for plaintiffs in this cause, appointed said Sam. Ladd to execute the said writ of attachment.

"4. Because J. L. Morphis, the U. S. Marshal for the Northern District of Mississippi, appointed R. N. Hall, Sheriff of Grenada County, his deputy to execute the said writ of attachment in this cause, by his written deputation upon the back of and on the said writ of attachment, which said writ was sued out in the U. S. Court for the Northern District of Mississippi; and said writ was not executed by said Hall, who was so appointed, but was executed by said Sam. Ladd upon the appointment of Mr. H. M. Sullivan as aforesaid, without any further author- [324]

ity from said U. S. Marshal, by striking out the name of said Hall, upon his own motion, upon said Hall's declining to act, and substituting the name of Sam. Ladd in place and stead thereof.

"5. Because said levy was not made by any lawful officer whatever, or by anyone duly appointed to make said levy."

The motion was denied, and the present writ of error is brought to reverse that judgment.

On behalf of the plaintiff it is insisted: 1. That the law does not authorize anyone to serve writs directed to a marshal, except that officer himself, or such of his appointees as may have [325] duly qualified as deputies, by taking the oath or affirmation prescribed by section 782 of the Revised Statutes of the United States; and that service by anyone else is void. 2. Assuming that an appointee of the marshal, who was not thus qualified, can serve process directed to the marshal, the latter has no right to delegate to another his power of appointment; and he cannot ratify such an appointment, nor validate a levy made in his name by one not lawfully appointed. 3. Assuming that the marshal has the right to delegate his power of appointment, the authority conferred by him on the attorney of Bickham & Moore was exhausted after Hall's appointment and agreement to serve.

On the other hand, it may be claimed that, if the appointment of Ladd to execute the attachment was illegal, and if his levy was void, the subsequent action of a regular deputy of the marshal in taking possession of the attached property, and holding it under the writ delivered to him by Ladd, made the levy from that time so far valid that the property was thereafter to be deemed in the lawful custody of such deputy, under the writ of attachment.

It is unnecessary to determine any of these questions; for the record shows that on the 19th of October, 1878—before the plaintiffs in error obtained their judgment against Lake & Austin, and, therefore, before they had acquired any special interest in the property—the court below, upon the application and with the consent of all the creditors who had theretofore sued out attachments, and with the consent, as well as of the debtors themselves as of Hebron, the assignee in the deed of assignment executed by the debtors, the attached effects were sold by order of the court, and the proceeds paid, pursuant to that order, to the clerk. Thus, every person, who was in a position, in reference to the property, to object to the manner in which the writ of attachment was executed consented that the property be placed under the control of the court, the proceeds of the sale to be applied to the attachment liens in their order.

[326] Under these circumstances, creditors who did not obtain judgments until after such consent order was made, cannot be heard to object to the manner in which the property was originally seized and brought into court, and made subject to its orders. The attaching creditors, the debtors, and the assignee of the debtors, having all approved what was done, subsequent judgment creditors—the consent order of sale not being impeached on the ground of fraud—acquired no such rights in the property as entitled them to question the disposition made of it or of the proceeds of sale.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, [347]
v.
WILLIAM PENDLETON, *Deft. in Err.*

(See S. C. Reporter's ed. 347-359.)

Constitutional law—interstate commerce—intercourse by telegraph—transmission into, and delivery in, other States—State cannot regulate—Indiana Statute, void.

1. Intercourse by telegraph between the States is interstate commerce.
2. A State has no authority to regulate the transmission of telegraphic messages into other States and their delivery therein.
3. The Statute of Indiana, which attempts to regulate the mode in which messages sent by telegraphic companies doing business in said State shall be delivered in other States, is void, such regulation being an interference with the freedom of interstate commerce.

[No. 267.]

Argued April 27, 1887. Decided May 27, 1887.

IN ERROR to the Supreme Court of the State of Indiana. *Reversed.*

Statement of the case by *Mr. Justice* **Field:** [348]

The Statute of Indiana declares that "Every electric telegraph company, with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphing lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed; *Provided, however*, That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others." Sec. 4176, R. S. Ind. 1881. And that "Such companies shall deliver all dispatches, by messenger, to the persons to whom the same are addressed, or to their agents, on the payment of any charges due for the same; *Provided*, Such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is." Sec. 4178, *Id.*

The present action is brought by William Pendleton, the plaintiff below, to recover of the Western Union Telegraph Company the penalty of $100 prescribed by the above statute, for failing to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The complaint, as finally amended, alleges that the defendant below, the Western Union Telegraph Company, is a corporation organized and subsisting under the laws of Indiana, with a line of wires from Shelbyville, in that State, to Ottumwa, in Iowa;

that on the 14th of April, 1888, at thirty-five minutes past 5 o'clock in the afternoon, at [349] which time the Company was engaged in telegraphing for the public, the plaintiff delivered to its agent at its office in Shelbyville, the following telegram for transmission to its office in Ottumwa, viz.:

"April 14th, 1888.

"To Rosa Pendleton; care James Harker,
Near city graveyard, Ottumwa, Iowa.

"Have you shipped things? If not, don't ship. Answer quick.

"Wm. Pendleton;"

That upon its delivery, the plaintiff paid the agent sixty cents, being the amount of the charge required for its transmission from Shelbyville to Ottumwa; that, without any fault or interference on his part, the Company, after transmitting the message to Ottumwa, where it was received at half past seven in the afternoon of that day, failed to deliver it either to Rosa Pendleton or to James Harker, whereby the plaintiff sustained damage, and the defendant became liable for $100, under the Statute of Indiana; for which sum plaintiff demands judgment.

To this Complaint the Company answered, admitting the receipt of the telegram as alleged, and setting up that it transmitted the message with impartiality and good faith, in the order of time in which it was received, and without delay, to its office in Ottumwa, Iowa, where it was received, as alleged, at half past seven of that day; that James Harker, to whose care the message was directed, lived more than one mile from the telegraph station at Ottumwa; that, in accordance with the usual custom of the office, the message was, without delay, placed in the postoffice of that town, with proper stamp thereon, and duly addressed; and that the telegram was received by the person to whom it was addressed on the following morning, April 15, 1888, at about 9 o'clock.

The answer further set forth that the duties and liabilities of telegraph companies in Iowa, and the transmission and delivery of the telegrams within the State, are regulated by a special statute of that State, which is as follows, [350] viz.: "Any person employed in transmitting messages by telegraph must do so without unreasonable delay; and anyone who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person, except him to whom it is addressed or to his agent or attorney, is guilty of a misdemeanor. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law;" that by that statute the defendant was not required to deliver telegrams by messenger to the persons to whom they were addressed; that in the City of Ottumwa it had established a certain district within which it delivered telegrams by messenger; and that on the receipt of the telegram in question at Ottumwa it was ascertained that Harker, to whose care it was addressed, did not reside within the delivery district, but outside of it, and more than one mile from the defendant's office, and that, in accordance with the custom and usage of the office, and in order to facilitate the delivery of the message, a copy of the telegram was promptly placed in the postoffice at Ottumwa, with proper address, and delivered as stated above.

To this answer the plaintiff demurred; the Circuit Court of the State sustained the demurrer; and, the defendant electing to stand upon its answer, judgment was rendered for the plaintiff for $100, which, on appeal to the Supreme Court of the State, was affirmed, and the Company brings the case here for review.

Messrs. **Augustus L. Mason,** *Joseph H. McDonald,* and *John M. Butler,* for plaintiff in error:

The business of telegraphing from one State to another is interstate commerce, within the meaning of the eighth section of the first article of the Constitution of the United States.

Pensacola Tel. Co. v. *Western Union Tel. Co.* 96 U. S. 1 (24: 708); *Telegraph Co.* v. *Texas,* 105 U. S. 460 (26: 1067).

The power of Congress to regulate interstate commerce is exclusive in all cases where the subject over which the power is exercised is in its nature national, or admits of one uniform system or plan of regulation. The inaction of Congress upon such a subject is equivalent to a declaration that it shall be free from all state regulation or interference.

Gloucester Ferry Co. v. *Pa.* 114 U. S. 196 (29: 158); *Brown* v. *Houston,* 114 U. S. 622 (29: 257); *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Wabash, St. L. & P. R. R. Co.* v. *Ill.* 118 U. S. 557 (*ante,* 244); *Walling* v. *Mich.* 116 U. S. 454 (29: 693); *Corson* v. *Md.* 120 U. S. 502 (*ante,* 699); *Case of The State Freight Tax,* 82 U. S. 15 Wall. 232 (21: 146); *Cooley* v. *Port Wardens,* 53 U. S. 12 How. 299 (13: 996); *Gilman* v. *Phila.* 70 U. S. 3 Wall. 713 (18: 96); *Hall* v. *De Cuir,* 95 U. S. 485 (24: 547), on page 497 (551); *R. R. Co.* v. *Husen,* 95 U. S. 465 (24: 527).

The subject over which the power of regulation is attempted to be exercised in this case is in its nature national and properly admits only of one uniform system or plan of regulation.

Telegraph Co. v. *Texas,* 105 U. S. 460, 466 (24: 1067, 1068).

Acts rendered penal by law are penal only because the law of the place where committed makes them so.

Graham v. *Monsergh,* 22 Vt. 543; *Richardson* v. *Burlington,* 33 N. J. L. 192; *Slack* v. *Gibbs,* 14 Vt. 357; *Whitford* v. *Panama R. R. Co.* 23 N. Y. 465; Story, Conf. L. §§ 18, 20; Hutchinson, Carriers, § 777; *Nashville etc. R. R. Co.* v. *Eakin,* 6 Cold. (Tenn.) 582; *Crowley* v. *Panama R. R. Co.* 30 Barb. 99; *Leonard* v. *Steam Nav. Co.* 84 N. Y. 48; *Shedd* v. *Moran,* 10 Bradw. 618.

(No counsel appeared for defendant in error.)

Mr. Justice **Field** delivered the opinion of [356] the court, as follows:

The contention of the Western Union Telegraph Company is that the law of Indiana is in conflict with the clause of the Constitution vesting in Congress the power to regulate commerce among the States.

In *Telegraph Co.* v. *Texas,* 105 U. S. 460 [26: 1067], it was decided by this court that inter-

course by the telegraph between the States is interstate commerce. Its language was: "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different; but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

Although intercourse by telegraphic messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible: it carries only ideas, wishes, orders and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, [357] that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

In the consideration of numerous cases in which questions have arisen relating to ordinary commerce with foreign countries and between the States, this court has reached certain conclusions as to what subjects of commerce the regulation of Congress is exclusive, and indicated on what subjects the States may exercise a concurrent authority until Congress intervenes and assumes control. *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299 [13:996]; *Gilman* v. *Phila.* 70 U. S. 3 Wall. 713 [18:96]; *Crandall* v. *Nevada*, 73 U.S. 6 Wall.35 [18:745]; *Welton* v. *Missouri*, 91 U. S. 275 [23:347]; *Henderson* v. *Mayor*, 92 U. S. 259 [23:543]; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238 [24:118]; *Hall* v. *De Cuir*, 95 U. S. 485 [24:547]; *County of Mobile* v. *Kimball*, 102 U. S. 691 [26:238]; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691 [27:584]; *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196 [29:158]; *Wabash, St. L. & P. R. Co.* v. *Ill.* 118 U. S. 557 [*ante*, 244]; and *Robbins* v. *Shelby Tax. Dist.* 120 U. S. 489, 493 [*ante*, 694]. But with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the State over the subject. In *Pensacola Tel. Co.* v. *Western Union Tel. Co.* 96 U. S. 1 [24:708], this court had before it the Act of Congress of July 24, 1866, 14 Stat. at L. 221, "To aid in the construction of telegraph lines, and to secure the use of the same for postal, military and other purposes;" and it held that the Act was constitutional so far as it declared that the erection of telegraph wires should, as against state interference, be free to all who accepted its terms and conditions, and that a telegraph company of one State accepting them could not be excluded by another State from prosecuting its business within her jurisdiction. In *Telegraph Company* v. *Texas*, 105 U. S. 460 [*supra*], from the opinion in which we have quoted above, it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the State, was a regulation of foreign and interstate commerce, and, therefore, beyond the power of the State.

In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed, whenever that body chooses to exert its power; and it is also held that the States can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other States cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power. Whatever authority the State may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States. [358]

The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives. [359]

Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the require-

nent applies, according to the decision of its supreme court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in exten was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State.

The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserved powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite; yet in its regulations with respect to all of them there is this necessary limitation: that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may undoubtedly make all necessary provisions with respect to the buildings, poles and wires of telegraph companies within its jurisdiction which the comfort and convenience of the community may require.

It follows from the views expressed that *the judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.*

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[300] MINNEAPOLIS GAS LIGHT COMPANY,
Appt.,
v.
KERR MURRAY MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 300-306.)

Bill to enforce mechanics' lien—construction of contract—review of evidence.

Upon a bill filed to enforce a mechanics' lien for the price and value of a certain gas holder, alleged to have been constructed and erected by complainant for the defendant, upon a review of the evidence it is *held:* that the contract for the construction of said gas holder did not fix any time for its completion; that it was completed within a reasonable time; and that the allowance made by the court below, on account of inferiority in the quality of the material used and of the workmanship, was sufficient.

[No. 297.]

Argued May 9, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Anson B. Jackson** and *P. M. Babcock*, for appellant.

Mr. **George C. Squires**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court: [301]

This is a bill in equity filed by the appellee, who was complainant below, a corporation of Indiana, and a citizen of that State, for the purpose of enforcing a mechanics' lien under the laws of Minnesota for the price and value of a certain gas holder, alleged to have been constructed and erected by it upon the premises of the appellant.

The bill avers that on or about the 19th day of February, 1881, at the instance and request of the defendant, the plaintiff erected and constructed for the defendant one telescopic gas holder, at the City of Minneapolis, Minnesota, at the agreed price of $9,070; and that said gas holder was in all things manufactured, put up, and erected in a good, substantial and workmanlike manner, and was reasonably worth said sum of $9,070; that the defendant also agreed to pay the plaintiff the expense of labor and material expended by the plaintiff in erecting the scaffolding for the construction of said gas holder, and that said cost was the sum of $188.25, and that said gas holder was erected upon certain described real estate belonging to defendant; that the defendant has paid on account of the construction of said gas holder and cost of said scaffolding the sum of $3,792.74, and no more, and demands judgment against the defendant for the sum of $5,415.51, and that such judgment may be decreed to be a lien upon the said gas holder and the lands upon which the same is situated.

The answer admits that the contract price of said gas holder was the sum of $9,070; denies that the defendant agreed to pay for such scaffolding, and denies that said gas holder was worth the sum of $9,070, and avers that the same was of no greater value than the sum of $4,070; avers that the defendant has paid the plaintiff on account of said gas holder, in cash, the sum of $4,953.84; that the defendant delivered the plaintiff coke on account of said gas holder of the value of $1,440.46; denies that said gas holder was erected upon the lands of the defendant, and avers that the same is personal property, and avers that the same was erected and constructed under an express contract, by the terms of which said gas holder was to be constructed in exact accordance with certain plans and specifications which form a part of said contract; avers that said gas holder was not constructed according to said contract or said plans and specifications, or in a good and workmanlike manner; avers that by reason of the same not having been constructed according to said contract, plans and specifications, the same has never been fit for the purpose for which it was built, and has never worked in a manner contemplated by said contract, and has always been an imperfect holder; avers that the difference in value between said holder as constructed and what it would have been if constructed in accordance with said contract is the sum of $5,000; avers that by the terms of said contract it was expressly agreed that the plaintiff should have the iron and other material necessary to build, construct and fully complete [302]

said holder in the City of Minneapolis, within sixty days after being notified by the defendant to produce the same, and to fully complete said gas holder on or before the 15th day of November, 1880.

That the defendant notified the plaintiff on or about the first day of July, 1880, that it was ready for it to ship said material, and that the defendant, at great cost, erected and fully completed the tank and building, in which said gas holder was to be placed, on the first day of September, 1880, so far as the defendant had agreed to construct the same, but that the plaintiff, disregarding its contract, did not ship to and produce said material at the City of Minneapolis until the winter of 1880 and 1881, and did not pretend to have completed said holder until the 19th day of February, 1881, and that the defendant has never consented to or waived the breach of said contract, as above alleged; avers that between the 15th day of November, 1880, and the 19th day of February, 1881, the defendant was engaged in the business of manufacturing, furnishing and selling gas to the City [303] of Minneapolis and the citizens thereof, and that, had the plaintiff constructed and completed said gas holder on or before said 15th day of November, 1880, the defendant would have made a large amount of profit upon the gas it could and would have manufactured, furnished and sold between said 15th day of November, 1880, and the 19th day of February, 1881; to wit, the sum of $6,757.89, and that, by reason of said plaintiff not completing said gas holder within the time specified in the contract, the defendant was deprived of such profit and was thereby directly damaged in the sum of $6,757.89; and demands judgment against the plaintiff for the sum of $9,082.19, with interest thereon since the 19th day of February, 1881.

The replication denies all the averments of the answer.

On final hearing the court below found the facts to be as follows:

"On May 28, 1880, the complainant concluded a verbal contract with the defendant for the construction and completion, ready for use, of a telescopic gas holder at Minneapolis, according to certain written specifications furnished by the complainant. The defendant was to notify the complainant when to purchase the sheet iron to be used in manufacturing the holder, and was to have the benefit of any fluctuation in the price of the iron between the date of the contract and the day when notice was given. No time was fixed when the gas holder should be completed ready for use, though the defendant was anxious it should be ready by November 1, 1880, or in the early fall. The contract price was $9,070, and the holder was completed and accepted about February 19, 1881, and has been in part paid for. It is not constructed of the material required by the specifications, and does not fulfill in every respect the requirements of the contract.

"The complainant, by the terms of the contract, was required to erect the gas holder at Minneapolis and complete it ready for use, and this necessitated scaffolding as the work progressed. Although there is a conflict of testimony about furnishing the scaffolding, I am of the opinion that the complainant waived the clause in the original specifications, which require 'the gas company to furnish the necessary scaffolding, etc.' The iron used in the [304] manufacture of the holder is not of the kind and quality called for in the specifications, and the difference in price is three quarters of a cent per pound. The complainant did not furnish guard rails and braces, as required, which were worth about $50, and has not paid for stoves it used during the construction of the holder, which were purchased by the defendant at the price of $61.80. It would also require an expenditure of $10 to properly adjust the holder, which slightly tipped. The defendant has paid on account of construction $3,792.74, to which complainant concedes in addition a credit of $894."

A decree was rendered in favor of the complainant for $3,586.96, with interest from February 19, 1881, being for the amount of the contract price, less deductions on account of payments and the allowances mentioned.

In opposition to the conclusions of the circuit court, the appellant now insists:

1. That, by the terms of the contract between the parties, the gas holder was to have been finished and in place on or before the 15th of November, 1880.

2. That, on account of the delay between that date and February 19, 1881, when the work was completed, the appellant was entitled to the profit it would have made on the manufacture and sale of gas during that interval, amounting, as is claimed, to the sum of $6,757.89. The rule for the ascertainment of these profits, as stated and claimed by counsel for the appellant, is as follows:

"Given a fixed number of pipes of given dimensions for conducting the illuminating fluid from a holder of ample storage capacity to a given number of consumers, who desire and are ready to pay for all the gas which the standard pressure can supply during certain hours, and it becomes a mere matter of mathematics to ascertain the precise number of thousand feet which would be thus supplied and sold. It is equally a matter of arithmetic to ascertain the number of feet supplied through the same pipes, with one half or one third the proper pressure. And the difference multiplied by the net profit per thousand feet gives the precise amount lost by the loss of pressure and storage capacity."

It was in testimony on the part of the appel- [305] lant that the gas cost for its manufacture $1.50 per 1,000 feet, and that the Company obtained from its customers $3.50 per 1,000 feet, making a profit of $2 on every 1,000 feet. The assumption was that the whole amount of gas which could have been made by the use of the new gasholder during the period of delay, by the increased pressure, would have been forced through the pipes into consumption, without addition to the number of consumers, and that it would have amounted to the sum mentioned.

3. That a much larger sum than $675, being at the rate of three fourths of a cent per pound on the quantity of iron used, should have been allowed for the difference in value between the gas holder as constructed, and its value if it had been constructed according to the contract; the claim being, under this head, that the contract called for annealed iron, whereas that actually furnished was common iron, and not suitable for the purpose.

We have carefully examined and weighed all the evidence in the case bearing on the facts in dispute. We are clearly of opinion that the contract as made did not fix any time for the completion of the work. On the contrary, it was left indefinite at the time of the making of the contract at the request of the appellant itself, who desired to postpone the time for ordering the iron as long as possible, so that it might get the benefit of any fluctuation in the price. After the final order was given, it is true that the appellant endeavored to hasten the period for the final completion of the work; but there was no subsequent agreement fixing any precise date, and its actual completion, which took place on February 19, 1881, we find to have been within a reasonable time. As, therefore, there was no delay beyond the time fixed for its completion by the proper construction of the terms of the agreement, we are relieved from the necessity of considering the question of the alleged loss of profits.

An allowance was made by the circuit court in the decree of $675 as a difference in value between the gas holder as furnished, and as required by the contract, on account of inferi-
[306] ority in the quality of the material used and of the workmanship. We are satisfied, from an examination of the testimony, that this allowance ought not to be increased. There is no sufficient proof that the iron used was not annealed iron.

The decree of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenny, Clerk, Sup. Ct., U. S.

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[522] JAMES H. FISHER, *Plff. in Err.*,
v.
WILFRED CARRICO, Admr. *c. t. a.* of WILLIAM H. PERKINS, Deceased.

(See S. C. "*Fisher* v. *Perkins*," Reporter's ed. 522-527.)

Jurisdiction—review of judgment of state court—highest state court "in which decision could be had"—error to the Superior Court of Kentucky—what record must show.

1. This court cannot review the judgment of a state court unless it is that of the highest court "in which a decision in the suit could be had."
2. The court cannot review a judgment of the Superior Court of Kentucky, where the record does not show affirmatively that an application for the allowance of an appeal to the Court of Appeals of that State was made and refused.

[No. 241.]

Submitted April 20, 1887. Decided May 27, 1887.

IN ERROR to the Superior Court of the State of Kentucky.

Motion to dismiss. *Granted.*

The history and facts of the case appear in the opinion of the court.

Mr. **George W. Jolly**, for plaintiff in error.

Mr. **C. S. Walker**, for defendant in error.

[523] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a writ of error to the Superior Court of the State of Kentucky for the review of a judgment of that court, and the defendant, although uniting with the plaintiff in submitting the case for hearing on its merits, has moved to dismiss the writ for want of jurisdiction, because the superior court is not the highest court of the State in which a decision in the suit could be had. The record shows a suit by W. H. Perkins against James H. Fisher in the Circuit Court of Daviess County for the recovery of money and a judgment therein for Fisher. Afterwards this judgment was reversed by the Court of Appeals of the State, and the cause remanded for further proceedings. When the case got back to the circuit court additional pleadings were filed and a trial had, which resulted in a judgment in favor of Perkins for less than $1,000. From this judgment Fisher appealed to the court of appeals. Before this appeal was decided the Superior Court of the State was organized, and the case was transferred, in due course of law, to that court for decision.

Those parts of the Act establishing the superior court, which relate to the appellate jurisdiction of the court of appeals for the review of its judgments, are as follows:

"Sec. 5. The court of appeals shall have appellate jurisdiction over the final orders and judgments of the superior court in all cases except the following: 1. Those for fines or for the recovery of money or personal property where the amount of the fine, or the value in controversy, is less than one thousand dollars, exclusive of interest and costs. 2. Those where the judgment of the lower court had been affirmed by the superior court without a dissenting vote. But if, in any case coming within either of the above exceptions, any two of the judges of the superior court shall certify that, in their opinion, the question involved is novel, and is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the court of appeals as in other cases.

"Sec. 6. If an appeal shall be taken to the [524] court of appeals of which the superior court has jurisdiction, or, if taken to the superior court when the court of appeals has jurisdiction, it shall not be dismissed, but shall be transferred to the court having jurisdiction.

"Sec. 7. All appeals from the superior court to the court of appeals shall be prayed and granted in the superior court. But no appeal shall be granted after six months from the time the right to appeal first accrued, unless the party applying therefor was a defendant in the original action, and an infant not under coverture, or of unsound mind, or a prisoner who did not appear by his attorney, in which cases an appeal may be granted to such parties or their representatives within twelve months after their death, or the removal of their disabilities, whichever may first occur." Acts 1881, p. 118.

The judgment of the circuit court was affirmed by the superior court "without a dissenting vote;" and for the review of that judgment of affirmance this writ of error was brought, no application having been previously made to the superior court for the allowance of an appeal to the court of appeals.

This court has no power to review any other judgments of the courts of a State than those of the highest court "in which a decision in

the suit could be had." Sec. 709, Rev. Stat. The court of appeals is the highest court of the State of Kentucky, and consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the superior court. Although the value in controversy is less than $1,000, and the judgment of the inferior court was affirmed by the superior court without a dissenting vote, an appeal did lie to the court of appeals if two of the judges of the superior court certified that, in their opinion, the question involved was novel and of sufficient importance.

To get an appeal from the superior court in [526] any case an application therefor must be made to and granted by that court. Such is the express provision of section 7 of the Act under which the court was organized. Certainly it would not be claimed that a judgment of the superior court could be reviewed by this court in a case not within the exceptions mentioned in section 5, before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason. It is true that in this particular case the prayer for an appeal could not have been granted, unless the necessary certificate was given; but if given, it would have been as much the duty of the court to make the order of allowance as it would if the value in controversy had exceeded $1,000 or the judgment of affirmance had been with a dissenting vote. Such a certificate enters into and forms part of the allowance of an appeal in a case like this, and an application for the allowance necessarily includes an application for the certificate, unless it has been obtained before, because the certificate is one of the ingredients of an allowance. The want of a certificate is good reason for refusing to allow an appeal; but until it has been asked for and refused its absence furnishes no ground for a writ of error from this court.

The principle on which this case rests is illustrated by what was decided in *Gregory* v. *McVeigh*, 90 U. S. 23 Wall. 294 [23: 156]. In Virginia, the Supreme Court of Appeals is the highest court of the State. Judgments of the Corporation Court of Alexandria can only be taken there for review on leave of the Court of Appeals itself or some judge thereof. Gregory, against whom a judgment had been rendered in the corporation court, applied to each and every one of the judges of the court of appeals for a writ of error; but his applications were all rejected because the judgment was "plainly right." This, by a statute of Virginia, was a bar to any application to the court for the same purpose; and Gregory thereupon sued out a writ of error from this court to the corporation court, as the highest court of the State in which a decision in the suit could be had. Upon a motion to dismiss we upheld our jurisdiction, because everything had been done that could be to take the [527] case to the court of appeals, and its doors had "been forever closed against the suit, not through neglect, but in the regular order of proceeding under the law governing the practice." Had the court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance, which could have been reviewed in this court; but as in the regular course of proceeding that had been done which prevented either a review of a judgment of the court of appeals or an application to that court for a writ of error, the judgment of the corporation court had become the judgment of the highest court of the State in which a decision in that suit could be had, and consequently was reviewable here as such.

So, here, if an application to the superior court for an appeal had been refused, the doors of the court of appeals would have been closed against the suit, and we could have proceeded accordingly. As it is, we find nothing in the record to show that the suit could not have been taken to the court of appeals if the necessary application had been made, and, consequently we have no right to proceed. It matters not that the judgment of the superior court is in accordance with what was decided by the court of appeals on the former appeal. The judgment is still the judgment of the superior court, which is not the highest court of the State, and it might have been taken to the court of appeals for review if the grant of an appeal had been applied for and secured. *McComb* v. *Comrs. of Knox Co.* 91 U. S. 1 [23:185]; *Kimball* v. *Evans*, 93 U. S. 320 [23: 920]; *Davis* v. *Crouch*, 94 U. S. 517 [24: 282]. We are not to assume that an appeal would not have been granted if applied for. The record must show its refusal.

The motion to dismiss is granted.

NEW PROCESS FERMENTATION COMPANY, *Appt.*, [413]

v.

MAGDALENA MAUS, ALBERT C. MAUS, FRANK A. MAUS, AND MATHIAS MAUS.

(See S. C., Reporter's ed. 413-433.)

Patent law—claim for a process—state of art of brewing beer—infringement.

1. The third claim of letters patent No. 215679 for an "improvement in processes for making beer," (p. 1197, *post*), is a valid claim for the process covered by it and described in the specification.

2. In the case presented the evidence shows beyond doubt that the defendants have used the process covered by said claim of the patent.

[No. 298.]

Argued May 9, 10, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of Indiana. Opinion below, 20 Fed. Rep. 728. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Ephraim Banning, Wells W. Leggett** and *Thomas A. Banning*, for appellant.

Mr. **Charles P. Jacobs**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of Indiana, by the New Process Fermentation Company, an Illinois corporation, against Mag-

dalena Maus, Albert C. Maus, Casper J. Maus, Frank A. Maus, and Mathias A. Maus, for the infringement of letters patent No. 215679, granted May 20, 1879, to George Bartholomae, as assignee of Leonard Meller and Edmund Hofmann, as inventors, for an "improvement in processes for making beer," subject to the limitation prescribed by section 4887 of the Revised Statutes, by reason of the invention's having been patented in France, November 30, [414] 1876, and in Belgium, February 28, 1877. The specification and drawing and claims of the patent are as follows:

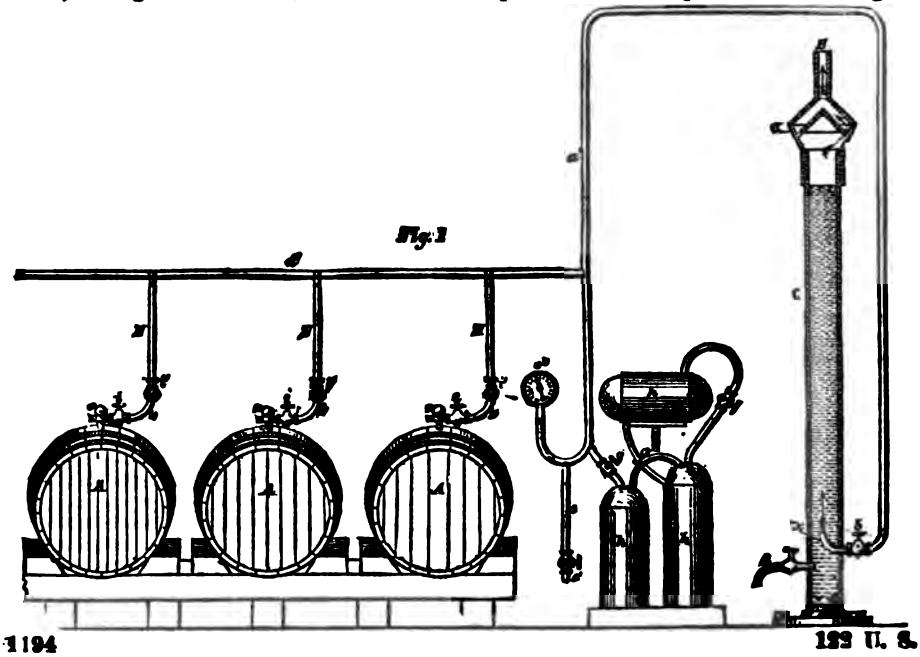
"To all whom it may concern:

"Be it known that we, Leonard Meller, of Ludwigshafen-on-the-Rhine, in the State of Bavaria, and Edmund Hofmann, of Mannheim, in the State of Baden, Germany, have invented certain new and useful improvements in the art of making beer, and we hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawing, making a part of this specification, in which the figure represents an end view of our apparatus, with the water column in section.

"Heretofore, in brewing beer, after cooking and cooling, the beer has been put into open vessels to ferment. The fermentation lasts, say fifteen days, and then the beer is drawn off from the yeast into large casks nearly closed, where it remains from one to six months to settle, and among the sediment there will still remain some yeast. The beer is then pumped into shavings casks and is mixed with young beer (kraeusen), which starts a mild fermentation, lasting from ten to fifteen days, until the generation of the gas is reduced to a minimum. During this fermentation the beer effervesces through means of the carbonic acid gas rising, and the lighter particles of yeast and solid matter are thrown to the top, forming a foam, which, during the ebullition, runs over the edges of the opening in the cask, and carrying along a small portion (more or less) of the beer, which is wasted, and this waste has to be replaced by refilling with new beer daily. This wastage we estimate, from practical experience in the manufacture, to be about one barrel in every forty, more or less. This waste beer, running down around the casks and on the floor of the cellars, sours and produces a mildew, which impregnates the air with foul vapors highly injurious to the workmen, and, permeating the beer in the casks, alters its flavor and, in instances where the mildew penetrates the wood of casks, spoils the beer entirely. This fouling of the barrels requires that they should be washed outside, from time to time, and the water used in this washing always [416] raises the temperature of the cellar, and wastes the ice which is therein packed to keep the temperature about 41° Farenheit. After the beer has been in the shavings cask from ten to fifteen days, the gelatine or other clarifying medium is introduced, and at the end of a couple of days the beer is entirely clear. The shavings cask is then bunged up tightly for from three to five days, to confine the last portions of the rising carbonic acid gas. This charges the beer with carbonic acid gas (CO_2), so as to make it merchantable, and it must be drawn off at once into kegs and used; otherwise, the pressure on the shavings cask may burst it.

"In selecting the time for drawing off the beer from the shavings casks into the kegs, to send it to market, the beer should never be under a pressure of over seven pounds to the square inch; otherwise, the keg fills with foam in the drawing off, and the bubbles subsiding leave an air space over the liquid beer, which absorbs a portion of the carbonic acid gas and soon leaves the beer in the keg flat. As the art is now practiced, arriving at the proper degree of pressure when to put the beer in kegs is

[415]



merely a matter of judgment or guess by the foreman, and no two shavings casks will be drawn off at precisely the same pressure, and the effervescing qualities of the beer will vary considerable, much to the detriment of sales by the brewer. If the beer is not put in market at once at this stage, the bungs have to be removed from the casks and the gas allowed to escape. Then the escaping gas stirs up the yeast and impurities that have settled to the bottom, and the beer has to go again through the entire shavings cask step in the process.

"Under the processes now in use, it requires about twenty days to put beer on the market after it is pumped into the shavings casks. This delay requires brewers to keep a large amount of capital invested during the time in unfinished beer, and it is highly important to decrease this time of preparation.

"The essential features of our invention have been patented in foreign countries as follows: France, to Leo. Meller & Co., filed September 28, 1876, allowed and countersigned, Paris, [417] November 30, 1876, No. 114787; Belgium, to Leo. Meller & Co., filed February 14, 1877, allowed and countersigned, Bruxelles, February 28, 1877, No. 41517.

"The object of our invention is to overcome the difficulties above named, and also to produce in a shorter time a better quality of beer, containing more sugar and less alcohol.

"Our invention consists in treating the beer when in the shavings cask step of the process, in one or more closed casks, under automatically controllable carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. This equalizes the pressure in such cask or series of casks; and the effervescing quality of the beer in all the casks, when two or more are connected together, is uniform.

"The cask or casks being closed, none of the beer wastes by running over, and the foul smells and washing of the casks and cellars are avoided. The escaping carbonic acid gas is conducted from the relief valve to the open air, and does not settle in the brewing cellars, to endanger life.

"Our invention consists, further, in similarly treating the beer when in the 'kraeusen' stage, or subsequently thereto, or both, or when in the settling casks ('ruh-beer'), this being the second fermenting stage—that is to say, our invention consists in so treating the beer at any time or times previous to racking off and bunging or bottling.

"In order that those skilled in the art may make and use our invention, we will proceed to describe the manner in which we have carried it out:

"In the drawings A A are shavings casks, having faucets *a a*, provided with valves *i i*, inserted tightly in their bungs. These faucets are connected to taps N on the main pipe *a'*, by means of flexible sections *k*, provided with couplings. The taps or connections have valves *i' i'*. Pipe *a'* bends upward and passes above the level of a water column, C, and then, passing downward, enters the base of the column at *x*, where it is provided with a cock *b'*. The water column or vessel C has a faucet, *d*, to draw off water, when desired to decrease the pressure. A depending branch pipe, *e*, and cock, e^1, serve to discharge any condensed moisture from pipe *a*, and a pressure gauge, [418] e^2, serves to indicate the pressure.

"By means of a gas generator located at *h* and connected to pipe *a* by means of pipe *f*, having cock *g*, we are enabled to test the joints of the apparatus and drive all atmospheric air from the pipes when the operation begins.

"At the top of the water column is a conical cap terminating in a pipe, E, which is projected out of the building and leads all the gas into the open air. Located within this cap is a conical diaphragm, C', centrally located, so that, should the escape of the gas become so rapid as to lift the body of water upward, the water will be arrested by the diaphragm, while the gas escapes around its edges.

"It is evident that the pressure in all the shavings casks connected with pipe *a'* will be equal, and will be kept so indefinitely by means of the water column, and, as far as the enlivening of the beer is concerned, it is always ready for market, be it ten days or four months; whereas, in processes now practiced beer has to be bunged at a particular time for a particular day's market.

"Our process enables the brewer to keep on hand merchantable beer, which can be shipped instantly; or, if trade decreases, it enables him to keep his stock on hand without deterioration till the demand is made for it.

"All that has been said above in relation to a series of casks applies, of course, equally to treatment in a single cask.

"It is obvious that means other than a water column may be adopted for equalizing the pressure of the gas, without departing from the spirit of our invention—as, for example, safety valves and the like—and the apparatus is susceptible of many other variations without affecting the process itself, which constitutes the essence of our invention.

"By using our process we are enabled to clarify the beer and clear it of impurities in eight days or less; whereas, in the ordinary process it takes from twelve to twenty days. This immense gain in time we ascribe to the following action: the air being forced out of the pipes, the carbonic acid fills them and the space in the casks above the beer. Then the gas slowly accumulates in the space above the beer [419] until the pressure above is such as to overcome the density of the beer and re-enter it, so as to charge it up to the pressure for which the column is set. This creates, in a manner, an equilibrium between the rising bubbles and the pressure above, during which gravity can act rapidly on the yeast and impurities in the beer and carry them down among the shavings at the bottom of the cask, where they remain.

"We introduce the clarifying gelatine into the shavings casks after the beer is introduced, and before connecting with pipe *a'*; and actual practice has demonstrated to us that to clarify the beer by our process requires only about one half of the gelatine heretofore used. This saving, together with the saving of the waste beer heretofore mentioned (one or more barrels in every forty), and the saving of labor, will greatly cheapen the production of beer.

"When we desire to make beer for bottling, we attach our apparatus to the settling casks filled with beer, and no young beer (kraeusen)

is added, but a little gelatine is added and the beer allowed to remain for from fourteen to twenty days, until it becomes 'lively' (saturated with CO_2), and it is then bottled.

"We find that bottled beer prepared this way is healthier, and will last in good condition two or three months; whereas, the beer bottled in the usual manner with kraeusen beer lasts only for eight or ten days, if pure and not steamed after bottling, the latter spoiling the aroma and flavor.

"Having thus described our invention, what we claim as new, and desire to secure by letters patent, is:

1. The process of preparing beer for the market, which consists in holding it under controllable pressure of carbonic acid gas when in the 'kraeusen' stage, substantially as set forth.

"2. The process of treating beer when in the kraeusen stage, which consists in holding it in a vessel under automatically controllable pressure of carbonic acid gas, substantially as described.

"3. The process of preparing and preserving [420] beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described.

"4. The method herein described of preserving beer in a marketable condition after it has passed the kraeusen stage, which consists in holding it under pressure of carbonic acid gas, said pressure being automatically regulated by a counteracting, hydrostatic pressure, substantially as described.

"5. The process of treating beer when in the second fermenting stage ('ruh-beer'), which consists in holding it under automatically controllable pressure of carbonic acid gas, substantially as described.

"6. The process of treating beer in the course of its manufacture, which consists in holding it in closed connected vessels under automatically controlled pressure of carbonic acid gas, substantially as described.

"7. The process of clarifying and settling beer in a series of shavings casks, and equalizing the rate of fermentation in all of them, whereby the beer is more rapidly and thoroughly clarified, and will be ready for racking off in all the casks at the same time, and can be kept so, which consists in holding the beer in closed connected shavings casks under automatically controlled low pressure of carbonic acid gas, substantially as described.

"8. Casks A A, provided with cocks *a a*, flexible sections *k*, and taps N N, in combination with main pipe *d*, water column C, and pressure gauge e^3, all constructed, arranged, and operated as and for the purposes set forth."

Infringement is alleged of claims 1, 2, 3, 4, 6 and 7. The circuit court dismissed the bill, and the plaintiff has appealed.

The principal contest in the case is as to the validity of the patent, as a patent for a process. The state of the art of brewing beer, so far as it concerns the invention of the patentees, is set forth in the specification. That invention, so far as it is applicable to what is called the kraeusen stage of beer, is applicable to the beer after it is pumped into the shavings casks, and the kraeusen beer is added for the purpose of starting a mild fermentation. By the old proc- [421] ess the fermentation lasted from ten to fifteen days, until the generation of the gas was reduced to a minimum. By the rising of the carbonic acid gas through the effervescence of the beer, a foam was formed, which ran over the edges of the open bung hole and wasted more or less of the beer, say one barrel in every forty. This waste beer soured and mildewed, produced foul vapors injurious to health, altered the flavor of the beer in the casks, and sometimes spoiled it entirely. The washing of the barrels on the outside was required, the temperature of the cellar was raised by the use of the water for the washing, and the ice was wasted which was packed in the cellar to keep the temperature at about 41° Fahrenheit. After the beer had been in the shavings casks from ten to fifteen days, gelatine or some other clarifying medium was introduced, and at the end of a couple of days the beer was entirely clear. The shavings cask was then bunged up tightly for from three to five days, to confine the last portions of the rising carbonic acid gas, and charge the beer with it to make it merchantable. The proper degree of pressure in the shavings cask at which to draw off the beer into kegs for market was a matter of judgment in the workman. If the pressure was over seven pounds to the square inch, the keg filled with foam in drawing it off and the bubbles subsiding left an air space over the liquid beer, which absorbed a portion of the carbonic acid gas, and soon left the beer in the keg flat. As a result of the fact that the proper degree of pressure was merely a matter of judgment, no two shavings casks were drawn off at precisely the same pressure, and the effervescing qualities of the beer would vary considerably. If the beer was not put into market at once, at the proper stage, the bungs had to be removed from the shavings casks and the gas allowed to escape. The escaping gas then stirred up the yeast and impurities which had settled at the bottom, and the beer had to go again through the entire shavings cask stage in the process. It required about twenty days to put beer on the market after it was pumped into the shavings casks. This delay required brewers to keep a large amount of capital invested during the time in unfinished beer, and a decrease of this time of preparation was [422] highly important.

Upon these premises, the object of the invention of the patentees was to overcome the difficulties above named. In this view, the statement of the invention in the specification is in these words: "Our invention consists in treating the beer when in the shavings cask stage of the process in one or more closed casks under automatically controlled carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. This equalizes the pressure in such cask or series of casks, and the effervescing quality of the beer in all the casks, when two or more are connected together, is uniform. The cask or casks being closed, none of the beer wastes by runnning over, and the foul smells and washing of the casks and cellars are avoided. The escaping carbonic acid gas is conducted from the relief valve to the open air, and does not settle in the brewing cellars, to endanger life." This is fairly to be read as a statement that the beer is to be thus treated

during the whole of its subjection to the shavings cask stage of the process, whether in one closed cask or in two or more closed casks connected together. The statement is that the cask or casks are to be closed, that is, closed throughout the shavings cask stage of the process, and kept during that process under automatically controllable carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. It is also stated that none of the beer wastes by running over, and that the foul smells and washing of the casks and cellars are avoided, and that the escaping carbonic acid gas is conducted to the open air. These consequences cannot follow, nor can the advantages of the invention set forth be fully availed of, unless the casks are closed from the beginning of the shavings cask kraeusen stage. Adequate means for working this process and securing this result are set forth in the specification; also, means for connecting together a series of shavings casks, so as to secure equal pressure in all of them.

The specification further says: "By using our process we are enabled to clarify the beer and clear it of impurities in eight days or less; whereas, in the ordinary process it takes from twelve to twenty days. This immense gain in time we ascribe to the following action: the air being forced out of the pipes, the carbonic acid fills them and the space in the casks above the beer. Then the gas slowly accumulates in [423] the space above the beer until the pressure above is such as to overcome the density of the beer and re-enter it, so as to charge it up to the pressure for which the column is set. This creates, in a manner, an equilibrium between the rising bubbles and the pressure above, during which gravity can act rapidly on the yeast and impurities in the beer and carry them down among the shavings at the bottom of the cask, where they remain.

"We introduce the clarifying gelatine into the shavings casks after the beer is introduced, and before connecting with pipe *d;* and actual practice has demonstrated to us that to clarify the beer by our process requires only about one half of the gelatine heretofore used. This saving, together with the saving of the waste beer heretofore mentioned (one or more barrels in every forty), and the saving of labor, will greatly cheapen the production of beer."

The third claim of the patent is as follows: "3. The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described." This claim covers the real invention of the process of the patentees, if it be their invention and be patentable as a process.

The circuit court, in its opinion (20 Fed. Rep. 725, 733), held that the most that could be claimed by the patentees was that they applied the controllable pressure, created by the carbonic acid gas in a state of fermentation, at an earlier stage than was before known; that the essential parts of the apparatus used were known before; that the same controllable pressure had been applied at various stages of the manufacture; that the application at one stage of the condition of the beer instead of another would seem not to involve anything more than a mere mechanical change, which could be employed by anyone skilled in the art; and that the claim of the patent for a particular [424] process, irrespective of the mechanical devices claimed (which the defendants had not used), could not be sustained. But we think that in this view the court erred, and that the third claim of the patent is a valid claim for the process covered by it and described in the specification. The testimony is very full and clear that, as a process, it was not known or used before in the art of making beer; that it worked a valuable and important change in that art, in the particulars set forth in the specification; that it went at once extensively into use, both in Europe and in the United States; and that it was recognized as a new and valuable invention, in published works on the subject, immediately after it was made known.

Professor Haines, the leading expert for the plaintiff, says: "The Meller and Hofmann system accomplishes, in my opinion, many results which had not before been obtained, and it acts, in doing so, in this way: automatically regulated pressure is applied to the casks during the process of active fermentation, and air is thereby, of course, excluded. Under this increased pressure and the exclusion of air, fermentation takes place more regularly, and the impurities in the beer settle more rapidly. By the exclusion of the air, moreover, fewer impurities are produced, for it is a demonstrated fact that, when oxygen is excluded from a fermenting mixture, fewer yeast cells and other solids are generated. Not only is there, therefore, produced less matter to subside, but by the increased pressure these particles are rendered specifically heavier, and therefore settle much more rapidly. The process, therefore, if applied during the stage of active fermentation, not only regulates the fermentation, but will materially hasten the clarifying of the beer, both of which are objects not obtained, so far as I know, by any previously used process or apparatus."

The invention of the patentees covered by claim 8 is, as stated before, applicable to the beer in the kraeusen stage in the shavings casks. The shavings in these casks are thin strips of white beech, hazel nut, or other suitable wood, placed lengthwise of the cask, on its bottom, [425] opposite the bunghole, and used as a fining medium. Being porous, they absorb the turbid ingredients in the beer, and also mechanically arrest them, when precipitated. The kraeusen beer which is added to the contents of the shavings casks, to produce fermentation, is young beer, in full fermentation, the beer or wort to which the kraeusen beer is added in the shavings casks being itself comparatively flat and not clarified.

Vent bungs of various descriptions existed before, but were used towards the last stage of the fermentation of the beer in the kraeusen stage in the shavings casks, to confine mechanically the very last of the slowly generating gas, the valve or vent in the bung operating to prevent over pressure or "over bunging," in case there should be delay in drawing off the beer after it became ready for market. The effect of the accumulation of the carbonic acid gas generated in the later stages of the fer-

mentation was and is to impart more effervescence to the beer. The invention of the patentees is entirely independent of the old and well known vent bungs, and of any prior apparatus for preventing over bunging. It is for the process of bunging the cask simultaneously with the commencement of the active fermentation of the beer in the kraeusen stage. It utilizes the gas to clarify the beer, the pressure of the gas causing the impurities quickly and permanently to deposit themselves on the bottom and sides of the cask, instead of being removed, as in the old method, by overflowing and slow deposit. Professor Haines says: "The novelty and characteristic feature of the process, by which its excellent results are produced, chiefly arises from its introducing an automatically acting process at an earlier stage of the preparation of beer than has been practiced by other devices. This earlier bunging produces a number of valuable results, one of the most valuable of which is the rapid clarification of the beer. By placing the actively fermenting liquid under adequate, automatically controlled pressure, and keeping it thus under pressure until drawn off for use, the beer ferments more equably, less sediment is produced, and clarification is more rapid and more certain. It is, then, as I understand it, not the mechanical application of pressure, but the application [426] of a suitable pressure, beginning with the second active fermentation of the beer and continuing to the close, that constitutes the most valuable and novel feature of this process."

Dr. Ruschhaupt, another expert witness for the plaintiff, says: "It is an acknowledged fact that the influence of pressure upon a compressible object suspended in a liquid causes it to sink, and also that pressure in closed vessels is propagated to all sides with the same force. For this reason an ascending or rising of the insoluble impurities cannot take place as long as the pressure continues or increases; however, as soon as the pressure is released or diminished, a rising must necessarily result. With beer especially such rising easily occurs, and the lighter impurities will almost at once be drawn into the beer again. Any apparatus which does not allow the pressure to become diminished at any time during the operation, and which is not apt to get out of order or become clogged, like a hydrostatic column, will avoid the drawbacks above referred to, and this object is beyond question fully acomplished by the apparatus patented to Meller and Hofmann. It is not simply a safety valve or vent, but intended to accomplish much more, and to be used, if necessary, in the height of the kraeusen stage. But not in this respect lies the principal advantages of said patent. Its new mode of treatment is the main thing. The patent recommends automatic bunging at an earlier stage of manufacture than before practiced, viz.: during the kraeusen stage, and for an entirely different purpose, viz., to hasten the clarifying and settling of the beer. The patent suggests in this respect a new and different mode of treatment before the beer is clear and settled. The new process is carried into effect by causing the liquid in the cask to be placed under an even and equal pressure of carbonic acid gas, which is uniformly applied and maintained throughout the treatment, up to the very time of racking off the beer, by means of an automatically working valve or weight, regulated at a prefixed standard of about seven pounds to the square inch."

The advantages of the process in practice are [427] thus stated by Mr. Seib, a brewer: "First, I save on a thirty-barrel cask about a barrel and a half of beer; secondly, my beer will not become over bunged; third, in the old mode of treating beer, when the liquid was two to three weeks on shavings, it became a shavings taste, which is not the case under the Meller and Hofmann method. You may keep the beer two months in the latter way. Fourth, it also involves material financial advantages, in this: if the beer is not used at the particular time, it needs not, as of old, be pumped over into other casks to guard against the results of over bunging. There is another most important advantage arising from this early process of bunging. It prevents overflowage and the yeast souring the floors and cellars; and, as the yeast is a plant and continues to grow, the atmosphere becomes corrupted, which reacts on the beer in the cellar."

Contemporary publications give to the patentees the credit of this invention. In the "Manual of Beer Brewing," published at Weimar, in 1877, by Prof. Ladislaus Von Wagner, at pages 728 and 729, Meller's method of treatment, in using carbonic acid gas to clarify beer, is spoken of as successful, and as having been already introduced for four years and spread over the whole European Continent. In a treatise on beer brewing, published at Braunschweig, in 1877, by Dr. Carl Lintner, the invention, as one for putting the beer, when drawn off into casks, immediately under the pressure of pure carbonic acid gas, is ascribed to Meller. In "The American Beer Brewer," published at New York, in June, 1878, by A. Schwartz, the invention is spoken of as one which the writer had seen in 1877 at the brewery of Mr. Hofmann, at Mannheim, in Germany, carried out by a bunging apparatus such as is described in the patent.

Within the rules laid down by this court in *Corning* v. *Burden*, 56 U. S. 15 How. 252, 267 [14:683, 690]; in *Cochrane* v. *Deener*, 94 U. S. 780, 787, 788 [24:139, 141]; and in *Tilghman* v. *Proctor*, 102 U. S. 707, 722, 724, 725 [26: 279, 286], we think that the method or art covered by the third claim of the patent is patentable as a process, irrespective of the apparatus or instrumentality for carrying it out. It is the performing of a series of acts upon the beer in the [428] kraeusen stage, producing new and useful results in the art of making marketable beer. The process consists not in merely applying an apparatus to the cask at some period of the kraeusen stage of the beer, but consists in this: that when the beer has been put into the casks, and the kraeusen beer is added to it, and the apparatus is applied at the beginning of the kraeusen stage, the beer will be kept under a controllable pressure of carbonic acid gas until such time as it is fit to be transferred to the kegs for market, such pressure resulting in the complete and speedy clarification of the beer, although it is in a state of active fermentation in the closed shavings casks, with the incidental results of no loss of beer, no fouling of the casks or the cellar, no alteration of the flavor of the

beer, and no danger to the health of the workmen. This is, as was said in *Cochrane* v. *Deener*, "A mode of treatment of certain materials to produce a given result," and "an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing," and "requires that certain things should be done with certain substances, and in a certain order." It is, therefore, a process or art. The apparatus for carrying out the process is of secondary consequence, and may itself be old, separately considered, without invalidating the patent, if the process be new and produces a new result.

There appears also to be a new principle of action involved in the invention of the patentees. The carbonic acid gas generated by the fermentation in the cask, instead of being allowed to continually ascend, as it does with an open bunghole, keeping the liquid constantly in a turbid state, and overflowing at the bunghole, is made, as stated in the specification, to first accumulate in the space above the beer in the closed cask, until the pressure is such that the gas overcomes the density of the beer, and enters it again, and charges it up to the pressure at which the water column is set, thus creating an equilibrium between the rising bubbles of gas and the pressure above, so that gravity can act on the yeast and impurities, and carry them down so that they will remain with the shavings [429] at the bottom. This is a new use, in the treatment of fermenting beer, of the carbonic acid gas which it generates, and a new method or process of hastening the clarifying and settling of the beer.

This being the proper construction of the third claim of the patent, we are prepared to consider the question of the novelty of the process covered by the claim, in the light in which it has been explained.

The United States patent to George Wallace, No. 62581, granted March 5, 1867, does not exhibit any such process. The apparatus shown in it acted on a directly opposite principle, and was designed to stir up the fermenting medium and accelerate the fermentation and decomposition of mash. Professor Haines says, in regard to it: "I have examined the Wallace patent, and compared it with the process and apparatus of Meller and Hofmann. In my opinion, the two are radically different. The Wallace patent introduces to the bottom of one fermenting tank a pipe which is connected with the upper portion of the other fermenting cask. Now, if any excess of pressure should occur in either cask over what there is in the other, a quantity of carbonic acid gas will be forced to the very bottom of the cask having the smaller pressure, and in this way the yeast and other sediment will be thoroughly stirred up and diffused through the fermenting liquid. This would unquestionably increase the rapidity of fermentation, but it would accomplish exactly the opposite result of what the Meller and Hofmann process contemplates; namely, the forcing down of the sediment, so as to clarify the beer, and not its agitation and dissemination through the fluid. It seems to me, therefore, that the Wallace apparatus and process, as figured and described in patent 62581, would not and could not be used for the same purposes that the Meller and Hofmann process is employed." Dr. Ruschhaupt testifies to the same effect.

The United States patent No. 63636, granted to Thomas R. Hicks, April 9, 1867, the United States patent No. 90849, granted to William Dietrichsen, May 25, 1869, and the United States patent No. 115950, granted to William Gilham, June 13, 1871, do not, any of them, [430] disclose the process of the appellant, of controlling the action of beer in active fermentation in the kraeusen stage, for the purposes of clarification and preparation for market, by means of the controllable pressure of carbonic acid gas. The patent to Gilham is for the production of sparkling wine, by charging the wine under pressure with the carbonic acid gas generated by the wine during the process of fermentation. It does not develop the process of the appellant as applied to beer in the kraeusen stage, nor does it disclose the fact that Gilham knew of the existence of any such process.

The patent to Henry Schlaudeman, No. 204687, of June 11, 1878, the patent to John M. Pfaudler, No. 205572, of July 2, 1878, the patent to Theodore F. Straub, No. 208771, of October 8, 1878, and the patent to Frank Fehr, No. 215596, of May 20, 1879, are later in date than the invention of Meller and Hofmann, and all of them are subsequent in date to the introduction into use of that invention in this country, in July or August, 1877.

The experiments of Clement A. Maus were in September, 1877. The apparatus of Jacob W. Loeper was an automatic vent bung, but it is not shown to have been used in carrying out any such process as that of the appellant. The apparatus of Herman Sturm was manifestly only an experiment, abandoned and given up before the invention of Meller and Hofmann was introduced. It is not satisfactorily shown to have been used on shavings casks with the beer in the kraeusen stage. Dr. Ruschhaupt testifies that the devices of Sturm, all of them, belong to the class of automatic vent bungs used during the last stages of after fermentation; that they were not capable of being used during the kraeusen stage, in shavings casks, because they were constructed to act under a much lower pressure than that spoken of in the patent to Meller and Hofmann; that the one with the mercury gauge was intended to work under a pressure of only about one pound to the square inch, and the others were liable to get out of order by the clogging and rusting of the springs; and that they were only applied to let off the surplus carbonic acid gas from lager beer casks to prevent their bursting. Prof. [431] Haines testifies as follows in regard to the Sturm apparatus: "In my opinion, the forms of apparatus described and figured in the testimony of Gen. Sturm could not be practically applied for the purposes of the Meller and Hofmann process, for the bungs figured and described would certainly become clogged by the foam that is sent upward in considerable quantity during the active fermentation, and, becoming clogged, would either cease to act or else remain permanently open. The other device figured and described contemplates, according to the description, the application of a very trivial pressure, stated by the witness himself as equivalent to about a pound per square inch.

As I before testified, I believe such a trivial pressure would not bring about the effects obtained by the Meller and Hofmann process, although it would be sufficient to charge the beer with a certain amount of gas and prevent the casks from bursting, which, as I understand it, was the object of the apparatus now spoken of. * * * It is difficult to determine, from the testimony of the witness, exactly at what stage of the brewing of the beer the apparatuses were employed; but as he states that they were made in 1860, at which time the treating of beer with kraeusen in shavings casks was not practiced, it is evident that the apparatuses were not intended to be applied during this stage of brewing."

It is testified that the appellant's process of treating beer under the automatically controllable pressure of carbonic acid gas is of great value in the brewing business, and has come into general use and been put up in about eighty breweries, many of which are among the largest in the United States.

There is no doubt whatever that the defendants have used the process covered by the third claim of the patent. One of the defendants, Frank A. Maus, testifies that, in the fall of 1878 or the spring of 1879, the defendants commenced using an apparatus which applies the controllable pressure of carbonic acid gas to the beer in the kraeusen stage; that, as soon as the finings are added to the beer in the shavings casks, they attach the apparatus; that sometimes, however, it is not attached until a day or two after the kraeusen and finings are added; [432] that they keep it attached from eight to twenty days, until the beer is drawn off for the market; that, on an average, they gain about two days by the use of the apparatus; and that they avoid the running over of the foaming yeast through the bung hole.

We have confined our consideration of this case to the third claim of the patent, as that is the one which distinctly embodies the invention of the patentees, and it has been infringed by the defendants. It will be time enough to consider the other process claims, and the eighth claim, in cases involving their infringement, where the third claim is not also infringed. In the present case it appears that the defendants have used "the process of preparing and preserving beer for the market," by "holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is tranferred to kegs and bunged, substantially as described" in the specification of the patent.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to enter a decree establishing the validity of the third claim of the patent, and awarding a perpetual injunction and an account of profits and damages, and to take such further proceedings in the suit as may not be inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

PHILADELPHIA & SOUTHERN MAIL STEAMSHIP COMPANY, *Plf. in Err.*, [326]
v.
COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 326-347.)

Constitutional law—regulation of interstate commerce—power of Congress—state taxation of gross receipts of steamship company engaged in interstate and foreign commerce, invalid.

1. A State cannot constitutionally impose upon a steamship company, incorporated under its laws, a tax upon its gross receipts derived from the transportation of persons and property by sea, between different States, and to and from foreign countries.
2. The regulation of fares and freights receivable for the transportation of persons and goods between different States and between the States and foreign countries, is within the power of Congress equally with the regulation of such transportation itself.
3. In the case presented, the tax in question cannot be regarded as an income tax.
4. Where a subject of interstate commerce is national in character, or admits of only one uniform system of regulation, the power of Congress is exclusive; and its failure to make express regulations indicates its will that the subject shall be free.
5. If a state statute imposing a tax upon interstate commerce is unconstitutional, it is not cured by including in its provisions subjects within the jurisdiction of the State.

The case of the *Philadelphia & Reading R.R. Co. v. Pennsylvania*, Bk. 21, criticised.

[No. 203.]

Argued April 7, 1887. Decided May 27, 1887.

IN ERROR to the Supreme Court of the State of Pennsylvania. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Morton P. Henry**, for plaintiff in error.

Messrs. **W. S. Kirkpatrick**, *Atty-Gen. of Pennsylvania* and *John F. Sanderson, Deputy Atty-Gen. of Pennsylvania*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

The question in this case is whether a State can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different States, and to and from foreign countries.

By an Act of the Legislature of Pennsylvania, passed March 20, 1877, it was, amongst other things, enacted as follows, to wit:

"That every railroad company, canal company, steamboat company, slackwater navigation company, transportation company, street passenger railway company, and every other company now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State, and doing business in this Commonwealth, and [327] owning, operating, or leasing to or from another corporation or company any railroad, canal, slackwater navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every telegraph company incorpo-

NOTE.—*Constitutional law; interstate commerce, regulation of; power of Congress; how far exclusive.* See Gloucester Ferry Co. v. Pa. 114 U. S. bk. 29, p. 158, note.

rated under the laws of this or any other State, and doing business in this Commonwealth, and every express company, and any palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the State Treasurer, for the use of the Commonwealth, a tax of eight tenths of 1 per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business."

A similar Act was passed by the same Legislature on the 7th of June, 1879.

By the terms of these Acts, returns of the gross receipts are required to be made every six months to the auditor-general, upon which the tax is assessed by him and charged against the company.

Under and by virtue of these Acts, the Auditor-General of the State, in October, 1882, charged the appellant, the Philadelphia & Southern Mail Steamship Company, taxes upon its gross receipts for the years 1877, 1878, 1879, 1880 and 1881, all of which receipts were derived from freight and passage money between the Ports of Philadelphia and Savannah, and in foreign trade from New Orleans, and a small amount for charter parties in the like trade. The tax thus charged against the Company for the five years in question amounted to about $6,500, and, with accumulated interest and penalties, to over $9,000. After serving the account upon the Company, an action was brought for its recovery in the Common Pleas of Dauphin County, at Harrisburg. The defendant pleaded that it was a Steamship Company, "operating sea-going steamships engaged in the business of ocean transportation between different States of the United States and between the United States and foreign countries; and that all the said steamships of the said defendant were duly enrolled or registered under [328] the laws of the United States for the coasting or foreign trade of the United States; and that the gross receipts so returned to the Auditor-General, upon which a tax has been levied by the Commonwealth of Pennsylvania, were received by defendant for freight and passengers carried in the said steamships on the ocean and on the navigable waters of the United States, between the State of Pennsylvania and other States of the United States, and between the States of the United States and foreign countries, and for the charter and hire of the said steamships to other parties in such trade and business; and that no part of the said gross receipts was received for the transportation of freight and passengers between places within the State of Pennsylvania, or for the hire and use of the said steamships within the State of Pennsylvania."

On the trial of the cause the parties entered into an agreement as to the facts, showing the gross receipts for each year, in each branch of the Company's trade: which facts supported the allegations of the plea. A trial by jury was dispensed with, and the court gave judgment for the Commonwealth for the principal of the tax and interest from the time of commencing suit. Exceptions were taken, on the ground that the judgment was in conflict with the clause of the Constitution of the United States giving to Congress the power to regulate commerce with foreign Nations and among the several States. The judgment, being removed by writ of error to the Supreme Court of Pennsylvania, was affirmed by that court; and its judgment is now before us for review.

The question which underlies the immediate question in the case is whether the imposition of the tax upon the Steamship Company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by [336] the Company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492, 498 [*ante*, 694]. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the Company: "We will not tax you for the transportation you perform, but we will tax you for what you get [337] for performing it." Such a position can hardly be said to be based on a sound method of reasoning.

This court did not so reason in the case of *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678]. The State of Maryland required all importers of foreign goods, and other persons selling the same by wholesale, bale or package, to take out a license and pay $50 therefor, subject to a penalty and forfeiture for selling

without such license. It was contended on the part of the State that this was a mere tax on the occupation of selling foreign goods, affecting only the person and not the importation of the goods themselves, or the occupation of importing them. *Chief Justice* Marshall met this objection by showing that the attempt to regulate the sale of imported goods was as much in conflict with the power of Congress to regulate commerce as a regulation of their importation itself would be. "If this power," said he (referring to the power of Congress), "reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, where given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * Any penalty inflicted on the importer for selling the article in his character of importer must be in oppposition to the Act of Congress which authorizes importation. * * * The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce." Pp. 446-448 [688].

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The application of this reasoning to the case in hand is obvious. Of what use would it be to the ship owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from State interference if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it. To apply the language of *Chief Justice* Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.

It is necessary, however, that we should examine what bearing the cases of the *State Freight Tax* and *Railway Gross Receipts*, reported in 15th of Wallace, have upon the question in hand. These cases were much quoted in argument, and the latter was confidently relied on by the counsel of the Commonwealth. They both arose under certain tax laws of Pennsylvania. The first, which is reported under the title of *Case of the State Freight Tax*, 82 U. S. 15 Wall. 232 [21: 146], was that of the Reading Railroad Company, and arose under an Act passed in 1864, which imposed upon every railroad, steamboat, canal and slack water navigation company, a tax of a certain rate per ton on every ton of freight carried by or upon the works of said company; with a proviso directing, in substance, that every company, foreign or domestic, whose line extended partly in Pennsylvania, and partly in another State, should pay for the freight carried over that portion of its line in Pennsylvania, the same as if its whole line were in that State. Under this law the Reading Railroad Company was charged a tax of $38,000 for freight transported to points within Pennsylvania, and of $46,000 for that exported to points without the State. The latter sum the company refused to pay; and the question in this court was whether that portion of the tax was constitutional; and we held that it was not. *Mr. Justice* Strong delivered the opinion of the court. It was held that this was not a tax upon the franchises of the companies, or upon their property, or upon their business, measured by the number of tons of freight carried; but was a tax upon the freight carried, and because of its carriage; that transportation is a constituent of commerce; that the tax was, therefore, a regulation of commerce, and a regulation of commerce among the States; that the transportation of passengers or merchandise from one State to another is in its nature a matter of national importance, admitting of a uniform system or plan of regulation, and therefore, under the rule established by *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 299 [13: 996], exclusively subject to the legislation of Congress. The inevitable conclusion was that the tax then in question was in conflict with the exclusive power of Congress to regulate commerce among the States, and was therefore unconstitutional. Referring to the decision in *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 [18: 745], in which this court had decided that a State cannot tax persons for passing through or out of it, *Justice* Strong said: "If state taxation of persons passing from one State to another, or a state tax upon interstate transportation of passengers, is unconstitutional, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from State to State in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation."

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The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the State and that which was destined to, or came from, another State. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other. On this subject *Justice* Strong said: "The State may tax its internal commerce; but if an Act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions

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subjects within the jurisdiction of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State, any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal." This last observation meets the argument that might be made in the present case; namely, that the law is general in its terms, and taxes receipts for all transportation alike, making no discrimination against receipts for interstate or foreign transportation, and hence cannot be regarded as a special tax on the latter. The decision in the case cited shows that this does not relieve the tax from its objectionable character.

If this case stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually a tax upon the transportation itself. But at the same time that the *Case of State Freight Tax* was decided, the other case referred to; namely, that of *State Tax on Railway Gross Receipts*, was also decided, and the opinion was delivered by the same member of the court. 82 U.S. 15 Wall. 284 [21:164]. This was also a case of a tax imposed upon the Reading Railroad Company. It arose under another Act of Assembly of Pennsylvania, passed in February, 1866, by which it was enacted that, "In addition to the taxes now provided by law, every railroad, canal and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three fourths of 1 per centum upon the gross receipts of said company; the said tax shall be paid semi-annually." Under this statute the accounting officers of Pennsylvania stated an account against the Reading Railroad Company for tax on gross receipts of the company for the half year ending December 31, 1867. These receipts were derived partly from the freight of goods transported wholly within the State, and partly [341] from the freight of goods exported to points without the State, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two: first, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in *Brown v. Maryland* [*supra*] to be taxable.

This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the State, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the State they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton v. Missouri*, 91 U. S. 275 [23:347], that goods brought into a State for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the State, or because they are the products of another State. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the Company, dollar for dollar. It is those specific receipts, or the amount thereof, which is the same thing, for which the Company is called upon to pay the tax. They are taxed not only [342] because they are money, or its value, but because they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland*, but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the Act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional. It was held by this court in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29:158], that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jersey, and the City

[343] of Philadelphia. The law under which the tax was imposed was passed by the Legislature of Pennsylvania on the 7th of June, 1879, and declared "That every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or Territory of the United States, or foreign government, and doing business in this Commonwealth", * * * (with certain exceptions named) "shall be subject to and pay into the treasury of the Commonwealth annually a tax to be computed as follows; namely," the amount of tax is then rated by the dividends declared, and imposed upon the capital stock of the company at the rate of so many mills, or fractions of a mill, for every dollar of such capital stock. It was contended that the ferry company could not hold property in Philadelphia for the purpose of carrying on its ferrying business, and could not carry on its said business there, without a franchise, express or implied, from the State of Pennsylvania. But this court held, in its opinion, delivered by *Mr. Justice* Field, that the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and a part of, their transportation across the Delaware River from New Jersey; that without it, that transportation would be impossible; that a tax upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between the two States involved in such transportation; and that Congress alone can deal with such transportation, its nonaction being equivalent to a declaration that it shall remain free from burdens imposed by state legislation. The opinion proceeds as follows: "Nor does it make any difference whether such commerce is carried on by individuals or corporations. *Welton* v. *Missouri*, 91 U. S. 275 [*supra*]; *Mobile Co.* v. *Kimball*, 102 U. S. 691 [26:238]. As was said in *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19:357], at the time of the formation of the Constitution, a large part of the commerce of the world was carried on by corporations; and [344] the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power [to Congress] is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations." P. 204 [162]. Again; "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce." P. 211 [164]. It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the State, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the State under the plea that they are exercising a franchise.

There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? And, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the State, but a special tax on [345] transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations, this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water power, and interest on moneyed investments. As a tax on transportation, we have already seen, from the quotations from the *State Freight Tax Case*, that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed. Those referred to are abundantly sufficient for our purpose. We may add, however, that since the decision of the *Railway Tax Cases* now reviewed, a series of cases has received the consideration of this court, the decisions in which are in general harmony with the views here expressed, and show the extent and limitations of the rule that a State cannot regulate or tax the operations or objects of

interstate or foreign commerce. We may refer to the following: *R. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527]; *Cook* v. *Pa.* 97 U. S. 566 [24: 1015]; *Guy* v. *Baltimore*, 100 U. S. 434 [346] [25: 743]; *Webber* v. *Va.* 103 U. S. 344 [26: 565]; *Moran* v. *New Orleans*, 112 U. S. 69 [28: 653]; *Walling* v. *Mich.* 116 U. S. 446 [29: 691]; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [29: 785]; *Wabash etc. R. R. Co.* v. *Ill.* 118 U. S. 557 [*ante*, 244]; *Robbins* v. *Shelby County*, 120 U. S. 489 [*ante*, 694]; *Fargo* v. *Mich.* 121 U. S. 230 [*ante*, 888]. The cases of *Moran* v. *New Orleans* and *Fargo* v. *Michigan* are especially apposite to the case now under consideration. As showing the power of the States over local matters incidentally affecting commerce, see *Munn* v. *Illinois*, 94 U. S. 123 [24: 83], and other cases in the same volume, pp. 161, 176, 180 [95, 98, 99], as explained by *Wabash etc. R. R. Co.* v. *Illinois*; *Wharfage Cases*, viz.: *Keokuk etc. Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377]; 100 U. S. 428 [25: 690]; 105 U. S. 563 [26: 1171]; 107 U.S. 698 [27: 587]; 121 U. S. 444 [*ante*, 976]; *Mobile Co.* v. *Kimball*, 102 U. S. 691 [26: 238]; *Brown* v. *Houston*, 114 U. S. 622, 630 [29: 257, 260]; *R. R. Commission Cases*, 116 U. S. 307 [29: 636]; *Coe* v. *Errol*, Id. 517 [29: 715].

It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things which actually existed under the Confederation *Chief Justice* Marshall, in the case before referred to, said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of Nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep [347] and general conviction that commerce ought to be regulated by Congress It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 446 [6: 688].

Nothing can be added to the force of these words.

Our conclusion is that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution.

The judgment of the Supreme Court of Pennsylvania is therefore reversed, and the cause is remanded, to be disposed of according to law, in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES A. WISNER, *Plff. in Errr.*, [214]
v.
WILLIAM N. BROWN ET AL.

(See S. C. Reporter's ed. 214-220.)

Bankruptcy—real estate of bankrupt—rights of purchaser from assignee—limitation—section 5057, R. S.—proper instruction to find for defendant, but erroneous reason—notice to adverse claimant.

1. A purchaser of land from the assignee of a bankrupt acquires no greater rights than those possessed by his grantor.
2. Such purchaser is bound, equally with the assignee, by section 5057, R. S., which limits the time within which action to recover property adversely claimed may be brought, to two years.
3. Where the jury was properly instructed to find for the defendant, the judgment will not be reversed merely because the reason assigned for the instruction was erroneous.

[No. 133.]

Submitted Jan. 13, 1887. Decided May 27, 1887.

IN ERROR to the Supreme Court of the State of Michigan. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **S. S. Burdett** and **H. H. Hoyt**, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action of ejectment, brought by Wisner, the plaintiff in error, against the defendants in error, for a lot of land in Isabella County, [216] Michigan. The plaintiff claims the land as purchaser from one Gillette, assignee in bankruptcy of Alfred Willey. The defendants claim the same under a number of tax sales, and a deed from Willey, the bankrupt. It appeared on the trial that Willey filed his petition in bankruptcy September 19, 1871, in the District Court of the United States for the Eastern District of Michigan, and set forth, in the schedule thereto annexed, the land in question (with other lands) as his property; and it was shown that he had purchased it several years before. He was decreed a bankrupt September 8, 1872, and Gillette was appointed his assignee February 21, 1873. On the third day of April, 1880, more than seven years after his appointment, Gillette filed a petition in the district court, praying for leave to sell the land in question and the several other lots mentioned in the schedule at private sale for any sum not less than $100. The petition alleged that Willey, at the time of filing his petition in bankruptcy, claimed an interest in the lands, describing them, and then proceeded as follows:

"Your petitioner, having no funds belonging to said estate in his hands, did not investigate the title of said bankrupt to said land, and believing that said lands were of little value, paid no attention to them until recently, when application was made to your petitioner to pur-

chase the right of said bankrupt in said lands. From examination of the records it appears that the lands have been sold for taxes to private parties for a number of years, beginning in 1867; that the right acquired by virtue of the sale of said lands for delinquent taxes is held by one party; in addition to such title has been obtained a deed from the bankrupt of said lands; that another party has, by virtue of a sale on execution, based upon a judgment obtained against said bankrupt before he was adjudicated a bankrupt, acquired a title to said lands; that the title to said lands is complicated in this manner, both parties claiming to own said lands by virtue of the title they have acquired thereto in the manner above stated; that, from inquiry and examination, your petitioner believes that the title which may be vested in him as assignee of said bankrupt is of but [217] little value without a lengthy litigation, and your petitioner has no funds in his hands to carry on such litigation or pay taxes that may be assessed thereon; that, from information, your petitioner sets forth that said lands were located for the pine timber that originally was on the land, which having been removed the lands were not considered by the bankrupt of sufficient value to pay taxes thereon; that petitioner is offered one hundred dollars for the conveyance of the title which he holds as assignee of the said bankrupt to said lands, and, upon information and belief, your petitioner affirms that said sum is all the interest of said estate in said lands is worth, and that the acceptance of said offer and the conveyance of said title to said lands accordingly would be for the interest of the creditors of the estate of said bankrupt. And your petitioner prays that an order may be made in this case authorizing your petitioner to sell said lands at private sale as he may deem advisable, but not at a less sum than one hundred dollars."

The court, on the 5th of April, 1880, made an order authorizing Gillette, the assignee, to make the sale as proposed by this petition, and the same was made accordingly to the plaintiff in error for the sum of $100, and on the 18th of April, 1880, a deed was given to him by the assignee for the lands.

No notice was given to the adverse claimants of the land, either of the application to the district court for authority to sell, or of the intention to sell the same.

The plaintiff in error, to sustain the action on his part, introduced proof of the proceedings in the bankrupt court, of the title of Willey, and of the deed from the assignee to himself. The defendants, on their part, deduced title to the premises in controversy by virtue of certain deeds made in pursuance of sales for taxes for the years 1867, 1868, and subsequent years; and also by a quitclaim deed from Willey, the bankrupt, to the defendant, Brown, dated September 11, 1875, and duly recorded. The defendants also proved by the testimony of Brown that he had no notice of the proceedings in bankruptcy until after he had obtained the said deed from Willey, nor until after the plaintiff in error had purchased the land from the assignee.

[218] The plaintiff then proposed to go into the validity of the tax titles; but the judge before whom the case was tried, being of opinion that the plaintiff had shown no title, directed the jury to find a verdict for the defendant. A bill of exceptions was taken, and the case was carried to the Supreme Court of Michigan by writ of error; and that court affirmed the judgment of the court below. The present writ is brought to review the judgment of the supreme court, on the ground that its decision was against the validity of a title claimed under the laws of the United States; namely, under the proceedings in bankruptcy.

The principal ground on which the Supreme Court of Michigan placed its decision was the want of notice by the assignee to the adverse claimants of the property. The petition of the assignee for authority to sell shows that the title to the land was in dispute, and that the adverse claimants were known to him; but he proceeded without giving them any notice, either of his intended application to the court, or of his intention to sell. The court inferred that notice was required by the 25th section of the Bankrupt Law, section 5063 of the Revised Statutes, which provides that "Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of, and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court."

As it is a question of doubt whether section 5063 refers to a case in which only the interest of the bankrupt is ordered to be sold, without attempting to affect the title or interest of other persons, and as there was another ground on which the court of trial might unquestionably have instructed the jury to find a verdict for the defendants, and which also involved a question of the plaintiff's right of action under the bankrupt law, we have deemed it unnecessary [219] to consider the validity of the point on which the case was actually decided. The other ground to which we refer is that of the two years' limitation within which the assignee can bring suit. It is declared by section 5057 of the Revised Statutes, that "No suit at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such an assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." This Act, as well as the Statute of Limitations of Michigan, was pleaded by the defendants in bar of the action. Now, the assignee in the present case received his appointment on the 15th of February, 1873, and the property in question was at that time adversely held by the defendants under tax sales made by the Auditor-General of the State of Michigan, and continued to be so held until the commencement of this suit. It is clear, therefore, that, from and after the 15th of February, 1875, the assignee himself was precluded by the statute

from bringing an action to recover the lands; and he could not, after that time, by selling them to a third person, enable the latter to maintain an action therefor. The sale made by the assignee to the plaintiff in April, 1880, could have no such effect. This point was directly decided in *Gifford* v. *Helms*, 98 U. S. 248 [25: 57]. The complainant in that case had purchased the lands from the assignee more than two years after the latter's appointment, and they had been continuously held under an adverse title. In delivering the judgment of the court *Mr. Justice* Clifford said: "Nothing can be plainer in legal decision than the proposition that the complainant did not acquire, by the conveyance made to him under that sale, any greater rights than those possessed by the grantor;" and in conformity with that conclusion it was held that the complainant, equally with the assignee, his grantor, was bound by the limitation prescribed by the statute; and the bill was accordingly dismissed, without any attention being given to the question of the validity of the sale,—in that case, as in this, there having been, apparently, no notice of the application to sell, although the sale itself was by public auction.

[220] Our conclusion, therefore, is that the instruction to find for the defendants was right, at all events; for they were entitled to such an instruction on the bar of the two years' limitation, whether they were so for the reason assigned by the judge or not.

The judgment is therefore affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[382] ELIZA ADAMS ET AL., *Appts.*,

v.

WILLIAM E. COLLIER (A. C. Riley) Assignee of BENJ. B. BARNES, a Bankrupt.

(See S. C. Reporter's ed. 382-391.)

Bankruptcy—deed by bankrupt to his children—bill by assignee to cancel and sell for creditors—limitation—validity of deed—rights of assignee—improper schedule of lands in dispute—effect of—credibility of grantor as a witness.

Upon a bill filed by an assignee in bankruptcy in the circuit court, to have a deed by the bankrupt made prior to adjudication in bankruptcy, conveying certain lands to his children, surrendered and the land sold, it is *held:* that the suit is to be considered, for the purposes of the limitation prescribed by section 5057, R. S., a continuation of a former proceeding instituted by petition in the district court; that the deed was good as between the grantor and his children; that, in the absence of fraud, the assignee cannot question it, as he took only such rights as the bankrupt had; and that the fact that the bankrupt improperly included the lands in question in his schedule, even if not satisfactorily explained, cannot legally affect the rights of his grantees, and is only important as bearing on his credibility as a witness as to the delivery of the deed and the character of his subsequent possession.

[No. 238.]

Argued April 20, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Thomas B. Gresham** and *R. F. Lyon*, for appellants.

Mr. **N. J. Hammond**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 25th day of September, 1863, Benjamin B. Barnes made his deed conveying to certain of his children several tracts of land in the Counties of Crawford and Houston, in the State of Georgia. The deed was witnessed by three persons—one of whom was a justice of the peace—who certified that it was signed, sealed, and delivered in their presence. It was duly recorded in Crawford County, where most of the lands are, on the 26th of March, 1864; in Houston County, September 30, 1874. [383]

The grantor, upon his own petition, was, March, 1874, adjudged a bankrupt by the District Court of the United States for the Southern District of Georgia. His schedule of real estate embraced these lands. He was in the actual possession thereof at the time of filing his petition in bankruptcy.

In June, 1874, immediately after an assignment, in the usual form by the register, of the estate of the bankrupt, his assignee in bankruptcy went into possession of the lands, and thereafter took to himself, as such assignee, the rents and profits thereof.

On the 19th of January, 1876, the assignee filed his petition in the district court, in bankruptcy, setting forth the above facts, and stating that the title to the lands was in dispute between him and the grantees in the deed of September 25, 1863. The petition alleged that the deed was wholly voluntary, and that, from its date to the commencement of the proceedings in bankruptcy, the grantor was in the continuous, uninterrupted possession of the lands, using and controlling the same as his property, and enjoying the rents, issues, and profits thereof. The prayer of the assignee was for notice to the claimants as required by section 5063 of the Revised Statutes, and for a sale of the lands, the proceeds to be held to answer any suit which might be instituted by the claimants.

That section of the Revised Statutes provides: "Whenever it appears to the satisfaction of the court that the title to any portion of the estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may upon the petition of the assignee and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action, commenced at any time before the court orders the sale." [384]

The claimants appeared and answered the petition. They asserted title to the property under the deed of 1863, claiming: 1. That the grantor made the deed to his children in good

faith, by way of advancement, and without any intent to delay or defraud his creditors, these lands constituting, at the time, an inconsiderable part of his estate, and his other property being largely more than was necessary to meet any indebtedness he then or thereafter had: 2. That the deed was delivered to the grantees by the grantor at or about the time of its execution; 3. That the grantor's possession, at any time thereafter, of the lands, was held for the grantees; 4. That the grantor was entirely solvent when adjudged a bankrupt, and was induced to go into bankruptcy by the fraudulent conduct of others, who, taking advantage of his feeble health, persuaded him into taking that step, and to include these lands in his schedule of real estate. They prayed that the assignee be required to account to them for the rents and profits received by him.

Upon the issues thus made the parties went into proofs, in accordance with the rules of the court. But for reasons not disclosed by the record, the assignee, by leave of the court and without notice to the defendants, withdrew his petition "without prejudice to either party or to any other proceeding he may be advised to institute touching the subject matter of said petition."

In a few days thereafter, to wit, on December 1, 1879, the defendants presented a petition to the district court, sitting in bankruptcy, reciting the foregoing facts and praying that the [385] assignee be required to surrender the possession of the premises to them, and account for rents and profits received by him. To this petition the assignee demurred, for want of jurisdiction in the district court to give the relief asked. No further steps seem to have been taken in that proceeding.

The present suit was commenced by the assignee in the circuit court on the 16th day of December, 1879. Its object is to obtain a decree requiring the surrender by the defendants, of the title deed for these lands, and ordering their sale. The bill sets out, substantially, the same facts as those alleged in the petition filed by the assignee in the district court. The relief asked is based upon the following grounds: 1. That these lands were the property of the bankrupt at the time of the adjudication in bankruptcy. 2. That the deed of 1868 was never delivered by the grantor to the defendants, or to any of them, in the presence of the subscribing witnesses, nor "until he became so greatly involved that he feared his creditors could reach said lands." 3. That the deed was wholly voluntary. 4. That if the defendants ever had a right to recover the lands from the assignee, their cause of action is barred by section 5057 of the Revised Statutes, which provides: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case waive a right of action barred at the time when an assignee is appointed." 5. That the deed held by the defendants creates a cloud upon the title of the assignee, and interferes with his sale of the lands for an adequate price.

The defendants in their answer resist the claim of the assignee upon the same grounds relied upon in the original proceeding in the district court. They also filed their cross bill, seeking a decree for the surrender of the lands to them, and an accounting by the assignee in respect to the rents by him received.

The circuit court, by its final decree, directed the surrender of the deed for cancellation, de- [386] clared it to be null and void, dismissed the cross-bill, and ordered the assignee, under the direction of the district court, sitting in bankruptcy, to sell the lands and distribute the proceeds.

The lands conveyed by Barnes to his children having come to the possession of, and being claimed by, his assignee, and the title thereto being in dispute, the petition filed by the latter in the district court was authorized by section 5068 of the Revised Statutes. Under the pleadings in that suit—all the parties therein having appeared, asserted their respective claims to the lands, and sought a determination of the dispute between them—it was competent for the district court, sitting in bankruptcy, to have determined, at least, the question of title. Had that court adjudged that the lands belonged to [389] the grantor in the deed of 1868 at the time he was adjudged a bankrupt, that judgment, until reversed or modified, would have been a bar to any new action by the defendants for the recovery of the property.

But we have seen that the assignee, after the expiration of several years, and without notice to the defendants, withdrew his cause from the district court, and instituted this suit in the circuit court, substantially for the same relief as that asked in his petition in the district court; using, upon the hearing of this suit, the evidence taken in his original suit. Evidently he supposed that, in a new suit in the circuit court, the limitation of two years prescribed by section 5057 of the Revised Statutes would defeat any claim to the lands which the defendants might assert. But that section, if applicable at all to such a case as this, is applicable to the plaintiff as well as to the defendants. If the assignee claims that the question of title could only be determined in a suit in equity in the circuit court, it might well be said that, not having himself instituted suit in the proper court against the holders of the legal title, within two years from the time of the cause of action accrued to him, he could not maintain the present suit. But we are of opinion that the suit in the district court and the present suit, having substantially the same object, are to be regarded, for the purposes of the limitation prescribed by section 5057, as the same suit, the latter being, in effect, a continuation of the former. It results that the question between the assignee and the grantees in the deed of 1868, as to the title to the lands in dispute, was raised in apt time. During the whole period, from the commencement of the suit in the district court until the institution of the present suit, the defendants have asserted their ownership of these lands, denying that they constituted a part of the bankrupt's estate. They met the issue tendered by the assignee in the forum selected by himself. To permit him to

abandon that forum without their knowledge or consent, and—in computing the time fixed for bringing actions, by or against assignees, touching property claimed adversely to him—
[390] to exclude the period between the institution of the suit in the district court and the commencement of this suit, would make the statute an instrument of fraud. It cannot receive that construction.

Upon the merits of the case we have no serious difficulty. The evidence satisfies us that the conveyance of 1863 was not made with any intent to hinder or defraud the creditors of the grantor. The latter was, at that time, in such condition, as to property, that he could, without injustice to creditors, make a gift of these lands to his children. The transaction was in good faith, and was not a mere device to hinder and defraud creditors. The deed was promptly delivered by the grantor to one for all of the grantees. The possession of the lands by the father, at times, subsequent to the execution and delivery of the deed, and his control of them apparently for his own benefit, is satisfactorily explained by witnesses. His possession, after the deed of 1863, was not intended to be, and was not in fact, adverse to his grantees. According to the weight of evidence he held possession under and for his children. The only fact in the case which creates doubt on this point is that he improperly included these lands in his schedule of the real estate of which he was in possession when he filed his petition in bankruptcy. But that circumstance, even if not satisfactorily explained, cannot legally affect the rights of his grantees, and is only important as bearing somewhat on his credibility as a witness, testifying that he delivered the deed immediately upon its execution, and that his possession at a later period was for his children. Ga. Code, 1867, in force Jan. 1, 1863, §§ 1942, 2620; *Clayton* v. *Brown*, 17 Ga. 217, 222; *Clayton* v. *Brown*, 30 Ga. 491, 495; *Weed* v. *Davis*, 25 Ga. 684; *Wallace* v. *Penfield*, 106 U. S. 262 [27: 148]; *Jay* v. *Welchel*, Sup. Ct. Ga. April 4, 1887.

There is still another view of the case. If the grantor was insolvent when he made the conveyance of 1863, or, if the lands so conveyed constituted more, in value, of his estate than he could rightfully withdraw from the reach of creditors and give to his children; in either case, the assignee in bankruptcy—there being no
[391] fraud on the part of the grantor—has no standing to impeach the conveyance. The deed was good as between the grantor and his children; and, in the absence of fraud, could not be questioned by the assignee, who took only such rights as the bankrupt had. *Yeatman* v. *Savings Inst.* 95 U. S. 764, 766 [24: 589, 590]; *Stewart* v. *Platt*, 101 U. S. 731, 738 [25: 816, 817]; *Hauselt* v. *Harrison*, 105 U. S. 401, 406 [26: 1075, 1076]; R. S. § 5046. It could only be avoided by creditors who were such at the date of the conveyance. *Warren* v. *Moody*, 122 U. S. 132 [*ante*, 1108], present term.

Upon the whole case we are of opinion that the assignee in bankrupty of Barnes has no valid claim to said lands or any of them; and that the deed of 1863 was not void as between him and the grantees therein. The Circuit court erred in declaring it to be void, and in ordering the sale of the lands, under the direction of the district court, as part of the bankrupt's estate.

The decree is reversed, and the cause remanded, with directions to set aside the entire decree of November 25, 1882, and for such further proceedings as are consistent with this opinion. Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MERCHANTS MUTUAL INSURANCE COMPANY, *Appt.*, [376]
v.
GEORGE D. ALLEN.

SAME *v.* SILAS WEEKS.

(See S. C. Reporter's ed. 376-382.)

Marine insurance—covenant not to insure interest in vessel—insurance on freight to be earned, not a breach.

An insurance on freight to be earned by the voyage, and not on the cargo simply, is not a breach of a covenant by the insured not to insure their respective interests in the vessel "or any other insurable interest in said interest, during the continuance of this policy", beyond the specified amounts.

[Nos. 77, 78.]

Submitted April 18, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

On petition for rehearing. *Denied.*

For a statement of the case see the report of the opinion of this court upon the former hearing, *ante*, p. 858.

Mr. **Thomas J. Semmes**, for petitioner.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The ground of this application is that the [381]
court committed an error on the former hearing in finding as a fact that the other insurance shown by the new testimony was on the cargo and not on the freight to be earned by the voyage. There were six policies proven—one in the Portland Lloyds for $2,000, another in the Crescent City Company of New Orleans for $3,000, another in the Merchants Marine of Bangor, Maine, for $4,000, another in the Union of Bangor for $2,000, and two others in Lloyds of London, England, each for £1,100. Those in the Crescent City and London Lloyds describe a risk on cargo, and nothing else. Baring Brothers & Company effected the insurance in London, as they say, by "two policies of insurance upon part of the freight of the ship Orient." Charles E. Rice, the secretary of the Crescent City Company, says he issued that policy "on the interest of John Baker, on the freight list of the ship Orient." Construing the language of the other three policies as meaning the same thing as those which were clearly on the cargo, we did not consider it necessary at the former hearing to do more than decide, as we did, that an insurance on cargo was not a breach of the warranty in the policies sued on. But if it be otherwise, and the policies in

the other three companies were on the freight o be earned by the voyage and not on the car-
[382] go simply, we see no occasion for a reargument of the case, as we are all of opinion that such an insurance would not be a breach of the covenant of the insured not to insure their respective interests in the vessel, "or any other insurable interest in said interest, during the continuance of this policy," beyond the specified amounts.

Rehearing denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[267] HENRY H. PORTER, *Appt.*,
v.
PITTSBURG BESSEMER STEEL COMPANY (Limited); CLEVELAND ROLLING MILL COMPANY; SMITH BRIDGE COMPANY; CRERAR, ADAMS & COMPANY, AND VOLNEY Q. IRWIN.

(See S. C. Reporter's ed. 267-283.)

Railroads—fixtures—when covered by prior mortgage as against furnisher—sale under execution—redemption by subsequent lienholder—exhaustion of first lien—Indiana Statute—error in opinion, not affecting result.

1. Rails and other property, which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against a contract between the furnisher of the property and the railroad company which provided that the title thereto should remain in the former until the contract price is paid. This rule applied to bridges and bridge materials.

2. The sale of property under execution exhausts the lien of the judgment as superior to the lien of a subsequent mortgage and a redemption by the subsequent lienholder does not restore the lien of the judgment creditor.

3. The Indiana Statute authorizes a redemption from a sale of railroad property under execution.

[No. 1280.]

Submitted May 23, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of Indiana.

On petition for rehearing. *Denied.*

For a full history and the facts of the case see main report, *ante*, p. 880.

The grounds of this petition are stated in the opinion.

Messrs. **William H. Calkins, John S. Cooper** and **A. C. Harris,** for petitioners.

Mr. **E. W. Tolerton,** also for petitioner, The Smith Bridge Company.

[280] *Mr. Justice* **Blatchford** delivered the opinion of the court:

The appellees in this case petition for a rehearing. The case was decided at the present term, and is reported in 120 U. S. 649 [*ante*, 880]. The application for a rehearing covers all the grounds discussed in the opinion of this court, and others which, though not touched upon in the opinion, were fully considered by the court in arriving at its judgment. Upon all the questions covered by the opinion we adhere to our conclusions, and we see nothing in the special grounds taken in regard to the cases of some of the appellees to warrant a different result from that arrived at on the former hearing. It is proper, however, to notice two of the grounds urged in respect to two of the appellees.

The appellee Irwin claims that, by virtue of the lien laws of the State of Indiana, he recovered a judgment for the amount of his claim against the railway company, which became a lien prior to the lien of the mortgages, and that, notwithstanding an attempted redemption by John C. New, the trustee in the mortgages, the lien of the judgment remained good (1) because the redemption laws of the State of Indi- [281]
ana did not apply to the case; and (2) because New did not comply with such laws in regard to redemption, in such manner as to destroy the lien of the judgment. It is contended on the part of Irwin that the Indiana Statute does not authorize a redemption from a sale of railroad property; that New had no lien on the property sold; and that a redemption redeems simply from the sale, and does not discharge the property from the lien, but only postpones any balance remaining due on the lien to the amount paid for redemption.

The decree of the Circuit Court of Warren County, made in April, 1884, in the suit to foreclose the lien, brought by Irwin, forecloses the lien for $11,815.70, as a lien on the line of the railway for a certain distance in Warren County. In June, 1884, execution was issued for a sale, and on the 12th of July, 1884, the property was sold by the sheriff to Irwin for $500, and a certificate of purchase was issued to Irwin, stating that he would be entitled to a deed of the property in fee simple in one year from the 12th of July, 1884, if the same should not be redeemed by the defendant or any other person entitled thereto, paying the purchase money, with interest at 8 per cent per annum, before the expiration of the one year. On the 10th of July, 1885, and within the year, New, as trustee in the mortgages, paid to the clerk of the circuit court $539.78, in redemption of the property so sold, that being the amount necessary at that date to redeem the property.

It is very clear that, by the sale of the property on the execution, the lien of Irwin upon the property was exhausted, as a lien superior to the mortgages, upon that part of the railway which was covered by such superior lien. The property redeemed by New was the property sold under the decree in favor of Irwin. The redemption by New did not have the effect to restore the lien of the decree upon the property sold and redeemed. The redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay. The redemption was [282]
made by another and a subsequent lienholder, who redeemed for his own benefit and the benefit of those for whom he was trustee, and not for the benefit of Irwin.

This we understand to be the meaning and effect of the Statute of Indiana in regard to redemption. Rev. Stat. Ind. 1881, secs. 770-776. We are not referred to any decisions of the courts of Indiana, giving any other construction to these provisions. Section 774 gives the right to redeem to a person having a lien otherwise than by judgment. The statute gives no right to Irwin to redeem from New. The sale

of the property on the foreclosure of the mortgages given to New, subsequently to the redemption by New, conveyed the redeemed property to its purchaser on the sale, free and discharged from the lien under the decree in favor of Irwin, on which the sale redeemed from was made; and none of the proceeds of the sale on the foreclosure of the mortgages given to New can be applied to pay the unpaid portion of Irwin's decree. If the grading, embankment and excavation done by Irwin was subject to a sale on execution under his judgment, the redemption law applies to the case, and was complied with by New.

It is claimed, on behalf of the Smith Bridge Company, that the contracts between it and the railway company, for the construction of the bridges, provided that the bridges should remain the property of the Smith Bridge Company until the contract price for them should have been fully paid, and that, in default of such payment, the Smith Bridge Company should have the right to remove the bridges and bridge material; that the mortgages became a lien on the bridges only as the bridges became the rightful and legal property of the railway company; that Porter, before he purchased the bonds, had notice of the equities of the Smith Bridge Company growing out of their contracts; and that the First National Bank of Chicago had like notice before it acquired any interest in the bonds. The contracts of the Smith Bridge Company were made in October, 1882, and in July, 1883. The bonds were pledged to Dull and McCormick in January, 1882, and passed from them to Drexel, Morgan & Co., in January, 1883. The bridges became
[283] a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham* v. *R. Co.* 68 U. S. 1 Wall. 254 [17:584]; *Galveston R. R.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 480, 482 [20:199, 206]; *U. S.* v. *New Orleans R. R.* 79 U. S. 12 Wall. 362, 365 [20:434, 436]; *Dillon* v. *Barnard*, 88 U. S. 21 Wall. 430, 440 [22:678, 678]; *Fosdick* v. *Schall*, 99 U. S. 235, 251 [25:339, 342].

In regard to the alleged notice to Porter and to the First National Bank of Chicago, no such notice was given until after Dull and McCormick, and Drexel, Morgan & Co. had acquired their rights, as *bona fide* holders of the bonds: and Porter, by purchasing the bonds from Drexel, Morgan & Co., acquired all their rights and those of Dull and McCormick, as shown in the former opinion, and those rights were free in their hands from any notice of any claim of the Smith Bridge Company. *Commissioners* v. *Belles*, 94 U. S. 104, 109 [24:46, 48]; *Montclair* v. *Ramsdell*, 107 U. S. 147 [27:431].

An error was committed in the former opinion, p. 657 [834], in stating that each of the five appellees knew of the pledge of the bonds to Drexel, Morgan & Co. for the loan, and knew that they were getting a part of the money loaned by Drexel, Morgan & Co. This was not true in regard to all of the five appellees, but was true in regard to only some of them. The error does not affect the result on the merits.

The application for a rehearing is denied.

True copy. Test:

James H. McKenny, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [365]

v.

MAXWELL LAND-GRANT COMPANY ET AL.

(See S. C. Reporter's ed. 365-376.)

Mexican grant to Beaubien and Miranda—petition for rehearing—newly discovered evidence.

1. A rehearing cannot be had in this court because of newly discovered evidence. It can only be had upon the record before the court as it came from the court below.

2. In the case presented, this court did not rest its judgment at the former hearing upon the ground that the grant in question was an *empresario* grant, but upon the ground that Congress, having confirmed it as made to Beaubien and Miranda and reported for confirmation by the Surveyor-General of New Mexico to that body, without qualification or limitation as to its extent, acted in that respect within its power, and that its action was conclusive upon the court.

3. Upon petition for a rehearing this court still *holds*: that the grant, as confirmed by the action of Congress, is a valid grant; that the survey and the patent issued upon it, as well as the original grant by Armijo, are entirely free from any fraud on the part of the grantees or those claiming under them; and that Beaubien in his petition to the Departmental Assembly referred to a different grant as not exceeding fifteen or eighteen leagues.

[No. 974.]

Submitted May 12, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado.

On petition of the United States for rehearing. Opinion below, 26 Fed. Rep. 118. *Denied.*

The grounds of this petition are set forth in the opinion.

For full history and statement of the case see main report, *ante*, p. 949.

Mr. **William A. Maury**, *Assist. Atty-Gen.*, for petitioner.

Mr. Justice **Miller** delivered the opinion of [370] the court:

A petition for a rehearing has been filed in this case, and on account of its importance, as well as the interest in it manifested by the Department of the Interior, we have considered the petition very fully, and, departing from our usual custom, make some response to its suggestions.

The first ground on which a rehearing is asked is that this court was in error in treating the grant to Beaubien and Miranda as an *empresario* grant, upon which alleged mistake it is asserted that the decision of the court turned. The error, however, is in the assumption in the petition that the decision of the court turned upon

that point. It is true that the Assistant Attorney-General, in his argument on behalf of the United States, rested the case almost exclusively, so far as he was concerned, on the proposition that the validity of the grant was governed by the limitation of the decree of the Mexican Congress of 1824 to eleven square leagues for each grantee, in ordinary grants; and in response to that argument we endeavored to show, that while the land in controversy was not strictly an *empresario* grant, there being no evidence of a contract with any person to bring emigrants from abroad for the purpose of settling them upon the land, yet that it partook very largely of that character, and that Beaubien and Miranda, Governor Armijo, the Departmental Assembly, and the Surveyor-General, had all looked upon it as partaking so much of that nature, in regard to the quantity of land granted, as well as the actual settlement of families upon it, that the Congress of the United States was justified in treating it likewise. But we stated distinctly that we did not rest our judgment upon the fact of its being an *empresario* grant, but upon the proposition that the Congress of the United States, having confirmed this grant as made to Beaubien and Miranda, and reported for confirmation by the Surveyor-General of New Mexico to that body, without qualification or limitation as to its extent, acted in that respect within its power, and that its action was conclusive upon the court.

[371] In the opinion, after discussing the history of this grant, and its conformity to the character of a colonization grant, it was said, 121 U. S. 863 [*ante*, 952]: "The final confirmation of this grant by the Congress of the United States in 1860 affords strong ground to believe that that body viewed it as one of this character, and not one governed by the limitation of eleven square leagues to each grantee."

Afterwards we added, p. 865 [952]: "But whether, as a matter of fact, this was a grant, not limited in quantity, by the Mexican decree of 1824, or whether it was a grant which in strict law would have been held by the Mexican Government, if it had continued in the ownership of the property, to have been subject to that limitation, it is not necessary to decide at this time. By the Treaty of Guadalupe Hidalgo, under which the United States acquired the right of property in all the public lands of that portion of New Mexico which was ceded to this country, it became its right, it had the authority, and it engaged itself by that treaty to confirm valid Mexican grants. If, therefore, the great surplus which it is claimed was conveyed by its patent to Beaubien and Miranda was the property of the United States, and Congress, acting in its sovereign capacity upon the question of the validity of the grant, chose to treat it as valid for the boundaries given to it by the Mexican Governor, it is not for the judicial department of this Government to controvert their power to do so."

In support of this we cited *Tameling v. United States F. & E. Co.* 93 U. S. 644 [23: 998], in which that proposition is emphatically laid down. And in the concluding paragraph of the opinion, referring to the constitutional provision that Congress shall have power to dispose of the territory, or other property, belonging to the United States, p. 882 [*ante*, 959], we further said:

"At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress."

It is, therefore, quite clear that, as regards this question, the court rested its opinion upon the action of the Congress of the United States. [372]

In reference to this action of Congress, the petition says that it was error on the part of the court "further to assume that the Surveyor-General reported to Congress upon the extent of the grant, or that Congress knew or considered the question of quantity, since no survey had been made and no statement of area, other than that made by Beaubien to the Departmental Assembly, appears in the papers in the case."

It is nowhere stated in the opinion of the court that Congress had before it any actual computation of the contents of this grant, either of the number of acres or the number of square leagues, but what the court said upon that subject was in reply to the argument of the counsel for the United States, that the Surveyor-General had no *authority* to determine upon the extent of the grant. This was shown to be an error, inasmuch as the statute under which he acted required him to report upon the extent of the grant, as well as upon its validity.

It is true that there was in the papers no report of the number of leagues or the number of acres embraced within the grant. That was probably not known with any degree of accuracy by anybody at that time. But the grant by Armijo to Beaubien and Miranda described the boundaries in a manner which could leave no doubt upon the mind of Congress that the grant was an immense one, and so largely exceeded twenty-two leagues that there could be no question upon that subject. Besides this, there was among the papers in the office of the Surveyor-General the *diseño*, or plat, made and returned by the alcalde, Vigil, who delivered the juridical possession to the grantees, which also made it plain that an immense quantity of land beyond the twenty-two leagues was included within the grant.

Other reasons given in the opinion, which we do not think it necessary to repeat here, convince us that Congress knew that it was dealing with an extraordinary grant, and must have decided that it should not be limited by the eleven leagues of the Mexican law. [373]

It is said further in the petition that "The court was also mistaken in conceiving that Beaubien's statement to the Departmental Assembly, that the grant claimed did not exceed fifteen or eighteen leagues, referred to a grant made to Martinez."

In the argument of the case before us counsel made but a brief allusion to the proposition that Beaubien, in the petition which he presented against the intrusion of the priest Martinez, speaks of his own grant as being only

about fifteen leagues, to which we responded, p. 373[365]: "We think a critical examination of that petition will show that he is speaking of the claim of Martinez and his associates as amounting in all to about fifteen leagues, and not of his own claim under the grant." As this is again presented to us as a reason for a rehearing in this case, we will give a little more attention to it than its importance deserves.

After the grant was made to Beaubien and Miranda, on January 11, 1841, Cornelio Vigil, on the 22d day of February, 1843, as justice of the peace, delivered the juridical possession, of which we have already spoken, to the grantees. The petition of Charles Beaubien to the then Governor of New Mexico, who appears to have been some person other than Armijo, the original grantor, is dated April 13, 1844. It was designed to obtain a revocation of an order made by the then Governor, February 27, 1844, permitting Martinez to use and occupy a part of the land included within the grant by Armijo to Beaubien and Miranda. The whole matter is very imperfectly stated, but it would seem that Martinez, in his petition asking for this order, asserted that the grant to Mr. Charles Bent, which was prior in time to that to Beaubien and Miranda, included the land which he and his associates desired to use, and which he had purchased of Bent. It will be readily seen by anyone, even through the bad translation of the language of Beaubien, that he is endeavoring to show that the grant to Bent could not include any of the land within his own grant. He says on that subject: "I have been prevented from carrying those projects into effect" (meaning the making of settlements upon his grant), "on account of the decree of the 27th of February last, issued by Your Excellency, and which, through your secretary, was communicated to the prefecture of the first district, in order that paying attention to the petition addressed to Your Excellency by the curate Martinez and others in reference to the grant of lands made to the citizen of the United States, Mr. Charles Bent, and that all use made of them be suspended, I have to state to Your Excellency, in defense of those lands which are in our possession, according to the titles thereto, which are in our possession, that the petition addressed to Your Excellency by the curate Martinez and others is founded upon an erroneous principle, as the aforesaid Mr. Bent has not acquired any right to the said lands. It is therefore very strange that the curate Martinez and others pretend to involve our property, as it has no connection with that of that individual; therefore, it is to be presumed, the necessary consequence must be, that the curate Martinez and his associates do not know to whom those lands belong, nor their extent, as he states that a large number of leagues were granted, when the grant does not exceed fifteen or eighteen, which will be seen by the accompanying judicial certificates."

[374]

He then goes on to show other errors and mistakes in the claim of Martinez and his associates, on account of which he appeals to the Governor, who referred the matter to the Departmental Assembly, and that body recommended the revocation of the order in favor of Martinez, to which the Governor conformed.

We think it impossible for anybody, after reading this statement, with any just conception of the facts to which it related, to believe that Beaubien, in referring to the fifteen or eighteen leagues, meant his own grant and not the grant to Charles Bent, under which the curate Martinez was claiming. It would be an absurdity to suppose that Beaubien, claiming a grant whose boundaries, described by rivers, mountains and uplands, *must* have contained more than a million of acres, to whom juridical possession had been delivered and the report of it made about a year before these proceedings, could have intended to make to any public authority, a statement which must be referred to the Departmental Assembly composed of the representatives of the Territory, that his grant only included fifteen or eighteen leagues. This fact, concurring with the grammatical construction of the language used, the meaning of which can be plainly perceived through what is, perhaps, a very imperfect translation, leaves no doubt now in our minds, after a thorough examination, that the statement of the opinion was correct.

[375]

There is a reference in the part of the petition for a rehearing which was prepared in the office of the Commissioner of the General Land-Office, to the existence of new and material evidence touching the fraudulent character of the grant, which we must suppose to have been addressed to the Secretary of the Interior and the Attorney-General as reasons for obtaining a new trial if they could, and not addressed to this court as any legal foundation for reconsidering its decision. If this court should grant a rehearing it could only be had, according to the uniform course of the court during its whole existence, upon the record now before the court as it came from the Circuit Court for the District of Colorado.

We have thus considered all the points suggested in the petition as grounds for rehearing with the utmost care. The case itself has been pending in the courts of the United States since August, 1882, and, on account of its importance, was advanced out of its order for hearing in this court. The arguments on both sides of the case were unrestricted in point of time, and were wanting in no element of ability, industrious research, or clear apprehension of the principles involved in it. The court was thoroughly impressed with the importance of the case, not only as regarded the extent of the grant and its value, but also on account of its involving principles which will become precedents in cases of a similar nature, now rapidly increasing in number. It was therefore given a most careful examination, and this petition for a rehearing has had a similar attentive consideration. The result is that we are entirely satisfied that the grant, as confirmed by the action of Congress, is a valid grant; that the survey and the patent issued upon it, as well as the original grant by Armijo, are entirely free from any fraud on the part of the grantees or those claiming under them; and that the decision could be no other than that which the learned judge of the circuit court below made, and which this court affirmed.

[376]

The petition for rehearing is therefore denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[469]

SAMUEL CLINTON, *Plff. in Err.*, v. MISSOURI PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 469-477.)

Practice—proceeding to condemn land for railroad purposes—removal after appeal from county to district court—dismissal of appeal by U. S. Circuit Court—Nebraska Statute—transcript from state court, part of record—bill of exceptions—assignment of error.

1. In a proceeding to condemn land for railroad purposes, the case having been removed after appeal from the County Court to the District Court of the State wherein the land is situated, it is *held*:

a. That the court below improperly dismissed the case on the ground that the appeal to the district court was not taken within the statutory time of sixty days after the assessment;

b. That said period of sixty days did not commence to run until the final action of the commissioners in presenting their report to the county court; and not when they viewed the ground;

c. That the filing of a transcript, though imperfect, which could be amended by the writ of *certiorari* was sufficient to make the appeal valid;

d. That the assignment of error in this court is sufficient; and

e. That this court can review the order of dismissal upon the record presented, which contains the transcript of the record from the state court.

2. A judgment appealed from requires no bill of exceptions, but is simply to be transcribed as a part of the record.

3. Upon removal, the transcript from the state court becomes a part of the record, and as such is reviewable by this court.

[No. 811.]

Submitted May 11, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Reversed, Remanded.*

The history and facts of the case appear in the opinion of the court.

Mr. **John M. Thurston**, for plaintiff in error.

Mr. **John F. Dillon**, for defendant in error.

[470] *Mr. Justice* **Miller** delivered the opinion of the court:

This case is in many respects anomalous and bristles with points, but it is otherwise not very important. It commenced in a proceeding instituted by the Missouri Pacific Railway Company of Nebraska, under a statute of that State providing for the condemnation of land for the use of railroads. It was begun in the County Court of Cass County, Nebraska, by which a commission was appointed to make the assessment of damages. From this assessment, after it was returned to the county court, Samuel Clinton, some of whose land was taken, appealed to the district court of said county. In that court he made a motion, which was successful, to remove the case into the Circuit Court of the United States for the District of Nebraska. In this latter court a motion was made to remand the case to the District Court of Cass County, which seems never to have been acted upon, but on a motion made by the Railway Company to dismiss the appeal—meaning thereby the appeal from the County Court to the District Court of Cass County—the circuit court granted the motion and dismissed the appeal. The matter, therefore, not being remanded to the state court, the Circuit Court of the United States deciding that no valid appeal had been taken from the County to the District Court of Cass County, the dismissal of the appeal was of course an end of the case.

To this judgment of dismissal the present writ of error is prosecuted.

The only error assigned by the plaintiff here is in the following language:

"The court below sustained the motion to dismiss, solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, [471] and not from the date of the return of their assessment. This is the only error relied upon by plaintiff in error."

The defendant in error insists that the case should be dismissed here for want of an assignment of errors. In regard to this it is sufficient to say that it would be difficult to formulate a more precise and specific assignment of error than that contained in the foregoing extract from the brief of the plaintiff.

The next point presented is that the ruling of the court in this case, upon the question of the dismissal of the appeal is not presented by any bill of exceptions, and that there is nothing in the record on which this court can review that decision. But the determination of this subject is the final judgment of the court. This is so in any sense in which it can be looked at. The order to dismiss is in the following terms:

"This cause coming on to be heard this 20th day of December, 1883, on the motion filed by the defendant to dismiss the appeal herein from the assessment of damages made by the commissioners appointed by the County Court of Cass County, Nebraska, on the ground that said appeal was not taken within sixty days after the assessment of damages to said real estate by said commissioners, and for other reasons contained in said motion on file, and on [474] argument of counsel and on consideration thereof by the court, the court doth here find that said appeal was not taken within sixty days from the date of the assessment of damage made by such commissioners of the land in controversy, and the court doth sustain said motion to dismiss such appeal. It is ordered by the court here that said appeal be, and the same is hereby dismissed, each party to pay its own costs."

If it be true that the appeal from the Cass County Court to the district court of that county was not taken in time, that is, within the sixty days referred to in this judgment, there is an end of the plaintiff's case in any court whatever. The Circuit Court for the District of Nebraska, assuming to come into the place of the District Court of Cass County, and exercising the powers which that court would have exercised if the case had not been removed, holds that no valid appeal was taken, and for that reason dismissed the case. If such finding be correct and it remains as a valid judgment, it puts an end to the plaintiff's claim; it can nowhere be considered any further, and it is final upon the questions involved in the case.

As to the proposition that it cannot be reviewed here for want of a bill of exceptions, that is equally untenable. A judgment of a court appealed from is never incorporated into

a bill of exceptions. It is always a part of the record of the case, and, like the plea and the verdict, it needs no bill of exceptions, but is simply to be transcribed as a part of the record. In this case it presents for itself the point or matter on which the court acted. It is there distinctly stated that the case was dismissed because the appeal was not taken within sixty days from the date of the assessment of damages made by the commissioners. Now, if the facts on which this decision was made are to be found in what may be properly called the record of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter.

Whatever there was on that subject to guide the action of the court on the motion to dismiss [475] the appeal was found in the transcript as it came from the state court and was filed in the Circuit Court of the United States. If there was enough in that transcript to present the question in this case, then we must review it; for we take it to be a necessary rule in such cases that the transcript from the state court becomes a part of the record of the case in the federal court. There is no mode by which that transcript, or any of its contents, can be abstracted and made a part of a bill of exceptions to be signed by the federal judge. He can know nothing about what takes place in the state court, personally, and cannot therefore certify to it. It comes to him as certified by the court in which the proceedings were had. It is itself the foundation on which he is to act in the future proceedings in the case. It is already a record of another court transcribed and certified to his court; and in any writ of error from the Supreme Court of the United States that transcript from the state court necessarily becomes a part of the record.

As regards the main point, that the appeal was not taken within sixty days, this transcript, which is said to be imperfect, sufficiently shows that the commissioners were appointed; that they returned the award and assessment of damages into the county court on the first day of December, 1881, allowing to Clinton for damages to his property, known as the "Mill Reserve," the sum of $850, and that on January 28, 1882, Clinton filed a notice of appeal from this award. Although the time is pretty close, it is very obvious—these things being matters of record—that Clinton intended to appeal within the sixty days allowed by the statute, and that he did appeal within sixty days after the commissioners filed the award, and thereby made it public.

We think the circuit judge, in dismissing this appeal because it was not taken in time, erred in holding that the assessment of damages must be considered as having been made on the 23d of November, at which time they went upon the ground to view it. There is no reason to believe that on that day they made their assessment. There was no assessment of damages, however much it may have been talked about, until they concluded upon and signed a final report upon that subject, and it is not to be be- [476] lieved that the Nebraska Statute, limiting the right of appeal from the award of such commissioners to sixty days, intended that period should commence to run at any time prior to the final action of the board in presenting their report to the county court. This point seems to have been so decided by the Supreme Court of Nebraska in the case of *Gifford* v. *Republican Valley and K. R. R. Co.* 20 Neb. 588. On this point, therefore, the judgment of the circuit court, which is here for review, was evidently erroneous.

Another point taken by counsel for defendant in error is that the requirements specified by the Supreme Court of Nebraska have not been complied with, that court having, in the case just referred to, decided that "The essentially requisite proceeding to perfect an appeal from the award of commissioners, in a case of this kind, and to give the district court jurisdiction of the same, is to file in the said court, or in the office of the clerk thereof, a certified transcript from the county judge of the condemnation proceedings, from the original application to said county judge for the appointment of commissioners to the report of such commissioners in the respective case, both inclusive."

It is urged that the transcript filed in the district court in this case was imperfect and defective, among other reasons, because it did not contain a copy of any petition of the Railway Company for the appointment of commissioners. We are of opinion, however, that what was filed in the district court was sufficient to give that court jurisdiction to proceed further in the case. It contained the order appointing the commissioners, the swearing of them to perform their duties, the report which they made in the matter, the award of $850 damages upon Clinton's property and the taking of the appeal by him, and the service of notice of that appeal on the parties. This is sufficient, at least, to show to the district court that a case had arisen which the statute intended might be brought before that court on appeal. If it had been suggested by either party that this transcript was imperfect or defective because it omitted some paper, or order, or matter in the county court, which was necessary to the hearing in the district court, the usual and [477] proper way of correcting that evil, pursued in all courts of appeal, would be by *certiorari* directed to the court from which the appeal was taken, commanding it to send up the complete and perfect record.

The case of *Gifford* v. *R. R. Co.*, above referred to, gives support to this view of the subject. There, no transcript of the record in the county court, whether perfect or imperfect, was filed in the district court, and it was on this ground of the entire failure to have any transcript whatever of the proceedings in the county court filed within sixty days, as well as the absence of all sufficient effort to do so, that the dismissal in that case was sustained. In that opinion *Republican Valley R. R. Co.* v. *McPherson*, 12 Neb. 480, is cited with approval, in which case, although no transcript whatever was filed within the sixty days limited by the statute, yet the evidence given by the appellant, of diligent effort to obtain a transcript from the county judge and his refusal to make one in due time, was accepted as a sufficient reason why the appeal should not be dismissed.

We are of opinion that where there is a transcript furnished by the county judge, even

though it be imperfect, the same having been filed in due time, and which could be amended as to its imperfections by the writ of *certiorari*, that it must be held sufficient to make the appeal valid.

For the error of the Circuit Court in dismissing the appeal the judgment is reversed, and the case remanded to that court for further proceedings according to law.

True copy. Test:
James H. McKenney, Clerk. Sup. Court, U. S.

8.

[487] THOMAS STRUTHERS, *Plf. in Err.*,
v.
JOSEPH W. DREXEL.

(See S. C. Reporters' ed. 487-496.)

Pleading—evidence—variance—consideration—instructions—usury—exceptions.

In an action on a contract whereby the defendants agreed to repurchase certain shares of stock sold by them to the plaintiff, it is *held:*

a. That the contract and an extension thereof are admissible in evidence under the declaration, although they express a consideration of one dollar;

b. That said consideration need not be stated or proven; that the second count sets out the contract according to its legal effect;

c. That a letter from the plaintiff notifying the defendants of his readiness to sell and transfer the stock, is admissible in evidence;

d. That an instruction that the plaintiff might recover under the common money counts, if erroneous, did not prejudice the defendants;

e. That an instruction that there can be no usury where there is no loan, and that the defendants had shown no loan, was correct; and,

f. That a statement, not verified or included in any proper bill of exceptions, that counsel objected to certain parts of the charge, cannot be treated as a part of the record for any purpose.

[No. 278.]

Argued May 2, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **George Shiras, Jr., Rasselas Brown** and *W. M. Lindsay*, for plaintiff in error.

Mr. **John Dalsell**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

[488] This is an action of assumpsit brought by the defendant in error against the plaintiff in error and Thomas S. Blair, the latter not having been served with process. The declaration contained two special counts, as follows:

"For that whereas heretofore, to wit, on the 4th day of April, A. D. 1873, at New York, to wit, in the Western District of Pennsylvania aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and pay for, at the rate of $50 per share, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, they, the said defendants, undertook, and then and there faithfully promised the said plaintiff, that if at the end of one year from said date he, the said plaintiff, should desire to sell the said shares at the said price by him paid for the same, they, the said defendants, would purchase the said shares of the said stock, to wit, four hundred shares of the said Blair Iron and Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of 7 per centum per annum.

"And the said plaintiff avers that he, confiding in the said promises and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, take and pay for four hundred (400) shares of said stock aforesaid, at the rate of $50 per share, amounting in all to a large sum, to wit, the sum of twenty thousand dollars ($20,000).

"And the said plaintiff further avers that at divers times subsequently, to wit, on the 4th day of April, A. D. 1874, and, to wit, on the 4th day of April, A. D. 1875, in consideration that the said plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the said defendants the said shares of the capital stock of the said Blair Iron and Steel Company, to wit, four hundred (400) shares thereof, they, the said defendants, undertook, and then and there promised faithfully the said plaintiff, that [489] if at the end of one year from the said last mentioned dates, respectively, to wit, April 4, A. D. 1874, in the first instance, and April 4, A. D. 1875, lastly, he, the said plaintiff, should desire to sell the said hereinbefore mentioned shares at the said price by him paid for the same, they, the said defendants, would purchase the said shares of the said stock at the said price paid by him, the said plaintiff, paid therefor, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of 7 per cent per annum.

"Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said stock was by the said plaintiff tendered to the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiff the said sum of twenty thousand dollars ($20,000), but have hitherto wholly neglected and refused, and do still refuse and neglect, to wit, at the Western District of Pennsylvania, to the damage of the plaintiff thirty thousand dollars.

"And the said plaintiff further complains of the said defendants, for that whereas heretofore, to wit, on the 4th day of April, A. D. 1876, to wit, at the Western District of Pennsylvania, the said defendants bargained for and bought of the said plaintiff, at the special instance and request of the said defendants, and the said plaintiff then and there sold to the said defendants, a large quantity of goods, to wit, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, at the rate or price of $50 per share, with 7 per cent interest added from April 4, A. D. 1873, to be delivered by the said plaintiff to the said defendants, and to be paid for by the said defendants to the said plaintiff on the delivery thereof as aforesaid, and in consideration thereof, and that the plaintiff, at the like special instance

and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said stock to the said defendants in the time and at the place aforesaid, they, the said defendants, undertook, [490] and then and there faithfully promised the said plaintiff, to accept the said stock of and from him, the said plaintiff, and to pay for the same on the delivery to them, the said defendants, as aforesaid.

"And though the said plaintiff afterwards, to wit, on the day and year aforesaid, to wit, at the Western District of Pennsylvania aforesaid, was ready and willing and then and there tendered and offered to deliver the said stock to the said defendants, and then and there requested the said defendants to accept the same and to pay him therefor as aforesaid, yet the said defendants, not regarding their said promises and undertakings, but contriving and craftily and subtly intending to deceive and to defraud the said plaintiff in this behalf, did not nor would at the time when they were so requested as aforesaid, or at any time before or afterwards, accept the said stock or any part thereof of or from the said plaintiff, or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do, to the damage of the plaintiff thirty thousand dollars."

It also contained common counts for goods bargained and sold, money had and received, and money laid out and expended for the use of the defendants.

To this declaration the plaintiff in error pleaded, as to all the counts: 1. That the consideration mentioned in the alleged agreements, referred to in the declaration, bearing date April 4, 1873, April 4, 1874, and March 22, 1875, was never paid, nor was any valid consideration paid or given, or agreed to be paid or given therefor. 2. That the alleged agreements were usurious under the laws of New York, where they were made, being a mere device or contrivance for obtaining to the plaintiff more than the legal rate of interest for money advanced by way of loan to the Blair Iron and Steel Company. 3. That the plaintiff did not tender the 400 shares of stock referred to in the plaintiff's declaration, as therein alleged. 4. That the alleged agreements were void as against public policy, being in fraud of the other subscribers to the stock of the Blair Iron and Steel Company, as they secured to the plaintiff an advantage over other subscribers by a secret agreement 5. That the agreement [491] set out in the declaration was without consideration. 6. The Statute of Limitations of six years.

The cause was tried by a jury, and a verdict and judgment rendered in favor of the plaintiff for the sum of $34,651.36, to reverse which this writ of error is prosecuted.

The transcript of the record contains what purports to be the charge of the court in full, with a memorandum at the close, stating that defendant's counsel excepted to certain portions thereof; but, as it is not verified, or included in any proper bill of exceptions, we are not at liberty to treat it as a part of the record for any purpose. Several bills of exception were taken, during the progress of the trial, to rulings of the court, on which assignments of error are alleged, and which we will consider in their order:

1. From the first bill of exceptions it appears that upon the trial the plaintiff offered in evidence two papers, one dated April 4, 1873, and the other March 22, 1875, as follows:

"New York, April 4, 1873.

"Whereas, Joseph W. Drexel has purchased four hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, trustee of said company, at the price of fifty dollars per share:

"Now, we, the undersigned, in consideration to us of one dollar, in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if, at the end of one year from this date, the said Drexel shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate of 7 per cent per annum.

"April 4, 1873.

"THOS. S. BLAIR.
"THOMAS STRUTHERS."

"New York, March 22, 1875.

"In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred shares of stock in the Blair [492] Iron and Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year; viz., to April 4, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at the rate of 7 per cent per annum from the dates of the payment by him of the respective installments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron and Steel Company to be held by him in trust for that purpose.

"THOS. S. BLAIR.
"THOMAS STRUTHERS."

To the reception in evidence of these papers the defendants' counsel objected, stating that he did not deny their execution, but that they were not admissible in evidence, because the plaintiff had averred in the declaration that the consideration of the contract was the subscription to 400 shares of stock in the Blair Iron and Steel Company; whereas, in these papers the consideration set forth is the payment of one dollar. The objection was overruled, and an exception taken. This ruling is now alleged as error. In ruling on the papers, the court said the contracts were admitted subject to consideration thereafter, in view of further evidence which might be adduced. The bill of exceptions does not set out what, if any, further evidence was adduced. We are of opinion that the testimony was properly admitted. Even if there was a variance between the contract as shown by these papers and that alleged in the first count of the declaration, certainly there was none between the allegations of the second

count and the written instrument as offered, according to its legal effect.

The second count of the declaration sets forth a contract whereby the plaintiff sold and agreed to deliver to the defendants 400 shares of the capital stock of the Blair Iron and Steel Company, at the price specified, to be paid by the [493] defendants on delivery, in consideration whereof the defendants undertook and promised to accept the said stock and pay for the same on delivery in accordance therewith. This is precisely the legal effect of the contract set out in the instrument dated April 4, 1873. The recital in that instrument, that the plaintiff had purchased the same from the trustee of the Blair Iron and Steel Company, is mere matter of inducement and immaterial. The statement of the consideration of one dollar paid is also entirely immaterial, and may be treated as merely nominal. The real agreement embodied in the instrument is, according to its legal effect, that at the end of one year from that date the defendants would buy and pay for the number of shares of stock mentioned at the price specified, on delivery thereof at that time by the plaintiff. When thereafter, at the time specified, as it was subsequently extended, the plaintiff exercised his option by a tender of the stock, the contract became unconditional and absolute, and from that time the plaintiff was entitled to treat it as a contract in ordinary form for the sale and delivery of the subject of the agreement. The second count of the declaration sets it out in that form, and according to its legal effect, which is all that is required by the strictest rules of pleading.

2. The second bill of exceptions shows that the plaintiff offered in evidence the following paper:

"New York, March 20, 1876.

"Gentlemen: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron and Steel Company, held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4, 1873, and the several renewals thereof.

"You are hereby notified that I am ready to transfer the stock to you or to any person or persons whom you may designate, upon the payment of the purchase money thereof and 7 per cent interest thereon from date of payment.

"I hereby tender you the certificate of stock, [494] and I demand fulfillment of your contract on the premises. I am ready and willing at any time to transfer the stock upon the book of the company and fully perform the condition of rescission of purchase.

"Respectfully, J. W. DREXEL.

"To Mess. Thos. S. Blair and T. Struthers."

The admission of this paper in evidence, which was objected to, is assigned for error. There is no ground for this exception. The paper was certainly competent as constituting one item in the proof that the plaintiff exercised the option to sell the stock in accordance with the agreement, and tendered it for delivery.

3. The third bill of exceptions states that in the further progress of the trial the defendants' counsel offered to prove by two witnesses that the consideration of $1, named in the said agreement, was not paid by the plaintiff, or by anybody on his behalf, to the defendants. This offer was rejected on objection made, and an exception taken. We have already said that the mention of this nominal consideration was entirely immaterial, and might properly be omitted from any statement of the contract in a pleading which set out its legal effect. It was of course, therefore, not necessary to prove it, and immaterial if disproven. The real consideration for the defendants' agreement to buy was the plaintiff's agreement to sell, determined by the exercise of his option and the tender for delivery of the stock for that purpose.

4. The fourth bill of exceptions is based on an alleged error occurring in the following portion of the charge to the jury:

"Supposing that he (Wallace) did comply with his instructions (in making the demand), then did it become the duty of Mr. Struthers to pay the amount represented by that stock? If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common money counts) is sufficient to enable him to recover. Where parties have made a contract by which certain things are to be done on one side and certain things on the other, if one party does all those [495] things that are required to be done by him to entitle him to a sum of money from the other party, he may recover that sum of money under the common money counts. We instruct you, therefore, that so far as the pleadings are concerned, there is no difficulty in the plaintiff recovering, under the declaration, a verdict for the amount that is due him."

"The point of the objection is that the jury was instructed that a recovery in favor of the plaintiff might be had under the common money counts of the declaration, and this is alleged for error. If so, however, it did not prejudice the defendants; for, as we have already seen, a recovery might be had upon the contract, considered as an executory contract for the purchase by the defendants of the stock in question, under the second special count. In addition to that, so far as the bill of exceptions shows, it might well be that there was proof in the case, not only of a tender of the stock, but of an actual delivery and acceptance. In that case the contract would have been completely executed on the part of the plaintiff, title to the stock passing by the delivery to the defendants. In such a case, the charge would be entirely correct, and a recovery might be had under the common counts.

5. The fifth bill of exceptions is based upon an alleged error in the following portion of the charge:

"On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money; and the question is whether the transaction involved a loan or attempted loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiff and the defendant whereby usury could arise.

"It is our duty to give you instructions on that subject, and we say to you that upon that point the defense of the defendant must fail."

This charge is correct. There is nothing upon the face of the papers to show that the transaction was a loan of money by the plaintiff to

the defendants, or to the Blair Iron and Steel Company. Unless there was a loan there can [496] be no usury. The bill of exceptions sets out no evidence to show the transaction to have been different from what it appears to be on the face of the papers.

This covers all the points raised upon the record. *We find no error in the proceedings of the Circuit Court, and its judgment is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[241] FRANCIS A. DREXEL ET AL., *Appts.*,
v.
LOUISE BERNEY.

(See S. C. Reporter's ed. 241-255.)

Equitable estoppel—character of—when court of equity may enforce—injunction against setting up certain facts in action at law—demurrer, improperly sustained.

1. In order to justify a resort to a court of equity to enforce an equitable estoppel, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. The case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right.

2. Upon a bill, filed in aid of the defense of an action at law brought by one of the defendants as executrix of her deceased husband, who died in France, for an injunction against setting up or claiming in such action that the decedent was not domiciled in Alabama; that his will was not duly admitted to probate there; that the administration thereunder of the sole executor and his attorney were not valid and binding; and against using in support of such allegations certain ancillary letters of administration, alleged to have been fraudulently and unlawfully procured to be issued to or in the name of said defendant, it is *held:* that the facts alleged amount to an equitable estoppel which is enforcible in equity.

[No. 305.]

Argued May 11, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of New York. Opinion below, 16 Fed. Rep. 522. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Wayne MacVeagh** and *C. H. Tracy*, for appellants:

Such of the defenses to the claim of defendant as are of equitable cognizance must be availed of by bill in equity; as the fusion of law and equity which prevails under state practice does not obtain in the federal courts.

Northern Pac. R. R. Co. v. *Paine*, 119 U. S. 562 (*ante*, 513).

All of the defenses which complainants here allege are cognizable in equity alone, for the reason that the matters arise out of acts which the defendants have performed as individuals; whereas, the action at law is in the name of an executrix, whose right as such is derived from an independent and isolated proceeding upon the will, which not only ignores, but enables her to contest the validity of what was done previous to her acquisition of her present right, as well as the satisfaction to the real parties in interest made by St. James, the alleged wrong doer.

The estoppel arising thereon is not a legal one, because it does not arise out of privity of contract or of estate, but is purely equitable—as it arises out of what the beneficiaries themselves did before Louise Berney obtained her present authority. The settlement between the defendants and St. James is probably no defense to the action at law.

An equitable estoppel is sufficient ground or basis for equitable relief.

Bispham, Eq. §§ 280-282.

"It is now a well established principle that where the true owner of property holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected."

Bigelow, Estoppel, 434, and authorities cited.

The complainants have not "a plain, adequate and complete remedy at law."

Boyce's Exrs. v. *Grundy*, 28 U. S. 3 Pet. 210 (7: 655); *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74 (18: 580); *Barber* v. *Barber*, 62 U. S. 21 How. 582 [16: 226]; *Oelrichs* v. *Spain*, 82 U. S. 15 Wall. 211 (21: 43); *Sullivan* v. *R. R. Co.* 94 U. S. 811 (24: 326); *Crane* v. *McCoy*, 1 Bond, 422, *Baker* v. *Biddle*, 1 Baldw. 394; *Harrison* v. *Rowan*, 4 Wash. C. C. 205.

A precedent for this case is found in *Brown* v. *Pacific Mail St. Sh. Co.* 5 Blatchf. 525, where an injunction was sought against anticipated *ex parte* proceedings affecting an election of directors about to be held, and for error or fraud for which there was a remedy at law.

Messrs. **Franklin B. Lord** and *George De Forest Lord*, for appellee:

If the matters complained of could be availed of by the complainants, as matter of defense in the actions at law brought against them, the complaint was rightly dismissed, for they had, on that assumption, "a plain, adequate and complete remedy at law."

While the doctrine of equitable estoppel originated and was promulgated by courts of chancery, it is now recognized and enforced as liberally in courts of law as in courts of equity.

Dickerson v. *Colgrove*, 100 U. S. 578 (25: 618).

The complainants, therefore, can avail themselves of the estoppel as a defense at law, and there is no necessity for their seeking affirmative relief in equity; nor does the alleged fraud in obtaining letters testamentary to Madam Berney furnish any ground for equitable interference, for the allegations in such proceedings only establish jurisdiction in the absence of fraud; and fraud, if it exists as the complainants allege, will undoubtedly be available to them in any action in which the proceedings may be used in evidence.

N. Y. Code of Procedure, § 2473.

Mr. Justice **Matthews** delivered the opinion of the court: [242]

This is a bill in equity filed by the appellants, some of whom are citizens of Pennsylvania and others of New York, against the appellee, who is an alien, a citizen of the Republic of France, and William Berney, a citizen of Texas, and Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, and William

C. Hallonquist, citizens of the State of Alabama. Of these defendants, none were served with process or appeared, except the appellee, [243] Louise Berney. The cause was heard in the circuit court on a general demurrer filed by the appellee to the bill. The demurrer was sustained, and the bill dismissed for want of equity. The complainants appealed.

The following statement of the case, as made by the bill, is taken from the brief filed by counsel for the appellants:

The bill alleges in substance:

1. That said Robert Berney, the decedent, made his will November 2, 1864, at Croydon, England, whereby he bequeathed his residuary estate to his executors therein named as trustees and upon trusts, among others, for the benefit of his widow, the defendant Louise Berney, and of the other persons named as defendants; and afterwards, on the 25th of September, 1874, a codicil thereto, making changes in some of the bequests in his will, and appointing as executors and trustees of his will the defendant Louise Berney; also James Berney, his brother; a Mr. Messier de St. James, of Paris, France, and John Drummond and William Drummond.

2. That Robert Berney died at Paris, France, November 19, 1874, leaving him surviving his widow, the defendant Louise Berney, his said brother, James Berney, and nephews and nieces, who are named as defendants in the bill of complaint. His widow was a native of France, and was with him at the time of his death, but his said brother James and his nephews and nieces were all citizens and residents of Montgomery County, Alabama; said St. James was a resident of France, and the Messrs. Drummond, of England. The decedent left personal estate in France, England, and the United States.

3. At the time of his death, Robert Berney, the decedent, was a citizen of the United States, who had lived abroad for some years, but had never acquired a domicil in France under or in accordance with its laws. Upon his death his widow, the defendant Louise Berney, presented the will and codicil of the decedent to the proper judicial authority in France, and, in accordance with French law, the administration of the estate was committed to a notary by competent judicial authority, December 4, 1874.

[244] 4. Subsequently, and before anything else was done, and on the application of said James Berney, the brother of decedent, and one of his executors, the will and codicil were formally admitted to probate, and letters testamentary thereon issued to said James Berney alone, by competent judicial authority at Montgomery, Alabama, on the 8th of February, 1875, the decree of the Alabama court being that the decedent was domiciled at Montgomery, Alabama, and that it had full jurisdiction in the premises. All of the heirs at law and next of kin of the decedent, except the widow, the defendant Louise Berney, were at that time citizens and residents of Alabama, and by the laws of Alabama such probate and issue of letters testamentary cannot be impeached collaterally, and are conclusive upon all persons and parties.

5. That said James Berney, having been thus constituted sole executor, gave a full power of attorney to said St. James, empowering him, among other things, to reduce the decedent's estate to possession, and to sell any and all property, etc. About the same time and on the 9th of March, 1875, said James Berney, being thus sole executor by reason of the Alabama probate, obtained the issue to himself, by the Surrogate or Court of Probate in the City of New York, of ancillary letters testamentary, based upon the Alabama probate. This adjudication is in due form, and also remains unimpaired and in full force. All of the said proceedings of said James Berney were known to the defendant Louise Berney and the other persons named as executors, as well as to the legatees under the will, the other defendants in the bill of complaint.

6. That at the time of the decedent's death, certain evidences of title of the personal property left by him were in his possession at Paris, France, and the purpose and intention of the proceedings above mentioned was to secure immunity of the decedent's estate from taxation in France, and to provide for the due and lawful administration of the assets, which were then actually in the possession of the widow, the defendant Louise Berney, and said St. James; and by the joint action of the sole qualified executor, said James Berney, said St. James and said defendant Louise Berney, before [245] the notary to whom the matter had been so judicially committed in France, as aforesaid, the whole estate and its administration was intrusted to said St. James, as attorney for said James Berney, executor, with the knowledge and approval of all parties in interest, including the defendants. Formal proceedings were afterwards had before the notary of Paris, on the 30th and 31st of March and the 3d and 4th of May, 1875, and afterwards on the 11th of June, 1875, and on those dates formal documents or records were duly executed by the parties before the notary: the first, by the widow, the defendant Louise Berney, and said St. James; and the second, by the same persons in connection with said James Berney, the qualified executor, in person. At these proceedings and in the notarial instruments or records it was formally evidenced and declared that the decedent was at the time of his death domiciled at Montgomery, Alabama, that the probate of the will in Alabama was regular and valid, and that said James Berney was the sole qualified executor, and his power of attorney substituted said St. James in all the executor's functions and rights; and the defendant Louise Berney acknowledged receipt of the legacies given to her by the will from the administration of the estate thus constituted. By the laws of France, neither the defendant Louise Berney, nor any other of the persons named as executors in the will, nor anyone claiming under them, is permitted to assert the contrary of any of the matters thereby established.

7. That among other assets the decedent left $200,000 in United States bonds; $12,500 in stock of the U. S. Mortgage Co.; $58,200 in stock of the N. Y. Central & H. R. R. R. Co.; £8,000 in bonds of the N. Y. & Canada R. R. Co.; £3,000 bond and mortgage on real estate in England, and moneys on deposit with bank-

ers at London. Of these items said James Berney, in person, took possession of and sold the $12,500 in stock of the U. S. Mortgage Co. and the $58,200 in stock of the N. Y. Central & H. R. R. R. Co. On the 15th of June, 1875, the [246] defendant Louise Berney and said St. James procured proof of the will and codicil in common form, and the issue of letters testamentary to them by a competent court in England, and having taken possession of the £8,000 in bonds of the N. Y. & Canada R. R. Co., and the £8,000 bond and mortgage on real estate in England, by virtue of their English letters got in and converted into money the assets in England, as to the last mentioned item, an instrument having been jointly executed by all three of the parties, Louise Berney, St. James and James Berney. All these proceedings were had without objection on the part of any of the defendants. The $200,000 of United States bonds were sent to this country, and by agents of said St. James at the City of New York presented to complainants, with directions to change the bonds from registered to bearer bonds by selling the registered bonds, and with the proceeds buying bearer or coupon bonds of the same issue, the only method of effecting such exchange. The agents of said St. James furnished to the officers of the United States Treasury satisfactory evidence of their authority to transfer the bonds, and upon which the bonds were transferred, and the complainants sold the registered bonds and with the proceeds bought $195,000 of coupon bonds, and with a sum in money representing the difference delivered the same to the agents of said St. James, who, in their turn, delivered the same to said St. James himself after he and the defendant Louise Berney had taken out their letters testamentary in England.

8. That legacies given by the will and codicil to several of the defendants were duly received by them from James Berney or said St. James under the administration of the estate so established, and during all the times mentioned said James Berney was the agent for, and actual guardian of, the defendants, and had full knowledge of all the aforesaid transactions.

9. That in the year 1880 said James Berney sent his son, the defendant Saffold Berney, to France, who then and there, acting as attorney and agent for his father in his quality of executor, and for himself and defendants as legatees, instituted judicial proceedings against said St. James for an account of his administration of the decedent's estate, and finally received from [247] said St. James, in full satisfaction and discharge of his liability to them, certain property. Because St. James has since died, and because of the laws and customs of France, complainants cannot ascertain the precise details of the transaction.

10. That the defendants now claim that said St. James diverted the $195,000 in coupon bonds and the money so received by him in exchange for the $200,000 United States registered bonds, and that the Alabama probate so obtained by said James Berney was invalid, because, as they now assert, the decedent was domiciled in France. The defendants have confederated together to assert and maintain this claim by means as follows: They have obtained from the Surrogate of New York County a second issue of ancillary letters testamentary to the defendant Louise Berney alone, based upon the false representation that the decedent's will had been admitted to probate in England in such manner as to justify the issue of ancillary letters testamentary here, and the false representation that there were unadministered assets in New York, and the fraudulent suppression of the facts concerning the former issue of letters ancillary to James Berney, founded upon the Alabama probate, and thereupon have brought an action at law in the Circuit Court of the United States for the Southern District of New York, in the name of said defendant, Louise Berney, as sole executrix under and by virtue of the letters so issued to her, against the complainants, for conversion of said $200,000 United States bonds, and wherein they allege that said decedent was domiciled in France, and the said Alabama probate was invalid for that reason; and that the letters testamentary so issued to the defendant, Louise Berney, are conclusive upon the complainants, so far as her right to bring and maintain said action is concerned. Complainants are not permitted by law to procure the cancellation of said letters, or to contest the validity thereof. In view of the foregoing, complainants insist that the defendants are estopped in equity from now asserting against them that said decedent was not domiciled elsewhere than at Montgomery, Alabama, or that the proceedings of the executors at Paris are not binding upon them. Complainants also allege that the several mat- [248] ters and things above mentioned may not be pleaded and do not constitute a defense to the action at law, etc.

11. That, in addition to the action at law in the federal court before referred to, the defendants have brought another action in the Supreme Court of the State of New York in their own names as plaintiffs against the complainants, wherein they make the like claim as to Robert Berney's domicil and the Alabama probate of his will, and assert that they are the owners of the $200,000 United States bonds, and that complainants have converted them, etc.

12. That, according to the French law, the defendant Louise Berney, as the widow of the decedent, would have been entitled to a certain portion of his estate, had he been domiciled in France. The portion she would have received under the French law, had the right been claimed or asserted by her, was much more than the value of the $200,000 of United States bonds, and consequently she cannot maintain the action at law in the right or interest of her codefendants, if it be true that decedent was domiciled in France, until an accounting shall have been had between her and the legatees under the will.

13. And that the defendants are all beyond the jurisdiction of the court, and the defendant Louise Berney is an alien and resident of France, where her testimony cannot be taken by any ordinary process because of the laws of France; that the facts are within the knowledge of defendants and a discovery is necessary, etc., etc.

The relief sought was an injunction against setting up or claiming in the action at law or elsewhere that the decedent was not domiciled at Montgomery, Alabama; that his will was not

duly admitted to probate there; and that the administration thereunder of said James Berney, as sole executor, and said St. James, as his attorney, were not valid and binding, and against using in support of such allegations the ancillary letters testamentary, which defendants have fraudulently and unlawfully procured to be issued to or in the name of the defendant Louise Berney, discovery of the facts within defendants' knowledge, etc.

It does not as distinctly appear from the bill itself as from this statement, that the first action [252] at law, referred to, was brought and is pending in the Circuit Court of the United States for the Southern District of New York. It may, however, perhaps be fairly inferred from the allegations of the bill that such is the fact; and as it has been so assumed in the argument of the cause, no question is made upon the sufficiency of the bill in that respect. The only ground here urged in support of the decree and of the demurrer to the bill is that the complainants, upon the case made in the bill, have a complete and adequate defense at law, and that, consequently, they do not bring themselves within the jurisdiction of a court of equity.

If the decedent, Robert Berney, at the time of his death was domiciled in France, and not in Alabama, the letters testamentary issued to his brother James Berney, as executor in Alabama, were void, and the authority given by James Berney to St. James by the power of attorney was also invalid, and the payment made by the appellants to St. James of the proceeds of the sales of the bonds which belonged to the estate does not bind the rightful executor or protect the complainants. The ground of the bill therefore is that, upon these facts, an action at law may be successfully maintained by the appellee as executrix of Robert Berney against the complainants for the value of the bonds. The question is whether the other facts set up in the bill furnish a complete and adequate defense to such an action at law, or whether they establish a right in equity to relief. The rule as laid down by this court in *Boyce's Exr.* v. *Grundy*, 28 U. S. 8 Pet. 210 [7:655], is that "It is not enough that there is a remedy at law. It must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." And, as appears by that case, the principle is as applicable in cases where a complainant resorts to a court of equity to enforce a defense to an action at law, as where he seeks by a bill in equity other relief. This is illustrated by the case of *Grand Chute* v. *Winegar*, 82 U. S. 15 Wall. 373 [21: 174]. That was a case of a bill in equity by a municipal corporation to procure the cancellation of bonds on which an action at law had been brought, alleged to be void in the hands of the holder. The court said: "A judgment against Winegar in the suit brought by him would be as conclusive upon [253] the invalidity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent future deception as perfectly and thoroughly as would a judgment in the equity suit. Under such circumstances, there is no authority for bringing this suit in equity."

The ground of relief alleged in the present bill is that by her acts and conduct the appellee has estopped herself, as against the complainants, from asserting any fact which annuls the executorship of James Berney under the Alabama probate, and the authority of St. James as his attorney in fact. Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is not meant thereby that they are cognizable only in courts of equity, for they are commonly enforced in actions at law, as was fully shown in *Dickerson* v. *Colgrove*, 100 U. S. 578 [25:618]. But it does not follow, because equitable estoppels may originate legal as distinguished from equitable rights, that it may not be necessary in particular cases to resort to a court of equity in order to make them available. All that can properly be said is that, in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right. Such a case is one for equitable interposition.

A close analogy is found in the doctrine of equitable set-off. The rule regulating the right of set-off is the same both at law and in equity; and yet there are many cases where set-offs not permissible at law may be enforced in equity. As was said by *Mr. Justice* Story in *Green* v. *Darling*, 5 Mason, 201, 209: "Now, the general rule in equity is, like that at law, that there can be no set-off of joint debts against separate debts, unless some new equity justify it. Such an equity may arise under circumstances of fraud; or where the party seeking relief is only a surety for a debt really separate; or where there are a series of transactions in which [254] joint credit is given with reference to the separate debt." * * * P. 212. "Since the statutes of set-off of mutual debts and credits courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts; they have rarely if ever broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to." In *Downer* v. *Dana*, 17 Vt. 518, *Judge* Redfield said: "Although a court of equity will not, any more than a court of law, allow a set-off of joint debts against separate debts, yet there are many exceptions. One important exception is where the debts are in reality mutual, although not so in form, as where one of the joint debtors is a mere surety." In *Smith* v. *Felton*, 43 N. Y. 419, the court said: "Equity will look through the form of the transaction, and adjust the equities of the parties with a view to its substance, rather than its form, so long as no superior equities of third persons will be affected by such adjustment." In such cases, equity looks to the beneficial ownership of the debt. Kerr, Injunctions, 64, chap. 4, sec. 5.

The principle of these cases applies, we think, to the present. The ground of equity jurisdiction asserted in the bill is that the estoppel relied on would be good at law as against Louise Berney in her individual right,

but not against her in her representative capacity as executrix of the estate of her deceased husband under the New York letters testamentary; but that it is good against her in equity in that capacity to the extent of her own individual interest, and the interest of any distributees of the estate equally bound thereby, in the fund which she is seeking as executrix at law to recover. She sues at law as executrix for the purpose of recovering a sum in dispute for the general benefit of the estate to be applied to the payment of creditors, legatees, and other distributees. Under the law of France as widow, and under the will as beneficiary, she is individually entitled to some as yet undetermined portion of the assets of the estate, after the payment of creditors, if there are any [255] unpaid. Others named as defendants, similarly bound by the transactions relied upon as an estoppel, are also beneficially interested in the distribution of the estate in some yet unascertained proportions. There may be others entitled to some portion of the estate on distribution, in respect to whom the defense relied upon does not apply. As between them and the appellee and other beneficiaries it may be necessary to have an account of what they have received, and of what they are still to receive, and an adjustment upon equitable grounds, based on the right of the appellants to enforce the recognition of their payment to St. James as an agent whose authority the appellee and some of the other distributees cannot in equity be allowed to question. In the action at law, the appellee represents the whole estate, and everyone interested in its collection and distribution. It may very well happen, therefore, that in the action at law the right to prove the facts on which the estoppel rests may be questioned and denied, on the ground that the plaintiff in the action at law is not bound as executrix for what she did and assented to in her character as widow and legatee.

On this ground, therefore, and because it appears to be altogether uncertain whether the appellants can avail themselves in the action brought against them at law of the defense asserted in this bill, and admitted by the demurrer to be true, we think the demurrer should have been overruled, and the defendant required to answer. For error in this particular *the decree of the Circuit Court is reversed, and the cause remanded, with directions to take further proceedings therein as equity and justice may require. It is accordingly so ordered.*

True copy. Test:
James H. McKenny, Clerk, Sup. Court, U. S.

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[432] MAURICE GANDY, *Appt.*,

v.

E. M. MARBLE, as Commissioner of Patents, AND HIS SUCCESSOR in Office as Such, for the Time Being.

(See S. C. Reporter's ed. 432-440.)

Patent law—application—limitation under statute—application to proceeding by bill in equity.

1. Under section 4894, R. S., an application for a patent is regarded as abandoned if the applicant fails to prosecute the same within two years after any action therein of which notice shall have been given him. This limitation affects a proceeding by bill in equity under section 4915, R. S., on the refusal to grant an application for a patent.

2. The presumption of abandonment, under section 4894, R. S., unless it is shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity, as in regard to any other part of the application.

[No. 277.]

Argued Apr. 29, May 2, 1887. Decided May 27, 1887.

APPEAL from the Supreme Court of the District of Columbia. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **A. J. Willard** and **Amos Broadnax**, for appellant.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the plaintiff in a suit in [433] equity brought in the Supreme Court of the District of Columbia against the Secretary of the Interior and the Commissioner of Patents, from a decree of the General Term of that court dismissing the bill. The suit was brought by Maurice Gandy against H. M. Teller, as Secretary of the Interior, and E. M. Marble, as Commissioner of Patents. The bill was founded upon section 4915 of the Revised Statutes, which provides as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The facts of the case are these: On the first of December, 1877, Gandy filed in the Patent Office an application for a patent for "improvements in belts or bands for driving machinery." The application was rejected on the merits. After due proceedings, an appeal was taken to the Commissioner of Patents in person, who, on the 7th of April, 1879, affirmed the decision rejecting the application. Gandy appealed to the Supreme Court of the District of Columbia, which, on a hearing, and on the 30th of January, 1880, dismissed the petition of Gandy, and directed that a copy of its decree be transmitted to the Commissioner of Patents. The bill states that the ground of the action of the Patent Office and of the Supreme Court of the District

of Columbia in rejecting the application was that the invention was not patentable, having been anticipated in prior patents. The bill alleges that the application was erroneously rejected, and prays that the court will hear and determine the right of the plaintiff to a patent for what he claims, or for such parts thereof as he may be justly entitled to, and will decree accordingly.

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The bill was filed on the third of May, 1883. A subpœna was issued upon it, and served upon the Secretary of the Interior and the Commissioner of Patents, on the 5th of May, 1883. On the 19th of October, 1883, the solicitor for the plaintiff served on the Secretary of the Interior and the Commissioner of Patents, in person, a notice that he would, on the next day, move the court for leave to enter their default in the case, and thereupon to proceed with the cause *ex parte* to final hearing. On the 20th of October, 1883, the court made an order setting forth that the process of the court and a copy of the bill had been duly served upon the defendants, that they had not appeared or answered, and that, on proofs of service of the above named motion, no one appearing for the defendants, it was ordered that the plaintiff have leave to enter the default of the defendants and to proceed with the cause *ex parte*, and that he have sixty days to take and put in his proofs. It also specified the officers before whom proofs might be taken. Documentary and oral proofs were put in, the former including a copy of the proceedings in the Patent Office by which it appeared that the date of the last proceeding in the application was the making of the decree of January 30, 1880, by the Supreme Court of the District of Columbia. No one appeared for the defendants on the taking of any of the proofs. On the 14th of April, 1884, the Supreme Court, in Special Term, no one appearing for the defendants, made an order that the cause be heard in the first instance by the General Term. On the 30th of April, 1884, Benjamin Butterworth, having succeeded Mr. Marble as Commissioner of Patents, moved the court, in General Term, to dismiss the bill and set aside the order entering the default of the defendants, and for leave to make a defense in the cause, assigning as grounds for the motion that the Secretary of the Interior was not a proper party to the suit; that Mr. Butterworth had succeeded Mr. Marble as Commissioner of Patents; and that the application for the patent had been abandoned by reason of the failure to prosecute the same within two years after the last action thereon, of which notice was duly communicated to the applicant. The court in General Term made an order allowing the plaintiff to amend his bill, striking out the name of the Secretary of the Interior as a defendant and adding as a defendant the successor in office of Mr. Marble. On the same day, the court in General Term made a decree, on a hearing of counsel for both parties, dismissing the bill, with costs. From that decree the plaintiff has appealed to this court.

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We are of opinion that this decree must be affirmed. It is provided by section 4894 of the Revised Statutes as follows:

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"Sec. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application; and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The applicant failed to prosecute his application within two years after the last action therein, of which notice was given to the applicant. The decree of the Supreme Court of the District of Columbia was made on the 30th of January, 1880, and this bill was not filed until the third of May, 1883. No excuse for the laches and delay is set up in the bill, and none is shown in the proofs, nor is it alleged in the bill that the delay was unavoidable. Although, as was said by this court in *Butterworth* v. *U. S.* 112 U. S. 50, 61 [28:656, 659] (citing *Whipple* v. *Miner*, 15 Fed. Rep. 117; *Ex parte Squire*, 8 Ban. & Ard. 133; and *Butler* v. *Shaw*, 21 Fed. Rep. 321), the proceeding by bill in equity, under section 4915, on the refusal to grant an application for a patent, intends a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits, yet the proceeding is, in fact and necessarily, a part of the application for the patent. Section 4915 declares that the judgment of the court, if in favor of the right of the applicant, is to be a judgment that the applicant "is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear;" and that, if the adjudication be in favor of the right of the applicant, it shall authorize the commissioner to issue the patent, on the filing in the Patent Office, by the applicant, of a copy of the adjudication, and on his "otherwise complying with the requirements of law." One requirement of law is, by section 4894, that the application shall be regarded as abandoned if the applicant fails to prosecute the same within two years after any action therein of which notice shall have been given to him, "unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." All that the court which takes cognizance of the bill in equity, under section 4915, is authorized to do is to adjudge whether or not "the applicant is entitled, according to law, to receive a patent," and, after an adjudication in his favor to that effect, the commissioner is not authorized to issue a patent unless the applicant otherwise complies with the requirements of law. In the present case, there would be no compliance with the requirements of law, in view of the delay for more than two years, unless it be shown to the satisfaction of the court that the delay was unavoidable. The jurisdiction of the application being transferred, *pro tanto*, to the court, by virtue of the bill in equity, it cannot adjudge that the applicant is entitled, according to law, to receive a patent, unless he shows to the satisfaction of the court that the delay was unavoidable, under an allegation to that effect in the bill. The presumption of abandonment, under section 4894, unless it is

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shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity as in regard to any other part of the application, whether so much of it as is strictly within the Patent Office, or so much of it as consists of an appeal to the Supreme Court of the District of Columbia under section 4911. The decision of the court on a bill in equity becomes, equally with the judgment of the Supreme Court of the District of Columbia on a direct appeal under section 4911, the decision of the Patent Office, and is to govern the action of the commissioner. It is, therefore, clearly a branch of the application for the patent, and to be governed by the rule as to laches and delay declared by section 4894 to be attendant upon the application.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[518] GEORGE A. MORRISON, ET AL., *Appts.*,
v.
JOHN DURR, ET AL.

(See S. C. Reporter's ed. 518, 519.)

Practice — answer under oath — sufficiency of evidence to overcome — sales — fraud.

1. An answer under oath denying each and all of the allegations of fraud contained in the bill must be overcome by the satisfactory evidence of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another, before the complainant can be granted the relief asked.

2. This court affirms the decree of the court below dismissing the bill, the evidence not being sufficient to justify a reversal.

[No. 270.]

Argued April 27, 28, 1887. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the District of California. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Messrs. **Eppa Hunton** and *W. C. Belcher*, for appellants.

Mr. **Edward J. Pringle**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity brought by several judgment creditors of the mercantile firm of Kennedy & Durr, to set aside a sale of the goods of the firm to Charles McDermot, under executions on judgments in his favor, on the ground of fraud, and to have the property and its proceeds in the hands of McDermot subjected to the payment of the amounts due them respectively. The bill called for answers under oath, and McDermot answered accordingly, denying each and all of the allegations of fraud which were made against him. This being responsive to the bill, his denials must be overcome by the satisfactory evidence of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another, before the complainants can be granted the relief they ask. No such proof has been made. We have looked carefully through the whole evidence, and, while it is full of circumstances calculated to excite suspicion, there is not enough to justify us in reversing the decree of the court below dismissing the bill. The questions involved are principally of fact, [519] which it would serve no useful purpose to consider at length in an opinion.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROXANA SIMONTON, EXTX. of ROBERT F. SIMONTON, Deceased, *Appt.*, [220]
v.
HIRAM SIBLEY AND PAUL P. WINSTON, Assignee in Bankruptcy of LANCASTER, BROWN & Co.

(See S. C. Reporter's ed. 220-231.)

Partnership — settlement of accounts — sale of partnership property by a member of the firm — proceeds held as collateral security for debts of copartners to himself — construction of contract — objection, not taken below — jurisdiction.

Upon a bill for a settlement of the accounts of a partnership, formed June 20, 1872, between Hiram Sibley, R. F. Simonton and others, for the purpose of speculating in certain railroad bonds and stock, it is *held:*

a. That, under a certain clause in the partnership agreement, Sibley was not required immediately to apply the proceeds of a sale of the bonds and stock, or of a foreclosure of the mortgage securing the bonds, to the payment of the debts of his copartners to himself;

b. That he might hold the whole proceeds of such sale or foreclosure, just as he had previously held the bonds and stock, as collateral security for the payment of said debts, leaving the title to said proceeds in the partners respectively, in the proportions determined by the partnership agreement;

c. That Sibley is not chargeable with the par value of certain stock, which is now worthless, received by him on account of a sale of the bonds and stock; and,

d. That an objection, not taken below, that the bill cannot be maintained because the evidence shows an account stated on which an action at law would lie, is not supported by the evidence.

[No. 97.]

Argued Dec. 16, 1886. Decided May 27, 1887.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was a bill in equity by Hiram Sibley, a citizen of New York, and Paul P Winston, assignee in bankruptcy of Lancaster, Brown & [221] Co., and a citizen of Virginia, against the executrix of Robert F. Simonton, a citizen of North Carolina, for a settlement of the accounts of a partnership formed June 20, 1872, by Sibley, Simonton, and Lancaster, Brown & Co., for the purpose of speculating in certain railroad bonds and stock, as shown in the two following agreements signed by them:

"New York, June 19, 1872. This agreement

between Hiram Sibley, of Rochester, R. F. Simonton, of North Carolina, and Lancaster, Brown & Co., of New York, *witnesseth:* That the said Sibley agrees to sell to the said Simonton one half interest in all his right and title to $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company now held by him ($500,000 of said bonds being signed by only one trustee), and now in hands of Lancaster, Brown & Co. for safe keeping, and eight thousand one hundred and fifty-eight shares of stock in said company, for the sum of $135,633, payable on the 14th day of March, 1873, and the said Simonton agrees to buy the said interest and to pay as aforesaid; and the said Sibley also agrees to sell the said Lancaster, Brown & Co. one fourth of all his right and title to the said bonds and stock, for the sum of $67,817, payable on 14th March, 1873, and the said Lancaster, Brown & Co. agree to buy the same and to pay as aforesaid. It is expressly understood that the aforesaid bonds and stock sold each party are to be considered as held by Hiram Sibley as collateral security for the prompt payment of the said sums of money, and the whole amount of bonds and stocks shall be held together, and that neither party to this contract shall sell or in any way dispose of the whole or any part of his interest in the same, without the consent of all of the other parties. But Hiram Sibley shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply the proceeds to the payment of said sums due to him, allowing a rebate at the rate of 7 per cent per annum, if the payment shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be [222] borne by the parties in interest, in proportion to the amount of bonds and stock held by each; and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively."

"New York, June 20, 1872. Mr. Hiram Sibley having this day sold to R. F. Simonton one half of his interest in $1,057,000 first mortgage bonds of the Western North Carolina Railroad Company, and eight thousand one hundred and fifty-eight shares of the stock of said company, and to Lancaster, Brown & Co. one fourth interest in said bonds and stock, he himself holding the remaining one fourth interest, it is mutually agreed between all the parties that from any profits arising from the sale, foreclosure, or any other disposition of said bonds and stock, $25,108.75 shall be first set apart to be divided in three equal parts, Hiram Sibley, R. F. Simonton, and Lancaster, Brown & Co. each to have one third; from any profits remaining there shall be first paid to Lancaster, Brown & Co. the commission by them for sale of bonds and tax, amounting to $1348.20, and to the Western North Carolina Railroad Company $881.27 due to said company, and any balance remaining shall be divided as follows: Hiram Sibley one fourth; R. F. Simonton one half; Lancaster, Brown & Co. one fourth. In case of loss in this adventure, the amount due to Lancaster, Brown & Co. of $1,348.20, and to the Western North Carolina Railroad Company of $881,27, shall be paid by each of the parties in proportion to their interest, and in the same proportion any deficiency that may exist in the proceeds necessary to return to the said Hiram Sibley the sum of $271,266."

The other material facts, appearing by the master's report and the evidence taken in the case, were as follows:

Sibley brought a suit to foreclose the mortgage; and on November 7, 1872, by contract in writing with one Wilson, agreed to sell him the [223] aforesaid bonds and stock, and his interest in that suit, for the sum of $370,000, and acknowledged the receipt of $100,000 in part payment, but in fact received instead stock of the Southern Railway Security Company of this amount at its par value, which afterwards became worthless.

Sibley testified that he received this stock on the joint account of himself, Simonton, and Lancaster, Brown, & Co. Lancaster, who had obtained his discharge in bankruptcy, testified that he knew and informed Simonton that this stock had been so received; and that Simonton was kept by him fully informed of all negotiations pending and concluded from time to time for the sale of the bonds and stock of the partnership, and personally approved of them.

On April 25, 1874, Simonton, in a letter to Lancaster, Brown & Co., spoke of the pending proceedings for foreclosure, and said: "The trade with Wilson was a bad one; but we must stick to it, as Mr. Sibley made it in good faith."

On October 3, 1874, Simonton and Lancaster, Brown & Co. signed and sent to Sibley this power of attorney:

"New York, October 3, 1874. *Whereas*, we the undersigned, in connection with Hiram Sibley, Esq., became the purchaser of $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company; and *whereas*, the said Sibley furnished nearly the whole amount of money paid for said bonds, and has not required us to pay him for our proportion of said cost, although the delay in realizing on said bonds has been much greater than was expected; and *whereas*, appreciating his liberality, and being anxious that he should recover his money thus invested in the shortest time possible, we have heretofore left to him the management of the adventure, we hereby authorize and request him to continue to direct the foreclosure proceedings against the said railroad company, or to take such other action, by sale of bonds or otherwise, as may in his judgment appear for the best interest of all concerned, hereby assuring him that whatever course he may deem best will be satisfactory to us."

On October 27, 1874, Wilson having failed to [224] carry out his contract by paying the rest of the consideration, Sibley sold the aforesaid bonds and stock of the Western North Carolina Railroad Company, subject to any claim of Wilson, to one Matthews for $270,000 paid in cash, with a stipulation that Sibley in any event should retain the $100,000 received by him from Wilson in stock of the Southern Railway Security Company.

On October 31, 1874, Sibley received on this stock a stock dividend of 50 per cent and a cash dividend of $3,500.

On December 24, 1874, Lancaster wrote a letter to Simonton, which was received, in which he said: "Mr. Sibley sold out to Mr. Matthews for $270,000, but in order to induce him to purchase had to lend him $200,000. We enclose a statement showing figures, as near as we can give them, of your indebtedness to Mr. Sibley and to ourselves, growing out of that transaction. To Mr. Sibley you will owe $14,364; to us $1,292.46. And Mr. Sibley will have to transfer to you, upon the payment of the aggregate amount, say $15,656.46, $75,000 of Southern Railway Security stock. That amount of that stock cannot be sold now to realize as much as $15,000, but it is said that it is intrinsically worth 25 cents in the dollar. We have written Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I enclose."

In the statement enclosed, the amount due from Simonton to Sibley was made up by charging Simonton with the sum of $135,633, which he had agreed to pay Sibley by the agreement of partnership, and interest from March 14, 1873, to October 31, 1874, and crediting him as of the latter date with $135,000, half the proceeds of the sale to Matthews, and with half the cash dividend of $3,500 received by Sibley.

Lancaster testified that this statement was correct; and that Simonton made no objection to it in a conversation which they afterwards had in reference to the state of accounts between the parties to the adventure.

On February 23, 1875, Sibley drew up and sent to Simonton an account like that sent by Lancaster, Brown & Co., except in crediting Simonton with half of the interest from March 14, 1873, to October 31, 1874, on the cash dividend, and charging him with half of certain expenses, thereby reducing the balance to $14,252.94. [225]

On December 17, 1875, Lancaster wrote to Simonton, saying: "Mr. Sibley is here, and seems very much annoyed at not hearing from you in regard to your indebtedness to him growing out of that Western North Carolina Railroad bond transaction. He says he is not inclined to give you trouble, and is willing to make a liberal settlement; but a settlement he must insist on, and hopes you will not force him to bring suit against you."

On January 10, 1876, Simonton replied: "Your letter, with Mr. Sibley's request, received. I have been an invalid all last year, and Col. Tate has all my papers, and promised me to go to New York, see you and Mr. Sibley and make a settlement. He has not done so. I have forwarded your letter to him. I hope he will attend to this case. There is no use of a suit; all can be settled without."

Simonton died in 1876, and this bill was filed March 5, 1877.

The account rendered by Sibley to Simonton as aforesaid was adopted by the master as the true statement of accounts between them.

The defendant excepted to the master's report, "in that he did not charge the complainant, Hiram Sibley, with $100,000 of Southern Railway Security stock, with interest at 7 per cent, which the evidence shows the said Sibley received as cash at par value."

The circuit court overruled this exception and confirmed the master's report, and afterwards, upon the report of a special master showing that Simonton's estate was insolvent, entered a final decree in favor of Sibley for the sum of $5,191.85. The defendant appealed to this court.

Mr. **S. F. Phillips,** for appellant.
Mr. **William E. Earle,** for appellees.

Mr. Justice **Gray** delivered the opinion of the court: [228]

The object of this bill is the settlement of the accounts of a partnership, the members of which were Sibley, Simonton, and the firm of Lancaster, Brown & Co.

By the original agreement in writing, dated June 19, 1872, which took the place of articles of partnership, the partnership property was to consist of a large quantity of bonds and stock of the Western North Carolina Railroad Company, previously held by Sibley; Simonton bought one half of Sibley's interest therein for the sum of $135,633, and Lancaster, Brown & Co. bought one fourth of Sibley's interest for $67,817; Sibley was to hold the same as collateral security for the payment to him of those sums; the whole amount of the bonds and stock was to be held together, and neither partner was to sell or dispose of the whole or any part of his interest without the consent of his copartners; but there were provisions authorizing Sibley to sell the whole property of the partnership, which will be considered presently.

Early in November, 1872, Sibley made a contract with Wilson to sell him the Western North Carolina Railroad bonds and stock, belonging to the partnership, for $100,000 in stock of the Southern Railway Security Company, which Wilson transferred to him, and $270,000 in cash, which Wilson did not pay; and in the latter part of October, 1874, Sibley sold the Western North Carolina Railroad bonds and stock to Matthews for the like sum of $270,000 paid in cash, with a stipulation that Sibley should retain the $100,000 of Southern Railway Security stock that he had received from Wilson. Sibley never received any money from this stock, except one cash dividend of $3,500.

The master has treated this stock as partnership property, and has charged Simonton's estate with his aforesaid debt to Sibley of $135,633, and interest, and credited him with $136,750, half of the sums received by Sibley in cash as aforesaid, showing, with the interest and expense account, a balance due Sibley of something more than $14,000.

The argument of the appellant, that Sibley should have been charged with the $100,000 of stock of the Southern Railway Security Company at its par value, is based upon the theory that Sibley, in selling the partnership property, acted, and was authorized to act, only as a creditor of his copartners, and not as a partner on behalf of the partnership. [229]

It cannot be denied that some of the pro-

visions of the original agreement of partnership are consistent with this theory.

The agreement provides that Sibley "shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply the proceeds to the payment of the said sums due to him." If this were all, there might be some difficulty in construing Sibley's authority to sell as absolute and unqualified; and his "privilege of selling" might perhaps be considered as so coupled with a duty to "apply the proceeds" of any sale "to the payment of the said sums due to him," that he would be bound, if he sold the property, to apply the proceeds at once to the payment of those sums.

The agreement of June 19 next provides that Sibley may, if he thinks best, proceed to foreclose the mortgage by which the bonds were secured, "and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held." This provision, again, if it had stopped here, might possibly have been understood as intended only to affirm the right of the partners to share, according to their respective interests, in the proceeds of either a foreclosure or a sale—the debt to Sibley, as well as the incidental expenses, being first paid out of those proceeds.

But this provision goes on and ends with these words: "but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively." This clause, taken in connection with what goes before, cannot possibly mean that it is only the net proceeds, after deducting out of them the sums due to Sibley from his copartners, together with the incidental expenses, in the event of a foreclosure, or after deducting the sums due him from his copartners in the event of a sale, that are to be held by him "as collateral security for the payment of the aforesaid sums respectively;" for, after an application of the proceeds of a sale to the payment of those sums, either those sums would have been wholly paid if the proceeds were sufficient to pay them, or if they were insufficient, no proceeds would remain to be held as collateral security. The only reasonable construction of the clause is that Sibley, instead of immediately applying the proceeds, either of a sale or of a foreclosure, to the payment of the debts of his copartners to himself, may hold the whole proceeds, just as he previously held the bonds and stock, as collateral security for the payment of those debts, leaving the title to the proceeds after the sale or foreclosure, as the title to the bonds and stock was before, in the partners respectively, in the proportions determined by the partnership agreement.

[230]

The supplemental agreement of June 20, 1872, also, making special provisions for the distribution of "any profits arising from the sale, foreclosure, or any other disposition of said bonds," clearly implies, by the use of the word "profits," that any sale by Sibley might be made by him as a partner on behalf of the partnership, and not merely as a creditor enforcing his collateral security.

The view that the partnership agreement empowered Sibley to sell the property as managing partner, independently of his right as a creditor, is confirmed by the terms of the power of attorney given him by his copartners on October 3, 1874, by which they recited that they had "heretofore left to him the management of the adventure," and authorized and requested him, either to prosecute the proceedings for foreclosure, "or to take such other action, by sale of bonds or otherwise, as may in his judgment appear for the best interest of all concerned."

The Southern Railway Security Company stock is now worthless; and it is not proved, nor even contended, that Sibley neglected any opportunity of selling it and turning it into money. The only exception to the master's report relied on at the argument was that the master had not charged Sibley with this stock at its par value, and interest. Upon the true construction of the partnership agreement, and the proofs in the case, this exception was rightly overruled by the circuit court, because this stock was never received by Sibley as cash, or accepted by him as his own property in part payment of the sums due him from the other partners, but was received and afterwards held by him as property of the partnership, belonging to all the partners in the proportions stipulated in the original agreement.

[231]

The further objection has been taken for the first time in this court, that the bill cannot be maintained, because the evidence shows an account stated between Sibley and Simonton, on which an action at law would lie. It is a sufficient answer to this objection that the evidence does not show, and the master has not found, that an account was rendered by the one party and assented to by the other, but only that Sibley rendered to Simonton a statement of the account between them, which was not treated by either as an account stated, nor ever agreed to or settled, but remained open at the death of Simonton, and until its truth was established by the evidence in this suit against his executrix to settle the accounts of the partnership.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[450]

Z. N. ESTES ET AL., Partners, as ESTES & DOAN, *Appts.*,
v.
S. H. GUNTER ET AL.

(See S. C. Reporter's ed. 450-458.)

Assignment laws of Mississippi—fraud—preferences, allowed—security to sureties—payment of debt due wife—supplies for wife of assignor.

1. The laws of Mississippi allow an insolvent debtor to make a general assignment of his property in which one or more of his creditors may be preferred to others.

2. A deed in the nature of a mortgage, to secure sureties on the grantor's note, does not affect the validity of a subsequent assignment, though made in contemplation of it. The same is true of a payment by the assignor of a debt due his wife before the assignment

3. A fraudulent disposition of property does not of itself impair a subsequent general assignment.

[No. 285.]

Submitted May 3, 1887. Decided May 27, 1887.

APPEAL from the District Court of the United States for the Northern District of Mississippi. Opinion below, 19 Fed. Rep. 714. *Reversed.*

Statement of the case by *Mr. Justice* **Field.**

In March, 1882, one S. H. Gunter, a merchant who had been for many years engaged in business at Sardis, in Mississippi, was largely indebted to the complainants and others; and, being unable to pay them in full, made a general assignment of his property of every description, except such as was exempt from execution, to one S. G. Spain, as trustee, for their benefit, which was recorded the same day. The assignment preferred certain of the creditors, who are named in a schedule annexed. Among them were the complainants, Estes, Doan & Co., merchants at Memphis, in Tennessee. The [451] sum due them was $18,587.68, but they were preferred only to the amount of $10,000. Their claim grew out of advances of cash and supplies furnished to Gunter. There is no question as to its amount or justice. On the same day and immediately preceding the execution of the assignment, Gunter executed a deed of a house and lot in Sardis to one J. G. Hall, as trustee, to secure the firm of Boothe, Rice & Carleton, who were sureties upon his note, held by the bank of Sardis, for $1,000, due on the first of December, 1882. This deed was to be void if the note was paid at maturity; otherwise the trustee was, on the written request of the sureties, to take possession of and sell the property at public auction, after due notice, and apply the proceeds to its payment. Any surplus was to be returned to the grantor. If the property should at any time "become endangered" as a security, the trustee was at liberty to take possession of and hold it until the debt was discharged by payment or by sale of the property; but until demanded by the trustee the grantor was to hold the same subject to the deed of trust. This deed was also recorded on the same day and a few minutes before the assignment.

At the same time Gunter transferred and delivered to several of his clerks and employés certain notes and accounts in payment of his indebtedness to them. It was also in proof that Gunter was hopelessly insolvent; that for twelve days before he made the assignment he knew of his condition and contemplated making the assignment; that during this time he gave to his wife the sum of $900 in payment of an alleged indebtedness to her, and she was permitted to take money from the drawer of the store, and that more goods than usual were carried from the store to his house.

Soon after the assignment and deed of trust were recorded the defendants, Bickham & Moore, who were also creditors of Gunter, sued out an attachment against him in the Circuit Court of the United States for the Northern District of Mississippi, which was levied on the property assigned by Gunter to Spain as trustee. This attachment was followed by attachments of other creditors, and the property was seized by the marshal. Spain, the assignee, thereupon renounced his trust and refused further to act. Thereupon the complainants, [452] Estes & Doan, who were much the largest creditors of Gunter, filed their bill against Bickham & Moore and other attaching creditors, setting forth the assignment of Gunter to Spain, his debt to them, the several attachments levied, and the refusal of Spain, the assignee, to act, and praying the court to appoint a trustee in his place, to direct the enforcement of the trust, and to enjoin the attaching creditors from further proceeding with their suits.

Bickham & Moore and other defendants answered, charging that the assignment was fraudulent and void, but admitting that Spain refused to act as trustee or assignee. Proofs were taken, and upon the hearing the court held that the assignment was fraudulent and void, and accordingly entered a decree dismissing the bill with costs. From this decree the complainants have appealed to this court.

Mr. **Luke E. Wright,** for appellants.

Messrs. **H. M. Sullivan, W. V. Sullivan,** and **Edward Mayes,** for appellees.

Mr. Justice **Field** delivered the opinion of the court:

It appears from its opinion in the record that the court below held the assignment of Gunter for the benefit of his creditors to be fraudulent and void on these grounds: 1. Because of the execution of the trust deed to Hall to secure the sureties on his note held by the bank of Sardis. 2. Because of the payment of the $900 to his wife, shortly before the assignment, for a debt which he claims to have owed to her. 3. Because he permitted her to take money from the cash drawer; and 4. Because more supplies than usual were taken from the store to his house shortly before the assignment.

The answer to these objections is readily given, and it appears to us conclusive. The laws of Mississippi allow an insolvent debtor to make a general assignment of his property in which one or more of his creditors may be preferred to others. The assignment is not invalid, therefore, [455] because of the preferences given. In *Eldridge* v. *Phillipson*, 58 Miss. 270, 280, the Supreme Court of that State said: "The right to make a preference results from the dominion which the owner has over his property; it is a part of his proprietorship. The law has not said he shall divide his estate ratably among his creditors. It has left to him the discretion to act as he will, provided only he acts with the honest intent to pay a valid debt, and does not, under cover of such a disposition, stipulate for a benefit to himself."

Nor did the deed to Hall to secure the sureties on the assignor's note affect the validity of the assignment, though made in contemplation of it. Such security might have been provided in the assignment itself. The assignor had a right to use his property to protect parties who had become his sureties, as well as to pay existing debts. Until the assignment he could dispose of his property in any way he may have thought proper, so that he did not thereby defraud any of his creditors.

The court below seems to have concluded that the two instruments, the assignment and

the deed to Hall, should be considered together, and, as the deed contained a proviso that the grantor was to remain in possession of the property until the note matured, and the sureties should request the trustee to take possession of the same, there was such a reservation for the benefit of the grantor as rendered the assignment invalid. The deed was in fact a mortgage of the property to secure against a prospective liability; and in such cases it is usual for the grantor or mortgagor to remain in possession of the property until the maturity of the obligation and a sale of the premises. Standing by itself, the deed was not open to any serious objection. And even that reservation was defeated by the assignment, which included the property in question with other property of the assignor, and provided that the assignee should take possession of the same and sell and dispose of it with all convenient diligence. The assignment was subsequent to the deed and carried all that could in any way be considered as a benefit secured by the deed to the assignor. [456] The creditors were not, therefore, in any way hindered or defrauded by the alleged reservation.

There is nothing in Gunter's payment to his wife of the $900 which can affect the validity of the assignment. Gunter's testimony is all that there was on the subject, and he testifies that she received the money from her grandfather, and that he borrowed it from her and used it. His statement is not contradicted. Under these circumstances he was not blameworthy in paying to his wife the amount he had used belonging to her. But, as counsel well observes, if that payment were fraudulent, it would not vitiate a subsequent assignment. A fraudulent disposition of property does not of itself impair a subsequent general assignment. The assignee may sue for its recovery, and, if successful, it will be for the benefit of the creditors precisely as if it had been included in the assignment. *Wilson* v. *Berg*, 88 Pa. 167; *Reinhard* v. *Bank of Kentucky*, 6 B. Mon. 252.

The same observation may be made as to the alleged taking of money by Mrs. Gunter from the cash drawer, and of his sending supplies from the store to his house. She was a clerk in the store and took the money from the drawer in the course of business, and supplies for Gunter's house were generally taken from the store. It was quite natural, therefore, that he should take needed supplies before the assignment was executed. There is no evidence that the supplies were excessive or unreasonable; but even if they were, that fact would constitute no ground for setting the subsequent assignment aside.

From a consideration of the whole case, we are clear there is no just ground shown by the record for disturbing the assignment. *It follows that the decree below must be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

C. H. GOODLETT, Admr. of SIMON CALLAHAN, Deceased, *Plff. in Err.*, [391]

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 391-412.)

Removal of causes—citizenship—Louisville & Nashville Railroad Company, a Kentucky corporation—action to recover damages to employé—gross negligence—instruction to find for defendant, sustained.

1. The Louisville & Nashville Railroad Company is a Kentucky corporation. Tennessee, by the Act of December 4, 1851, did not create a new corporation but merely granted to said Company a license to exercise within her limits all or some of the powers conferred upon it by the State of Kentucky.

2. An action brought in a Tennessee court by a citizen of that State against said Company is removable.

3. When the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

4. In the case presented it is *held:* that the deceased, an employé of the defendant, was guilty of the grossest negligence in running his hand car into a deep cut where he was injured; that the defendant is not liable under sections 1166-1168 of the Tennessee Code; and that the court properly instructed the jury to find for the defendant.

[No. 184.]

Argued and submitted April 4, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **F. E. Williams**, for plaintiff in error:

The defendant Company was first chartered by the State of Kentucky. It was also chartered by the State of Tennessee; and its status is the same in Tennessee as if it had been originally created by that State, because that State adopted it.

Muller v. *Dows*, 94 U. S. 447 (24: 208); *Uphoff* v. *St. Louis etc. R. R. Co.* 5 Fed. Rep. 547; *R. Co.* v. *Whitton's Admr.* 80 U. S. 13 Wall. 270 (20: 571).

The question is always a question of intent (*R. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 83 (20: 358); and all the statutes which relate to the question must be read by themselves.

R. R. Cos. v. *Schutte*, 103 U. S. 140 (26: 335).

One State can make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction.

Graham v. *Boston, H. & E. R. R. Co.* 118 U. S. 161, 168 (*ante*, 196); *R. R. Co.* v. *Harris*, *supra*.

And this is allowable, for the reason that a corporation of one State has no existence as a legal entity or person in another State, except under and by virtue of its incorporation by the latter State.

Memphis & C. R. R. Co. v. *Alabama*, 107 U. S. 585 (27: 520); *Muller* v. *Dows*, *supra*.

If there is any evidence tending to prove the issue on either side, it is error to withdraw the case from the jury.

Hickman v. *Jones*, 76 U. S. 9 Wall. 197 (19: 551); *Manchester* v. *Ericsson*, 105 U. S. 347 (26: 1099); *U. S.* v. *Tillotson*, 25 U. S. 12 Wheat. 180 (6: 594).

Directions to find for a party can only be given where there is no conflicting evidence.

Klein v. *Russell*, 86 U. S. 19 Wall. 433 (22: 116); *Moulor* v. *Ins. Co.* 101 U. S. 708 (25: 1077).

A case should not be withdrawn from a jury unless the facts are undisputed or testimony so conclusive that a verdict in conflict with it would be set aside.

Conn. Mut. L. Ins. Co. v. *Lathrop*, 111 U. S. 612 (28: 536) *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30 (27: 65).

It is true, the rule is, that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict, so that such verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

Schofield v. *Chicago M. & St. P. R. Co.* 114 U. S. 619 (29: 225).

Mr. **Ed. Baxter,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the Circuit Court of Williamson County, Tennessee, by Simon Callahan, to recover damages for personal injuries sustained by him while in the discharge of his duties as section foreman on a railroad [392] between Nashville, Tennessee, and Decatur, Alabama, which, at the time, was operated by the Louisville and Nashville Railroad Company. The declaration alleges that the defendant is a corporation created by the Legislature of Tennessee, and that the injuries complained of were caused by the negligence and carelessness of that Company, its servants, and agents. In due time, the defendant filed its petition, accompanied by bond in proper form, for the removal of the action into the Circuit Court of the United States for the Middle District of Tennessee—alleging that the plaintiff was a citizen of Tennessee, and that the defendant was a citizen of Kentucky, having its principal place of business in that Commonwealth. The state court made an order recognizing the right of removal, and declaring that no further proceedings be had therein in said suit.

In the circuit court, a motion to remand the cause to the state court—the ground of such motion being that the defendant was a corporation of Tennessee, and, therefore, a citizen of the same State with the plaintiff—was denied. To that action of the court an exception was taken.

Upon the trial of the case the court gave a peremptory instruction to find for the defendant. It also refused to give the instructions asked in behalf of the plaintiff.

The first question presented by the assign- [401] ments of error relates to the refusal by the court below to remand the action to the state court. If the defendant is a corporation of Kentucky, then its right to have the case removed from the state court cannot be denied.

Whether a corporation created by the laws of one State is also a corporation of another State within whose limits it is permitted, under legislative sanction, to exert its corporate powers, is often difficult to determine. This is apparent from the former decisions of this court. To some of those decisions it will be well to refer, before entering upon the examination of the particular Statutes of Tennessee, which it is claimed created the defendant a corporation of that State.

In *Ohio & M. R. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286, 293, 297 [17: 130, 133], it was a question whether that company was not a corporation both of Indiana and Ohio. The company, claiming in its declaration to be "a corporation created by the laws of the States of Indiana *and* [402] Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio," sued Wheeler, a citizen of Indiana, in the Circuit Court of the United States for the District of Indiana. It was incorporated by an Act of the Legislature of Indiana. Subsequently the Legislature of Ohio passed an Act reciting the incorporation of the company in Indiana, and declared that "the corporate powers granted to said company by the Act of Indiana, incorporating the same, be recognized." At a later date the Legislature of Ohio passed an Act authorizing the extension of the company's road to Cincinnati, declaring that the intention of the previous Act "was to recognize, affirm, and adopt the charter of the said Ohio & Mississippi Railroad Company, as enacted by the Legislature of the State of Indiana."

In the opinion of the court it is said "that a corporation by the name and style of the plaintiff appears to have been chartered by the States of Indiana and Ohio," and, therefore, that the company was a "distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio."

In *R. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65, 88 [20: 354, 358], it appeared that the Baltimore and Ohio Railroad Company was incorporated by the State of Maryland for the purpose of securing the construction of a railroad from Baltimore to some suitable point on the Ohio River. Subsequently, Virginia, by a statute, which set out at large the Maryland Act, declared that "The same rights and privileges shall be and are hereby granted to the aforesaid company, in the territory of Virginia, as are granted to it within the territory of Maryland"—the company to be subject to the same pains, penalties and obligations as were imposed by the Maryland Act, and the same rights, privileges and immunities being secured to Virginia and her citizens, except as to lateral roads. Congress, at a later date, passed an Act authorizing the company to extend its road into the District of Columbia, and to exercise "The same powers, rights and privileges, and shall be subject to the same restrictions in the construction and extension of said lateral road into and within the said District, as they may exer- [403] cise or be subject to under or by virtue of the said Act of incorporation in the construction and extension of any railroad in the State of Maryland," etc. Touching the question whether the legislation of Virginia and of Congress created a new corporation, this court said: "In both, the original Maryland Act is referred to, but neither expressly or by implication creates a new corporation. The company was chartered to construct a railroad in Virginia as well as in Maryland. The latter could not be done

without the consent of Virginia. That consent was given upon the terms which she thought necessary to prescribe. * * * The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland body as such, and that body was the same in all its elements and in its identity afterwards as before." Referring to *Ohio & M. R. R. Co.* v. *Wheeler* [*supra*], the court said that, "As the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company, licensed by Ohio, suing a citizen of Indiana in the federal court of that State."

In *R. R. Co.* v. *Vance*, 96 U.S. 450 [24: 752], an Act of the Illinois Legislature, referring to a lease made by the Indianapolis & St. Louis Railroad Company, an Indiana corporation, of a certain railroad in Illinois, belonging to the St. Louis, Alton & Terre Haute Railroad Company, an Illinois corporation, and declaring that "The said lessees, their associates, successors, and assigns, shall be a railroad corporation in this State, under the style of the Indianapolis & St. Louis Railroad Company, and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations," was held not to be a mere license to an Indiana corporation to exert its corporate powers, and enjoy its corporate rights and privileges, in Illinois, but to create the lessees, their associates, successors, and assigns, a distinct corporate body in the latter State. The court said: "It does more; it gives the style by which that corporation shall be known; still further, it does not authorize the complainant corporation [404] to exercise in Illinois the corporate powers granted by the laws of Indiana, but confers by affirmative language, upon the corporation, which it declares shall be a railroad corporation in Illinois, the same or as large, powers, as are possessed by an Illinois corporation, the St. Louis, Alton & Terre Haute Railroad Company, and, in addition, such other powers as are usual to railroad corporations. The Indianapolis & St. Louis Railroad Company, as lessee of the St. Louis, Alton & Terre Haute Railroad Company was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence derived from the Legislature of another State."

In *Memphis & C. R. R. Co.* v. *Alabama*, 107 U. S. 581, 584 [27: 518], the question was as to the citizenship of the corporation against which that suit was brought by the State of Alabama. The State of Tennessee, in 1846, created a corporation by the name of the Memphis & Charleston Railroad Company. The Legislature of Alabama subsequently passed an Act entitled "An Act to Incorporate the Memphis and Charleston Railroad Company." That Act referred to the Act of the Tennessee Legislature, and granted to said company a right of way through Alabama, to construct its road between certain points named, declaring that it should have all the rights and privileges granted to it by the said Act of incorporation, subject to the restrictions therein imposed. The statute contained other provisions of the same general nature, from all of which, however, it was not, as this court observed, made quite clear, whether the company referred to in the body of the Act was the one which the Act in its title purported to incorporate, or the one created by the Tennessee Act and referred to in the preamble of the Alabama Act. But there were other sections expressly referring to the company "hereby incorporated," that is, incorporated by the Alabama Act. The whole of the latter Act, taken together, the court said, manifests the understanding and intention of the Legislature of Alabama that the corporation, which was thereby granted a right of way to construct through that State a railroad "was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the Legislature of Tennessee."

In the recent case of *Pennsylvania R. R. Co.* [405] v. *St. Louis, A. & T. H. R. R. Co.* 118 U. S. 295, 296 [*ante*, 84], the general question now before us received careful consideration. It was there said: "It does not seem to admit of question that a corporation of one State, owning property and doing business in another State, by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may, by permission of the State of Indiana, extend its road a few miles within the limits of the latter, or indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an Act of the Legislature conferring upon this corporation of Illinois by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the State which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence, under laws of another State, to exercise its functions in the State where it is so received. To make such a company a corporation of another State the language used must imply creation, or adoption in such form as to confer the power usually exercised over corporations by the State, or by the Legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers." So that the essential inquiry here must be, whether, within the doctrine established in the cases we have cited, the State of Tennessee, by [406] her legislation, granted a mere license to the Louisville and Nashville Railroad Company to exercise within her limits all or some of the powers conferred upon it by the State of Kentucky, or established a new corporation over which she could exert such direct control and authority as is usually exerted by a State over corporations of her own creation.

The solution of this question depends upon the intent of the Legislature of Tennessee, as gathered from the words used in the statutes now to be examined.

We lay out of view the Acts of the General Assembly of Tennessee, approved February 1, 1850, incorporating a company by the name of the Louisville & Nashville Railroad Company, and the Act of February 9, 1850, entitled "An Act to Incorporate the Nashville & Louisville Railroad Company." It appears in evidence that no organization was effected under those Acts; and we do not understand the counsel for the plaintiff to rely upon either of them as showing that the present defendant is a corporation of Tennessee.

By an Act of the General Assembly of Kentucky, approved March 5, 1850, a corporation was created by the name of the Louisville & Nashville Railroad Company, with power to construct a railroad "from the City of Louisville to the Tennessee line, in the direction of Nashville;" and by an Act of the same body, approved March 20, 1851, authority was given to connect said road "with any railroad extending to Nashville, on such terms and conditions as the two companies may, from time to time, agree on. for the through transportation and travel of freight and passengers."

On the 4th of December, 1851, the General Assembly of Tennessee passed an Act, the *title* of which is "An Act to *Incorporate* the Louisville and Nashville Railroad Company." As the question of citizenship depends mainly upon the construction of that Act, it is given in full, as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the right of way for the construction of a railroad from the line between the States of Kentucky and Tennessee, so as to connect the cities of Louisville and Nashville by railroad communication, be, and is hereby, granted to the Louisville and Nashville Railroad Company, incorporated by the Legislature of Kentucky, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities set forth and prescribed in the charter granted to said Company by the Legislature of Kentucky, and approved March the 5th, 1850, and the amendments thereto passed by said Legislature, and approved March the 20th, 1851, for the term of nine hundred and ninety-nine years, except as further provided in this Act. [407]

"Sec. 2. *Be it further enacted*, That said Company shall construct said railroad from the boundary line between said States, beginning at said line where it shall be intersected by that part of said railroad which is to be within the State of Kentucky, to (a point within or convenient to) the City of Nashville; *Provided*, That in the construction of said railroad said Company shall commence at each end of the line at the same time, and continue the work from each end until said railroad is completed; *Provided further*, That said Company shall not be compelled to use the capital stock subscribed and paid in by the citizens, companies, corporations, or counties in the State of Kentucky in the construction of that part of said railroad lying in the State of Tennessee until the part thereof lying in Kentucky is completed.

"Sec. 3. *Be it further enacted*, That so soon as said Company shall have completed five miles of said railroad from Nashville they may commence and prosecute their business, as provided in the twenty-first section of said charter; that the tariff of charges for transportation of passengers, and for goods, wares, merchandise, and other articles and commodities, shall be equal on all parts of said railroad in proportion to distance, and that equal facilities for the transportation of the same in either direction shall be furnished.

Sec. 4. *Be it further enacted*, That the stockholders in the State of Tennessee shall be entitled to be represented in said Company by directors residing in Tennessee in proportion to their stock, to be chosen by the stockholders of the Company in the manner and at the time the other directors are chosen.

"Sec. 5. *Be it further enacted*, That nothing in this Act, or in said charter or amendments thereto, shall be so construed as to prohibit the Legislature of Tennessee from passing any law authorizing the construction of railroads within this State parallel to, crossing, or to unite with said railroad from Louisville to Nashville, and the State of Tennessee reserves the right so to do. [408]

"Sec. 6. *Be it further enacted*, That the twentieth section of said charter and the fourth section of the amendments thereto shall be void and of no force or effect within this State.

"Sec. 7. *And be it further enacted*, That the twenty-third, twenty-fourth, twenty-fifth and twenty-ninth sections of the Act of 11th December, 1845, incorporating the Nashville and Chattanooga Railroad Company, be, and are hereby, made a part of the said charter of the Louisville and Nashville Railroad Company, to be in force within this State, and that this bill shall take effect from and after its passage; *Provided*, That the Commonwealth of Kentucky shall grant to the State of Tennessee or to such companies as the General Assembly may charter, the right of way from Nashville to intersect with the Lexington and Danville Railroad at Danville, Harrodsburg, or such other point on that road as the Company may designate, provided it does not interfere with any vested rights of the citizens of Kentucky, with the like powers and privileges granted to this Company.

"Sec. 8. *Be it further enacted*, That the Company shall bring said railway to the City of Nashville, or South Nashville, and locate their depot convenient to the Nashville and Chattanooga Railroad, so as to form the connection."

Some stress is laid upon the title of that Act, as indicating a purpose to create a corporation, and not simply to recognize an existing one of another State, and invest it with authority to exert its functions within the State of Tennessee. While the title of a statute should not be entirely ignored in determining the legislative intent, it cannot be used "to extend or restrain any positive provisions contained in the body of the Act," and is of little weight, even when the meaning of such provisions is doubtful. *Hadden* v. *Collector*, 72 U. S. 5 Wall. 110 [18: 519]. Looking, then, at the body of the Tennessee Act of December 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another [409]

State, in such form as to establish the same relations, in law, between the latter corporation and the State of Tennessee, as would exist in the case of one created by that State. The Act grants to a named company "incorporated by the Legislature of Kentucky" a right of way, within designated limits, for the construction of a railroad, with all the rights, powers and privileges, and subject to all the restrictions and liabilities prescribed in its original and amended charter, "except as further provided in this Act." The remaining sections of the Act are, in form, additions and alterations of the charter of the Kentucky corporation; but, in effect, they only prescribe the terms and conditions upon which that corporation was given a right of way and permitted to construct a railroad and exercise its powers in Tennessee.

If the Legislature of the latter State intended to do anything more than grant a license to a corporation of another State to construct a railroad and exert its corporate functions within her limits, it was intended to bring into existence a corporation subject to the paramount authority of Tennessee as were other corporations created by her laws, certain sections of the Act incorporating the Nashville and Chattanooga Railroad Company would not have been made a part of the charter of the Louisville & Nashville Railroad Company, to be in force simply "in this [that] State," but would have been incorporated into the Company's charter, to be in force wherever and whenever it exerted the powers granted to it. And the same observation applies to the proviso in the 7th section of the Act of December 4, 1851, which requires that Kentucky should grant to Tennessee, or to such companies as the latter State might "charter," the right of way from Nashville to intersect with a named road at certain points in Kentucky, with the like powers and privileges granted by Kentucky to the Louisville & Nashville Railroad Company.

[410] Taking the whole of that Act together, we are satisfied that it was not within the mind of the Legislature of Tennessee to create a new corporation, but only to give the assent of that State to the exercise by the defendant, within her limits, and subject to certain conditions, of some of the powers granted to it by the State creating it.

This construction is not, if indeed it could be, affected by the subsequent legislation of Tennessee. While the titles of the acts of January 16, 1852, December 15, 1855, and March 20, 1858, give some slight support to the position taken by the plaintiff, the Acts themselves do not militate against the conclusions here expressed. In legal effect, they only impose other terms and conditions than those prescribed in the original Act, upon the exercise by the defendant, within Tennessee, of the powers and privileges conferred by its charter, as granted by Kentucky.

Upon the authority of the cases cited, and for the reasons herein stated, we are of opinion that the Louisville & Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee, and, consequently, that the action was removable, upon its petition and bond, into the Circuit Court of the United States.

It only remains to consider the assignments of error relating to the charge to the jury, and to the refusal of the court to give certain instructions in behalf of the plaintiff. The bill of exceptions states that "on the trial of this cause the following testimony was submitted to the jury." Then follows the evidence of numerous witnesses for the respective sides, given in narrative form, and the charge of the court. The court, among other things, charged the jury that the plaintiff did not himself exercise reasonable care and prudence, but was guilty of negligence, so that had the people upon the train, or the persons controlled by him, been injured, they could have recovered against his employer for his negligence. "Under the facts proven in this case," the judge said, "were you to give a verdict against the defendant, I should feel bound to set it aside and grant a new trial." In such a state of the case it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the instructions requested by plaintiff's counsel." [411] The bill of exceptions does not, in express words, state that it contains all the evidence introduced at the trial.

Assuming, but without deciding, that the bill of exceptions sufficiently shows that all the evidence is embodied in the record, the question arises whether the court erred in withdrawing the case from the jury, and directing a verdict for the Company. In *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 32 [27: 66], it was said that "Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved;" and that a case should never be withdrawn from them "unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it." So, in *Randall* v. *Balt. & O. R. R. Co.* 109 U. S. 482 [27: 1005], it was declared to be the settled law of this court, "That when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

These authorities sustain the charge to the jury. The evidence makes a case of utter recklessness upon the part of the deceased, who was a section boss of the defendant, charged with the duty of keeping its road in repair between certain points, so that trains could pass over it in safety. He was guilty of the grossest negligence in running his hand car into the deep cut where he was injured, without having sent anyone ahead to watch for, and warn, the passenger train, which he knew was approaching, or would soon reach, that point on the road. But for his negligence in that respect he would not have been injured.

It is said, however, that despite any negligence to be fairly imputed to the deceased, the agents of the Company, who were in charge of the passenger train, might have avoided injuring him had they exercised reasonable dilligence to that end. This position is supposed [412] by counsel to be justified by sections 1166, 1167, and 1168 of the Code of Tennessee, which provide:

Sec. 1298 (1166). "Every railroad company

shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

Sec. 1299 (1167). "Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur."

Sec. 1300 (1168). "No railroad company that observes, or causes to be observed, these precautions, shall be responsible for any damages done to persons or property on its road. The proof that it has observed said precautions shall be upon the company." Code, M. & V., §§ 1298-1300.

Without considering the question whether those sections are intended for the benefit of the general public only, not for the servants of the Company—especially one whose negligence caused or contributed to cause the accident—it is sufficient to say that the court below correctly held that the requirements of the Tennessee Code were complied with by the Company, so far at least as the circumstances attending the injury of the deceased are concerned. A verdict based upon a different view of the evidence should have been set aside, upon motion by the defendant.

The jury having been properly directed, in view of all the evidence, to find a verdict for the Company, it is unnecessary to consider the exceptions taken to its refusal to grant certain instructions asked in behalf of the plaintiff.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[535] THORN WIRE HEDGE COMPANY ET AL., *Plffs. in Err.*,

v.

CASSIUS D. FULLER AND BURT G. PATRICK.

(See S. C. Reporter's ed. 535-543.)

Removal of causes—action of trespass against sheriff—intervention under Minnesota Statutes—sheriff, a necessary party.

An action of trespass against a sheriff for a wrongful seizure of the property of the plaintiff, in which the plaintiff and defendant are citizens of the same State, is not removable upon petition of interveners, who are citizens of another State and who have placed themselves on record as promoters of his alleged trespass, the sheriff being a necessary party defendant. The case is not altered by the fact that, if the intervention was under a certain local statute, the property of the interveners would have to be sold first under a joint judgment against them and the sheriff.

[No. 1871.]

Submitted May 10, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **Charles D. Kerr**, for plaintiffs in error.

The effect of the intervention was to shift from the sheriff to the interveners the entire burden and responsibility of the suit, so far as the official action of the officer is concerned.

Greene v. *Klinger*, 10 Fed. Rep. 689; *Greene* v. *Kingsley*, 10 Cent. L. J. 47; *Texas* v. *Lewis*, 12 Fed. Rep. 1; *Re Iowa & M. Construction Co.* 10 Fed. Rep. 401.

Upon general principles, and independent of the statutes, we claim that when such a bond of indemnity has been given by the execution plaintiff, he thenceforth becomes the substantial defendant between whom and the person claiming the goods levied on, there is a separate controversy.

Beuttel v. *Chicago, M. & St. P. R. Co.* 26 Fed. Rep. 50; *Mayor of N. Y.* v. *Steamboat Co.* 24 Fed. Rep. 817; *Township of Aroma* v. *Auditor*, 9 Biss. 289; *Removal Cases*, 100 U. S. 457 (25: 698).

It is clearly held that if the suit at the time of the removal had assumed such a phase that the resident defendant had become in effect a nominal party merely, while the nonresident defendant was the real party in interest, the case would be removable.

Wood v. *Davis*, 59 U. S. 18 How. 467 (15: 460); *Sioux City etc. R. Co.* v. *Chicago, M. & St. P. R. Co.* 27 Fed. Rep. 771; *Foss* v. *First Nat. Bank of Denver*, 1 McCrary, 474; *Allen* v. *Ryerson*, 2 Dill. 501.

Mr. **Thomas Wilson**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court remanding a suit which had been removed from the District Court of Freeborn County, Minnesota. The facts are these: Cassius D. Fuller and Burt G. Patrick, citizens of Minnesota, doing business as hardware merchants in the City of Albert Lea, began the suit October 12, 1886, against Jacob Larson, sheriff of the county, for trespass, in taking possession of their stock of goods and destroying their business. The sheriff answered, November 13, 1886, to the effect that his taking was under the authority of an execution issued upon a judgment in the same court in favor of the Thorn Wire Hedge Company, an Illinois corporation, against George A. Patrick, and that the goods were the property of the execution debtor, which had been transferred by him to Fuller & Patrick, the plaintiffs, in fraud of the rights of his creditors. [536]

On the same day the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, intervened as defendants in the action, and filed an answer, substantially the same in all respects as that of the sheriff, with the following in addition:

"That in making the levy of said execution and in selling the said property under the same, the said sheriff (Larson) acted under the express direction of said intervener, the Thorn Wire Hedge Company, and upon indemnity furnished him by said Thorn Wire Hedge Company, with said interveners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as sureties and bondsmen, according to the statute in

such case made and provided, and in that behalf said interveners acted, * * * without any malice or want of probable cause or intent to wrong anybody, and solely with intent to obtain payment of a just debt due from said George A. Patrick, and out of the property which he owned and had attempted to cover up, but which really belonged to him. * * * That by reason of said facts, said interveners, the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, acting under the statute in such case made and provided, are the parties primarily liable for the acts and doings of said defendant Jacob Larson, and as such are interested in the matters in litigation in this action and in the success of the defendant therein and in resisting the claim of the plaintiffs therein. Wherefore said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins intervene in this action and pray that said plaintiffs take nothing by this action."

To these answers the plaintiffs replied, and on the 22d of November the interveners presented to the district court their petition for the removal [537] of the suit to the Circuit Court of the United States, in which they state that the plaintiffs and the defendant Larson were citizens of Minnesota, and the interveners and petitioners citizens of Illinois; and,

"5. That such taking, detention, and ultimate sale * * * were all done by said Jacob Larson in his official capacity as such sheriff, and at the request of your petitioners and by virtue of a writ of execution duly allowed and issued out of the District Court of the Tenth Judicial District of the State of Minnesota, for the County of Freeborn, in an action therein pending in that court between said petitioner, the Thorn Wire Hedge Company, as plaintiff, and one George A. Patrick, as defendant, and under indemnity furnished by said Thorn Wire Hedge Company, with said petitioners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as bondsmen and sureties therein to such sheriff, pursuant to the statute in such case made and provided, and to save him harmless from all damages and costs for and on account of so doing; and accordingly said sheriff has duly notified said petitioners to defend this said action; and accordingly said petitioners, pursuant to the statute in such case made and provided, have duly intervened in said action as parties defendant thereto, and have duly made and filed in said action their pleading as such intervening parties defendant.

"6. That, in virtue of said facts, said defendant, Jacob Larson, was at all such times and in all said matters, so far as said plaintiffs are concerned, the mere agent of said petitioners provided for them by law in such cases; and there can be a final determination of the controversy in said action, so far as concerns said petitioners, without the presence of such agent, said defendant Jacob Larson; and, in fact, the real controversy in said action is wholly between said plaintiffs on the one side and said petitioners on the other side; and the same can be fully determined as between them.

"7. That your petitioners have reason to believe, and do believe, that, from prejudice as well as from local influence, they will not be able to obtain justice in said action in said state court.

"Wherefore, said petitioners pray that said action be removed into the United States Circuit Court to be held within and for the District of Minnesota, and herewith present the bond and surety as in such cases required." [538]

Upon this petition an order of removal was made and the suit entered in the circuit court December 11, 1886; and, on the 21st of the same month, it was remanded on motion of Fuller and Patrick. To reverse that order this writ of error was brought.

We have been referred by the parties to the following sections of chapter 66 of the General Statutes (1878) of Minnesota as authority for the intervention of the execution creditor and his sureties in the action:

Sec. 131. "Intervention. Any person who has an interest in the matter at litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the paintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine the issue made by the intervention at the same time that the issue in the main action is decided, and the intervener has no right to delay; and if the claim of the intervener is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto."

Sec. 154. "Claim of property by third person—affidavit—indemnity by plaintiff. If any property levied upon or taken by a sheriff, by virtue of a writ of execution, attachment, or other process, is claimed by any other person than the defendant or his agent, and such person, his agent or attorney, makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof, and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff, on demand, indemnify the sheriff against such claim, by bond executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made; and, notwithstanding such claim, when so made, he may retain such property under levy a reasonable time to demand such indemnity."

Sec. 155. "Plaintiff to be impleaded with [542] sheriff in action against him. If, in such case, the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaint-

iff in such execution, attachment, or other process, shall, on motion of such sheriff, be impleaded with him in such action. When in such case a judgment is rendered against the sheriff and his codefendants, an execution shall be immediately issued thereon, and the property of such codefendants shall be first exhausted before that of the sheriff is sold to satisfy such execution."

The record does not state in direct terms which of the forms of proceeding provided for in these sections was adopted. The interveners claim they went into the suit under sections 154 and 155, and the plaintiffs that it was under section 131. In the view we take of the case this question is quite immaterial. The interveners, in their answer, state in positive terms that Larson in all that he did acted under the express direction of the Thorn Wire Hedge Company and upon the indemnity furnished him for that purpose, and that they are the parties primarily liable for his acts and doings. In their petition for removal they are even more explicit, and say that he "was at all such times, and in all such matters, so far as said plaintiffs are concerned, the mere agent for the petitioners provided for them by law." In other words, they have by their pleadings placed themselves on record as joint actors with the sheriff in all that he has done, and as promoters of his trespass, if it be one. The suit, therefore, stood at the time of the removal precisely as it would if it had been begun originally against all the defendants upon an allegation of a joint trespass. By coming into the suit the interveners did not deprive the plaintiffs of their right of action against the sheriff. He is still, so far as they are concerned, a necessary party to the suit. The interveners may unite with him to resist the claim of the plaintiffs; but by their doing so the nature of the action is in no way changed. The cause of action is still the original alleged trespass. At first the suit was against him who [543] actually committed the trespass alone; now it is against him and his aiders and abettors, who concede, upon the face of the record, that they are liable if he is. As the case stood, therefore, when it was removed, it was by citizens of Minnesota against another citizen of Minnesota and citizens of Illinois, for an alleged trespass committed by all the defendants acting together and in concert. If one is liable all are liable. The judgment, if in favor of the plaintiffs, will be a joint judgment against all the defendants.

That such a suit is not removable was decided in *Pirie* v. *Tvedt*, 115 U. S. 41 [29: 331]; and *Sloane* v. *Anderson*, 117 U. S. 275 [29: 899]. The fact that if the intervention was had under sections 154 and 155, the property of the interveners must first be exhausted on execution before that of the sheriff is sold, does not alter the case. The liability of all the defendants upon the cause of action is still joint, so far as the plaintiffs are concerned. By getting the interveners in, the sheriff will be able to establish his right of indemnity from them; but that does not in any way change the rights of the plaintiffs. The interveners do not seek to relieve themselves from liability to the sheriff if he is bound, but to show that neither he nor they are liable to the plaintiffs

It follows that the order to remand was properly made, and it is, consequently, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DONALD M. McLEOD ET AL., *Plffs. in Err.*, [528]
v.
FOURTH NATIONAL BANK OF ST. LOUIS.

(See S. C. Reporter's ed. 528-534.)

Negotiable paper—fraudulent bill—false bill of lading—action against bank, which had made advances and received proceeds—fraud—instruction to find for defendants, sustained.

In an action by the acceptors of a bill of exchange, drawn against a shipment of cotton in bales which the drawers had fraudulently reduced in weight, against a bank, which had made advances on the cotton prior to its shipment and which had received the proceeds of the bill, it is *held:*

a. That the bank is not shown to have participated in the fraud; that it was not the owner of the cotton;

b. That it had a right to suppose that the custom of reweighing by the transportation company would be followed; and,

c. That the court below properly instructed the jury to find for the defendant.

[No. 268.]

Argued April 27, 1887. Decided May 27, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. Reported below, 20 Fed. Rep. 225. *Affirmed.*

The history, facts and case appear in the opinion of the court.

Messrs. **Frederick N. Judson,** *Warwick Hough* and *John H. Overall*, for plaintiffs in error:

Camfield, the pledgeor, to whom the defendant, the pledgee, delivered the documents of title (the cotton notes) for the temporary purpose of surrendering them in exchange for a bill of lading, such bill of lading to be returned as a "substituted security," received and held such securities and prepared and returned such bill of lading in a fiduciary capacity; *i. e.*, as agent of the defendant.

Story, Bailm. § 299; Jones, Pledges, § 86; *Clark* v. *Iselin*, 88 U. S. 21 Wall. 360 (22:568); *Casey* v. *Cavaroc*, 96 U. S. 476 (24: 783); *White* v. *Platt*, 5 Den. 269; *Hays* v. *Riddle*, 1 Sandf. N. Y. 248; *Nottebohn* v. *Maas*, 3 Robt. N. Y. 253; *Macomber* v. *Parker*, 14 Pick. 497; *Reeves* v. *Cupper*, 5 Bing. N.C. 136; *Way* v. *Davidson*, 12 Gray, 465; *Thayer* v. *Dwight*, 104 Mass. 254; *Bruley* v. *Rose*, 57 Iowa, 651; *Cooper* v. *Ray*, 47 Ill. 53; *Hutton* v. *Arnett*, 51 Ill. 198.

The false statement of weights being inserted by Camfield, while thus acting as agent of defendant, and effecting the exchange of securities on its behalf, defendant, receiving and forwarding such false bill of lading, and collecting and retaining the proceeds of the fraud, thus obtaining payment in full of its own claim, which could not have been paid except by means of the fraud, is in law responsible to plaintiffs in error for their loss sustained in consequence of such fraud.

Bigelow, Frauds, 362; *Hern* v. *Nichols*, 1 Salk. 289, cited in *Merchants Bank* v. *State Bank*, 77 U. S. 10 Wall. 646 (19:1018); *Jeffrey* v. *Bigelow*, 13 Wend. 518; *Veazie* v. *Williams*, 49 U.S. 8 How. 134 (12:1018), *Locke* v. *Stearns*, 1 Met. 560; *Bennett* v. *Judson*, 21 N. Y. 238; *Durst* v. *Burton*, 47 N. Y. 167; *Craig* v. *Ward*, 42 N.Y. 387; *Davis* v. *Bemis*, 40 N.Y. 453, note; *White* v. *Sawyer*, 16 Gray, 586; *Stockwell* v. *U.S.* 80 U. S. 13 Wall. 531 (20:491); *Castle* v. *Bullard*, 64 U. S. 23 How. 172 (16:424); Story, Agency, 127.

Messrs. **G. A. Finkelnburg** and *George A. Madill*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Eastern District of Missouri.

The plaintiffs in error were the plaintiffs in the original action, the gravamen of which was that the defendant, the Fourth National Bank of St. Louis, conspired with the firm of Norvell, Camfield & Co., who were dealers in cotton in that city, to obtain from the plaintiffs, McLeod & Reid, residing in the City of Glasgow, Scotland, the acceptance of a draft drawn by Norvell, Camfield & Co. upon said plaintiffs for £6,000 sterling, and that this draft was accompanied by a fraudulent bill of lading, on the strength of which plaintiffs accepted and were compelled to pay it. The bill of lading was for a certain number of bales of cotton, which were falsely represented to contain 276,850 pounds; whereas, the aggregate weight of these bales when reweighed at the place of delivery was only 192,385 pounds.

[529] That this bill of lading was false, that it was gotten up by fraud, and that this fraud deceived the plaintiffs, there is no question. Nor is there any doubt that the fraud was perpetrated by Norvell, Camfield & Co. The case was tried before a jury on the general issue, by which the Bank denied all the allegations of fraud, and in general everything charged in the declaration. The court refused several requests to charge made by the plaintiffs with regard to the connection of the Bank with this fraud, and in the end peremptorily instructed the jury that there was no evidence to support such an allegation of fraud on the part of the defendant, and that they must find for the Bank.

This bill of exceptions, like so many others that we find in the records that have been sent up to us recently, is simply a stenographic report of all that took place at the trial; and we are expected to consider the whole of this evidence and pick out such portions of it as may be pertinent to the issue, as if addressed to us originally, and to ascertain whether there was any evidence which should have been left to the jury on the question of the participation of the defendant in the fraud.

The main facts in the case are substantially as follows:

Norvell, Camfield & Co. were dealers in cotton in St. Louis. They bought this commodity throughout the cotton region, brought it to that city, and then sold it in the markets of the Eastern States and of Europe. To enable them to carry on their extensive business they required large advances from the capitalists of St. Louis, and these were obtained mainly from its banks. The defendant Bank in this case had so advanced them about $64,000; and in every instance, as such advances were made, the firm deposited with the Bank what were known as "cotton notes." These were instruments made by a warehouse company, whose business it was to receive and take care of cotton until it was sold, or its delivery demanded by the person who originally deposited it in the warehouse, or by some holder of the cotton notes. Each note represented a bale of cotton, and the following is the form of these instruments in general use in that business:

"[No. of bale.] Received in store of —— [530]
——, one bale of cotton, in apparent good order, of the above number and following marks [marks, if any], deliverable to bearer upon return of this receipt, and payment of warehouse charges, risk of fire excepted.

"(Signed) —— ——, Secretary."

The cotton of Norvell, Camfield & Co., which is the subject of this controversy, was stored in the warehouse of the St. Louis Cotton Compress Company, and the notes therefor were in the hands of the Bank, when Camfield, one of that firm, without obtaining the notes from the Bank, or any orders from it, had a very large amount of this cotton transferred to a cotton "pickery," as it was called. There the bales were opened, the cotton picked, reassorted, and repacked, and the tags with the numbers on them, which represented the cotton as it was originally delivered to the warehouse company, reattached to these readjusted bales. In doing this the quantity of cotton in each bale was so much reduced that the difference was made, which we have already stated, between the amount which was called for by the bill of lading and the amount which was received in Glasgow.

By what means Camfield obtained the cotton from the warehouse without the production of the notes is not explained, nor is it very material in this case, as there is no evidence to show that the Bank had anything to do with that transaction, but was informed of it after it was over and the cotton returned to the warehouse. Upon being so informed it took some steps to ascertain the amount of the loss it might incur by this multiplication of the bales out of this same cotton, had some fifteen or sixteen bales reweighed, and called upon Camfield to put up further margins, which he did.

During this time, or shortly afterwards, and while the matter remained in this condition, Mr. Norvell, who was in Europe, negotiated the sale of this cotton to the plaintiffs, and Mr. Camfield, his partner in St. Louis, forwarded it to Glasgow by way of New York. In doing this, he forwarded it by railroad from St. Louis to the Atlantic coast, and took from the transportation company at St. Louis a bill of [531] lading, describing the bales by their numbers and weights, which amounted to the aggregate number of pounds already stated. In order to obtain these bales for shipment from the warehouse company, Camfield had to produce the notes which were in the possession of the Bank. Of course he could only do this by the Bank intrusting him with the notes for the

short time necessary to make the shipment and procure the bill of lading, when, having delivered up the notes to the warehouse company in order to get possession of the cotton for shipment, he was to return the bill of lading, which represented the cotton, to the Bank.

In all cases of shipments of this character from St. Louis to the Eastern States or Europe, the transportation company, on giving its bill of lading, requires a reweighing of the cotton upon delivery to it, and upon that being done, the weights are marked upon the bales or certified by the weigher in a schedule or statement. There are persons appointed for this special purpose of reweighing cotton for transhipment. It is upon the strength of this reweighing that the transportation company makes out its bill of lading.

What was done in the present case was, that Camfield induced the clerk, or other officer who made out this bill of lading, to accept his own statement of the weight of the bales and to give his bill of lading accordingly, without ever having the cotton reweighed or having any certificate of the reweigher thereto. The number of bales were all right, but in this way, Camfield obtained from the transportation company a false bill of lading. Upon this Camfield, in the name of his firm, Norwell, Camfield & Co., drew his draft upon the plaintiffs at Glasgow, at sixty days, for a sum corresponding to the amount in the bill of lading, and to the contract price which Norvell had made with them in Europe. This draft the defendant Bank declined to buy, and Norvell who had returned to America, negotiated and sold it to Knoblauch & Lichtenstein, bankers in the City of New York; and the money, or so much of it as was necessary to pay its debt, was turned over to the defendant.

[532] Of course the plaintiffs, who had accepted the draft on its presentation, with the bill of lading, were bound to pay it at its maturity, although in the mean time they had discovered the discrepancy between the amount of the cotton actually shipped and that described in the bill of lading.

The defendant Bank never indorsed this bill of lading; it was never made payable to it. It never did anything to give it currency or to make itself responsible for its accuracy, and it was no party to the bill of exchange. The whole case of the plaintiffs is that, having received the proceeds of the sale of this bill of lading from Knoblauch & Lichtenstein in discharge of the debt of Norvell, Camfield & Co. to the Bank, it so acted in regard to the matter as to be a participant in the fraud which was practiced by that firm. The whole case then turns upon the truth of this allegation.

It is attempted to be supported principally upon the ground that Mr. Biebinger, who was the cashier of the Bank, was aware of the change made in the quantity of cotton in the "pickery," where it was rebaled. But it does not appear that he, or any other officer of the Bank, had any reason to suppose that the number of bales repacked at that establishment was very considerable. They had fifteen or sixteen of them weighed, and called upon Camfield to make good the deficiency, so far as they knew of it, which he did. This was all that concerned them; they were only acting for themselves; there was no obligation between them and anybody else at that time to disclose this matter, as there was nobody then interested in the property but the Bank and the firm. They might very well have supposed that whenever this cotton was sold by the firm and was to be delivered, the rule for reweighing would be complied with, and that the purchaser of the cotton, or of the bill of lading, or of the bill of exchange drawn on it, would have seen to his own security in that matter, and would have relied, as he had a right to do, upon the sufficiency of the process of reweighing for that protection.

It is very clear from the evidence, and it is undisputed, that this reweighing is the uniform and regular custom, and that it constitutes the evidence of the weight of the bales in the final sale by the cotton dealer of St. Louis to the pur- [533 chaser in the Eastern or European market. Is there any evidence to show that the Bank was guilty of any fraud, or of any negligence which amounted to a fraud, or had any design to cheat anybody in this matter? When Camfield notified them that the cotton had been sold, and that he wanted to ship it, the use of the cotton notes, which they held as security for the amounts due to them, was necessarily to be intrusted to one of the owners, or to one of their agents, for the purpose of getting the cotton out of the warehouse. It could not remain there and at the same time go East; neither could it be obtained from the warehouse for shipment without the use and delivery of the notes. For the short time necessary to ship this cotton and obtain the bill of lading it was a matter of necessity, as well as a custom, unless the Bank would undertake the business for itself, to intrust these notes to the shipper in order that he might do it.

In this we see no injury to the plaintiffs. All the risk involved in it was borne by the defendant, who trusted Camfield with the notes which represented the property until he brought back the evidence that the cotton had been shipped. When this was done and Camfield had drawn his draft in the name of Norvell, Camfield & Co. upon the plaintiffs for the amount of the cotton, according to the terms of sale, it appears that he wanted to sell the draft to the Bank, but it refused to buy it, and it was finally negotiated to Knoblauch & Lichtenstein in New York, and the money placed to the credit of the defendant Bank there.

In order to sustain the argument, arising out of this transaction, that the defendant Bank was itself cognizant of this fraud, and that it was practiced for its benefit, it is argued by plaintiffs' counsel that the Bank was the owner of this cotton. If this proposition is in any way pertinent to the inquiry, it is not true. The Bank never had anything more than a pledge of the cotton as a security for the payment of its debt. The real ownership of the property always remained in Norvell, Camfield & Co. They could sell it at any time, and, after the payment of the debt due to the Bank, receive the remainder; if it had been sold for less than [534 the debt to the Bank, the loss would have been theirs, and not the Bank's, if they were solvent.

This firm did sell the cotton; it was not sold by the Bank; they shipped it, and the Bank did not even accept their bill of exchange drawn

against the cotton in payment of their debt, but insisted on getting the money; and therefore the bill of exchange was sold in the City of New York.

The essential ownership of the cotton during all the time of this transaction was in Norvell, Camfield & Co., and any loss upon it was their loss, any profit upon it was their profit, and the Bank only had this modified control of it by means of the cotton notes of the warehouse company, which in effect they relinquished when they delivered those notes to Camfield. Their actual control over the cotton, or over its proceeds, ceased with the delivery, and their acceptance of the proceeds of the draft at the hands of the New York bankers, who bought it, was a thing they had a right to do, both in honor and according to all sound rules of mercantile law.

Certain letters of introduction, given by the defendant Bank to Mr. Norvell on a visit to Europe, made by him, and certain very guarded answers to inquiries made by a Dutch house in Europe as to his character and responsibility, are introduced to show that the Bank was using this means of enabling Norvell to raise the money for them by selling the cotton. We do not think these letters have any tendency to prove any such thing. And without going into the large mass of testimony on this subject, having considered the main and turning points in the controversy, and the principal points upon which plaintiffs rely to establish the fraud upon the part of the Bank, we are of opinion that the circuit court was right in telling the jury that there was no such evidence as justified them in finding a verdict for the plaintiffs.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

END OF REPORTED CASES IN VOL. 122, AND IN THIS BOOK.

FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1886,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS VOLUME.

Ex parte: In the Matter of GEORGE K. GROVE.

Motion for leave to file petition for a writ of *mandamus*.

Mr. George A. Jenks, for petitioner.

May 27, 1887. Motion denied.

HENRY H. DODGE *v.* SUP. COURT, DIST. OF COLUMBIA.

Motion for leave to file a petition for a writ of prohibition.

Mr. O. D. Barrett, for the motion.

March 14, 1887. *Mr. Chief Justice* **Waite:** This motion is denied. The petition which is presented does not on its face show facts sufficient to entitle the petitioner to the writ he seeks.

WASATCH & JORDAN VALLEY R. CO. *v.* J. W. SNELL *et al.* [No. 1.]

In error to the Sup. Ct. of Utah.

Messrs. J. R. McBride and *J. C. Sutherland*, for plaintiff in error.

October 22, 1886. Dismissed, pursuant to the 19th Rule.

GEORGE HAYES *v.* JOHN SETON. [No. 8.]

Appeal from the C. C., U. S. for E. D. of N. Y.

Messrs. J. H. Whitelegge and *Livingston Gifford*, for appellant. *Messrs. G. G. Frelinghuysen* and *John Davis*, for appellee.

October 22, 1886. Dismissed, pursuant to the 19th Rule.

CITY OF N. O. *v.* LOUISIANA, *ex rel.* Henry Shepherd. [No. 7.]

In error to C. C., U. S. for E. D. of La.

Mr. C. F. Buck, for plaintiff in error. *Messrs. T. J. Semmes & C. W. Hornor*, for defendant in error. *Messrs. E. H. McCaleb, W. H. Mills*, and *W. S. Benedict*, also entered appearances for the defendant in error.

October 25, 1886. Dismissed, pursuant to the 19th Rule.

WILLIAM T. LEVINE *et al.* *v.* ROBERT M. WILSON *et al.* [No. 18.]

Appeal from C. C., U. S. for E. D. of La.

Mr. J. R. Beckwith, for appellant. *Nem. con.*

October 25, 1886. Dismissed by appellant.

HOME INS. CO. OF N. Y. *v.* PEOPLE OF N. Y. [No. 14.]

In error to the Sup. Ct. of N. Y.

Messrs. B. H. Bristow and *David Wilcox*, for plaintiff in error. *Mr. Denis O'Brien*, for defendant in error.

November 15, 1886. Affirmed by a divided court. See report, *ante*, 350.

February 7, 1887. Petition for rehearing granted; judgment of November 15, 1886, rescinded and annulled, and the cause restored to its place on the docket for argument before a full bench.

CHESAPEAKE & OHIO R. CO. *v.* A. E. WHITE, Admr. etc. [No. 16.]

In error to the Sup. Ct. of App. of West Va.

October 12, 1886. Dismissed, on motion of *Mr. W. J. Robertson*, for plaintiff in error. *Nem. con.*

CHESTER A. ARTHUR, Collector, etc. *v.* T. and R. BARBOUR. [No. 26.]

In error to C. C., U. S. for S. D. of N. Y.

November 3, 1886. Dismissed on motion of *Mr. Asst. Atty-Gen. Maury*, for plaintiff in error. *Mr. M. W. Divine*, for defendant in error.

November 8, 1886. Motion to rescind judgment of November 3, 1886, and to enter one of affirmance, with costs and interest, filed and argued. *Mr. Divine*, for the motion. *Mr. Asst. Atty-Gen. Maury*, opposing.

November 22, 1886. *Mr. Chief Justice* **Waite:** This motion is denied.

CUNARD STEAMSHIP CO. (Limited) *v.* PATRICK CAREY. [No. 29.]

In error to C. C., U. S. for S. D. of N.Y.

Mr. R. D. Benedict, for plaintiff in error. *Messrs. H. H. Shook* and *W. C. Trull*, for defendant in error.

November 15, 1886. Affirmed by a divided court. See report, *ante*, 354.

HENRY S. HALE *et al.* etc. *v.* E. E. EVERETT. [No. 41.]

In error to the Sup. Ct. of Pa.

Messrs. G. W. Biddle and *George Harding*, for plaintiffs in error. *Messrs. J. Hubley Ashton, E. C. Mitchell* and *W. P. Bowman*, for defendant in error.

November 1, 1886. Dismissed per stipulation.

SMITH ELY v. ANN ELIZA MITCHELL *et al.*, EXRS. etc. [No. 44.]

In error to C. C., U. S. for S. D. of N.Y.
Mr. Moses Ely, for plaintiff in error. *Mr. John E. Parsons*, for defendants in error.
November 12, 1886. Dismissed, pursuant to the 10th Rule.

NATIONAL INS. CO. OF THE U. S. A. v. ALBERT SCHEFFER *et al.*, EXRS., etc. [No. 70.]

In error to the Sup. Ct. of Minn.
Mr. Frederick Allis, for plaintiff in error. *Nem con.*
December 2, 1886. Dismissed, pursuant to the 10th Rule.

J. H. BURKE *et al.* v. O. E. WOOD *et al.* [No. 99.]

In error to D. C., U. S. for Dist. of West Va.
Mr. G. D. Camden, for plaintiffs in error. *Nem con.*
December 16, 1886. Dismissed, pursuant to the 10th Rule.

JAMES CREEGAN v. W. D. ANDREWS *et al.* [No. 101.]

Appeal from C. C., U. S. for S. D. of N.Y.
Mr. Wm. A. Senger, for appellant. *Mr. J. C. Clayton*, for appellees.
December 16, 1886. Dismissed per stipulation.

JOSEPH RAYMOND v. JOSEPH BILLGERY *et al.* [No. 106.]

Appeal from C. C., U. S. for E. D. of La.
Mr. Gus. A. Breaux, for appellant.
December 21, 1886. Dismissed pursuant to the 10th Rule.

CHARLES M. THEBERATH v. RUBBER AND CELLULOID HARNESS TRIMMING CO. [No. 108.]

Appeal from C. C., U. S. for Dist. of N. J.
Mr. Philip W. Cross, for appellant. *Mr. J. C. Clayton*, for appellee.
July 10, 1886. Dismissed pursuant to the 28th Rule.

NEW YORK BELTING AND PACKING CO. *et al.* v. EDWIN E. SIBLEY. [No. 109.]

Appeal from C. C., U. S. for Dist. of Mass.
Mr. Thomas H. Talbot, for appellants. *Messrs. B. F. Thurston* and *Frederick P. Fish*, for appellee.
October 9, 1886. Dismissed pursuant to the 28th Rule.

MUTUAL LIFE INS. CO. OF N. Y. v. WALBURGA WACKERLE. [No. 116.]

In error to C. C., U. S. for E. D. of Mo.
Messrs. John F. Dillon and *Wager Swayne*, for plaintiff in error.
October 25, 1886. Dismissed on motion of *Mr. Benjamin H. Bristow*, in behalf of counsel for plaintiff in error.

JOHN A. KELLY *et al.* v. JAMES WATSON *et al.* [No. 123.]

Appeal from C. C., U. S. for E. D. of Pa.
Mr. Francis Rawle, for appellants. *Mr. J. E. Shaw*, for appellees.
January 12, 1887. Dismissed pursuant to Rule 10.

JACOB DUNTON v. BENNETT L. SMEDLEY. [No. 124.]

Appeal from C. C., U. S. for E. D. of Pa.
Mr. S. S. Hollingsworth, for appellant. *Mr. J. E. Shaw*, for appellee.
January 12, 1887. Dismissed pursuant to Rule 10.

CHARLES M. JEFFRIES v. MARY HERMAN. [No. 131.]

In error to Sup. Ct. of Montana Ter.
Messrs. E. W. Toole and *A. E. Mayhew*, for plaintiff in error. *Messrs. S. Shellabarger, J. M. Wilson*, and *J. H. Shober*, for defendant in error.
January 13, 1887. Dismissed pursuant to Rule 16.

SUN MUTUAL INS. CO. OF NEW ORLEANS *et al.* v. KOUNTZ LINE *et al.* [No. 136.]

December 13, 1886. Motions to dismiss or affirm submitted.
Messrs. R. H. Browne and *C. B. Singleton*, for the motion. *Mr. O. B. Sansum*, in opposition.
December 20, 1886. Mr. Chief Justice Waite: Each of these motions is denied.
Full report, *ante*, 1187.

ROBERT C. EASTMAN *et al.* v. FREDERICK ECKER *et al.* [No. 139.]

Appeal from C. C., U. S. for E. D. of Pa.
October 25, 1886. Dismissed on motion of *Mr. H. Howson*, for the appellants.

HELENA BRIDGE CO. v. Z. KING & SON. [No. 140.]

Appeal from C. C., U. S. for W. D. of Tex.
Mr. M. F. Morris, for appellant. *Mr. H. E. Davis*, for appellee.
January 19, 1887. Affirmed with costs.

BACKUS WATER MOTOR CO. v. FREDERICK W. TUERK, JR., *et al.* [No. 141.]

Appeal from C. C. U., S. for N. D. of Ill.
Mr. S. S. Henkle, for appellant.
January 19, 1887. Dismissed pursuant to the 10th Rule.

GERMAN-AMERICAN HAIL INS. CO. v. F. J. SCHREIBER. [No. 146.]

In error to C. C. U. S. for Dist. of Minn.
Mr. John B. Sanborn, for plaintiff in error.
January 24, 1887. Dismissed pursuant to the 10th Rule.

BARNARD & LEAS MFG. CO. *v.* JAMES MILLIKEN *et al.* [No. 147.]

Appeal from C. C., U. S. for S. D. of Ill.
Mr. W. G. Rainey, for appellant.
January 24, 1887. Dismissed on authority of appellant.

SOLOMON MOSES *et al.*, Survivors of GOTCHO BLUM, *v.* GEORGE H. WOOSTER. [No. 151.]

Appeal from C. C., U. S. for S. D. of N.Y.
Mr. H. P. Allen, for appellants. *Mr. F. H. Betts*, for appellee.
March 21, 1887. Dismissed pursuant to stipulation on file.

WINTHROP IRON CO. *et al.* *v.* ARTHUR B. MEEKER *et al.* [No. 154.]

Appeal from C. C., U. S. for W. D. of Mich.
January 26, 1887. Reversed and remanded pursuant to stipulation on file, on motion of *Mr. R. D. Mussey*, for appellants. *Mr. Frederic Ullman*, for appellees.

DISTRICT OF COL. *v.* OWEN O'HARE. [No. 158.]

Appeal from Court of Claims.
Mr. Atty-Gen. Garland and *Mr. F. P. Dewees*, for appellant. *Messrs. W. A. Cook* and *C. C. Cole*, for appellee.
March 28, 1887. *Mr. Chief Justice* **Waite**: This judgment is affirmed. No further opinion will be delivered.

AMERICAN IRON CO. *v.* ANGLO-AMERICAN ROOFING CO. [No. 162.]

Appeal from C. C., U. S. for S. D. of N. Y.
Mr. L. W. Frost, for appellant. *Mr. E. C. Webb*, for appellee.
March 24, 1887. Dismissed pursuant to the 10th Rule.

CENTRAL CONSTRUCTION CO. *v.* GEORGE PAUL. [No. 164.]

In error to C. C., U. S. for N. D. of Ill.
Mr. Henry G. Miller, for plaintiff in error. *Mr. W. W. Upton*, for defendant in error.
March 24, 1887. Dismissed pursuant to the 10th Rule.

JOSEPH WHITE *v.* BENEDICT AND B. MFG. CO. [No. 166.]

Appeal from C. C., U. S. for E. D. of Pa.
Mr. M. D. Connolly, for appellant. *Mr. J. K. Beach*, for appellee.
March 25, 1887. Dismissed pursuant to the 10th Rule.

JEAN MARIE BRUNET, Tutor, etc. *v.* J. B. CLEMENT. [No. 171.]

Appeal from C. C., U. S. for E. D. of La.
Messrs. J. P. Hornor and *Charles Louque*, for appellant.
March 30, 1887. Dismissed pursuant to the 10th Rule.

EDWARD LEES *et al.* *v.* ANDERSON FOWLER [No. 174.]

Appeal from C. C., U. S. for N. D. of Ill.
Mr. M. W. Fuller, for appellants. *Messrs. Geo. F. Edmunds* and *W. R. Page*, for appellee.
May 2, 1887. Affirmed by a divided court.

SETH BULLOCK *et al.*, as Star & Bullock, *v.* JOHN L. FARWELL. [No. 176.]

Appeal from the Sup. Ct. of Dakota.
Messrs. Wm. R. Steele and *Daniel McLaughlin*, for appellants. *Messrs. A. H. Garland, J. W. Smith* and *R. A. Burton*, for appellee.
April 11, 1887. Affirmed by a divided court.

ASA C. CALL *v.* NORTHWESTERN MUT. LIFE INS. CO. [No. 178.]

Appeal from C. C., U. S. for S. D. of Iowa.
Mr. Jo. H. Call, for appellant. *Messrs. C. C. Nourse* and *B. F. Kauffman*, for appellee.
June 19, 1886. Dismissed pursuant to the 28th Rule.

ASA C. CALL *v.* NORTHWESTERN MUT. LIFE INS. CO. [No. 179.]

Appeal from C. C., U. S. for S. D. of Iowa.
Mr. Jo. H. Call, for appellant. *Messrs. C. C. Nourse* and *B. F. Kauffman*, for appellee.
June 19, 1886. Dismissed pursuant to the 28th Rule.

DENVER, SOUTH PARK & PAC. R. CO. *v.* JOHN FITZGERALD *et al.* [No. 180.]

In error to C. C., U. S. for Dist. of Colorado.
Mr. T. M. Marquette, for defendant in error.
October 18, 1886. Dismissed on motion of *Mr. John F. Dillon*, for plaintiff in error.

JOHN N. POAGE *v.* T. J. MCGOWAN *et al.*, etc. [No. 185.]

Appeal from C. C., U. S. for S. D. of Ohio.
Mr. L. M. Hosea, for appellant. *Mr. Arthur Stem*, for appellees.
April 4, 1887. Dismissed pursuant to the 10th Rule.

ABRAHAM J. MANNY *v.* GEORGE K. OYLER. [No. 190.]

Appeal from C. C., U. S. for E. D. of Mo.
Messrs. H. M. Pollard and —— *Taylor*, for appellant. *Messrs. West & Bond*, for appellee.
April 6, 1887. Dismissed pursuant to stipulation on file.

ABRAHAM J. MANNY *v.* ST. LOUIS MALLEABLE IRON CO. [No. 191.]

AND

ABRAHAM J. MANNY *v.* FURST AND BRADLEY MFG. CO. [No. 192.]

Appeals from C. C., U. S. for E. D. of Mo.
Messrs. H. M. Pollard and —— *Taylor*, for appellants. *Messrs. West & Bond*, for appellees.

April 6, 1887. Dismissed pursuant to stipulations on file.

CHARLES W. GAUTHIER *v.* DARIUS COLE *et al.* [No. 193.]

In error to C. C., U. S. for E. D. of Mich.
Mr. C. E. Warner, for plaintiff in error. *Mr. Ashley Pond*, for defendants in error.
April 6, 1887. Dismissed pursuant to stipulation on file.

HENRY C. HUISKAMP *et al.* *v.* MOLINE WAGON CO. [No. 194.]

In error to C. C., U. S. for W. D. of Mo
Motion to dismiss.
Mr. C. M. Osborn, for the motion. *Mr. James Hagerman*, in opposition.
December 13, 1886. *Mr. Chief Justice* **Waite:** This motion is denied.
See full report on merits, *ante*, 971.

GEORGE W. PILE *v.* MRS. MARY H. WILSON, Admrx. of Hardesty, Dec'd. [No. 195.]

In error to C. C., U. S. for W. D. of Pa.
Mr. G. A. Endlich, for plaintiff in error. *Messrs. H. W. Weir, A. H. Coffroth* and *W. H. Ruppel*, for defendant in error.
April 7, 1887. Affirmed, with costs and interest.

POST, MARTIN, & CO. *v.* EDWARD CARR, Owner of Steamship "INDIA." [No. 198.]

Appeal from C. C., U. S. for E. D. of Tex.
Mr. T. N. Waul, for appellants.
April 7, 1887. Dismissed pursuant to the 16th Rule, on motion of *Mr. James Lowndes*, for appellee.

F. J. D. LANIER *et al.*, as Winslow, Lanier, & Co. *v.* JOHN NASH *et al.* [No. 200.]

Appeal from C. C., U. S. for N. D. of Ohio.
On motion to dismiss, and motion to restrain proceedings on execution. See S. C. on merits, *ante*, 947.
Mr. D. S. Hounshell, for the motion. *Nem con.*
December 6, 1886. *Mr. Chief Justice* **Waite:** The motion to dismiss is denied. We cannot dismiss a case for want of jurisdiction here, because the court below ought to have dismissed it. That is a question which goes to the merits of the appeal.
The further consideration of the motion for stay of execution is continued for notice to the other side to appear and show cause to the contrary, on the third Monday of the present month. Service is to be made by delivering a copy of the motion and of the brief which has been filed in support of it, and of this order, on the counsel, in the court below, of William Goodrich, against whom the stay is asked, at least one week before the day fixed for the hearing.

And further, in same case: *January 17, 1887.* *Mr. Chief Justice* **Waite:** This motion is denied. The motion papers do not show any necessity for the order which is asked, as there is no proof of any attempt on the part of Goodrich, since the appeal, to cause his judgment to be carried into execution. In the absence of anything to the contrary, it is to be presumed that the parties to a suit submit to a *supersedeas* obtained upon an appeal to this court.

March 14, 1887. On motion of Nash *et al.* for stay of execution pending appeal.
Messrs. D. S. Hounshell and *Wm. Lawrence*, for the motion.
Mr. Chief Justice **Waite:** This motion is denied. The judgment in favor of Goodrich is involved in this appeal only to the extent that it is a lien on the property covered by the mortgage, which is the subject matter of the suit. The executions which are complained of were issued after the appeal, and levied on other property. There is no such merger of the judgment nor *supersedeas* in this case as will operate to stay a proceeding against other property not involved herein.

JOHN HURD *v.* GILL CAR MFG. CO. [No. 201.]

In error to C. C., U. S. for N. D. of Ohio.
Mr. C. H. Scribner, for appellant. *Mr. E. L. Taylor*, for appellee.
January 19, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. W. H. Smith*, in behalf of counsel.

FIRST NAT. BANK OF WASHINGTON COURT HOUSE, OHIO, *v.* CONTINENTAL LIFE INS. CO. OF HARTFORD. [No. 202.]

Appeal from C. C., U. S. for S. D. of Ohio.
Mr. M. J. Williams, for appellant.
April 7, 1887. Dismissed pursuant to the 10th Rule.

BELDEN MINING CO. *v.* JOHN HARVEY. [No. 209.]

In error to C. C., U. S. for Dist. of Colorado.
Messrs. C. S. Thomas and *T. M. Patterson*, for defendant in error.
March 15, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. Chapin Brown*, for plaintiff in error.

JOHN MILLER, Treas. etc. *v.* UNION PAC. R. CO. [No. 215.]

Appeal from C. C., U. S. for Dist. of Neb.
Mr. C. J. Phelps, for appellant.
October 18, 1886. Dismissed per stipulation, on motion of *Mr. John F. Dillon*, for appellee.

UNITED STATES, *ex rel.* William W. Warden, *v.* WILLIAM E. CHANDLER, Secretary, etc. [No. 218.]

In error to Sup. Ct. of Dist. of Columbia.
Mr. W. W. Warden, for himself. *Nem con.*
April 18, 1887. *Mr. Chief Justice* **Waite:** This is a writ of error for the review of a judgment of the Supreme Court of the District of Columbia, refusing a *mandamus* against William E. Chandler, Secretary of the Navy, to require of him the performance of certain

alleged official duties Mr. Chandler is no longer Secretary, and the office is now filled by his successor. The suit has therefore abated, and it is dismissed on the authority of *United States* v. *Boutwell*, 84 U. S. 17 Wall. 609 [21: 723.]

TOBIAS NEW *v.* AMZI L. BARBER. [No. 233.]

Appeal from C. C., U. S. for S. D. of N.Y.
Mr. A. H. Evans, for appellant. *Mr. W. W. Niles*, for appellee.
April 14, 1887. Dismissed, pursuant to the 10th Rule.

MEMPHIS & LITTLE ROCK R. R. CO. (as reorganized) *v.* LAWRENCE B. SMITH. [No. 234.]

In error to C. C., U. S. for W. D. of Tenn.
Mr. U. M. Rose, for plaintiff in error. *Mr. Luke E. Wright*, for defendant in error.
April 14, 1887. Dismissed pursuant to stipulation on file.

JOSEPH MORRISON *v.* JAMES MCCOY. [No. 235.]

In error to the Sup. Ct. of Cal.
Mr. James A. Johnson, for plaintiff in error.
Messrs. W. Drummond and *R. H. Bradford*, for defendant in error.
April 14, 1887. Dismissed pursuant to the 10th Rule.

A. B. STOCKWELL *v.* JAMES BOYCE. [No. 230.]

In error to C. C., U. S. for S. D. of N.Y.
Mr. Wm. G. Wilson, for defendant in error.
December 2, 1886. Dismissed per stipulation on motion of *Mr. M. H. Cardoso*, for plaintiff in error.

BISHOP GOODRICH *et al.* *v.* SAMUEL C. SCHARFFER. [No. 232.]

Appeal from C. C., U. S. for W. D. of Mo.
Mr. C. O. Tichenor, for appellants.
November 11, 1886. Dismissed per stipulation, on motion of *Mr. M. F. Morris*, for appellee.

WEBSTER ELECTRIC CO. *v.* JOHN B. ODELL *et al.* [No. 236.]

Appeal from C. C., U. S. for N. D. of Ill.
Mr. Geo. P. Barton, for appellant. *Mr. James L. High*, for appellees.
April 20, 1887. Dismissed pursuant to stipulation on file.

JOSEPH DAVIES, Collector, etc. *v.* UNITED STATES, *ex rel.* Corbin *et al.* [No. 237.]

In error to C. C., U. S. for E. D. of Ark.
Messrs. W. Hallett Phillips, B. C. Brown, E. W. Kimball and *C. P. Redmond*, for defendants in error.
March 21, 1887. Dismissed on motion of *Mr. A. H. Garland*, for plaintiff in error.

N. Y. MUT. GAS LIGHT CO. *v.* ALBERT G. THORP. [No. 239.]

In error to C. C., U. S. for S. D. of N.Y.
Mr. T. M. Wheeler, for plaintiff in error. *Mr. W. C. Witter*, for defendant in error.
October 21, 1886. Dismissed per stipulation.

EAGLE LOCK CO. *v.* LUCIUS ANDRESS. [No. 240.]

In error to C. C., U. S. for N. D. of Ohio.
Mr. E. W. Laird, for plaintiff in error.
April 20, 1887. Dismissed pursuant to the 10th Rule.

CHARLES H. PALMER *v.* GATLING GUN CO. [No. 246.]

Appeal from C. C., U. S. for Dist. of Conn.
Mr. R. C. Daniel, for appellant. *Mr. Wm. H. Simonds*, for appellee.
April 21, 1887. Dismissed pursuant to the 10th Rule.

MARY M. MORRISON *et al.* *v.* MARTHA S. WITHERS *et al.* [No. 248.]

Appeal from C. C., U. S. for S. D. of Miss.
Mr. J. Z. George, for appellants. *Mr. M. F. Morris*, for appellees.
April 21, 1887. Dismissed pursuant to the 10th Rule.

HUKILL GOLD AND SILVER MINING CO. *v.* LEWIS C. ELLSWORTH, Receiver, etc. [No. 249.]

Appeal from C.C., U. S. for Dist. of Colorado.
Mr. C. J. Hillyer, for appellant. *Mr. E. O. Wolcott*, for appellee.
April 21, 1887. Dismissed pursuant to the 10th Rule.

UNION METALLIC CARTRIDGE CO. *v.* UNITED STATES CARTRIDGE CO. [No. 256.]

Appeal from C. C., U. S. for Dist. of Mass.
Mr. Causten Browne, for appellant.
April 22, 1887. Dismissed pursuant to the 10th Rule.

MAUD EGGLESTON *et al.* *v.* CENTENNIAL MUT. LIFE ASSO. OF BURLINGTON, IOWA. [No. 261].

In error to C. C., U. S. for E. D. of Mo.
Mr. G. D. Reynolds, for plaintiffs in error. *Mr. B. J. Hall*, for defendant in error.
January 21, 1887. Dismissed on motion of *Mr. James O. Broadhead*, in behalf of counsel for plaintiffs in error.

ST. LOUIS, FT. SCOTT & W. R. R. CO. *v.* WILLIAM B. DINSMORE, Pres. of ADAMS EXPRESS CO. etc. [No. 281.]

Appeal from C. C., U. S. for Dist. of Kan.
Messrs. J. C. Brown and *John F. Dillon*, for appellant. *Mr. C. A. Seward*, for appellee.
January 31, 1887. Reversed and remanded pursuant to stipulation on file, on motion of *Mr. W. H. Smith*, in behalf of counsel.

DETROIT CITY RAILWAY v. CITY OF DETROIT *et al.* [No. 291.]

Appeal from C. C., U. S. for E. D. of Mich.
Mr. John C. Donnelly, for appellant. *Mr. Henry M. Duffield*, for appellees.
April 29, 1887. Dismissed per stipulation.

M. A. DAUPHIN v. THE TIMES PUBLISHING CO. [No. 294.]

In error to C. C., U. S. for E. D. of Pa.
Messrs. B. F. Fisher, C. W. Moulton and *Jeff. Chandler*, for plaintiff in error. *Mr. R. E. Shapley*, for defendant in error.
April 29, 1887. Dismissed pursuant to authority of plaintiff in error on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

CENTRAL R. R. AND BANKING CO. OF GEORGIA v. JAMES C. MCKENZIE. [No. 300.]

In error to C. C., U. S. for M. D. of Ala.
Action for personal injuries.
Messrs. A. R. Lawton, J. D. Roquemore and *M. F. Morris*, for plaintiff in error. *Mr. G. L. Comer*, for defendant in error.
May 27, 1887. Affirmed by a divided court.

J. W. CURRY, Surviving Assignee of William M. Lloyd, a Bankrupt, v. THOMAS MCCAULEY *et al.* [No. 301.]

Appeal from C. C., U. S. for W. D. of Pa.
Mr. Geo. Shiras, Jr., for appellant. *Mr. A. H. Clarke*, for appellees.
October 3, 1886. Dismissed pursuant to the 28th Rule.

JAMES DEMPSEY *et al.* v. MANISTEE RIVER IMPROVEMENT CO. [No. 312.]

In error to the Sup. Ct. of Mich.
Mr. M. J. Smiley, for plaintiffs in error. *Mr. Benton Hanchett*, for defendant in error.
July 22, 1886. Dismissed pursuant to the 28th Rule.

ST. LOUIS, IRON MT. & S. R. CO. v. SOUTHERN EXPRESS CO. [No. 315.]

Appeal from C. C., U. S. for W. D. of Tenn.
Mr. R. J. Morgan, for appellant. *Mr. Geo. Gillham*, for appellee.
July 13, 1886. Dismissed pursuant to the 28th Rule.

PACIFIC R. IMPROVEMENT CO. v. LEWIS V. VON HOFFMAN *et al.* [No. 337.]

In error to C. C., U. S. for S. D. of N.Y.
Mr. John F. Dillon, for plaintiff in error. *Mr. Henry T. Wing*, for defendants in error.
December 17, 1886. Dismissed per stipulation, on motion of *Mr. J. M. Wilson*, in behalf of counsel.

LOUISVILLE & N. R. R. CO. v. EDWARD HOBART. [No. 343.]

In error to C. C., U. S. for S. D. of N.Y.
Mr. John L. Cadwalader, for plaintiff in error. *Mr. A. G. Fox*, for defendant in error.
May 9, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

STEAM TUG "E. LUCKENBACH," Her Engines, etc., L. & E. LUCKENBACH, Claimants, v. WM. H. BEARD *et al.* [No. 355.]

Appeal from C. C., U. S. for E. D. of N.Y.
Messrs. Butler, Stillman & Hubbard, for appellants. *Mr. W. W. Goodrich*, for appellees.
September 15, 1886. Dismissed pursuant to the 28th Rule.

W. H. FOWLE, JR., Admr. v. ALEXANDER HAY. [No. 383.]

Appeal from C. C., U. S. for E. D. of Va.
Mr. F. L. Smith, for appellee.
November 9, 1886. Dismissed on motion of *Mr. H. O. Claughton*, for appellant.

WILLIAM H. ROBERTSON, Collector, etc. v. WILLIAM J. MATHESON *et al.* [No. 401.]

In error to C. C., U. S. for S. D. of N.Y.
Messrs. Edward Hartley and *W. H. Coleman*, for defendants in error.
March 21, 1887. Dismissed on motion of *Mr. Atty-Gen. Garland*, for plaintiff in error.

KEHLOR MILLING CO. v. JOHN T. NOYE MFG. CO. [No. 407.]

In error to C. C., U. S. for S. D. of Ill.
Mr. G. M. Stewart, for plaintiff in error. *Mr. Asel F. Hatch*, for defendant in error.
October 4, 1886. Dismissed pursuant to the 28th Rule.

SAMUEL S. CISSEL v. ANTHONY M. DUTCH *et al.* [No. 437.]

Appeal from S. C. of Dist. of Columbia.
On motion to dismiss.
Mr. J. Parker Jourdan, for the motion. *Mr. T. A. Lambert*, in opposition.
March 14, 1887. *Mr. Chief Justice* **Waite**: This motion is denied. The affidavits show by a fair preponderance of evidence that the value of the property in dispute exceeded $2,500 at the time of the decree and the appeal.

TOWN OF SANTA ANNA v. HENRY W. HAMLIN. [No. 441.]

In error to C. C., U. S. for S. D. of Ill.
Mr. J. H. Rowell, for plaintiff in error. *Mr. R. A. Lemon*, for defendant in error.
January 11, 1887. Dismissed per stipulation.

HENRY A. TARVER *et al.* v. S. W. FICKLIN *et al.* [No. 456.]

AND

S. W. FICKLIN *et al.* v. HENRY A. TARVER *et al.* [No. 457.]

Appeals from C. C., U. S. for S. D. of Ga.

Messrs. Wm. Garrard and *R. K. Hines*, for Tarver *et al.* *Mr. W. J. Robertson*, for Ficklin *et al.*

December 17, 1886. Dismissed per stipulation.

THE PENNSYLVANIA CO. *v.* ANNA W. FERGUSON, Admrx. of M. W. Ferguson, Dec'd. [No. 478.]

In error to C. C., U. S. for Dist. of Ind.

Mr. S. Stansifer, for plaintiff in error. *Mr. J. E. McDonald*, for defendant in error.

June 14, 1886. Dismissed pursuant to the 28th Rule.

ABNER GAINES, Collector, etc. *et al.* *v.* UNITED STATES, *ex rel.* Corbin *et al.* [No. 496.]

In error to C. C., U. S. for E. D. of Ark.

Messrs. W. Hallett Phillips and *C. P. Redmond*, for defendants in error.

March 21, 1887. Dismissed on motion of *Mr. A. H. Garland*, for plaintiffs in error.

THURBER, WHYLAND & CO. *v.* A. W. WOODWARD *et al.* [No. 498.]

Appeal from C. C., U. S. for S. D. of Iowa.

Mr. Chas. A. Clark, for appellants. *Mr. C. C. Nourse*, for appellees.

February 7, 1887. Dismissed on motion of *Mr. W. C. Goudy*, in behalf of counsel.

THURBER, WHYLAND & CO. *v.* A. W. WOODWARD *et al.* [No. 499.]

Appeal from C. C., U. S. for S. D. of Iowa.

Mr. Chas. A. Clark, for appellants. *Mr. C. C. Nourse*, for appellees.

February 7, 1887. Dismissed on motion of *Mr. W. C. Goudy*, in behalf of counsel.

BOARD OF COMRS. OF GRANT COUNTY, INDIANA, *et al.* *v.* EDWARD P. KIMBALL. [No. 520.]

Appeal from C. C., U. S. for Dist. of Ind.

Messrs. Benjamin Harrison and *W. H. Miller*, for appellants.

May 27, 1887. Dismissed pursuant to authority of appellants on file, on motion of *Mr. W. Hallett Phillips*, in behalf of counsel.

STATE OF LOUISIANA, *ex rel.* New Orleans Gas Light Co., *v.* CITY OF NEW ORLEANS. [No. 533.]

In error to S. C. of Louisiana.

Mr. Thos. J. Semmes, for plaintiff in error. *Messrs. W. H. Rogers* and *Henry C. Miller*, for defendant in error.

June 22, 1886. Dismissed pursuant to the 28th Rule.

WESTHAM GRANITE CO. *et al.* *v.* WILLIAM E. CHANDLER *et al.* [No. 570.]

Appeal from S. C. of Dist. of Columbia.

Messrs. M. F. Morris and *Wm. Jno. Miller*, for appellants. *Messrs. F. W. Jones* and *J. Holdsworth Gordon*, for appellees.

June 19, 1886. Dismissed pursuant to the 28th Rule.

NORMAN B. HARWOOD *et al.* *v.* EMIL DICKERHOFF *et al.* etc. [No. 587.]

Appeal from C. C., U. S. for N. D. of Fla.

Mr. Charles J. Babbitt, for appellees.

May 3, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. Henry Jackson*, for appellants.

LOUISVILLE & NASHVILLE R. R. CO. *v.* MARY I. DUFFY, Admrx. etc. [No. 637.]

In error to C. C. U. S. for M. D. of Ala.

Messrs. T. G. Jones and *Russell Houston*, for plaintiff in error.

April 29, 1887. Dismissed on motion of *Mr. William A. McKenney*, in behalf of counsel.

J. W. EBBINGHAUS, Trustee, *v.* J. G. KILLIAN *et al.* Trustees, etc. [No. 644.]

Appeal from the S. C. of Dist. of Columbia.

Mr. H. Wise Garnett, for appellees.

November 29, 1886. Dismissed per stipulation, on motion of *Mr. P. E. Dye*, for appellant.

JOHNSON N. CAMDEN *v.* MAYHEW & CO. *et al.* [No. 650.]

Appeal from C. C., U. S. for Dist. of W. Va. On motion by appellants to dismiss the appeal in part, and to vacate the *supersedeas* accordingly.

Messrs. J. E. Kenna and *A. H. Garland*, for the motion. *Nem con.*

May 27, 1887. *Mr. Chief Justice* **Waite**: This motion is granted, and an order may be granted accordingly.

NEW CASTLE NORTHERN R. R. CO. *v.* THOMAS P. SIMPSON. [No. 670.]

Appeal from C. C., U. S. for W. D. of Pa.

January 17, 1887. Dismissed on motion of *Mr. R. B. McComb*, for appellant.

TOWN OF URBANA *v.* GEO. W. SANFORD. [No. 677.]

In error to C. C., U. S. for S. D. of Ill.

Mr. J. O. Cunningham, for plaintiff in error.

March 7, 1887. Dismissed on motion of *Mr. J. H. Russell*, in behalf of plaintiff in error.

LOUISIANA SUGAR REFINING CO. *v.* JAMES W. TODD *et al.* [No. 685.]

In error to C. C., U. S. for E. D. of La.

October 12, 1886. Dismissed on motion of *Mr. S. T. Wallis*, for plaintiff in error.

JOSEPH A. LARUE *et al.* *v.* JOHN V. WINTER'S HEIRS. [No. 695.]

Appeal from S. C. of New Mexico.

Mr. O. D. Barrett, for appellants. *Mr. H. P. Bennett*, for appellees.

May 23, 1887. Dismissed on motion of *Mr. William Penn Clark*, in behalf of counsel for appellants.

ST. LOUIS, I. M. & S. R. CO. v. FRANK CROSNOR. [No. 701.]

In error to S. C. of Mo.

November 8, 1886. Dismissed on motion of *Mr. A. B. Browne*, for plaintiff in error.

MISSOURI PACIFIC R. CO. v. A. P. SNODDY. [No. 702.]

In error to S. C. of Mo.

November 8, 1886. Dismissed on motion of *Mr. A. B. Browne*, for plaintiff in error.

BENJAMIN F. ALLEN v. SARAH A. HICKLING, EXTX. of Wm. Hickling, Deceased. [No. 726.]

In error to C. C., U. S. for N. D. of Ill.

Messrs. L. H. Bisbee, John P. Ahrens and *Henry Decker*, for plaintiff in error. *Mr. Lyman Trumbull*, for defendant in error.

August 6, 1886. Dismissed pursuant to the 26th Rule.

TOWN OF BLUE RIDGE v. HENRY ST. JOHN. [No. 760.]

In error to C. C., U. S. for S. D. of Ill.

Mr. John McNulta, for plaintiff in error. *Mr. T. C. Mather*, for defendant in error.

April 29, 1887. Dismissed on motion of *Mr. William A. McKenney*, in behalf of counsel for plaintiff in error.

MELVILLE R. BISSELL v. ADELMER D. PLUMB. [No. 769.]

Appeal from C. C., U. S. for W. D. of Mich.

Mr. Jno. W. Stone, for appellant. *Mr. Edward Taggart*, for appellee.

March 7, 1887. Dismissed pursuant to stipulation on file.

WM. S. LAWRENCE *et al.* v. DE WITT C. REED *et al.* [No. 812.]

Appeal from C. C., U. S. for W. D. of Mich.

Messrs. M. D. Leggett, B. F. Thurston and *Wm. G. Howard*, for appellees.

January 10, 1887. Dismissed on motion of *Mr. N. H. Stewart*, for the appellant.

NEHEMIAH CHASE *et al.* v. DE WITT C. REED *et al.* [No. 813.]

Appeal from C. C., U. S. for W. D. of Mich.

Messrs. M. D. Leggett, B. F. Thurston and *Wm. G. Howard*, for the appellees.

January 10, 1887. Dismissed on motion of *Mr. N. H. Stewart*, for the appellants.

LOUIS PHILLIPS *et al.* v. MOUND CITY LAND AND WATER ASSO. [No. 819.]

November 23, 1886. Motion to dismiss.

Messrs. A. T. Britton, A. B. Browne and *W. H. Smith*, for the motion. *Messrs. Geo. H. Smith* and *Geo. F. Edmunds*, in opposition.

December 6, 1886. *Mr. Chief Justice* Waite: This motion is continued for hearing with the case on its merits.

CRESCENT CITY L. S. LANDING AND SLAUGHTER HOUSE CO. *et al.* v. BUTCHERS' UNION SLAUGHTER HOUSE AND L. S. LANDING CO. [No. 825.]

In error to S. C. of La.

February 7, 1887. On motion of *Mr. William A. Maury*, for plaintiffs in error, and consent of *Mr. B. R. Forman*, for defendant in error, this cause was stricken from the docket.

SAMUEL STRONG v. DIST. OF COLUMBIA. [No. 833.]

In error to S. C. of Dist. of Columbia.

May 6, 1887. Dismissed pursuant to authority of plaintiff in error on file, on motion of *Mr. O. D. Barrett*, for plaintiff in error.

GEORGE SELIGSON, Admr. etc. v. TEXAS TRANS. CO. *et al.* [No. 851.]

Appeal from C. C., U. S. for E. D. of Tex.

April 25, 1887. Dismissed on motion of *Mr. Wm. E. Earle*, for the appellant.

GEORGE GIBSON v. H. H. SHUFELDT & CO. [No. 868.]

Appeal from C. C., U. S. for E. D. of Va. On motion to dismiss.

Messrs. W. W. Crump and *John A. Cobb*, for the motion. *Nem con.*

January 17, 1887. *Mr. Chief Justice* Waite: This motion is denied. The record has not been printed, and the motion papers do not present the case in a way to enable us to act understandingly without reference to the transcript on file.

See final report of this case, *ante*, 1068.

CITY OF EVANSVILLE v. PORTLAND SAVINGS BANK. [No. 963.]

In error to C. C., U. S. for Dist. of Ind.

Mr. John M. Butler, for plaintiff in error. *Messrs. T. B. Reed* and *T. H. Haskell*, for defendant in error.

May 23, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

ANTON SCHINDELHOLZ v. N. Y. AND COLORADO MINING AND MILLING CO. [No. 958.]

Appeal from C. C., U. S. for Dist. of Colorado.

November 1, 1886. Dismissed on motion of *Mr. Leigh Robinson* for appellant. *Nem. con.*

BURLINGTON, CEDAR RAPIDS & NORTHERN R. CO. v. CHARLES L. DUNN, by His Guardian *ad litem*, Gorman. [No. 977.]

In error to S. C. of Minn.

December 20, 1886. Motions to dismiss and to affirm submitted.

Mr. Enoch Totten, for the motions. *Messrs. Eppa Hunton* and *Jeff. Chandler*, in opposition.

January 10, 1887. Mr. Chief Justice **Waite:** Each of these motions is denied. The claim that the case was removed to the Circuit Court of the United States under sub. sec. 3, § 639 of the Revised Statutes, presents a federal question of too much practical importance to be decided on a motion to affirm.

See final report, *ante*, 1159.

CONTINENTAL INS. CO. *v.* THOMAS B. JOHNSON. [No. 979.]

In error to C. C., U. S. for E. D. of La.

Mr. O. B. Sansum, for plaintiff in error.

April 4, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. C. W. Hornor*, for defendant in error.

UNION PACIFIC R. R. CO. *v.* FRANCIS B. BREWER. [No. 1012.]

In error to S. C. of N. Y.

Messrs. John F. Dillon and *Holmes & Adams*, for plaintiff in error.

May 4, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. Edward F. Bullard*, in behalf of counsel.

SELMA, ROME & DALTON R. R. CO. *v.* UNITED STATES. [No. 1014.]

Appeal from the Court of Claims.

Messrs. Geo. A. King and *W. W. Belknap*, for appellant. *Mr. Atty-Gen. Garland* and *Mr. Asst. Atty-Gen. Howard*, for appellee.

March 7, 1887. Affirmed by a divided court.

March 28, 1887. Petition for rehearing granted, order of March 7, 1887, rescinded and annulled, and cause restored to its place on the docket.

BERTRAND SALOY *v.* SIMON BLOCH. [No. 1019.]

In error to C. C. and U. S. for E. D. of La. Motions to dismiss or affirm.

Messrs. C. W. Hornor and *W. S. Benedict*, for the motions. *Mr. E. H. McCaleb*, in opposition.

May 2, 1887. Mr. Chief Justice **Waite:** Each of these motions is denied. The amount in dispute is:

1. Judgment in favor of Bloch	$3812.50	
Less the judgment in favor of defendant	312.50	
	$3500.00	
		$3500.00
2. The amount of the claim in reconvention—		
1. For rent	$6017.00	
2. " rice seed	350.00	
		$6054.50
In all		$9554.50

The questions involved are too important for consideration on a motion to affirm.

MARY WELLS *v.* WILLIAM N. PARKER *et al.* [No. 1052.]

Appeal from C. C., U. S. for N. D. of Ohio.

Mr. Henry Newbegin, for appellant.

April 25, 1887. Dismissed on authority of appellant on file, on motion of *Mr. W. Hallett Phillips*, in behalf of counsel.

HENRY T. COGHLAN *v.* SOUTH CAROLINA R. R. CO. *et al.* [No. 1089.]

Appeal from C. C., U. S. for Dist. of S. C.

Messrs. Fred'k W. Whitridge, H. E. Young and *James Lowndes*, for appellant.

May 27, 1887. Dismissed on motion of *Mr. W. Hallett Phillips*, in behalf of counsel for appellant.

HUBERT B. GATES *v.* BOSTON & N. Y. AIR LINE R. R. CO. *et al.* [No. 1097.]

In error to S. C. of E. of Conn.

Mr. W. W. McFarland, for plaintiff in error.

Mr. Simeon E. Baldwin, for defendants in error.

April 29, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

CITY OF JOLIET *v.* JOSEPH HILLER FOSTER *et al.* [No. 1114.]

Appeal from C. C., U. S. for N. D. of Ill.

Messrs. Thos. Dent and *M. W. Fuller*, for appellant. *Mr. J. L. High*, for appellees.

Affirmed by a divided court.

See report, *ante*, 942.

HAMILTON ORMSBY *et al.* *v.* WM. B. WEBB *et al.* [No. 1154.]

In error to the S. C. of Dist. of Columbia.

November 23, 1886. Motion to dismiss and to affirm.

Mr. Enoch Totten, for the motion. *Messrs. W. Stone Abert* and *J. J. Johnson*, in opposition.

December 6, 1886. Mr. Chief Justice **Waite:** Each of these motions is denied.

MARIA L. BIRTH *et al.* *v.* WILLIAM W. BIRTH. [No. 1157.]

Appeal from S. C. of Dist. of Columbia.

May 23, 1887. Dismissed on motion of *Mr. W. H. Smith*, for the appellants.

Mr. Will A. Coulter, also for appellants.

LEON KLEIN *et al.* *v.* JESSE SPALDING, Late Collector, etc. [No. 1169.]

In error to C. C., U. S. for N. D. of Ill.

Mr. Percy L. Shuman, for plaintiffs in error.

Mr. Atty-Gen. Garland, for defendant in error.

November 15, 1886. Dismissed without prejudice as per stipulation.

ELIZA B. CAUSTEN *v.* J. H. C. YOUNG *et al.* [No. 1209.]

Appeal from S. C. of Dist. of Columbia.

October 18, 1886. Docketed and dismissed on motion of *Mr. H. H. Wells*, for appellees.

LOUIS TRAYER *v.* HENRY FRANK. [No. 1210.]

In error to 2d C. C. of App., Concordia Parish, La.

October 18, 1886. Docketed and dismissed on motion of *Mr. James Lowndes*, for defendant in error.

MOLINE WAGON CO. *v.* JONATHAN G. ARAM *et al.* [No. 1213.]

Appeal from C. C., U. S. for N. D. of Ill.

Mr. L. L. Coburn, for appellant.

April 29, 1887. Dismissed pursuant to authority of appellant, on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

GOODRICH H. BUSH, Claimant, etc. *v.* UNITED STATES. [No. 1221.]

In error to C. C., U. S. for Dist. of Mass.

Mr. W. A. Munroe, for plaintiff in error.

April 4, 1887. Authority of appellant to dismiss having been filed, it is dismissed on motion of *Mr. Asst. Atty-Gen. Maury*, for defendant in error.

CONTINENTAL INS. CO. OF HARTFORD, CONN. *v.* THOMAS W. PUMPHREY. [No. 1238.]

In error to C. C., U. S. for Dist. of Md.

October 20, 1886. Docketed and dismissed, on motion of *Mr. Michael Bannon*, for defendant in error.

JACOB C. SEALE *v.* PARISH OF MADISON. [No. 1287.]

Appeal from C. C., U. S. for W. D. of La.

Mr. F. P. Cuppy, for appellee.

January 21, 1887. Dismissed, on motion of *Mr. S. Prentiss Nutt*, for appellant.

JACOB C. SEALE *v.* H. B. HOLMES, Sheriff, etc. [No. 1288.]

Appeal from C. C., U. S. for W. D. of La.

Mr. F. P. Cuppy, for appellee.

January 21, 1887. Dismissed, on motion of *Mr. S. Prentiss Nutt*, for appellant.

BALTIMORE & OHIO R. R. CO. *v.* J. S. MILLER, Auditor, etc. *et al.* [No. 1239.]

In error to and appeal from C. C., U. S. for West Va.

Mr. Alfred Caldwell, for defendants in error and appellees.

January 10, 1887. Dismissed, on motion of *Mr. E. J. D. Cross*, for plaintiff in error and appellees.

BALTIMORE & OHIO R. R. CO. *v.* BOARD OF PUBLIC WORKS OF WEST VA. [No. 1240.]

In error to and appeal from C. C., U. S. for West Va.

Mr. Alfred Caldwell, for defendant in error and appellee.

January 10, 1887. Dismissed, on motion of *Mr. E. J. D. Cross*, for plaintiff in error and appellant.

NANCY A. MAAG *v.* W. L. HYDE *et al.* [No. 1278.]

Appeal from C. C., U. S. for Dist. of Ind.

December 20, 1886. Motion to dismiss submitted.

Messrs. A. W. Hatch and *Lew Wallace*, for the motion. *Mr. D. V. Burns*, in opposition.

January 10, 1887. *Mr Chief Justice* **Waite:** This record has not been printed, and the motion papers do not present the case in a way to enable us to act understandingly without reference to the transcript on file. *Waterville* v. *Van Slyke*, 115 U. S. 290 [29:406.] The motion is therefore overruled, without prejudice to its renewal after the record is printed, or so much thereof as may be necessary for the determination of the question of jurisdiction.

ANNIE M. UPSHUR *et al.* *v.* MARY E. BRISCOE *et al.* [No. 1278.]

In error to S. C. of La.

November 8, 1886. Docketed and dismissed, on motion of *Mr. Wm. A. Maury*, for defendants in error.

FIRST NAT. BANK OF COBLESKILL, N. Y. *et al.* *v.* WABASH, ST. LOUIS & P. R. CO. *et al.* [No. 1281.]

Appeal from C. C., U. S. for Dist. of Ind.

Messrs. J. E. McDonald and *J. M. Butler*, for appellants. *Messrs. Wager Swayne, Butler, Stillman & Hubbard*, and *W. H. Blodgett*, for appellees.

April 27, 1887. Dismissed, pursuant to stipulation on file.

NORTH BLOOMFIELD GRAVEL MINING CO. *et al.* *v.* EDWARDS WOODRUFF. [No. 1289.]

Appeal from C. C., U. S. for N. D. of Cal.

November 15, 1886. Docketed and dismissed, on motion of *Mr. A. B. Browne*, for appellee.

CELLULOID MFG. CO. *et al.* *v.* S. C. NOYES & CO. [No. 1299.]

Appeal from C. C., U. S. for Dist. of Mass.

November 24, 1886. Docketed and dismissed, on motion of *Mr. E. B. Smith*, for appellee.

CELLULOID MFG. CO. *et al.* *v.* AMERICAN ZYLONITE CO. *et al.* [No. 1300.]

Appeal from C. C., U. S. for Dist. of Mass.

November 24, 1886. Docketed and dismissed, on motion of *Mr. E. B. Smith*, for appellees.

HENRY S. GILSON *v.* TOWN OF DAYTON. [No. 1308.]

In error to C. C., U. S. for N. D. of Ill.

March 7, 1887. Motion to dismiss or affirm submitted.

Mr. G. S. Eldredge, for the motion. *Mr. G. A. Sanders*, in opposition.

March 14, 1887. *Mr. Chief Justice* **Waite**: These motions are denied. The bond is sufficient, and the questions involved in the merits are not such as ought to be disposed of on a motion to affirm.

VICKSBURG, SHREVEPORT AND PACIFIC R. R. Co. *v.* ROBERT N. SMITH *et al.* [No. 1309.]

In error to C. C., U. S. for W. D. of La. On motion to dismiss.

Messrs. A. J. Falls and *S. F. Phillips*, for the motion. *Mr. E. M. Johnson*, in opposition.

March 14, 1887. *Mr. Chief Justice* **Waite**: This motion is continued for hearing with the case on its merits. The record has not been printed, and the motion papers do not present the questions involved in a way to enable us to act understandingly, without reference to the transcript on file.

HENRY T. ALLEN *v.* TEXAS & PACIFIC R. Co. [No. 1310.]

In error to C. C., U. S. for E. D. of La.

December 14, 1886. Docketed and dismissed on motion of *Mr. J. H. Kennard*, for defendant in error.

FAZENDE & SEIXAS *v.* MAYOR etc. OF HOUSTON. [No. 1318.]

AND

SAME *v.* SAME. [No. 1319.]

In error to C. C., U. S. for E. D. of Tex.

Messrs. E. H. Farrar and *E. B. Kruttschnidt*, for plaintiff in error. *Messrs. T. N. Waul* and *C. Anson Jones*, for defendant in error.

May 9, 1887. Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney*, in behalf of counsel.

WILLIAM REA *et al.* *v.* THE STEAMER "ECLIPSE," AND WM. BRAITHWAITE. [No. 1331.]

Appeal from S. C. of Dakota.

Mr. J. G. Bigelow, for appellees. *Mr. W. Hallett Phillips*, for appellants.

January 24, 1887. Docketed and dismissed pursuant to Rule 9.

March 28, 1887. Order of January 24, 1887, rescinded, and leave granted to file record and docket cause on payment of costs.

STANLEY G. WIGHT *et al.* *v.* JACOB J. B. DUBOIS *et al.* [No. 1352.]

Appeal from C. C., U. S. for Dist. of Colorado.

March 8, 1887. Docketed and dismissed on motion of *Mr. G. G. Symes*, for appellees.

HORACE BOUGHTON *et al.* etc. *v.* CHARTER OAK LIFE INS. CO. *et al.* [No. 1353.]

Appeal from S. C. of Dist. of Columbia.

March 8, 1887. Docketed and dismissed on motion of *Mr. S. R. Bond*, for appellees.

WILLIAM L. POWELL *v.* COMMONWEALTH OF PENNSYLVANIA. [No. 1359.]

In error to S. C. of Pa. Motions to dismiss or affirm.

Mr. Wayne MacVeagh, for the motions. *Mr. D. T. Watson*, in opposition.

May 2, 1887. *Mr. Chief Justice* **Waite**: Each of the motions is denied.

BAXTER MOUNTAIN GOLD MINING Co. *v.* HENRY J. PATTERSON *et al.* [No. 1368.]

Appeal from S. C. of New Mexico.

March 28, 1887. Docketed and dismissed on motion of *Mr. H. W. Garnett*, for appellees.

May 2, 1887. Order of dismissal rescinded and leave granted to file record and docket cause.

NEWARK MACHINE Co. *v.* PETER L. HARGETT & Co. [No. 1381.]

Appeal from C. C., U. S. for Dist. of Md.

April 25, 1887. Docketed and dismissed on motion of *Mr. Samuel Shellabarger*, for the appellees.

L. D. BROWN *et al.* *v.* G. T. MCCONNELL. [No. 1394.]

Appeal from S. C. of Washington Ter.

May 23, 1887. Docketed and dismissed, on motion of *Mr. A. H. Garland*, for appellee.

ROBERT C. HEWETT *et al.* *v.* WESTERN UNION TELEGRAPH Co. *et al.* [No. 1395.]

Appeal from S. C. of Dist. of Columbia.

May 23, 1887. Docketed and dismissed on motion of *Mr. J. Hubley Ashton*, for the appellees.

END OF ALL CASES.